May 2004

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Legal Update

A WRA Publication Exclusively for the Designated REALTOR®

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Avoiding Liability When Signing and Making Referrals

Protection from liability is always an important concern for brokers and agents. This *Legal Update* discusses two important contractual pitfalls that may expose REALTORS® to needless potential liability: improper signatures in contracts, and the hiring and supervising of contractors and inspectors on behalf of parties.

Properly authorized and executed signatures on behalf of brokers and on behalf of parties in real estate transaction contracts can help ensure that brokers and agents are not exposed to unintentional personal liability and that parties are appropriately bound to the offer to purchase and other contracts. Agents signing contracts on the broker's behalf should also state any corporate or other organizational status of the company and the capacity of the person signing to avoid the possibility of personal liability. Brokers and agents can also avoid potential liability exposure by providing parties with lists of certified or otherwise competent contractors and inspectors rather than recommending a sole contractor. REALTORS® should avoid arranging transactional services on behalf of parties, because this exposes the licensee to liability for negligent hiring, training and supervision if the retained contractor or inspector is negligent or inept.

This *Update* begins with a review of the Wis. Stat. § 706.02 requirements for signatures by or on behalf of the parties to a contract, which is followed by a detailed discussion of powers of attorney. The proper persons who may sign on behalf of various entities and the authority required to sign is reviewed, with an emphasis on the importance of stating party names precisely and indicating corporate or other company status when signing contracts on behalf of an entity. Proper procedures for referring parties to contractors and inspectors are analyzed with respect to the potential liability that may await agents who carelessly refer parties to contractors or arrange for contractors on behalf of parties. Illustrative Legal Hotline questions and answers are interspersed throughout the discussion

Signatures on Conveyances

Wis. Stat. § 706.02 states that a real estate conveyance is not valid unless it identifies the parties, is signed by or on behalf of each of the grantors, and is signed by or on behalf of all parties if the conveyance is an offer to purchase, land contract or some other contract to convey.

Signatures by Individuals

The sellers in a transaction are in the middle of a divorce. Both the husband and the wife are named on the title to the house. The wife has signed all amendments to the offer, but the husband is refusing to sign. Are both signatures needed?

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Wis. Stat. § 706.02(1) states that a conveyance document, such as an amendment to the offer, is not valid unless signed by or on behalf of each party. In order for the amendment to be binding, both the husband and the wife must sign the document.

Three people own the property that the broker is going to list. Do all three need to sign the listing contract and/or the offer?

The listing contract must be signed by someone agreeing to pay a commission. The law does not require that all the owners sign a listing contract in order for the listing contract to be enforceable against the owner who does sign. In the real world, though, a listing contract without the signature of all owners is a disaster waiting to happen. Prior to accepting a listing signed by fewer than all sellers, counsel should be obtained regarding the myriad of potential problems. Unlike the listing contract, all parties must sign the offer to purchase to create a valid offer. Under Wis. Stat. § 706.02, an offer is conveyance while the listing contract is not.

What is a Signature?

Wis. Stat. § 706.01(10) provides that the term "signed" includes any handwritten signature or symbol on a conveyance intended by the person as his or her execution of the conveyance. Similarly, Wis. Stat. § 990.01(38) indicates that any signature required by law shall be either (a) the handwriting of the person, (b) if the person is unable to write, the person's mark, (c) the person's name written by some other person at the person's request and in the person's presence, or (d) subject to any applicable requirements in chapter 137 of the statutes, the electronic signature of the person.

A corporate buyer has had an offer signed on its behalf by an officer whose signature is unreadable. In a counter-offer back from seller, should the seller ask for proper identification of the person signing the offer?

In Wisconsin, any handwritten signature or symbol intended to be the person's signature is acceptable. However, having the correct name and spelling is also important and should be obtained.

On page four of a faxed accepted offer, the seller's name is printed out and the social security number is given, but there is no handwritten cursive signature. The listing agent said that the offer was accepted. Is this an accepted offer without a cursive signature?

Wis. Stat. § 706.02 requires a contract to convey an interest in real estate to be signed by or on behalf of all parties to the contract. A real estate contract is considered signed if the contract includes any handwritten signature or symbol intended by the person affixing the signature or symbol to be an execution of the conveyance. If seller's name was intended to be an execution of the contract, it would constitute a symbol and the contract would be valid in this regard.

Powers of Attorney

A power of attorney (POA) is a written document whereby the principal gives authority to an agent to act on the principal's behalf. The authority may be general and give the agent broad power or it may be very narrowly stated to give the agent only specific, limited powers. A POA, for instance, may be prepared for the sole purpose of handling real estate matters. A POA may be drafted to become effective immediately or to go into effect at a later time, for example, if the principal becomes incapacitated or when the principal reaches a certain age. The authority conferred by a POA ends when the

attorney-in-fact or other party relying upon the POA receives notice that the principal has died or terminated the POA.

Most powers of attorney are durable powers of attorney that continue in effect after the principal becomes incompetent or disabled and cannot act for him or herself. A durable power of attorney will state that, "this power of attorney shall not be affected by subsequent disability or incapacity of the principal," or "this power of attorney shall become effective upon the disability or incapacity of the principal" or similar words showing that the authority granted by the POA will continue regardless of the principal's subsequent disability or incapacity. The passage of time does not revoke a durable power of attorney, but the durable POA may state an end date. Durable powers of attorney are regulated by Wis. Stat. § 243.07.

A real estate agent signed a listing agreement with a man who had power of attorney for his sister. One month later the sister passed away. The POA expires upon her death, but is the listing that the man signed prior to her death as attorney-in-fact still valid?

