OCTOBER 2009

Legal Update

A WRA Publication Exclusively for the Designated REALTOR®

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Inside This Issue

Diligent Disclosure

A REALTOR® recently called the WRA Legal Hotline with an interesting disclosure question. The seller has made a comment suggesting that there may be bats living in the attic of the home the REALTOR® is about to list. The seller says he sometimes hears squeaking sounds in the attic and has seen a few bats flying about from time to time. The seller is wondering if he has to disclose this on the Real Estate Condition Report. The REALTOR® is wondering whether she must go up in the attic to look for bats or whether a pest control contractor must be hired to investigate the situation because the presence of bats in the seller's attic has not been confirmed. The REALTOR® also is unsure what needs to be disclosed to buyer prospects. She has read that bats they tend to return to their prior "lodging" each year so disclosure may be important even if the bats are not presently "in residence."

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

This *Legal Update* examines a seller's and a REALTOR® duty to disclose information to the parties in a real estate transaction. The *Update* begins with a review of the seller's disclosure responsibilities with regard to the RECR, including tips for REALTORS® who are assisting sellers who must complete this form. The *Update* overviews other property condition reports before examining the REALTOR®'s duty to disclose, including a discussion of when disclosure is necessary and the special circumstances when disclosure is not required.

The *Update* concludes with a discussion of "as is" clauses and a section of Legal Hotline questions and answers regarding disclosure issues. A summary of licensee disclosure tips and a sample copy of the WRA's Disclosure of Material Adverse Facts are also included.

Whenever provisions of the residential offer to purchase are involved in the discussion, the *Update* refers to the provisions of the draft of the new WB-11 Residential Offer to Purchase, projected to have a mandatory use date of March 1, 2010 (the 2010 WB-11). Line number references are used with the hope that they will not change before the Department of Regulation and Licensing formally approves the revised contract form. References to the residential offer with a mandatory use date of November 1, 1999 (1999 WB-11) are also included for easy reference.

Seller's Duty to Disclose

The seller in a real estate transac-

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tion is asked to disclose property condition information and other defects relative to the transaction several times throughout the process of listing and selling a property.

Contractual Duties

In the listing contract the seller agrees to complete the Real Estate Condition Report provided by the listing broker and to amend the report if the seller learns of additional defects after the RECR has been completed but before acceptance of an offer to purchase. For example, see the WB-1 Residential Listing Contract at lines 164-166. The seller also represents to the listing broker on lines 169-171 of the WB-1 that the seller has no notice or knowledge of any defects affecting the property as of the date of the listing contract other than those itemized in the RECR.

In the offer to purchase the seller represents to the buyer that, as of the date the offer is accepted, the seller has no notice or knowledge of any "conditions affecting the Property or transaction" as defined in the offer, other than those stated in the RECR. The offer language presumes that the buyer received the RECR before signing the offer to purchase and the RECR is made a part of the offer. This is true in both the 1999 WB-11 (lines 53-58) and the 2010 WB-11 (lines 158-165):

PROPERTY CONDITION REPRESENTATIONS: Seller represents to Buyer that as of the date of acceptance Seller has no notice or knowledge of conditions affecting the Property or transaction … other than those identified in Seller's Real Estate Condition Report dated _____, which was received by Buyer prior to Buyer signing this Offer and which is made a part of this Offer by reference COMPLETE DATE OR STRIKE AS APPLICABLE and _____ [INSERT CONDITIONS NOT ALREADY INCLUDED IN THE CONDITION REPORT].

However, the definition of "Conditions affecting the Property of transaction" on page 2 of the 2010 WB-11(lines 66-114) does not match the definition found in the 1999 WB-11 (lines 59-81). Instead, it lists all of the items from the RECR with an additional three items that appeared in the 1999 WB-11 definition that are not addressed by the RECR items. This is due, in part, to the *Below v. Norton* decision that eliminated a homebuyer's ability to sue a seller for common law misrepresentations made in the RECR (see Pages 1-6 of the August 2008 *Legal Update*, "2008 Supreme Court Decisions Affecting Real Estate," at www.wra.org/LU0808 for a detailed discussion of the decision). According to the Wisconsin Supreme Court, buyers must look to the contract and the statutes to determine what, if any, remedies are available for misrepresentations. The thought was to list the RECR items in the offer so that misrepresentations will become contractual violations. While the passage of Wis. Stat. § 895.10 (http://www.legis.state.wi.us/statutes/Stat0895.pdf) reverses this decision and eliminates much of this concern (residential real estate buyers may once again sue sellers for fraud and intentional misrepresentation), some misgivings remain.

For example, if a seller refuses or is not obligated to complete a RECR, the buyer loses the benefit of the seller's valuable and unique knowledge of the property. If the RECR items are part of the contract, then even a seller who does not complete a RECR must disclose any "Conditions affecting the Property of transaction" in the offer. A buyer who did not receive a RECR can see the things the seller is supposed to disclose. If the seller still refuses to disclose, the buyer will at least know the type of

information he or she is not receiving.

Clearly the RECR is the key to the seller's disclosures.

Chapter 709 RECR

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

Applicability

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

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

Chapter 709 does not apply to:

1. Personal representatives, trustees, conservators, guardians and other fiduciaries appointed by or subject to supervision by the court, but only if those persons have never occupied the property. For example, if a personal representative lived in the property 20 years ago, that personal representative is not exempt and must complete an RECR. This exemption for fiduciaries does not apply to persons holding powers-of-attorney because that relationship is created by contract, not by court appointment, and is not subject to direct court supervision.
2. Real estate that has not been inhabited, such as new construction and properties converted to residential from another use.
3. Transfers exempt from the Wisconsin real estate transfer fee, such as gifts between spouses, tax sales, foreclosures, condemnations and transfers by will.

There is no Chapter 709 exemption based solely on the fact that the seller does not live in the property or is not familiar with the condition of the property. Thus, the owner of a rental duplex or a bank that has acquired a home by foreclosure (REO) is still expected to complete an RECR when the property is sold to a buyer. A seller in this position can either:

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

(b) Retain a contractor or expert to provide a written report to be used as the basis for completing items on the RECR. Sellers have the option to use such reports in place of the owner's own response if the information is in writing and the entry to which it relates is identified. The contractors and experts that may be used in this manner include:

1. Licensed engineers
2. Licensed land surveyors
3. Structural pest control operator licensed by the Department of Agriculture, Trade and Consumer Protection
4. Contractors, provided the information supplied is limited to matters within the scope of the contractor's occupation
5. Local, state or federal governmental units, departments, agencies or political subdivisions, for example, a city building inspector
6. A "qualified third party:" a federal, state or local governmental agency or any person whom the broker, salesperson or a party to the transaction reasonably believes has the expertise necessary to meet the industry standards for the type of inspection or investigation conducted by the third party in order to prepare the written report.

A contractor or expert providing information regarding one or more property condition statements must certify that the information he or she provided is true and correct to the best of his or her knowledge either on the RECR or on the expert's report. The seller can check the "See Expert's Report" column next to a property condition statement on the RECR and then attach the expert's written report or furnish the written information separately to the buyer.

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

(d) Refuse to complete the RECR and sell the property "as is," refusing to accept any offers from buyers who do not waive their chapter 709 rescission rights. Wis. Stat. § 709.08 allows a buyer to waive, in writing, the right to receive a RECR and/or

the right to rescind the offer based upon the content of the RECR. Buyers should be advised to confer with legal counsel before waiving any legal rights – REALTORS® cannot provide legal advice of this sort. If the buyer proceeds to closing, the buyer's right to rescind is terminated.

Seller Completion of RECR

By completing the RECR, the seller is indicating his or her notice or knowledge of the listed property conditions. The seller is disclosing conditions he or she became aware of by personal observation or experience, or because another pointed out or announced the property condition information verbally or in writing.

As defined on lines 184-186 of the 2010 WB-11 and in the RECR (Wis. Stat. § 709.03), "defect" means "a condition that would have a significant adverse effect on the value of the property; that would significantly impair the health or safety of future occupants of the property; or that if not repaired, removed or replaced would significantly shorten or adversely affect the expected normal life of the premises." Thus the effort is made in the 2010 WB-11 to utilize only one, consistent definition of defect instead of having the variations found in the 1999 WB-11 (defect definition in the inspection contingency is slightly different than the RECR definition). See the discussion of the varying definitions of defect on Pages 11-12 of the August 2004 *Legal Update*, "Effective Home Inspections," at www.wra.org/LU0408.

"Repaired Defects"

A seller's disclosure responsibility on the RECR is to disclose those defects of which the seller is aware. When a defect is repaired and the problem has apparently been eliminated, many sellers tend to think it is no longer considered a defect requiring disclosure. However, some repairs do not hold and the defects may reoccur. For example, if there had been a water leak it may be possible that, unbeknownst to the seller, part of the sub floor is damaged or moisture is trapped and mold is growing below. There are various remedies recommended and applied in leaking basement situations and in some cases it becomes apparent that the remedy selected was not the correct solution for that particular basement when a pond reappears in the basement after the next torrential downpour or major spring snow melt.

Since a buyer's attorney may argue in court that all past and present defects should be revealed, a seller may want to take the conservative approach: disclose the incident and explain the corrective measures taken in order to avoid possible misrepresentation claims. If it were to turn out that the problem really was not corrected and there still is a defect, a buyer's attorney may sue the seller for misrepresentation or fraudulent advertising if the seller does not disclose and the buyer later experiences the same difficulties. Sellers may benefit from more liability protection in the long run by disclosing corrected defects or by explaining the corrective measures taken in the RECR.

Buyers are often more comfortable and trusting when the past defect is disclosed, along with information about the repairs made, so that they at least have the opportunity to investigate and confirm elimination of the problem for themselves.

The seller or the seller's attorney, not the agent, decides whether the seller discloses information about a property condition. If a seller fails to disclose a defect, the licensee must promptly disclose it to all parties in writing if it constitutes a material adverse fact.

REALTOR® Practice Tips: Do Not Complete the RECR for the Seller! Chapter 709 provides that the sellers will be the ones completing the RECR. Sellers should complete the form themselves, preferably in their own handwriting. Licensees should never answer the RECR items for the seller. If sellers have questions about whether a specific item constitutes a defect, the sellers should be referred to legal counsel. If a licensee helps a seller complete the RECR, it may look like the licensee was coaching the seller, answering for the seller or giving the seller legal advice in violation of Wis. Admin. Code § RL 24.06.

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

Buyer Rescission

- If a buyer receives a completed RECR before he or she submits an offer to purchase, there will be no buyer rescission rights. Accordingly, it is recommended that sellers subject to chapter 709 complete an RECR as soon as possible.
- If a buyer receives an RECR that discloses a defect, as defined in the RECR, after the buyer submitted an offer to purchase, the buyer may rescind the contract.

- If a buyer receives an RECR that is incomplete or incorrectly asserts that an item is not applicable, or if the RECR is not received within 10 days of acceptance, the buyer may rescind the contract.
- A buyer may not, however, rescind an offer or option based upon a defect disclosed in an RECR, an amended RECR or an amendment to a previously completed RECR if the buyer was aware, or had written notice, of the nature and extent of the defect at the time the offer or option was submitted to the owner or owner's agent.

> **REALTOR® Practice Tips:** All defects disclosed in an RECR prior to the time the buyer makes his or her offer cannot come back and bite the seller, provided the full nature and extent of the defects is adequately disclosed. That is why it may be better for sellers to over-disclose and give lots of details.

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

How to Amend the RECR

If the seller has already completed an RECR and then obtains new information or becomes aware of a condition that would change a response on the completed RECR, and if this occurs before acceptance of a buyer's offer to purchase, then the RECR must be amended and submitted to the buyer and any subsequent prospects. The seller, however, has no duty to amend the RECR if the new information is learned or the condition arises after acceptance of the buyer's offer.

The RECR may be amended by either completing another RECR or by preparing an amendment to the previously completed RECR. Wis. Stat. § 709.035 states the rules for amending the RECR.

- **New RECR.** The seller may simply take another RECR form and complete it to include the owner's changed responses. It may be helpful to write in "AMENDED" on the title line or on the first line of section A. The new date in section A will be sufficient to distinguish the amended RECR from the previously completed RECR. The amended RECR must be submitted to the buyer no later than 10 days after the seller accepts the offer.
- **RECR Amendment Form.** Instead of completing a whole new RECR, the owner may wish instead to complete an amendment to the previously completed RECR. § 709.035 indicates that any such amendment must state the address of the property, the owner's name, the date of the RECR being amended, the number of any property condition statement on the RECR that is affected by the new information or condition, what the owner's new response is to the statement, and if the new answer is "yes," an explanation of why the owner's response changed to "yes." The amendment to the RECR, along with a copy of the previously completed RECR if not already submitted to the buyer, must then be submitted to the buyer no later than 10 days after acceptance of the offer or option. The WRA publishes an Amendment to Real Estate Condition Report form (WRA-MCR, 1996).

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

Seller Refusal to Complete RECR

If a seller refuses to complete an RECR, the agent should make sure that the seller understands that an RECR is a statement of what the seller knows about the condition of the property, not a warranty. The agent should also be sure that the seller understands that buyers may be able to rescind their offers if they do not receive a completed RECR in a timely manner. If the seller still refuses, the agent should ask the seller to sign a "Seller Refusal to Complete Condition Report" form (WRA-SRR, revised 2009) or another form indicating that the seller has read a written summary of the seller disclosure law and understands that his or her refusal may give buyers the right to rescind their offers to purchase.

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

Non-Residential Seller Disclosure Reports

The Wis. Stat. Ch. 709 RECR applies to sellers of properties that contain one to four dwelling units.

Farm

The WRA has updated and revised the WRA Real Estate Condition Report – Farm (WRA-F) for use with the updated WB-2 Farm Listing Contract – Exclusive Right to Sell. The WRA Farm RECR is a Wis. Stat. § 709.02 RECR for real property including one

to four dwelling units that has been supplemented to bring in additional disclosure items pertinent to a working farm and rural life. The Farm RECR includes features from both residential and vacant land RECR forms. Farms typically include a farmhouse, which brings into play the considerations of the chapter 709 RECR concerning the purchase of a residence. Farms also typically include numerous acres of land, which trigger a great many of the issues addressed in the vacant land forms, such as fence law and land conservation programs. In addition, farms often include outbuildings and equipment unique to farming operations such as barns, silos, milking systems and feeding equipment. Thus the Farm RECR is a hybrid containing provisions from the residential and vacant land RECR forms and features unique to the operation of a farm. See the September 2008 *Legal Update*, "WB-2 Farm Listing and Farm Real Estate Condition Report – 2008 Revisions," online at www.wra.org/LU0809.

Chapter 709, however, does not apply to properties containing no dwelling units or more than four units. Nevertheless, listing brokers have an independent obligation under Wis. Admin. Code § RL 24.07(1)(b) to request that sellers provide a written response to the licensee's inquiries with respect to "the condition of the structure, mechanical systems and other relevant aspects of the property as applicable." Having seller disclosure report forms for other types of transactions helps brokers discharge their duties and just makes good sense for the parties if information pertinent to property involved in the transaction can be disclosed.

Vacant Land and Commercial

The WRA accordingly publishes seller disclosure reports for transactions involving properties that do not contain dwelling units and therefore are not subject to Chapter 709. These forms include the WRA's Seller Disclosure Report-Vacant Land (WRA-RV) and Seller Disclosure Report-Commercial (WRA-RCC).

These are not DRL-approved forms. They are helpful and useful optional forms that facilitate a listing broker's fulfillment of his or her inspection and inquiry obligations, and fulfills the seller's promise made in the Seller's Disclosure Report section of the listing contract to complete a seller's disclosure report.

The Seller Disclosure Report – Vacant Land (VLR) addresses issues that have been listed on prior versions of the WB-3 vacant land listing as "conditions affecting the Property or transaction," and has been supplemented to bring in additional disclosure items pertinent to the purchase of vacant land with an eye toward improvement and development. For more information and a sample copy of the VLR, see the November 2008 *Legal Update*, "WB-3 Vacant Land Listing and Seller Disclosure Report," online at www.wra.org/LU0811.

The WRA also has developed a condition report for use with commercial properties – the updated WRA Seller Disclosure Report – Commercial (CR) is intended for use together with the updated commercial listing. The CR addresses issues that have been listed on prior versions of the WB-5 commercial listing as "conditions affecting the Property or transaction," and has been supplemented to bring in additional general disclosure items pertinent to the purchase of commercial property. Since commercial property entails such a diverse range of property types, the CR attempts to address important disclosure areas in a general manner rather than address the specifics in every conceivable commercial property type. A sample copy of the CR appears in the February 2009 *Legal Update*, "Revised WB-5 Commercial Listing and Seller Disclosure Report," online at www.wra.org/LU0902.

Commercial sellers who do not want to complete a commercial condition report do not have to, but they can be reminded that similar representations will need to be made in the offer. If they do not wish to make representations in the offer, they should be referred to legal counsel for legal advice regard-

ing structuring an "as-is" transaction.

Use-Value Assessments

Note that all WRA RECRs and property condition reports include information and disclosure items relating to use-value assessments. Under the use-value assessment method, Wisconsin farmland is assessed for property tax purposes based upon its agricultural productivity rather than its fair market value or potential for development. If the use of land assessed under the use-value system is changed to a non-agricultural use, the then-current owner must pay a "conversion charge" (previously referred to as a penalty). In other words, if a buyer changes the use of the land assessed under the use-value system, the buyer may have to pay a conversion charge that captures between 5 and 10 percent of the property tax savings that occurred when the land was taxed as agricultural land in the year before the conversion. If the use changed before the sale, the seller would be responsible for the conversion charge.

A conversion charge is assessed when agricultural land is converted to a residential, commercial or any other non-agricultural use. The statutes do not define when a "change of use" occurs. Rather, the local assessors are given the authority to make this determination.

With respect to real estate sales, Wis. Stat. § 74.485 requires sellers to notify the buyer of three things:

1. that the land has been assessed as agricultural land under the use-value law;
2. whether the seller has been assessed a conversion charge; and
3. if so, whether the conversion charge 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 conversion charge, given that such a penalty would likely be considered a defect or material adverse fact. The WRA has updated its RECR forms to include this recommended disclosure.

NOTE: The farmland preservation conversion fee discussed in the September 2009 *Legal Update*, "Wisconsin Farmland Initiatives," at www.wra.org/LU0909, will be triggered when a farmland preservation agreement is terminated early, when land is released from a farmland preservation agreement or when land is rezoned out of a farmland preservation zoning district. The amount of the conversion fee is significant and developers considering the purchase of farmland preservation lands should factor in these conversion fees, as well as any use-value conversion fees, when projecting development costs.

REALTOR® Practice Tips:
Because farmland preservation conversion fees could impact a buyer's decision to purchase the property or the amount the buyer is willing to pay, the Wisconsin REALTORS® Association will modify the WRA Real Estate Condition Report – Farm, the WRA Seller Disclosure Report – Vacant Land and other WRA disclosure reports to alert buyers of rural properties to the possibility of farmland preservation conversion fees.

Sex Offender Notice

All WRA RECRs and seller disclosure report forms also include the sex offender notice language for the protection of the seller. If sellers are asked whether a particular person is required to register as a sex offender, the location of sex offenders in a neighborhood or for any other information about the sex offender registry, the seller must disclose whatever actual knowledge he or she has on the subject. However, seller will have immunity relating to the disclosure of such information if he or she promptly gives – or has already given - the person requesting information written notice that information about registered sexual offenders and the sex offender registry can be obtained by contacting the Department of Corrections via either the Internet or a toll-free number.