A POA is a written instrument in which a person appoints another as his or her agent or attorney-in-fact and confers the authority to perform certain specified acts. Upon the death of the principal, the authority of the attorney-in-fact is terminated. That does not affect the legitimacy of any documents properly signed by the attorney-in-fact while the principal was still alive. However, because a listing contract is a personal service contract, the death of the seller or the broker will terminate the contract. Therefore, the listing contract terminated when the real estate agent and the man learned of the sister's death.

In a situation where one of the sellers has Alzheimer's, the broker believes that only one seller/spouse needs to sign the listing contract. Does only one spouse need to sign the offer?

To create a valid real estate conveyance document, including an offer to purchase, the contract must be signed by all the parties or by someone with actual authority to sign for them. The seller without Alzheimer's disease may sign for the spouse that is afflicted only if he or she has a durable POA that was executed before the onset of the disease. A durable power of attorney survives incompetency, while a regular power of attorney will not. If there is no pre-existing POA, it may difficult if not impossible for the seller with Alzheimer's disease to execute a POA. This will depend upon whether the afflicted individual does still have periods of competency when he or she could sign a POA. This is a question for a physician. If there is no POA and the seller is incompetent, it may be necessary to initiate legal proceedings for the appointment of a guardian. The sellers should discuss this situation with their attorney.

Power of Attorney Forms

A POA addressing real estate matters may be drafted by an attorney or may be created using a preprinted form. The Wisconsin Statutes contain a basic power of attorney for finances and property form in § 243.10. This form, which has been updated and streamlined several times over the past 10 years, is available from the Wisconsin Department of Health and Family Services (DHFS) at http://dhfs.wisconsin.gov/forms/AdvDirectives/index.htm. This POA covers real estate matters and provides that the agent (attorney-in-fact) "may manage real property; sell, convey and mortgage realty for prices and on terms as considered advisable; foreclose mortgages and take title to property in my name; and executes deeds, mortgages, releases, satisfactions and other instruments relating to realty." This version of the statutory power of attorney does not have to be filed with the county clerk in order to be effective, as was the case with the statutory power of attorney that was used in the early 1990s.

When REALTORS® are faced with situations where the parties may be best served if a POA is executed, generally the better choice is to direct the party to his or her attorney for assistance in preparing a POA tailored to the transaction and personal circumstances. REALTORS® may also refer parties to the DHFS form if the parties refuse to consult with an attorney. As with other forms not approved by the Department of Regulation and Licensing (DRL) for use by real estate licensees, a REALTOR® should never assist a client or customer in completing a POA form or answering legal questions about the form. Such conduct constitutes the unlicensed practice of law and would subject the licensee to DRL discipline and local board sanctions.

Power of Attorney Signatures

A person who is expressly authorized by a party to sign documents for that party may do so. However, when signing an offer to purchase, a deed or any other conveyance, Wis. Stat. §706.03 requires that the signature block identify the principal and that the person signing be ready to prove his or her authority.

§706.03 Agents, Officers and Guardians.

A conveyance signed by one purporting to act as agent for another shall be ineffective as against the purported principal unless such agent was expressly authorized, and unless the authorizing principal is identified as such in the conveyance or in the form of signature or acknowledgment. The

burden of proving the authority of any such agent shall be upon the person asserting the same.

This statute sets forth two distinct requirements: (1) an express authorization of agency, and (2) the authorizing principal must be identified in the conveyance or in the form of signature or acknowledgment

1. Express authorization

Whenever someone who is not the owner of property signs on behalf of the owner, care must be taken to establish the authority of the person who is signing. Authority to sign for another ideally should be given in a written POA, preferably notarized, with the fullest possible instructions from the authorizing party. The person signing on behalf of another, called the attorney-in-fact, must be prepared to prove that he or she has the authority to sign if that authority is ever questioned, for instance, by a title company, a lawyer or another party to the transaction. That is best evidenced with a written document.

An attorney advised a broker's clients that in Wisconsin a wife could sign for her husband to create an enforceable contract. Is that true?

One spouse does not have automatic authority to sign on behalf of the other spouse. The wife cannot sign for the husband unless she has a power of attorney or other authorization to sign on behalf of the husband. If the wife indicates that she has authority to sign for her husband, it would be prudent to have the title company or other legal counsel confirm this authority. The wife would have the burden of proof if the husband later indicated that she was acting without his authority.

The dangers that could result from our recognizing an implied agency between spouses to convey each other's interest in jointly held property was illustrated in the case of *State Bank of Drummond v. Christophersen*, 93 Wis. 2d 148, 286 N.W.2d 547 (1980). In that case a wife forged her husband's signature in order to obtain a second mortgage on their jointly owned homestead without his knowledge or consent. She later defaulted on the payments and the bank foreclosed before the husband even knew about the second lien. Fortunately for the husband, the court held that the wife's attempted conveyance of her husband's interest in their homestead was void, but only after he was forced to defend a foreclosure lawsuit and sue his wife

2. Identification of authorizing principal:

REALTOR® Practice Tips: When actually executing real estate documents under a POA, the attorney-in-fact must comply with Wis. Stat. § 706.03(1m), and state the name of the authorizing principal. It is also recommended that the attorney-in-fact indicate his or her authority or capacity, as illustrated in the following examples:

"Seller XYZ

By: (attorney-in-fact signs name)
(Print or type name), authorized attorney-in-fact"

-OR-

" (attorney-in-fact signs name)
(Print or type name), as authorized agent on behalf of Buyer ABC"

Undisclosed Principals

Under the general principles of agency law, an agent can act for an unidentified or undisclosed principal. In such cases, it is generally inferred that both the agent and the unidentified principal are parties to the contract. The agent and the other party, however, can agree in the contract that the unidentified principal is the real party. This would arguably permit a buyer's agent, for example, upon proper authorization from the buyer in a POA, to execute an offer to purchase on behalf of the buyer who would be referenced only as the unidentified principal.