In other words, even if the seller may know something about sex offenders in the neighborhood, the seller will have immunity if the person asking the question is referred to the DOC. Instead of answering based upon what he or she has heard or read, the seller will have already referred prospects in receipt of a seller disclosure report or RECR to the DOC for factual and accurate information. See additional discussion of this issue on Page 14 of this *Update*.

Licensee's Duty to Disclose

A Wisconsin REALTOR®'s duty to disclose property conditions and other information affecting a transaction is substantially regulated in the Wisconsin Statutes and in the Wisconsin Administrative Code. That duty is defined in Wis. Stat. § 453.133 and is expanded and further defined in Wis. Admin. Code § RL 24.07. Exceptions to the overall duty are carved out in Wis. Stat. §§ 452.23 and 452.24. The following discussion takes the following short sale transaction scenario and examines it step-by-step in light of each of these provisions.

Fact Situation

The agent is glad to list the property for the homeowner but is a little concerned over whether this seller may be at risk. He said that he wasn't in trouble with his mortgage lender but he didn't seem very comfortable with the initial conversation about his financial position. As the agent pulls onto the driveway and gets her first look at the home, she is relieved to see that it appears to be in good shape, just as the owner had said. However, the agent notes mentally to herself, that the driveway seems to be pretty close to the neighbor's house and it appears that the one driveway splits with one branch leading to the seller's garage and the other branch leading to the neighbor's garage. The agent crosses her fingers and hopes for the best as she knocks on the seller's front door, glad that the storm clouds looming on the horizon have not yet let loose with the forecasted downpour.

STEP # 1 – LICENSEE INSPECTION OF PROPERTY

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

License law requires listing brokers, before executing the listing contract, to inspect the property and ask the seller about the condition of the structure, mechanical systems and other relevant aspects of the property, requesting that the seller provide a written response, that is, an RECR. Prudent listing brokers will require all listing agents to keep a written record of their observations, using a form like the WRA Listing/Selling Visual Inspection Form (WRA-LAI). As an alternative, the agent can note on a completed copy of the RECR any defects observed by the listing agent that are not otherwise known or disclosed by the seller in the RECR.

The visual inspection form is a due diligence tool for implementing licensee inspection and disclosure duties under § RL 24.07. Listing agents are required to inspect a property and disclose material adverse facts and facts inconsistent with the seller's RECR or other disclosures.

The form serves as a checklist to help ensure that a competent and reasonably thorough inspection has been performed, and provides a record of observations to use when reviewing the RECR to look for inconsistencies, and when making written disclosures of material adverse facts. Detailed notes on the visual inspection form, for example, "boxes stacked against west basement wall," will help licensees accurately remember what they saw – and could not see. The form will assist agents to spot issues and concerns for their clients who may address these items prior to putting their property on the market.

REALTOR® Practice Tips:
Having a detailed property inspection checklist and an inspection routine will go a long way towards protecting the agent and the broker from liability.

The agent in the fact scenario is relieved to see that there do not seem to be any major defects or problems with the physical condition of the home. She tours the home and notes the flaws she sees, but they all appear to be minor items. She remembers to make note of what appeared to be a shared driveway in the Property Exterior section of her Listing/Selling Visual Inspection Form.

STEP # 2– LICENSEE INQUIRY ABOUT PROPERTY CONDITION

The second step when listing a property is the listing agent's inquiry to the seller about the condition of the structure, mechanical systems and other relevant aspects of the property as applicable. The mandatory inquiries to the seller regarding the property condition and the request for the seller's written response generally take the form of a RECR or seller disclosure report that the listing agent asks the seller to complete. Note that the DRL listing contracts revised in 2008 and 2009 contain a promise by the seller to complete a RECR or a seller disclosure report, depending upon the type of property involved.

A prudent listing broker will go beyond the license law requirements to visually inspect the property and use a RECR or seller disclosure report to collect written property condition disclosures about the structure, mechanical systems and other relevant aspects of the property. A prudent listing broker also will order a "search and hold" from the title company to see what liens appear of record. In

order to identify potential liens and encumbrances not listed on a search and hold or not covered by title insurance, listing brokers may also wish to use a brief questionnaire when listing properties that will trigger the seller to identify potential title issues that would not be evident from simply examining recorded documents, such as WRA's "Listing Questionnaire Regarding Title Issues." A copy may be found at www.wra.org/LU0309quest or on ZipForm or ordered from the WRA (WRA-QST). For further discussion see the February 2004 *Legal Update*, "Listing Procedures for the Prudent Broker," online at www.wra.org/LU0402.

Insurance Claims: Order CLUE Report

Comprehensive Loss Underwriting Exchange (CLUE) is a loss history information database developed by and used by insurance companies to share information about the insurance claims, reported losses and damage, and even insurance policy inquiries with respect to properties and individuals. CLUE reports include all such information reported within the last five years.

A prudent listing broker would be aware that the reasons for a seller obtaining a copy of his or her property CLUE report are twofold: (1) the CLUE report will act as a supplemental property condition report and (2) the seller will be ready to respond to buyers who request a copy of the report before writing an offer to purchase. The broker may want to include a requirement in the listing contract that the seller provide a copy of his or her CLUE report to the broker. This will enable the broker to obtain as much information as possible and to increase the accuracy and completeness of disclosures.

Some sellers may not remember the details of property damage, such as dates, causes, and amounts spent, so the CLUE report also serves as a back-up measure to make sure that any recent property damage mishaps are documented and disclosed. A CLUE report will reveal a particular property's claims history: how many claims were reported, how many resulted in loss payments and how much each loss cost. CLUE information includes dates of initial reports of possible claims and a brief description of claim's status as it is investigated, adjusted and settled. Seventy percent of all CLUE reports have no reported claims or paid losses – the average homeowner files an insurance claim only once every 10 years.

When looking at properties, buyers may ask the seller for the CLUE report on the property before the buyer writes an offer to purchase because the claims history of the property may impact the buyer's ability to obtain homeowner's insurance at a reasonable price. If the seller does not provide a CLUE report, the buyer may put a contingency in the offer requiring the seller to furnish his or her CLUE report information.

Buyers and real estate agents cannot order property CLUE reports; only the owner can. CLUE reports may be ordered online from www.choicetrust.com. A consumer also can mail a request for a copy of his or her property CLUE report on a form that may be downloaded from the Web site at https://www.choicetrust.com/pdfs/clue-prop-ro-order-by-mail.pdf.

> **REALTOR® Practice Tips:** A licensee's inquiry about the property can go beyond asking the seller to complete the RECR or seller disclosure report. Licensees can also use the Listing Questionnaire Regarding Title Issues and CLUE reports as additional sources of property condition information. Some property condition concerns might also be title problems.

The agent gives the seller a RECR and a Listing Questionnaire Regarding Title Issues to complete. The agent also tells the seller that she will order a search and hold from the title company to check on the title and asks the seller to please order a CLUE report, explaining that it is best to gather as much information as possible to make sure that nothing is forgotten or overlooked.

The agent and the seller discuss the driveway situation and the agent discovers that that it is indeed a shared, joint driveway. There had been a short-term written agreement with regard to the shared driveway, but it had expired and nothing had been done since to address the situation.

The agent told the seller that this could pose a stumbling block for buyers because many lenders seem to want a written recorded document when it comes to shared features.

The agent pointed out to the seller that condition #21 on the Listing Questionnaire Regarding Title Issues addresses shared driveways, just so he would know when he completed the form. When the seller got to condition # 26 on the questionnaire, he became upset and confessed that he was a few months behind on his mortgage payments.

The agent at that point thought it prudent to halt the process so that they could determine the extent of the seller's financial distress and see whether this was going to be a short sale. She recommended that they await the results of the search and hold and asked that the seller gather information about the loans and other liens or debts on the property so that she could prepare an estimated net sheet and see what the bottom line for the seller looked like. As it turned out, this was a short sale transaction as the agent had feared. As the agent also had feared, the skies blackened and unleashed a torrential downpour as she left the seller's home.

LICENSEE DUTY TO INSPECT

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

(1) INSPECTION OF REAL ESTATE.

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

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

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

STEP # 3– DETERMINATION OF REALTOR® DUTY TO DISCLOSE MATERIAL ADVERSE FACT

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

Factor #1 – Seller Disclosure

If seller chooses not to disclose the information on the RECR, the REALTOR® will have to determine whether he or she must disclose this information as a material adverse fact.

REALTOR® Practice Tips: If the seller or another qualified expert has already effectively disclosed the information, then the licensee need not disclose the information a second time as a material adverse fact.

The agent must consider whether the seller will disclose the shared driveway and the short sale on the RECR. The shared driveway could be disclosed on item C 14, but if this is going to be a short sale, then this will invariably be an "as is" transaction and seller may not complete the RECR at all.

The seller does end up deciding not to complete the RECR because the search and hold and the preliminary net sheet spell out the bad news that this will be a short sale. The agent gathers her checklist, addenda and other forms for short sales and goes back to the seller's house to complete the listing process and paperwork. For discussion of short sale forms, see the March 2009 *Legal Update*, "Working with Distressed Sales," at www.wra.org/LU0903 and the July 2009 *Legal Update*, "Solving the Mysteries of Short Sales," at www.wra.org/LU0907.

The agent sighs with the realization this transaction was going to mean more work and a more uncertain outcome that what she originally had hoped. When she reaches the seller's home she discovers there is more bad news: although the seller insists this has never happened before, the 10-hour downpour earlier in the week has left a pond of water on the floor of the seller's basement workroom. And now she, not the seller, was left to decide if, when and how to disclose the shared driveway, the short sale and the water in the basement.

Material Adverse Facts

A real estate licensee has a duty to disclose material adverse facts to all parties to a transaction per Wis. Stat. § 452.133(1)(c). "Adverse fact" and "material adverse fact" are defined in Wis. Stat. § 452.01(1e) & (5g).

Factor #2 – Definition of Material Adverse Fact

Whether a particular condition or information constitutes a fact that a real estate licensee needs to disclose as a material adverse fact is a judgment that only the licensee can make after considering all of the facts and circumstances in the situation.

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

manner, even if the client would direct the licensee not to disclose.

Agents want nice black and white answers to their material adverse fact questions and are frustrated when they realize this is a case-by-case determination dependent upon the facts and circumstances and the agent's observations and judgement as a real estate professional. Sometimes disclosure may not be required if the information is already disclosed by the seller or on another report while sometimes disclosure may be prohibited if the information is confidential or unlawful discrimination. Other times there may be a situation where it seems like a fact that the buyer should know in order to protect everyone from liability does not, strictly speaking, fall within the categories of the material adverse facts definition. In that case there is no legal duty to disclose and the question becomes whether the information should be disclosed because it is the safest thing to do.

REALTOR® Practice Tips: If the information falls outside the material adverse fact definitions but the issue is of concern to the agent, the most prudent course may be to simply disclose. If the information was important enough for the agent to ask about or wonder about, it is likely best to disclose it.

Whether the shared driveway, the water in the basement and the probable short sale are facts that the agent needs to disclose as material adverse facts is a judgment that only she can make after considering all of the facts and circumstances in the situation. The shared driveway is technically an encumbrance or lien on title as well as a physical encroachment; the seller and the neighbor use a driveway that, according to the surveys done a few years back, runs on both the seller's and the neighbor's property.

The water in the basement is clearly a concern and the agent has no idea if this is a recurrence of an ongoing problem or a first-time event caused by the exceptional rainfall. This will have to be disclosed. Buyers will want to investigate the potential impacts on structural integrity and possible health effects if evidence of mold or dampness is found.

The short sale possibility means that the seller may not be able to sell unless lender approval is secured. The agent does not want to compromise the seller's chances of getting the best price possible for a home by disclosing the seller's distressed condition too early. On the other hand, Wis. Admin. Code § RL 24.07(2) requires licensees to promptly disclose material adverse facts in writing to all parties to the transaction. Failure to disclose may lead to licensee liability. A transaction that may be a short sale may fall more squarely under § RL 24.07(3), which provides that a licensee is practicing competently when the licensee discloses information suggesting the possibility of material adverse facts to the parties

STATUTORY DUTY TO DISCLOSE

Wis. Stat. § 452.133 (1) Broker's duties to all persons in a transaction. A broker who is providing brokerage services to a person in a transaction owes all of the following duties to the person:

(c) The duty to timely disclose in writing all material adverse facts that the broker knows and that the person does not know or cannot discover through reasonably vigilant observation, unless the disclosure of a material adverse fact is prohibited by law.

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

MATERIAL ADVERSE FACTS

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

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

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

1. Significantly and adversely affecting the value of the property.
2. Significantly reducing the structural integrity of improvements to real estate.
3. Presenting a significant health risk to occupants of the property.

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

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

in writing, recommends that the parties obtain expert assistance and, if directed by the parties, drafts appropriate contingencies to address the matter. The fact that the transaction is subject to lender(s) approval and apparently will not be able to close without such approval falls within the category of information that may be stated factually to buyers. If the agent discloses that lender approval is required, then appropriate contingencies can be included in the offer to purchase for the protection of both the seller and buyer.

A party to the transaction might indicate that they do not want to buy a property where the driveway access is in question or there is water in the basement. It would seem that a competent licensee would generally recognize that the shared driveway, the water in the basement and the short sale are of such importance that it might affect a reasonable party's decision to enter into a contract or affect the party's decision about the terms of the contract.

Only if a fact is both adverse and material, would the agent be obligated to timely disclose the fact in writing to all parties to the transaction. In this scenario, the agent decides that she will disclose the undocumented shared driveway and the water in the basement as material adverse facts and will categorize the short sale as information suggesting the possibility of a material adverse fact. The agent first will, however, consider whether there may be other factors at play that would impact her disclosure obligations.

Factor #3 – Does Party Know or Can Party Observe the Fact?

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

Although the agent observed the location of the driveway and suspected that was something unusual, she does not want to trust that prospects visiting the property will notice the driveway positioning or necessarily know that there could be encroachment or lien problems.

Factor #4 – Is Disclosure Prohibited by Law?

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

There is nothing legally that the agent is aware of that would prohibit the contemplated disclosures.

Factor #5 – Is Fact Confidential?

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

Although the seller does not want the agent to publically comment on his financial predicament, the agent convinces him that there really is not another way if he wants to try to sell the property.

The next factors the REALTOR® would consider if it was believed that the information was a material adverse fact would be whether the REALTOR® was exempt from material adverse fact disclosure under Wis. Stat. §§ 452.23 and 452.24.

Factor #6 – Unlawful Discrimination

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

The disclosure of the shared driveway and the short sale would not violate any fair housing laws because no protected classes under fair housing law are involved in the scenario.

Factor #7 – Stigmatized Properties

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

The disclosure of the shared driveway and the short sale does not involve any murder, suicide or haunting known to the agent and there has not been any other act or occurrence of this nature on the property.

Factor #8 – Qualified 3rd Party Inspection Report

No licensee disclosure is required if a written report that discloses the information has been prepared by

DISCLOSURE DUTY EXCEPTIONS (Part I)

Wis. Stat. § 452.23 Disclosures, investigations and inspections by brokers and salespersons.

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

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

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

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

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

a qualified 3rd party and provided to the parties. A qualified 3rd party means a federal, state or local governmental agency, or any person whom the broker, salesperson or a party to the real estate transaction reasonably believes has the expertise necessary to meet the industry standards of practice for the type of inspection or investigation that has been conducted by the 3rd party in order to prepare the written report.

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

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

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

The disclosure of the shared driveway and the water in the bsement may not be needed if there were a home inspection report where the home inspector lists these items. The shared driveway may also appear on the title commitment. However, the agent may not be able to wait to see if the issues appear on these other reports because her disclosure obligation requires prompt disclosures. The existence of the short sale in the fact scenario would not involve any third party inspections or reports.

Factor #9 – Group Homes

Under Wis. Stat. § 452.23(2)(c), the presence of certain family homes, community based residential facilities and nursing homes need not be disclosed to potential buyers. The definition of group homes is technical in nature. This section does not prohibit disclosure but merely clarifies that the licensee has no duty to do so. Any licensee considering disclosure should first determine whether that disclosure would violate fair housing rules and thus be prohibited (i.e., occupants with disabilities as a protected class).

The disclosure issues in the fact scenario do not involve any group homes.

Factor #10 – Information Contradicting Qualified Third Party Inspection Report

This is where having the visual inspection report documenting the agent's observations when inspecting the property may come in handy. If the agent observed or knows of information that contradicts information reported in the written report of a qualified 3rd party expert, this

must be disclosed to the parties per Wis. Stat. § 452.23(3). This will serve to signal to the buyer problems areas where there may be a change in conditions, an error made or a touchy situation perhaps deserving special attention or a second look.

LICENSEES' STANDARD OF PERFORMANCE FOR DISCLOSURES

Wis. Stat. § 452.23(4) makes it clear that through the process of inspecting a property and making the disclosures required under law, a real estate salesperson or broker is obligated to exercise the degree of care expected of a person with a salesperson's or a broker's license. Real estate licensees are expected to demonstrate the skills, knowledge and training that they were taught in the pre-license education sessions that they attended in order to become licensed and the continuing education sessions that they attended in order to keep their licenses. Knowledge or expertise beyond this training is not required with respect to inspections and disclosures. Real estate licensees are not expected to perform to the standards of Wisconsin registered home inspectors or other contractors or experts.

In addition, Article 2 of the REALTOR® Code of Ethics provides, "REALTORS® shall avoid exaggeration, misrepresentation, or concealment of pertinent facts relating to the property or the transaction. REALTORS® shall not, however, be obligated to discover latent defects in the property, to advise on matters outside the scope of their real estate license, or to disclose facts which are confidential under the scope of agency or non-agency relationships as defined by state law. *(Amended 1/00)"* Standard of Practice 2-1 additionally provides that, REALTORS® shall only be obligated to discover and disclose adverse factors reasonably apparent to someone with expertise in those areas required by their real estate licensing authority. Article 2 does not impose upon the REALTOR® the obligation of expertise in other professional or technical disciplines. *(Amended 1/96)*"

Factor #11 – Sex Offenders

Wis. Stat. § 452.23(2)(d) indicates that a broker or salesperson is not required to disclose any information related to registered sex offenders or the sex offender registry, except as provided in Wis. Stat. § 452.24.

Wis. Stat. § 452.24(1) begins with the proposition that real estate licensees have a duty, if asked by a person in connection with a real estate transaction, to disclose any actually known information concerning any sex offenders. Specifically, if asked whether a particular person is required to register as a sex offender, about the location of sex offenders in a neighborhood or for any other information about the sex offender registry, the licensee must disclose whatever actual knowledge he or she has on the subject.

However, Wis. Stat. § 452.24(2) provides that notwithstanding the apparent § 452.24(1) duty to disclose if asked about sex offenders, the real estate licensee is immune from liability relating to disclosures regarding sex offenders if he or she promptly gives the person requesting the information a written notice indicating that the person may obtain sex offender and sex offender registry information by contacting the Department of Corrections on the Internet or by telephone. In other words, even if the licensee knows something about sex offenders in the neighborhood, the licensee will have immunity if the person asking the question is referred to the Department of Corrections contact information. Instead of answering based upon what they have heard or read, the licensee can instead just refer the person to the Department of Corrections' sex offender registry for factual and accurate information.