Wis. Stat. § 706.02 and § 706.03, however, make this practice essentially impossible in Wisconsin. § 706.03(1) requires that a conveyance signed by an attorney-in-fact identify the principal. The Wisconsin courts have interpreted this statute to require that the authorizing principal be identified in the text of the offer, deed or other conveyance, or in the signature block or acknowledgment section of the conveyance. § 706.02(1)(a) also requires that all parties be identified in order for a conveyance such as an offer or deed to be valid.

Consequently, an agent in Wisconsin who signs an offer as "agent for unidentified principal" risks being held personally liable on the contract. In other words, if the buyer skips to Rio, the agent becomes the new owner of the property. There also is a risk that the contract will be found invalid for lack of mutuality because there is no real buyer identified who is actually entering into the agreement with the seller. The buyer may then lose the property.

Licensees as Attorneys-in-Fact

It is not an ordinary part of a real estate broker's or agent's authority as a licensee, nor is it a good idea or practice for licensees to seek or accept the authority to sign real estate contracts or documents for a party.

Can a licensee sign a contract for a buyer or seller?

Unless the licensee has actual authority, that is, a POA, the licensee may not sign for the buyer. A licensee signing transaction documents for a party without proper written authorization risks discipline and sanction by the DRL. It is better for the

party's attorney or a relative to assume this authority.

Re: Signatures on closing statements. § RL 15.03 does not mention signatures by the buyer or seller at closing, nor does it mention anything about the agent signing for a buyer or seller. Must the broker get a signature on the closing statement from the seller prior to closing if, indeed, the seller was not going to be present at closing? If there are corrections to the closing statement, would it be necessary for the broker to notify the seller at the time of the closing, and then is it appropriate for the broker to sign the HUD statement for the seller at closing?

It is generally assumed that the parties will sign closing statements because it demonstrates that they have received, reviewed and are in agreement with the closing figures. The DRL does not really regulate closings, per se, because closings are not considered to be part of licensed real estate brokerage activities.

Legally, a person who is properly authorized by a party to sign documents for that party may do so under Wis. Stat. § 706.03. Signing a closing statement introduces additional challenges because the attorney-in-fact must know what numbers and figures are acceptable, and this information often is modified at the closing table. In these times of overnight mail, fax machines and e-mail, documents can be exchanged on an almost immediate basis with a party at virtually any location.

Authority to Sign for Entities

REALTORS® typically encounter and work with different business entities in their daily real estate practice. Brokers generally conduct their real estate practice as a licensed business entity such as a corporation or a limited liability company (LLC). Accordingly, brokers must know the proper way to execute their real estate and business contracts to avoid personal liability and make the contract properly bind the entity. In addition, the sellers and buyers in real estate transactions may be corporations, LLCs, estates or other entities. Thus, it is helpful for REALTORS® to be familiar with the rules governing who may sign on behalf of these organizations and what special authority may be required when real estate is sold.

The following discussion overviews who may sign and what authority is generally needed to legally bind a company or entity. REALTORS® should be aware of these formalities and recognize that proper documentation of the authority to sell will often be needed by the title company. REALTORS® should also be careful that the person signing a listing contract, for example, can legally bind the company or entity to the obligation to pay commission.

Corporations

Authority to Sign

Wis. Stat. § 706.03(2) and (3) provide that any one officer of a corporation is authorized to sign conveyances in the corporate name, unless a different authorization appears in the corporation's articles of incorporation or in a certified corporate resolution that has been recorded with the register of deeds office in the county where the conveyance is occurring. A recorded resolution may specify by name or by title one or more persons who are authorized to execute conveyances in the name and on behalf of the corporation. The named persons do not have to be officers of the corporation. If such a corporate resolution has been recorded, the resolution overrides any other authorizations until another resolution amending or revoking the first resolution is properly adopted and recorded. Only those persons authorized in the recorded resolution may execute any conveyances on behalf of the corporation.

Authority to Sell

With a corporation, the proper authority to sell depends on whether the sale of the property is or is not in the regular course of business. If it is part of the corporation's normal business to sell real property, Wis. Stat. § 180.1201 provides that the sale must be on the terms and conditions and for the price determined by the corporation's board of directors.

If, on the other hand, the sale is not in the regular course of business or the sale is of all or substantially all of the corporation's assets, the sale again must be on the terms, conditions and for the price determined by the corporation's board of directors. In addition, Wis. Stat. § 180.1202 requires a resolution of the board of directors approving the proposed transaction and approval by a majority vote of the corporate shareholders. The vote is held at a shareholders' meeting that requires a minimum of 20 days' notice, so obtaining the needed approvals in this situation will take some time.

For example, if a development corporation were selling vacant lots in a subdivision, this would appear to be in the ordinary course of business. The board of directors would determine the terms of the sale. If a manufacturing company was selling it's entire facility, however, one would assume that this is not in the regular course of business and that the transaction will require approval by the board of directors in a corporate resolution and by a majority of the shareholders voting at a shareholders' meeting.

Limited Liability Companies (LLC)

With a limited liability company (LLC), the authority to transfer its

property depends on whether the LLC is member-managed or centrally managed.

Member-Managed LLC

In a member-managed LLC, Wis. Stat. § 183.0301 provides that each member is an agent of the LLC. A member may sign documents and bind the LLC if the member is apparently carrying on the ordinary course of business for the LLC, unless the member has no authority to act and the person he is dealing is aware of his lack of authority. Under § 183.0702, the property of the LLC that is held in the name of the LLC may be transferred by a conveyance executed by any member in the name of the LLC.

Centrally or Manager-Managed LLC

If one or more managers centrally manage the LLC, a member is not an agent of the LLC and cannot bind the LLC. Rather, each manager is an agent of the LLC and can execute documents and bind the LLC per § 183.0301. If there are one or more managers, property that is held in the name of the LLC may be transferred only by a conveyance executed by a manager in the name of the LLC; LLC members will have no authority to transfer title.