The following notice, that may be inserted into any existing form or a WB-41 notice form, satisfies the sex offender disclosure requirements. This notice is included in many WRA real estate forms including all agency agreements, customer agency disclosure forms and property condition reports.

> 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 www.widocoffenders.org or by phone at 608-240-5830 or 877-234-0085.

DISCLOSURE DUTY EXCEPTIONS (Part 2)

Wis. Stat. § 452.23 Disclosures, investigations and inspections by brokers and salespersons.

(2)(d) Except as provided in s. 452.24, any information related to the fact that a particular person is required to register as a sex offender under s. 301.45 or any information about the sex offender registry under s. 301.45.

(3) A broker or salesperson shall disclose to the parties to a real estate transaction any facts known by the broker or salesperson that contradict any information included in a written report described under sub. (2) (b).

(4) In performing an investigation or inspection and in making a disclosure in connection with a real estate transaction, a broker or salesperson shall exercise the degree of care expected to be exercised by a reasonably prudent person who has the knowledge, skills and training required for licensure as a broker or salesperson under this chapter.

DISCLOSURE DUTY EXCEPTIONS (Part 3)

Wis. Stat. § 452.24 Disclosure duty; immunity for providing notice about the sex offender registry.

(1) If, in connection with the sale, exchange, purchase or rental of real property, a licensee receives a request from a person to whom the licensee is providing brokerage services in connection with the sale, exchange, purchase or rental for information related to whether a particular person is required to register as a sex offender under s. 301.45 or any other information about the sex offender registry under s. 301.45, the licensee has a duty to disclose such information, if the licensee has actual knowledge of the information.

(2) Notwithstanding sub. (1), the broker or salesperson is immune from liability for any act or omission related to the disclosure of information under sub. (1) if the broker or salesperson in a timely manner provides to the person requesting the information written notice that the person may obtain information about the sex offender registry and persons registered with the registry by contacting the department of corrections. The notice shall include the appropriate telephone number and Internet site of the department of corrections.

The new 2010 WB-11 Residential Offer to Purchase is expected to contain the following information on page 6:

NOTICE ABOUT SEX OFFENDER REGISTRY

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 telephone at (608) 240-5830. This same notice will likely also be included in some of the other offer to purchase forms currently being revised by the DRL.

For additional information, see *Legal Update* 02.05, "Sex Offender Registry," online at www.wra.org/LU0205 and the Sex Offenders Registry Resource page at www.wra.org/sexoffenders.

There is no suggestion that a sex offender is involved in the fact scenario.

Factor #12—Information Suggesting the Possibility of a Material Adverse Fact

If the REALTOR® knows or is aware of information suggesting the possibility of a material adverse fact, Wis. Admin. Code § RL 24.07(3) states that the REALTOR® will be practicing competently if the REALTOR® makes timely written disclosure of the information suggesting the material adverse fact to all parties in the transaction, recommends the parties obtain expert assistance to inspect or investigate for the possible material adverse fact, and, if directed by the parties, draft appropriate inspection or investigation contingencies. In other words, a disclosure of a material adverse fact may not be required if the information is more appropriately disclosed to the parties as information suggesting the possibility of a material adverse fact. Under circumstances where it is not clear whether there is a material adverse fact or where additional investigation, inspection or testing are prudent to confirm whether a problem it truly present, the licensee may simply disclose the information and offer to draft any needed inspection or investigation provisions.

The agent decided this was the best means for working with the short sale disclosure. The agent will be practicing competently if the REALTOR® timely discloses information about the short sale in writing to the parties as information suggesting the possibility of a material adverse fact under § RL 24.07(3). Pursuant to a National Association of REALTORS® policy adopted in 2008, the MLS must give participants the ability to disclose to other participants any potential for a short sale, so that looks to be the best vehicle for this disclosure.

STEP #4 – FORMAT FOR DISCLOSURE OF MATERIAL ADVERSE FACTS OR INFORMATION SUGGESTING THE POSSIBILITY OF MATERIAL ADVERSE FACTS

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

If a REALTOR® is looking to create a proper disclosure document, the following points should be addressed in a written letter or memo printed on the letterhead of the REALTOR®'s company. The document should identify the REALTOR® as a licensed real estate salesperson or broker, cite the legal authority for making the disclosure [Wis. Admin. Code § RL 24.07 (2) or (3)], plainly and factually state the information comprising the material adverse fact or the information suggesting the possibility of the material adverse fact, attach any reports or supporting documents and recommend that the parties obtain expert assistance to inspect or investigate if information suggesting the possibility of a material adverse fact is given.

This written disclosure document should be provided to all parties – the seller and all prospective buyers. It may be delivered to buyers by giving it to them along with the seller's RECR when they attend property showings or at some other appropriate time.

LICENSEE DUTY TO DISCLOSE

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

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

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

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

The agent will use the WRA's Disclosure of Material Adverse Facts form to disclose the shared driveway and the water in the basement in a factual manner.

See the sample copy of the Disclosure of Material Adverse Facts form (WRA-DM) on Page 26 of this *Update*. Page 9 of *Legal Update* 02.12, at www.wra.org/LU0212, and the April 2007 edition of *Broker Supervision Newsletter*, "Material Adverse Facts: Disclose What? Disclose When?" at http://www.wra.org/online_pubs/broker_supervision/2007/br0704.asp also contain sample material adverse fact disclosure forms.

STEP #5 – TIMING FOR DISCLOSURE OF MATERIAL ADVERSE FACT OR INFORMATION SUGGESTING THE POSSIBLITY OF MATERIAL ADVERSE FACT

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

"As Is" Sales

An "as is" clause may be used in the offer to purchase for any type of property. Sellers may choose this when they are under financial constraints and cannot commit any more funds to repairs. It may be used because there are environmental or other problems that the seller does not want to confront. It may be when the seller is an estate or an elderly person who is physically or mentally unable to deal with the situation. And as has become all too familiar for many agents, most if not all short sales and REO (bank-owned real estate) transactions are "as is, where is." For a review of the use of "as is" clauses in short sales and REO sales, review the March 2009 *Legal Update*, "Working with Distressed Sales," at www.wra.org/LU0903. In the end there are no limits on who may use an "as is" clause or on the type of property that may be involved.

The prudent listing broker will explain the consequences of an "as is" sale to sellers who suggest that this concept appeals to them or has been recommended to them. 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 seller may still need to make some disclosures about the property if latent or dangerous defects or other special types of circumstances are present.

An "as-is" clause puts the burden on a buyer to determine the condition of the property. The clause suggests that the property is not in perfect condition and a buyer cannot rely upon a seller's failure to disclose defects as an indication that there are no problems or defects. The "as is" clause alerts the buyer that he or she is responsible to determine the condition of the property being purchased -- the clause does not mean that inspection contin-

gencies will not still be used. 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 -- the buyer is on a "take it or leave it" basis.

No RECR

In an "as is" transaction, the seller's duty to disclose is limited. The seller does not complete a RECR or any other seller condition report. This practice is not illegal if the buyer waives the right to receive a RECR. Even if the buyer does not waive this right, the buyer's remedy in an "as is" sale will typically be limited to rescinding the transaction. Many sellers do not take advantage of this strategy to not complete a RECR or the seller disclosure report because they often have already completed and distributed the report to buyers before deciding that the transaction will be "as is." Unfortunately, the agents they are working with sometimes do not realize this until it is too late – property condition disclosures have already been given to the buyer.

Instead, most if not all information about the condition of the property should come from buyer inspection and investigation. Accordingly, the seller should expect that the buyer will have inspection, testing and investigation contingencies that permit the buyer to fully investigate the condition of the property and withdraw from the transaction if the property condition is not satisfactory. The seller, however, will likely reject the offer or counter out any such provisions containing seller right-to-cure clauses because the seller intends to sell the property in its current condition without investing any time or money for repairs or improvements.

If the listing agent knows from the beginning that the seller will sell the property "as is," this may be indicated in the additional provisions section or in an addendum to the listing contract. The Real Estate Condition Report or Seller Disclosure Report section in the listing contract may also be deleted or lined out, in particular the seller's agreement to provide a RECR or seller disclosure report and to amend the report if new conditions or information comes into play. A seller might think that he or she wants to direct the listing broker to not make any representations about the property condition, but this is effective only to the extent that no material adverse facts or any other disclosure duties are involved. A licensee's duty to disclose adverse materials facts, or information suggesting the possibility of material adverse facts, overrides any duty to maintain a client's confidences or to follow the client's wishes.

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

Sometimes a seller does not decide to sell "as is" until marketing or even negotiations have begun. In this situation, the seller may have already completed a RECR. At that point in time the seller's statement that the property is being sold "as is" will simply mean that the seller is not going to make any repairs or improvements despite the presence of any property defects.

Limited Disclosures

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

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

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

3) Seller Cannot Make False Affirmative Representations. The seller may be liable if he or she makes false affirmative statements about the property, as was shown in *Grube v. Daun*, 173 Wis. 2d 30, 496 N.W.2d 106 (Ct. App. 1992). The broker in that case affirmatively represented that the property was suitable for business, residential, recreational and family purposes despite the fact that the subsurface water supply was threatened by gasoline contamination and the furnace and water supply system were incapable of being used as represented by the broker. The broker maintained that since the property was sold "as is," he had no duty to investigate and disclose because the "as is" clause shifted the burden to investigate onto the buyer. The court held, however, that when a seller or an agent of the seller makes an affirmative representation about the condition of the property, the seller

or agent is not relieved by the "as is" clause from the duty to investigate before making the representation and to accurately report the results to the buyer. Although an "as is" clause will protect the seller and the seller's agent from claims based on nondisclosure, the buyer is entitled to rely upon affirmative statements and expect full and fair disclosure of all material facts relevant to that aspect of the property.

In *McCabe v. Midwest Evergreens, Inc.* (No. 95-2148, Ct. App. 1996), the seller's agent gave the buyer a fact sheet representing that the seller's property had a well and septic system. The buyer's offer to purchase required the seller to have the septic system pumped if it had not been pumped within the last year. The seller countered the offer and submitted an addendum that disclaimed all warranties as to the condition of the property and sold the property "as is." At closing, the buyer discovered that the septic system had not been pumped. After eventually removing the front porch, the buyer discovered that the "septic system" consisted of a deteriorated fifty-gallon drum buried under the porch.

An "as is" clause generally shifts the responsibility to the buyer to determine the condition of the property being purchased, thus protecting the seller and his agent from any fault based on nondisclosure of facts. However, once a seller or his agent has made an affirmative representation about some aspect of the property, the buyer is entitled to rely upon that statement and expect full and fair disclosure of all material facts relating to that aspect of the property. The Court of Appeals held that the seller's promise to have "septic system" pumped was a misrepresentation of fact because an inaccessible drum under the porch is not a "septic system" that was capable of being pumped.

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

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

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

Thus, "as is" language shifts the burden to the buyer to determine the condition of the property being purchased. This serves to protect a seller and his or her agent from most claims based upon nondisclosure. One exception to this rule is where the seller or his agent has made an affirmative representation about some aspect of the property.

No Repairs or Curing of Defects

As "as is" clause does not delete the inspection contingency. If a buyer has the right to inspect, the buyer still may give notice of defects. The seller in a true "as is" sale, however, will have negotiated the offer to provide for no seller right to cure in the inspection contingency because the seller has no intention of making any repairs.

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

Licensee's Perspective

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

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

assure that all known material defects are disclosed in writing to the buyer.

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

Legal Hotline Questions and Answers

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

RECR: Bedbugs

A client went to Mexico and came back with bedbugs. Orkin came in to address the problem last July and every month since and not one bedbug has been found. Is this an infestation? Since it is no longer a problem, must it be disclosed on the RECR?

The seller's responsibility on the RECR is to disclose defects: conditions that would have a significant adverse effect on the value of the property, significantly impair the health or safety of future occupants of the property, or if not repaired, removed or replaced, would significantly shorten or adversely affect the expected normal life of the premises. The listing agent should remember that the responsibility to complete a RECR falls solely upon the shoulders of the seller. If the seller wants specific guidance on what to disclose or not disclose, the agent should refer him to his attorney for legal advice.

If the bedbugs were completely eradicated such that no defect remains, the seller may not need to disclose. While a seller may believe that an item that has been repaired is no longer a defect, some repairs do not hold and the defects may reoccur. Since a buyer's attorney may argue in court that all past and present defects should be revealed, a seller may want to take the conservative approach and disclose the incident and explain the corrective measures taken in order to avoid possible misrepresentation claims in the future. If it were to turn out that the problem really was not corrected and there still is a defect, a buyer's attorney may sue the seller for misrepresentation or fraudulent advertising if the buyer later has difficulty with the insects.

If a seller fails to disclose a defect, the licensee must promptly disclose the defect in writing if it constitutes a material adverse fact. Whether the bedbugs constitute a fact that the listing broker or agent needs to disclose as a material adverse fact is a judgment that a licensee can make after considering all of the facts and circumstances in the situation. If a licensee acting competently knows that this fact: (1) has a significant adverse affect on the value of the property; (2) significantly reduces the structural integrity of the property; (3) presents a significant health risk to the occupants of the property; or (4) is information that indicates that a party to the transaction is not able to or does not intend to meet their obligations under the contract, then the issue constitutes an adverse fact. If a party to the transaction was to so indicate, or if a competent licensee would generally recognize that this fact is of such importance that it would affect a reasonable party's decision to enter into a contract or would affect the party's decision about the terms of the contract, the fact is both adverse and material. If this fact is both adverse and material, then Wis. Admin. Code § RL 24.07(2) requires the licensee to timely disclose the fact in writing to all parties, even if the licensee's client would direct the licensee not to disclose.

In a case where a broker becomes aware of information that is inconsistent with the seller's RECR or disclosures, Wis. Admin. Code § RL 24.07(6) requires the broker to disclose in writing in a timely manner. Once informed, the parties may attempt to renegotiate the terms and conditions of the offer to purchase. If, they are unable to resolve the concerns, they may be able to void the contract based upon the concept of mutual mistake of fact. When both parties are mistaken as to a basic factual assumption on which the contract was made and the mistake has a material effect on their performances, the contract is voidable by the party adversely affected.

RECR: Assessment Districts

The new RECR item C.24.m regarding special assessment districts became a mandatory part of the form effective November 1, 2008. What are drainage districts and are there other examples of special purpose districts?

On the RECR, item C.24 asks about actual or future special assessments, and the new item C.24.m asks about special districts that have the power to assess: "I am aware that the property is located within a special purpose district, such as a drainage district, that has the authority to impose assessments against the real property located within the district."

The legislation that created this new item on the RECR came from DATCP and is intended to disclose drainage districts in agricultural areas. Approximately one-third of Wisconsin farms depend upon constructed drains to remove excess

water from their land. Most drains are operated by a single landowner or by voluntary cooperation among neighbors. However, approximately 10 percent of the drains are organized under Wis. Stat. Ch. 88 (http://www.legis.state.wi.us/statutes/Stat0088.pdf) into 228 known drainage districts that are governed by 31 county drainage boards, mainly in the eastern and southeastern portions of the state. The DATCP regulates the drainage district program. For more information, call the State Drainage Engineer at 608-224-4627.

Examples of other special purpose districts include public inland lake protection and rehabilitation districts (lake districts -- there are various kinds), sanitary districts and sewer districts. There is a listing of some specific districts in Wisconsin online at http://www.revenue.wi.gov/slf/cotvc/08spdis.pdf.

If an owner has been assessed in the past for one of these special purpose districts, they'll probably remember. Property owners on or near a lake should be asked if there is a formal lake district. Owners can contact their local assessor if they have questions as to whether or not they are in any special purpose district. As always, sellers with legal questions about how to answer a RECR question should consult an attorney – REALTORS® must be careful to never provide legal advice about how a seller should respond to an item on the RECR.

See pages 7-8 of the June 2008 *Legal Update*, "2008 Legislative Update," online at www.wra.org/LU0806 for additional information about the new required disclosure item.

Smoke as Potential Material Adverse Fact

The house next door to the home the REALTOR® has listed has an outdoor wood-burning furnace. The smoke from the furnace drifts up the hill to the listed house, and this has caused a dispute between the seller and the neighbor. In retaliation, the seller put up outdoor lighting that he keeps on all night. This upset the neighbor, so he put up signs declaring that his property rights were being violated. The seller has now taken down all of the lights and the neighbor has removed the signs, reflecting an apparent truce. The neighbor has asked the REALTOR® to tell potential buyers about the wood-burner and the smoke. What does the REALTOR® need to disclose about the smoke and the dispute?

The seller should consider whether the smoke should be disclosed on the RECR. Smoke can certainly be an irritant if not an environmental or health concern. If the seller does not disclose the smoke, the listing agent must decide whether the smoke coming from the neighbor's wood-burning stove is a material adverse fact or information suggesting the possibility of a material adverse fact. The facts do not appear to suggest an adverse affect on value because there does not seem to be any affect on the structural integrity of the property, and the smoke does not signify that a party can't or won't honor his or her contractual commitments.

There might be a health risk, although this possibility must be evaluated by the listing agent who is familiar with these properties and in a better position to decide whether there could be a significant health risk. Because this smoke apparently irritated the seller enough to retaliate by installing the outdoor lighting, it may be wise to disclose the neighbor's woodburning stove, and the smoke that it creates, as a potential material adverse fact that bears some investigation.

60 amps

The seller has disclosed on the RECR that the home has 60-amp electrical service. The buyer has made an offer and signed the RECR. The buyer is now trying to give a notice of defects because the electrical service needs to be updated to 100-amp service. Is this a defect?

The fact that the home has 60-amp service is not a defect per se. The service itself may, however, be defective. If the home inspection indicates that the electrical service is defective, the buyer could give a notice of defects per the home inspection contingency.

Defects are defined in the offer to purchase at lines 311 to 315 of the WB-11 Residential Offer to Purchase which provide that a defect does not include structural, mechanical or other conditions the nature and extent of which the buyer had actual knowledge or written notice before signing the offer. For more information on insurability issues the agent may refer to the WRA resource page at www.wra.org/Resources/resource_pages/Insurance_resources.htm Additionally, *Legal Update* 03.04, "Addressing Transactional Property Insurance Issues in Wisconsin," at www.wra.org/LU0304, includes information regarding insurance issues.

RECR: Foreclosure

Who legally needs to complete a RECR? A broker has several foreclosure properties that are bank owned and they refuse to complete a RECR.

There is no exemption from the Wis. Stat. Chapter 709 seller disclosure law based solely on the fact that the owner does not live in the property. Such owners might include the owner of a rental duplex or a bank selling a home that it has acquired by foreclosure. A seller in this position can either (a) complete the RECR to the best of his or her knowledge, (b) retain a professional to provide an inspection report to be used as the basis for completing the RECR, (c) refuse to complete the RECR and sell "as is," risking buyer rescission or (d) refuse to complete the RECR and sell "as is," refusing to accept any offers from buyers who do not waive their Chapter 709 rescission rights.