> **REALTOR® Practice Tips**: When dealing with a centrally managed LLC, it may be wise to ask for the LLC's operating agreement and/or other affirmative representations confirming a manager's authority to bind the LLC or to sell the real estate on behalf of the LLC.

Partnerships

General Partnerships

General partnerships are different from corporations and LLCs because they do not have any organizational documents that are required to be filed with any agency or recorded with the register of deeds. General partners do not enjoy limited liability; they are jointly and severally liable for the contractual debts incurred by the partnership.

Wis. Stat. § 178.06 provides that every partner is an agent of the partnership and may execute documents, including conveyances, in the partnership name and bind the partnership, unless the partner has no actual authority to act for the partnership and the person with whom the partner is dealing knows that the partner has no such authority. On the other hand, an act of a partner that is not apparently for the purpose of carrying on of the partnership's usual business does not bind the partnership unless authorized by the other partners.

Where real estate is in the partnership name, any partner may convey title to the property by a conveyance (offer, deed) executed in the partnership name. However, the partnership may recover the property under Wis. Stat. § 178.07 if the conveyance was not in the apparent usual course of the partnership's business, or the person dealing with the partner knew that the partner was not actually authorized to act on behalf of the partnership. If the partnership property is held in the names of one or more but not all of the partners who executed the conveyance, the partnership may again be able to recover the property per § 178.07.

Consequently, if a seller in a transaction is a general partnership, the title company may require documentation indicating which partner or partners are authorized to sell the partnership real estate and execute the offer and deed.

Limited Partnerships

With a limited partnership, if the real estate is in the name of the limited partnership, a general partner may convey title to the real estate unless it indicates otherwise in the certificate of limited partnership (filed with the Department of Financial Institutions) per Wis. Stat. § 179.065. Limited partners do not have this authority. Accordingly, the key authorization usually will be found in the certificate of limited partnership. If the limited partnership's real estate is not titled in the name of the limited partnership, the rules in Wis. Stat.§ 178.07 for general partnerships will apply with respect to the general partners of the limited partnership. This means that the partnership will be able to recover the property if the general partner or partners signing the conveyance were not actually authorized to do so.

In *Wyss v. Albee*, 193 Wis. 2d 101, 532 N.W.2d 444 (1995), a seller entered into a land contract with Co-Jems Farms, an Iowa partnership. Although this was intended to be a limited partnership, a certificate of limited partnership was never filed or recorded. The two partners who signed the land contract on behalf of Co-Jems were actually limited partners who did not have authority to bind the limited partnership.

The failure to record the limited partnership certificate made the limited partners potentially liable for the land contract as general partners because the seller believed that Co-Jems was a general partnership and that the signing partners were authorized general partners. When the seller sued for the enforcement of the land contract, the seller argued that the partnership was still liable under the contract because Wis. Stat. § 178.06 states that a partner is an agent of the partnership and that a partner with apparent authority acting in the partnership name may bind the partnership. The partnership believed that they should not be bound because Wis. Stat. § 706.03 states that an agent needs express authority to bind his principal in a real estate conveyance. The Wisconsin

Supreme Court held that partnership statute § 178.06, which allowed the seller to rely upon the apparent authority of the partners, controlled. The court believed that this was a better result than requiring a third party like the seller to investigate the partnership and determine who had authority to convey real estate.

Estates

The personal representative of an estate administers the property of the deceased. Wis. Stat. § 860.01 permits a personal representative to sell, mortgage or lease any property in the estate without notice, hearing or court order. A personal representative has no power to give warranties in any sale, mortgage or lease of property that are binding on the personal representative personally or on the estate. However, if an accepted offer to purchase or other contract required the deceased to give warranties, the personal representative shall give the required warranties. The warranties are binding on the estate as though made by the deceased during his or her lifetime but do not bind the personal representative personally.

Some estates may have special administrator appointed by the court pursuant to Wis. Stat. § 867.07. When a person has died, the special administrator is needed if the court would have jurisdiction for the administration of the person's estate and some act needs to be performed on behalf of the estate. A special administrator's powers and duties may be limited to those that are specifically granted to the special administrator by order of the court.

Parties Must Be Precisely Named

In *Ag Services of America, Inc. v. Krejchik d/b/a Rolling Meadows Farm*, Ct. App. No. 00-3430 (2001), a lender sued to collect the balance due under a promissory note. The note was executed by Roger C. and Maxine Krejchik (debtors) d/b/a Rolling Meadows Farm. Rolling Meadows Farm was a partnership solely owned by the Krejchiks. Judgment was entered against "Roger C. Krejchik and Maxine Krejchik d/b/a Rolling Meadows Farm." When the lender later tried to garnish the debtor's bank account, the complaint only named the individual debtors and did not mention the partnership.

When the bank searched for the debtors' names, it retrieved the Rolling Meadows Farm account because the debtors were listed as signatories. However, nothing in the garnishment complaint named the partnership and the bank held no personal accounts in the names of the debtors, so the bank answered that it had no accounts subject to the garnishment.

The circuit court concluded that it was the lender's responsibility to properly name the debtor on the garnishment complaint. The bank did not have actual knowledge that the debtors were the owners of the Rolling Meadows Farm account. The circuit court found that the lender improperly designated the debtor and, as a result, the bank correctly answered that it had no accounts belonging to the debtor.

The court of appeals found that "absolute exactness and particularity in regard to names is absolutely indispensable, not only for the security of the bank, but of those doing business with it." Lenders must know the names of their debtors, and must bring a garnishment proceeding against the proper persons or suffer the consequences of their own negligence.

REALTOR® Practice Tips: Licensees should always correctly identify all parties in their real estate and other business dealings, carefully noting business entities such as corporations, partnerships and LLCs, as well as the capacity of each person signing a contract or conveyance.