All sellers subject to Chapter 709

whether broker assisted or FSBO must complete a RECR or risk rescission of the offer to purchase. Chapter 709 generally applies to all persons who transfer real estate containing one to four dwelling units, including condominium units, time share property, living quarters in a commercial property, etc. Chapter 709 does not apply to (1) personal representatives, trustees, conservators and other fiduciaries appointed by or subject to supervision by the court, but only if those persons have never occupied the property (Note this does not include powers of attorneys); (2) real estate which has not been inhabited, e.g. new construction; and (3) transfers exempt from the real estate transfer fee, e.g. between spouses, foreclosures, probate transfers, etc.

Who Discloses Basement Problems?

A seller refuses to believe the listing broker that any adverse property condition must be disclosed to prospective buyers. A home inspection was performed and a basement specialist performed a basement inspection. The basement specialist recommended that steel beams be installed. The seller refuses to disclose this to any future buyers. What should the listing broker do?

If the current transaction does not result in a sale, the seller and broker will need to consider revising the property condition disclosures based upon the home inspection and basement inspection results. Pursuant to Wis. Stat. § 709.035 the seller is required, prior to the acceptance of an offer to purchase, to amend the RECR when he or she becomes aware of information that would change a response on the report. Whether the seller believes there are defects based on the results of the inspector's reports is a decision the seller will make with the assistance of legal counsel.

Regardless of the seller's disclosure, the broker in the transaction has a duty to disclose material adverse facts in writing, in a timely manner. If the seller elects not to disclose the basement defects on the RECR, the listing broker must disclose them.

RECR: Current or Previous Infestation

The seller had a termite inspection report that indicated that termites had been found and the home had been treated. The seller received an offer and showed the buyer the termite report and the buyer backed out based on the report. The seller received a second offer. On page 2 of the RECR the seller stated house was pre-treated as a preventive measure by Orkin in 1997. The house had activity found by Orkin in one other yearly inspection. The house was treated and no structural damage occurred. Apparently there is an Orkin house warranty that is transferable to new owner. The seller told the listing agent that their attorney advised them not to share any reports with the potential buyer. What should the agent do?

Arguably the past termite infestation is a defect even if it indicates nothing more than the presence of termites in proximity to the property. Although the seller, per their attorney's direction, may withhold the actual reports, the seller is not relieved of making property condition disclosures. Pursuant to item C.18 of the RECR the seller must disclose defects related to current or previous infestations of termites. The seller should then give an explanation in D3. The seller, in the offer to purchase, also represents to the buyer that there are no conditions affecting the property other than those identified in the RECR.

Whether the seller attaches a copy of the reports to the RECR or explains the condition in the offer to purchase is up to the seller. Provided the seller makes full disclosure, the listing agent has no additional disclosure obligation. If, however, the agent is aware of facts materially inconsistent with or materially contradictory to the seller's statements, the agent must disclose these facts in writing and in a timely manner to the parties. See Wis. Admin. Code § RL 24.07(6).

Where's the Air?

A buyer's agent inspected a property that is marketed as having central air and discovered that there is no central air. Does the agent have a duty to disclose this fact to the buyer?

If given access, the buyer's agent is required under Wis. Admin. Code § RL 24.07(1) to perform a reasonably competent and diligent inspection of the property. A buyer's agent, however, is not required to have the specialized knowledge and skills possessed by professional inspectors. If a reasonably competent and diligent licensee would note the absence of the central air unit, then arguably the buyer's agent should have discovered and disclosed this misrepresentation.

RECR Amendment

The offer to purchase included a safe water test contingency (for Coliform/E coli only). Although the plumber who was hired by the sellers was told the test for only Coliform/E coli, he made a mistake and had the nitrate level tested as well. The test results have come back bacteriologically safe, however, the nitrate level was over 15 parts per million (over the 10 parts per million recommended by the EPA). Do the sellers now need to disclose this to the buyer since it is now a known defect? What if the sellers refuse because the nitrates testing was unauthorized?

Wis. Stat. § 709.035 requires the sellers to amend the RECR prior to the acceptance of a contract if the sellers obtain information or become aware of any condition that would change a response on their RECR. The sellers may choose to attach a copy of an inspection report or test results to the RECR to accomplish disclosure for future transactions. If the sellers amend the RECR for this transaction, it would give the buyer the right to rescind the offer to purchase.

If the seller does not amend the RECR and fails to disclose the

nitrate test results, the agent in the transaction is required to disclose any material adverse facts. The agent may refer to Page 26 of this *Update* or ZipForm for a sample material adverse fact disclosure letter.

Late Rent as Material Adverse Fact

Does the listing agent have a duty to disclose that a tenant of the listed duplex has a history of late payments? The tenant has told the agent that he has lost his job. Is the agent required to tell buyers?

Wisconsin courts have indicated that a problematic tenant payment history may be a material adverse fact in the sale of an income property. See the summary of the *Kailin v. Armstrong* case, 2002 WI App 70, on Pages 5-6 of *Legal Update* 03.01 at www.wra.org/LU0301.

Landlord Notice and Knowledge

An owner has never lived in the property or even been inside the property listed by Broker A, so he is refusing to fill out a RECR. Broker A noted cracks in the basement when she toured the property. The tenant told Broker A that the roof leaks in one of the bedrooms, the basement has been wet in the past and these items had been reported to professional management company that manages the property. If the owner has second-hand information from the manager, does that make him aware of the leaking roof and wet basement? Should he disclose this in the RECR? What are Broker A's disclosure responsibilities?

There is no exemption from the Chapter 709 seller disclosure law based solely on the fact that the owner does not live in the property for sale. Regardless of whether the owner lives on the property, the owner may be aware of defects that must be included in the RECR. The owner apparently has notice or knowledge from the property management company and the tenants. The owner does not have to see a defect first-hand in order to have knowledge or notice.

To the extent that the owner does not disclose any material adverse facts, Broker A must disclose her property condition observations (cracks in the basement) and information learned from the tenant (roof leaks) in writing to all parties.

Group Home for the Elderly

An agent is listing a property across the street from a group home for the elderly. Does this need to be disclosed to potential buyers?

Under Wis. Stat. § 452.23(2)(c), the presence of certain family homes, community-based residential facilities and nursing homes need not be disclosed to potential buyers. The definition of group homes is technical in nature. This section does not prohibit disclosure but merely clarifies that the licensee has no duty to disclose. Any licensee considering disclosure should first determine whether that disclosure would violate fair housing rules and thus be prohibited (i.e., are the occupants members of a protected class such as occupants with a disability or elderly occupants).

Stigmatized Properties

If someone dies or commits suicide in a home, is this an adverse material fact that must be disclosed?

Wis. Stats. § 452.23(2)(a) states that a licensee is not required to disclose, "that a property was the site of a specific act or occurrence, if the act or occurrence had no effect on the physical condition of the property or any structure located on the property." This statute is intended to apply to "stigmatized properties" that have been or are the site of a murder, suicide, a haunting or other notorious events which do not physically damage the property. If the event resulted in physical damage, the seller would normally be required to disclose the defect on the Wis. Stat. Ch. 709 RECR unless the buyer had waived the report or the transaction was exempt from Chapter 709.

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

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

In the California lawsuit of *Reed v. King*, neither the seller nor the real estate agents involved told the buyer that the property had been the site of a brutal murder of a woman and four children 10 years earlier. The buyer won the lawsuit seeking rescission of the sale and monetary damages. This was based upon the court's finding that the multiple murders reduced the market value of the house.

In the New York *Stambovsky v. Ackley* case, the buyer sued for rescission of his purchase after he learned the house he had bought was reputably possessed by poltergeists. This fact had been the subject of a *Reader's Digest* article and local newspaper articles, but the buyer had not seen these publications. The court noted that a buyer doing the most thorough inspection of the property and the public records would normally not have discovered that the property was haunted. The court concluded where a condition materially impairs the value of a property and the matter is peculiarly within the knowledge of the seller or unlikely to be discovered by a buyer exercising due care, nondisclosure would be a basis for rescission.

In the 1992 *Green Springs Farms* case, the Wisconsin Court of Appeals held that a seller had the duty to fully disclose to potential buyers the existence of conditions material to the buyer's decision to purchase which the buyer is in a poor position to discover. Although this duty to disclose holding has not yet been applied to a stigmatized property case, it is arguable that it could be.

Therefore, if a death or suicide affects a property's value, a licensee is not required to but may disclose the event to buyers. The seller arguably should disclose the event on the RECR, and he or she may also have a common law duty to disclose the murder to the buyer if it was something a diligent buyer would not typically be able to discover during normal property inspections. If the seller is not willing to disclose, the seller may wish to contact the seller's attorney regarding the possibility of an "as is" sale.

Consumer Confidence Reports

Information on radium in water supplies has been in the local papers. Apparently tests on the municipal water in the broker's market show unsafe levels of radium. Where does a seller or broker get more information and what disclosure duties do they have?

Wisconsin real estate license law recognizes the ability of real estate licensees to distribute government agency reports to satisfy a licensee's disclosure duties. Assuming that a licensee had knowledge of hazardous levels of contaminants in a municipal water supply, a licensee may satisfy the licensee's duty to disclose the hazardous condition by distributing a municipal water quality report (disclosing the hazard) from the DNR.

These reports may be delivered in a variety of ways. Ideally, the seller will attach the report to the RECR and check "yes" and "See expert's report" at question C.15. The broker may also distribute the report as a disclosure document. The advantage of distributing a government agency report is that this method of disclosure complies with the statutory guidelines provided by Wis. Stat.§ 452.23 as well as avoiding liability arising out of a licensee's attempt to restate a technical report for written disclosure to a consumer. A good overview of drinking water issues can be found at http://www.dnr.state.wi.us/org/water/dwg/radium.htm.

A report on the municipal water supply servicing the real estate involved in the transaction can be found by searching the "municipal community" systems under the county where the property is located at http://prodmtex00.dnr.state.wi.us/pls/inter1/pws2$.startup. Go to the Consumer Confidence Report (CCR) for the applicable municipal water system. The broker may refer the parties to the DNR for more information relating to radium.