The vice president of a corporation signed an offer to purchase a property. The corporation is listed as the buyer on the offer. The vice president later passed away and now the corporation says that the contract is invalid and that the corporation will not proceed with the purchase of the property. Is the corporation still obligated to purchase the property?

Wis. Stat. § 706.03 (2) and (3) provide that any one officer of a private corporation is authorized to sign conveyances in the corporate name unless a contrary provision is contained within the articles of incorporation or in a corporate resolution recorded with the register of deeds. If the vice president was so authorized and his signature indicated his capacity as vice president of the corporation, the corporation will be bound to the contract. If he signed in his personal capacity, without stating his position as vice president, the seller will have to contact this gentleman's estate or successors in interest.

Failure to Disclose Entity in Contracts

As illustrated in the following Wisconsin cases, an individual entering into a contract on behalf of a corporation or LLC may become personally liable on the contract if the entity status and the individual's capacity as an agent, corporate officer, etc. is not clearly disclosed.

In *Bond Drywall Supply, Inc., v. James H. Smith d/b/a Smith Drywall* (Ct. App. No. 02-1719 2002), the issue was whether the $5,000 debt owed to Bond Drywall Supply, Inc. had been incurred by James Smith personally or by Smith Drywall, Inc. Smith had operated a dry walling business as a sole proprietor and had had an open account as an individual

before he stopped doing business as a sole proprietor and went to work for Smith Drywall, Inc., a corporation.

Smith argued that he could not be held personally and individually liable for the debt of Smith Drywall, Inc. because a corporation is recognized as a separate and distinct legal entity that cannot be lightly disregarded. The court, however, found Smith personally liable for the debt because Smith did not notify Bond that his drywall supply orders were no longer being placed on his own behalf, but rather on behalf of Smith Drywall, Inc. Bond received no actual notice that Smith was no longer a sole proprietor.

Similar facts were considered in *Philipp Lithographing Co. v. Babich*, 27 Wis.2d 645, 135 N.W.2d 343 (1965), where a sole proprietor incorporated. Babich had originally obtained printing services on open account based on his personal creditworthiness. The printer continued to do work for Babich's business after it was incorporated, and payments on the account were made with checks bearing the corporate name. The printer sued Babich and his partners in their individual capacities for the balance due on the printing contracts and won at trial. The Supreme Court affirmed, holding that individuals who hold themselves out as partners after they have incorporated cannot escape personal responsibility unless the printer was given adequate actual notice of the incorporation.

In *Benjamin Plumbing, Inc. v. Barnes*, 162 Wis. 2d 837, 470 N.W.2d 888 (1991), an agent acting for a partially disclosed principal was found liable on a contract for plumbing services because the agent never disclosed the corporate status of the buyer. The principal was Response to Hunger Network (RHN), which actually was a corporation, but this was never disclosed to the plumbing company.

The contract between the plumbing company and RHN stated, "William K. Whitcomb, for Response to Hunger Network" under the signature line. The RHN letterhead said, "National Council of the Churches of Christ in the United States of America, CHURCH WORLD SERVICE," with Whitcomb listed as its regional director. The plumber sued Whitcomb, two other members of RHN and RHN as an unincorporated association.

The court held that a person entering into a contract for a partially disclosed principal becomes a party to the contract and is liable for its breach. A principal is partially disclosed when the other party has notice that the agent is acting for an entity but has no notice what type of organization the entity is in fact. As applied to corporate contracts, an agent has a duty to disclose the corporate identity of the principal in order to avoid personal liability.

Under common law agency principles, an agent will be considered a party to the contract and held liable for its breach if the other contracting party never is notified that the principal is a corporation or some other business entity. If the agent with whom the party contracts is a partner, sole proprietor, or member of a voluntary association, the party may expect that agent to be personally liable on the contract. If the agent is contracting for a corporation or an LLC, on the other hand, the agent is not liable unless he or she expressly assumed such liability.

The contracting party needs notice of the principal's corporate status at or prior to the execution of the contract documents. Therefore, the failure to use the "Inc." notation in the contract is often critical in determining whether there was adequate disclosure of corporate status.

It is the agent seeking to escape liability who has the burden of proving that the principal's corporate status was disclosed. Conversely, the other party to the contract does not have any duty to inquire into the corporate status of the principal, even when it is within that party's capability of doing so.

In the *Benjamin Plumbing* case, the plumbing company was aware that Whitcomb was acting on behalf of an entity called RHN, but there was no express disclosure of RHN's corporate status in the contract or correspondence. RHN was essentially a tradename. It was Whitcomb's obligation to disclose RHN's corporate status in order to avoid personal liability on the contract. Since he did not, Whitcomb became liable as a contracting party. The rule in Wisconsin is that a corporation can be contractually bound even where the corporate name was not used in the contract, but if the principal's corporate status has not been disclosed, the agent is personally liable on the contract as well.

> **Key Point**: When signing any contracts on behalf of a broker, the formal name of the broker entity, for example "XYZ, Inc." or "AB Realty, LLC," should always be stated. The formal name may be followed by any widely used tradename in order to avoid confusing consumers. For example, the forma name can be followed with "d/b/a Hometown Real Estate," to show that the corporate or LLC entity is doing business under a tradename. This is critical to protect the signing agent or broker from personal liability under the contract.

A broker often finds himself in a situation where he is signing real estate sale documents in his capacity as a corporate officer. Is there anything that the broker needs to do to make clear that he is not acting as a broker?

Whenever signing a contract on behalf of a corporation, the broker

must state the name of the corporation, make sure that it is clearly indicated that it is a corporation and specifically indicate the capacity in which he is signing, for example, as president of the corporation. This will serve to limit the broker's personal liability provided that he is acting in accordance with the authority granted to him by the corporation.