Sex Offender Buyer

The broker has a customer who is on the registered sex offender list. The buyer wants to write an offer on a bank foreclosure (REO) condominium. The association has a total of 245 units, of which 192 are complete. The development is also in franchise receivership. Can or should broker disclose that buyer is a registered sex offender?

Under Wis. Stat. §§ 452.24, 704.50 & 706.20, real estate licensees, landlords, property managers and sellers all have a duty to disclose any actually known information concerning sex offenders if asked by a person in connection with a real estate transaction. If specifically asked whether a particular person is required to register as a sex offender, about the location of sex offenders in a neighborhood, or for 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, if the real estate licensee, owner or property manager instead promptly gives the person a written notice indicating that the person may obtain sex offender/registry information by contacting the DOC, he or she will have immunity relating to the disclosure of such sex offender information.

For additional information, see *Legal Update* 02.05, "Sex Offender Registry," at www.wra.org/LU0205 and the Sex Offenders Registry Resource page at www.wra.org/sexoffenders.

Licensees Must Disclose in As Is Transactions

In the last 18 months, a broker who specializes in finding foreclosed and distressed properties for investors has seen a large increase in the number of licensees listing REOs. Some of these licensees are not disclosing blatant material adverse facts when they list these properties. When asked why they did not disclose their response is, "it's a foreclosure, so it is sold 'as is.'" Apparently some of these agents do not go to the property to inspect it – or send out non-licensees to look at the property – and don't disclose any defects that they may have observed, e.g., mold on walls or foundation bulge or crack, etc. Doesn't a broker listing a property being sold "as is" still need to disclose material adverse facts?

From the licensee's standpoint, Wis. Admin. Code § RL 24.07 requires licensees to perform reasonably competent and diligent property inspections and disclose potential adverse material facts to the parties in writing. This duty is not waived in "as is" sales. In fact, where the buyer is purchasing "as is" it is very important for the buyer to know the condition of the property. Generally the buyer has professionals inspect the property as a condition of the offer to purchase, but this does not excuse the agent from his or her duty to assure that all known material adverse facts are disclosed in writing to the buyer.

Brokers should make sure that their agents all are inspecting

the REO properties they are listing and disclosing material adverse facts in writing to the parties

Conclusion

And what should the REALTOR® do about the seller who reported squeaks in the attic? The REALTOR® is a bit curious so she looks up some information about bats on the WRA Web site. She finds that they are not usually warmly received company when they decide to roost in the attic or some other portion of a home. They leave foul-smelling droppings and urine behind and can cause a ruckus with their high-pitched squeaking. Since bats have excellent homing abilities, they often return to the same summer or winter quarters every year. One or two bats in the house may mean they came in through an open window or chimney, but there also could be a colony of bats in the attic or walls. If there is a colony, the only way to stop this is to bat-proof the house and make sure that they cannot get back in again. Bats can fit into cracks that are only three-eighths of an inch, but they cannot gnaw or reopen old holes, like rats or squirrels do. Wis. Admin. Code § RL 24.07(1)(a) requires licensees to conduct a reasonable competent and diligent inspection of the accessible areas of the structure. Accessible is not defined but the REALTOR® decides that climbing the wobbly ladder to the ceiling access panel that opens into the attic – and may open the door to one of those bat colonies she read about – is going beyond the call of duty. It also goes beyond what is legally required in § RL 24.07(1)(d). She instead tries to talk the seller into hiring a pest control specialist. She explains to the seller that if the seller does not disclose his observations on the RECR, then the REALTOR® will need to disclose this information suggesting the possibility of material adverse facts. The REALTOR® explains that it may go better with buyers if the seller has a report from an expert to help calm any alarmed buyers. The seller reluctantly agrees to hire the bat control specialist and to write his observations on the RECR.

LICENSEE DISCLOSURE TIPS

These tips refer to a scenario where there is a discrepancy regarding the property acreage.

- Qualify Representations! Attribute the Source!

  A Wisconsin licensee can be found liable to a buyer for inaccurate statements made by the broker that appear to the buyer to have been made from the broker's own personal knowledge. Wisconsin law provides that a buyer should be entitled to rely on the factual statements made by a professional. Accordingly, when a broker receives data from the seller, the county treasurer's office or another third party and restates the information in the MLS, data sheets or other advertising as if it were fact, the broker may be held liable if the information is not true. Accordingly, REALTORS® are urged to specifically attribute data used in advertisements, such as acreage, square footage and assessed values, to the source.

- Duty to Inspect

  License law requires listing brokers, before executing the listing contract, to inspect the property and ask the seller about the condition of the structure, mechanical systems and other relevant aspects of the property, requesting that the seller provide a written response, that is, an RECR. Prudent listing brokers will require all listing agents to keep a written record of their observations, using a form like the WRA Listing/Selling Visual Inspection Form.

  Both listing and cooperating brokers have the duty to inspect the property, per Wis. Admin. Code § RL 24.07(1)(a). "A licensee, when engaging in real estate practice that involves real estate improved with a structure, shall conduct a reasonably competent and diligent inspection of accessible areas of the structure and immediately surrounding areas of the property to detect observable, material adverse facts. A licensee, when engaging in real estate practice that involves vacant land, shall, if the vacant land is accessible, conduct a reasonably competent and diligent inspection of the vacant land to detect observable material adverse facts."

- Seller's RECR

  The responsibility for completing an RECR falls solely upon the seller. If the seller wants specific guidance on what must be disclosed, the agent should refer him to his attorney for legal advice. An agent who tells a seller how to answer RECR questions risks liability for the content thereof.

- Material Adverse Facts

  If a seller fails to disclose a defect and it is not disclosed elsewhere, the licensee must promptly disclose the defect to all parties, in writing, if it constitutes a material adverse fact. A material adverse fact is defined in Wis. Stat § 452.01(1e) & (5g). If an agent, as a competent licensee, notices what appears to be a discrepancy regarding a property description or acreage, this may be an adverse fact, particularly when it may have a significant adverse effect on the value of the property. It would likely be material because buyers want to know exactly how many acres of land they are purchasing and have been known to rescind contracts and file lawsuits if the property they purchased contains less acreage than they originally contemplated. A sample material adverse fact disclosure letter is available in the April 2007 *Broker Supervision Newsletter*, online at www.wra.org/bsnapr07, on Page 26 of this *Update* or on ZipForm.

  Because REALTORS® are not trained as surveyors or assessors, they should refrain from making any definitive conclusions regarding acreage or a legal description. In some situations it is better if licensees treat their observations as information suggesting the possibility of material adverse facts.

- Disclosure of Information Suggesting Material Adverse Facts

  Wis. Admin. Code § RL 24.07(3) provides, "A licensee, when engaging in real estate practice, who becomes aware of information suggesting the possibility of material adverse facts to the transaction, shall be practicing competently if the licensee discloses to the parties the information suggesting the possibility of material adverse facts to the transaction in writing and in a timely fashion, recommends the parties obtain expert assistance to inspect or investigate for possible material adverse facts to the transaction, and, if directed by the parties, drafts appropriate inspection or investigation contingencies. … A licensee is not required to retain third party inspectors or investigators to perform investigations of information suggesting the possibility of a material adverse fact to the transaction."

- Qualified Independent Inspection Report

  Having a survey is the definitive way to resolve acreage or boundary questions. In addition, Wis. Stat. § 452.23(2)(b) provides that no licensee disclosure is required if a written report that discloses the information has been prepared by a qualified third party, such as a surveyor, and provided to the parties.

- Skills and Training

  Wis. Admin. Code § RL 24.03(2)(d) establishes an agent's inspection standard of performance, "Licensees are not required to have the technical knowledge, skills or training possessed by competent third-party inspectors and investigators of real estate and related areas." A licensee is not trained to survey property or correct the records at the county assessor's office. What the brokers in this type of situation need to do is spot the issue, disclose it and urge the retention of expert contractors.

WISCONSIN REALTORS® ASSOCIATION
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Madison, Wisconsin 53704

DISCLOSURE OF MATERIAL ADVERSE FACTS

I am licensed in the state of Wisconsin as a real estate broker/salesperson **STRIKE ONE**. Wisconsin law, per Wis. Stat. § 452.133 and Wis. Admin. Code § RL 24.07(2)-(3), requires real estate licensees to make prompt written disclosures to buyers and sellers regarding material adverse facts and regarding information suggesting the possibility of material adverse facts. In other words, the law says that I should make sure you know about certain possible problems that have not yet been reported to you by the other parties, licensees or professional inspectors.

An adverse fact is a condition or occurrence that is generally recognized by a competent real estate 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 or does not intend to fulfill his or her contractual obligations under the offer to purchase or other contract.

An adverse fact is material if a party indicates it is significant to them, or if it is generally recognized by a competent real estate licensee as being significant to a reasonable party, to the extent that it would impact whether or not the party enters into an offer to purchase or the party's decision about what terms and conditions should be in such a contract.

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

_____

_____

_____

_____

(Plainly state only the facts without drawing conclusions or making predictions. Attach supporting reports and documentation.)

It is recommended that the sellers and buyers in this transaction obtain professional assistance to conduct appropriate property inspections, testing and other investigations regarding this information. The licensees in this transaction will draft inspection, testing or investigation contingencies, amendments, notices and other documents pertaining to the offer to purchase as directed by the parties.

Sellers and buyers should contact their attorneys with any questions concerning their legal rights and obligations.

_____ _____

Licensee Signature ▲ Print Licensee Name Here ▲

_____ _____

Broker/Firm Name ▲ Date ▲

By initialing and dating below, I acknowledge that I have received and read this disclosure form.

_____ _____

Party Initials ▲ Date ▲

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