A broker is opening a new company and is having new signs made. Is it necessary to put "Inc." on her signs?

§ RL 23.03 provides that a trade name is a name other than the name appearing on the broker's license, under which the broker advertises or does business. Before doing business under any trade name, a broker must notify the DRL in writing of the trade name.

Using a trade name for advertising on signs may be appropriate, but the broker should be careful to use the full corporate name on contracts if he or she wants to avoid the chance of becoming personally liable. It may also be prudent to put both the full corporate name and the tradename on business contracts. The broker should ask her corporate attorney about the best way to proceed if the broker wants to achieve maximum protection from liability.

REALTOR® Practice Tips: All contracts, including listing contracts, that are executed on behalf of a broker entity should always be signed in the formal entity name and the person signing on behalf of the broker entity should designate his or her capacity, for instance, as agent, as a corporate officer, or as an LLC member. The signature line for a corporate broker would indicate the broker's name as "XYZ Corporation d/b/a Hometown Realty" and the person signing on behalf of the broker would indicate his or her name and capacity on the line or in the area where the person's name is printed or typed, for instance, "Sam Smith, Vice President," or "Judy Johnson, agent."

Referrals to Contractors

Clients and customers may sometimes ask REALTORS® to refer them to contractors. Although this may be beneficial to the consumer to have such a recommendation, this practice may lead to licensee liability if the referral is not handled properly.

Agent Not Responsible for Actions of Recommended Pest Control Company

The Court of Appeals of Kentucky ruled that a real estate agent did not guarantee the competency of a pest control company when the agent recommended the pest control company to a buyer. The court considered whether the buyer's broker could be liable to the buyers for recommending the pest control company to them when the lender required a termite inspection. The buyers asked their buyer's agent for a list of pest control companies, and he gave the buyers a list of three companies. The buyers selected and hired a pest control company to perform the inspection. The court considered whether the buyer's broker breached its fiduciary duty to the buyers by recommending a pest control company that allegedly did not perform its required duties in a satisfactory manner. The court ruled that making a recommendation does not guarantee performance when the buyer's broker also had given the buyers the names of two other pest control companies.

REALTOR® Practice Tips: When helping parties find professional inspectors and contractors (such as contractors for inspections and repairs), REALTORS® should carefully follow these steps:

- **Prepare a list of professional inspectors and contractors.** Do not recommend or endorse one particular contractor because a recommendation that does not present the party with options may result in liability. Instead, maintain a list with the names of at least three professionals in each field, and include any available references from past users. Any contractor included on a list of contractors should be certified in his or her field, if at all possible, and at minimum should hold all applicable credentials for the type of work being performed. Any company or agent affiliations with any of the listed contractors should be stated on the list or disclosed when the list is distributed. Put the list on a sheet of company letterhead, and include a disclaimer that the company's agents cannot personally endorse these professionals.
- **Avoid referral fees.** It is wise to not ask for or accept a referral fee from any name on the referral list. Earning a fee just for referring business (except to other real estate brokers) violates the Real Estate Settlement Procedures Act (RESPA) if the contractor or company is a RESPA settlement service provider like a home inspector, appraiser or title company. The best policy is to not take referral fees unless actual goods or services are provided.
- **Let inspectors and contractors do their jobs.** Licensees may wish to avoid accompanying an inspector through the house, because this may imply that the licensee is supervising the inspector. Reinforce that the party hired the inspector and let the party deal directly with the inspector. Similarly, do not volunteer to inspect work performed on the house unless you

wish to be considered the contractors' supervisor. Instead, suggest that the buyer engage an appropriate expert to inspect this work if the buyer wants a professional evaluation.

A relevant story about an agent who becomes too involved during a home inspectioncan be found at http://www.realtor.org/rmomag.nsf/0/9e5531a344af21c186256b3e0068e66e?OpenDocument.

Any contractor included on a list of contractors should certified in his or her field, if at all possible, and at minimum should hold all applicable credentials for the type of work being performed. Links to lists of certified contractors in different fields, including licensed home inspectors, can be found on the WRA REALTOR® Resource pages: https://www.wra.org/Resources/resource_pages/default.htm.

How can a REALTOR® or his or her client know if an environmental firm is qualified for mold remediation and if the bid is reasonable?

REALTORS® and parties can ask environmental contractors for credentials and resumes. There are no lists of certified or approved mold contractors, but the Wisconsin Department of Health and Family Services does have a list of indoor air quality consultants, mold remeditators and home performance specialists on its Web site at http://dhfs.wisconsin.gov/eh/HlthHaz/fs/hiringguide.htm.

Does all work disturbing paint require a certified LBP contractor?

The answer will depend upon the circumstances. Review *Legal Update 02.08* (www.wra.org/LU0208) for a discussion of when certified personnel is required. Listings of certified LBP contractors can be found on the DHFS Web site at http://dhfs.wisconsin.gov/dph_boh/lead/CompanyList/index.htm or by calling (608) 261-6876.

Ordering Services for Parties

Clients and customers sometimes may also ask REALTORS® to retain contractors on their behalf. Sometimes the party is pushed for time or may simply believe that this is part of the agent's job. However, this practice may pose serious legal risks for the licensee and should be avoided if possible. If the broker must retain a contractor for a party, it is critical that this request be handled properly.

Well and septic tests were recently done on a home. The seller signed a CAMR saying that the earnest money will be returned to the buyer after they pay for the septic and well tests. The buyer wants his earnest money returned. The contract called for the buyer to pay for the well and septic tests on the property. Does the broker have the right to retain the expenses incurred?

The parties may elect to negotiate the cancellation agreement and mutual release that directs payment of the earnest money to the contractors. The broker may wish to review their office policy concerning agents' responsibilities for ordering tests, surveys, work, etc. To limit possible liability for fees and costs, the parties should order services from third party providers.

A listing broker has the right to retain earnest money to pay for contractor expenses under the circumstances stated on lines 96-101 of the WB-1 "Residential Listing Contract Exclusive Right to Sell." The broker may be reimbursed if cash advances have been made on behalf of the seller.

Negligent Hiring or Supervision of Contractors

In *Miller v. Wal-Mart Stores*, Inc., 219 Wis.2d 250, 580 N.W.2d 233 (1998), the Wisconsin Supreme Court officially recognized negligent hiring, training and supervision as valid claims under Wisconsin law. When Stanley Miller left the Wal-Mart store in Superior, three Wal-Mart employees stopped him in the store's parking lot because they believed that Miller stole a swimsuit. The employees did not find the swimsuit on Miller. Miller sued Wal-Mart, claiming that Wal-Mart, acting through its employees, was liable for false imprisonment, battery, negligent infliction of emotional distress and loss of consortium. While the jury found for the store on many of these claims, the jury found that Wal-Mart was guilty of negligence in hiring, training and supervising its employees. Because the Wal-Mart employees did not have reasonable cause to believe that Miller had shoplifted a swimsuit, the court awarded Miller $20,000 in compensatory damages for past mental pain and suffering and $30,000 in punitive damages.

While negligent supervision often relates to an employer/employee relationship, Wisconsin cases have recognized claims arising from the failure to properly supervise the work of an independent contractor. For example, in *A.E. Inv. Corp. v. Link Builders, Inc.*, 62 Wis. 2d 479,214 N.W.2d 764 (1974), the Wisconsin Supreme Court recognized that an architect could be found liable for failing to adequately supervise the construction of a building.

The case that REALTORS® are most affected by, however, is *Chapman v. Mutual Service Cas. Ins. Co.*, 35 F.Supp.2d 699 (E.D. Wis. 1999). The buyers sued the seller, real estate broker and others for negligence resulting in the LBP poisoning sustained by their four-year-old son after they moved into their recently purchased home. The real estate broker was accused of negligent hiring, supervi-

sion and inspection of the contractor the real estate agent hired to paint the seller's house in order to meet the FHA loan requirements. The FHA appraisal/inspection had revealed peeling and chipping paint and the HUD-approved appraiser directed that much of the property's painted exterior be scraped and repainted.

After the buyer moved into the property, the buyer's four-year-old child was discovered to be suffering from elevated lead blood levels. The buyers' lawsuit accused the broker and the seller of being negligent in hiring the painter and in failing to supervise and inspect the painter's work.

The court found that a Wisconsin real estate company will owe buyers a common-law duty to exercise reasonable care when it hires, trains and supervises a painting contractor, as an independent contractor, to paint the seller's house when all parties believed that the painter was working for the real estate broker as an employee. The seller did not have a duty to exercise reasonable care in hiring and supervising the painter because the real estate agent was the one who selected the painter, contacted the painter, negotiated the price, and gave the painter instructions. The seller was not given a choice of painters, did not speak to the painter and relied upon the agent to supervise the painting.

The broker argued that he did not hire the painter, but rather served as a liaison between the painter and the seller who paid the painter's fees and signed the painter's contract proposal. The court found that this point was not critical because the seller, the buyers and the painter reasonably believed that the painter was working for the broker. In other words, the court's holding in this regard focused more closely on the parties' perceptions and less closely on the actual contractual dealings with the painter.

General legal principles dictate that one who contracts with an independent contractor is not liable to others for the negligence of the independent contractor. However, this principle does not apply when the person hiring the independent contractor is negligent in selecting, instructing or supervising the contractor. The hiring party also may remain liable if that party retains supervision rights such that the independent contractor is not entirely free to do the work in his or her own way.

Key Point: The lesson for REALTORS® from the Chapman case is clear: a REALTOR® who acts as a liaison between a party and a contractor risks liability if he or she actually hires, or is perceived to have hired, any contractors who work on a party's property or provide services for the real estate transaction. A REALTOR® may be held liable for damages resulting from a negligent performance by the retained contractor if the REALTOR® is found to have been negligent in hiring, instructing or supervising the contractor or his or her work. Therefore, REALTORS® should always avoid hiring contractors for parties.

REALTOR® Practice Tips: Real estate agents should recognize that it is not a part of their duties to hire contractors for clients or customers. The better practice is to give parties a list of local certified contractors, then leave them to determine which contractor best meets their needs and to hire the contractor. If an agent finds that it is necessary that he or she hire contractors in a particular situation, the agent should have the parties give a specific written authorization to hire contractors and sign a release from liability for any damages caused by the contractor. Use a written engagement letter or work order memo if forced to retain a contractor for the party, specify that the party is responsible for the bill, and require the contractor to follow all safe work practices required by applicable law. See the model forms for this process on pages 12 and 13 of this *Legal Update*.

The seller insists that the listing agent hire contractors to do some maintenance work on the listed property (a rental property built before 1978). What issues should the agent be aware of?

At a minimum, the agent should have a written work order which identifies the listing agent as an agent of the owner, indicates that the work is being done on behalf of the owner, and that all billings are the responsibility of the owner and should be put in the owner's name. The contractor should agree in writing to comply with the federal pre-renovation disclosure law and should be required to follow safe work practices to control any LBP hazards which result from the work. Information regarding the contractor's insurance, bonding, etc. should be provided to the owner. Preferably the owner will select a contractor from a list provided by the listing agent rather than have the listing agent select the contractor. The owner should sign any work order or contract prepared by the contractor.

The parties agreed that the buyer would pay for the septic, well and water inspections required in the offer to purchase. The lender wanted the buyer to use a certain septic and plumbing company. The listing agent ordered the septic, well and water inspection on the telephone and the inspection was completed. Now the buyer has backed out. The seller wants to use the earnest money to pay for the septic, well and water inspections and the septic pumping. The buyer wants earnest money returned. The

MODEL FORM

Service Request

(Refer to the May 2004 Legal Update for precautions when ordering work for a party, and refer to your office policy.) Instructions: Contact contractor or inspector and arrange for the services. Specify that you are relaying the request for services and are not the responsible party. Complete this form and forward one copy to the contractor, one copy to the party and retain a copy for the transaction file.

Contractor/Inspector's Company Name: _____

Contact Person's Name: _____ Telephone: _____

Contractor/Inspector's Address: _____

Fax: _____ E-mail: _____

Description of Services: *The Contractor/Inspector shall observe all safe work practices required under applicable law.

_____

_____

_____

Contractor's Credentials: Certified? ❑ Yes ❑ No

Contractor References: _____

_____

Property Address: _____

Date and Time for Services: _____

Special instructions: _____

_____

Responsible Party's Name: _____ ❑ Seller ❑ Buyer

Billing Address: _____

Telephone: _____ Fax: _____

E-mail: _____

Ordered by (Company Name and Agent's Name): _____

Date: _____

This request for services has been made solely as an accommodation for the named responsible party. The named agent and broker/company make no representations as to the competency or professionalism of the engaged contractor/inspector, and shall bear no responsibility for payment for services rendered. All billings and invoices should be forwarded directly to the above-named responsible party. No representation is made as to the legal validity of any provision or the adequacy of any provision in any specific transaction.

MODEL FORM

Authorization and Release from Liability

The undersigned Responsible Party ("Authorizing Party"), hereby authorizes the identified broker and agents (collectively "Agents") to retain and contract on behalf of the Authorizing Party the services of a contractor or inspector needed to provide the below described services that are required pursuant to the offer to purchase indicated below.

The Authorizing Party expressly agrees and understands that this agency authorization is exclusively for the retention of the services described below. The execution, performance and supervision related to the required services are the strict responsibility of the Authorizing Party and shall not be undertaken by the Agents.

The Agents do not endorse, sanction or approve any particular contractor or inspector. The Agents do not guarantee or provide any assurances as to the competence, ability or capability of the retained contractor or inspector. Furthermore, the Agents do not make any warranties, either expressed or implied, as to the quality or workmanship of the services to be performed.

The Authorizing Party hereby expressly releases, holds harmless and forever discharges and agrees to defend the Agents from any liability resulting from any claims, causes of action or legal proceedings of any type, related to the retention, execution and performance of the required services. This includes, but not limited to, claims of personal injury and property damage; negligent hiring, training and supervision; and any other misconduct of the contractor or inspector in the performance of the described services. In addition, the Authorizing Party agrees to indemnify the Agents for any damages, fees, costs, expenses of any type, including judgments and attorney fees, resulting from the retention, execution and performance of the required services.

The Agents will retain the services of certified contractors when certification is required by law.

The Authorizing Party shall be responsible to timely pay all bills, expenses and invoices for the services of all contractors or inspectors retained pursuant to this authorization, and shall indemnify and hold the Agents harmless for any damages, fees, costs or expenses of any type relating to the same.

Broker Name: _____

Agent Name(s): _____

Offer to Purchase dated: _____ Offer to Purchase Accepted: _____

Property Address: _____

Services Required per the Offer to Purchase: _____

_____

_____

Responsible Party's Name: _____

❑ Seller ❑ Buyer

Responsible Party's Signature: _____

Date: _____

Caution to Agents: Refer to the Wisconsin REALTORS Association's May 2004 Legal Update and legal counsel prior to accepting responsibility for ordering services for a party. No representation is made as to the legal validity of any provision or the adequacy of any provision in any specific transaction.

inspector is sending the listing agent the bill and has added a $52 late charge. The contract said that this was the buyer's expense. Who is responsible for the bill?

In this situation, the buyer should have ordered the inspections. Since the listing agent ordered the inspection and the inspector does not have the buyer's contact information, he is turning to the listing agent for payment. The listing agent's broker or an attorney may wish to write to the buyer and to the inspector (with copies to the selling agent) clearly stating that this is the buyer's obligation per the offer and reiterating that the listing agent told the inspector that she was placing the order for the buyer. Since the inspector is not local and does not know the listing agent, it may be difficult to get the inspector to pursue the buyer for the bill and the inspector may come after the listing agent. It may become expedient for the listing agent to pay the bill and pursue the buyer independently.

REALTOR® Practice Tips: REALTORS® should carefully follow these four rules if arranging transactional services for a party cannot be avoided:

- Always try to arrange for the services of a contractor or inspector in writing (or follow up a phone call with a written confirmation) specifying that the party is the client, the party will be paying for the service, and the agent is simply relaying the information as an agent for the party. See the model service request form on page 12 of this *Legal Update*.
- Obtain written authorization from the party, including disclaimers protecting the broker and agent from responsibility for any negligence performance by the contractor or inspector. See the "Model Authorization and Release from Liability" on page 13 of this *Legal Update*.
- Any contractor hired or included on a list of contractors should be certified, if possible, and hold all applicable credentials for the type of work being performed. At a minimum, ensure that the inspector (or other tradesperson, tester, etc.) is reasonably believed to be competent. Brokers ordering services can be found liable for negligent hiring.
- If the nature of the work requires it, be sure to specify the performance standards of the person being hired. For example, anyone being hired to do work which disturbs LBP must give the federal pre-renovation notice when applicable and must agree to follow lead-safe work practices.

Conclusion

REALTORS® can avoid liability by ensuring that all signaturest to a transaction on behalf of the broker and on behalf of the parties are properly authorized and indicate the capacity of any company and the person signing. Prudent practice dictates that REALTORS® should avoid engaging contractors for parties and instead furnish a list of appropriately credentialed professionals for the parties' use in hiring contractors for their transactions.