

LEGAL UPDATE

A WRA Publication

JUNE 2012

REEB 24 Regulatory Revisions

The “Conduct and Ethical Practices for Real Estate Licensees” administrative rules in Wis. Admin. Code chapter REEB 24 have been updated. The purpose of the revisions is to eliminate a few rules that no longer make sense given the current agency law in Wis. Stat. chapter 452, and to bring better clarity to the remaining rules that impact every day real estate practice. The revised rules were effective on July 1, 2012.

In terms of changes directly affecting real estate practice, there have been a few alterations to Wis. Admin. Code § REEB 24.05 rules for disclosure of compensation and of interest as well as the § REEB 24.07(8) rules regarding agency disclosures. The terminology used in chapter REEB 24 has been modified to better match the vocabulary used in Wis. Stat. chapter 452. Thus some definitions have been amended and new ones have been created. In addition, other changes were made to expand the application of the existing rules to apply not only to offers, but to counter-offers, leases and other contracts as well. Similarly, rules that on their face only applied to listing contracts in the past now apply to other agency contracts such as buyer agency agreements and property management agreements.

This *Legal Update* examines the changes made throughout the REEB 24 chapter, providing examples of how the changes may affect daily practice as well as implementation pointers and suggestions.

Definitions

The definitions in Wis. Admin. Code § REEB 24.02 have been updated to match the terminology in the statutes and help extend the other rules in the chapter to their intended parameters. Some of the changes to the definitions include:

- Now clarified, “agency agreement” has removed the reference to the statutes, which had become inaccurate. The definition now refers to a written agreement whereby a client authorizes the broker to provide brokerage services to the client. (§ REEB 24.02(2))
- Amended, “builder” encompasses any person in the business of constructing homes either with or without a

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specific buyer under contract. The definitions of “contract home” and “speculation home” have been eliminated. (§ REEB 24.02(4))

- Slightly revised, “buyer’s broker” replaces “buyer broker” and is defined as a licensee who has an agency agreement with a buyer. (§ REEB 24.02(5))
- Modified, “party” uses the term “transaction,” which is already defined in § REEB 24.02(18). A “party” is a

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person seeking to engage in a transaction; and a “transaction” is the sale, exchange, purchase or rental, or the granting or acceptance of an option to sell, exchange, purchase or rent, an interest in real estate, a business or a business opportunity. (§ REEB 24.02(13))

- Newly added, “principal broker” has been created to refer to a broker who engages a subagent to provide brokerage services in a transaction. This is the same definition that appears in chapter 452 of the statutes. (§ REEB 24.02(13m))
- Newly added, “written proposal” is created to mean any written document provided by one party to another during the course of a transaction, including but not limited to notices, offers, counter-offers, options, exchanges, rental agreements and amendments. (§ REEB 24.02(19))

Removed During the Revisions

Wis. Admin. Code § REEB 24.025 regarding agency was repealed because it was inconsistent with the agency provisions in chapter 452 of the statutes. The prior provision referenced the statutes regarding duties to clients and to all parties, and the necessity of agency agreements authorizing brokerage services.

Modified § REEB 24.05 – Disclosure of Compensation and Interests (Previously Self-Dealing)

All of the five subsections of § REEB 24.05 have been amended or completely rewritten to clearly focus on the specific disclosures and consents required in particular practice situations.

Wis.Admin. Code § REEB 24.05(I) Compensation

(a) Accepting Compensation: Prior Written Consent

This first subsection, which before was entitled Dual Compensation, has been renamed and modified to better reflect the intent and purpose of the provision. In the first of two provisions relating to compensation matters, this rule provides that, “(a) A licensee acting as an agent in a real estate or business opportunity transaction may not accept any fee or compensation related to the transaction from any person, other than the licensee’s client, principal broker, or broker-employer without prior written consent from all parties to the transaction.”

This revised provision is very similar to the prior provision and the goal is the same: a licensee in a transaction cannot accept compensation from persons other than the client unless the licensee has the prior written consent from all parties in that transaction. Therefore a buyer’s broker may accept a fee from a buyer-client and a listing broker may accept commission from the seller-client.

The revisions have added that a licensee may accept compensation from the licensee’s employing broker, or from the principal broker if the licensee is a subagent, without having to obtain written consent from the parties. Clearly a licensee who is engaged by a broker to provide brokerage services on behalf of the broker should be able to accept commission from the broker without any prior consents. It is only logical that an agent would not need to have written consent of the parties to accept commission from the broker-employer. This is consistent with the provisions under Wis. Stat. § 452.14(3)(f), which state that a licensee may be subject to discipline if the licensee accepts compensation from someone other than

the broker-employer. In the definitions, a broker or salesperson who is “employed” by a broker to provide brokerage services to the broker’s clients and customers, including under an independent contractor agreement, is an “employee” of that broker who is an “employer.” The licensee/employee should be able to freely accept compensation from the employing broker who has engaged him or her without any permission from those outside of the “employment” relationship.

The same is true when a broker is engaged in a subagency relationship to assist a principal broker. Subagency occurs when a broker is engaged by another broker to provide brokerage services in a transaction, but is not the other broker’s employee. For example, a cooperating broker works for a listing broker to find a buyer-customer and sell the property. The principal broker is the broker who engages the subagent to provide brokerage services and the subagent should be able to accept commission from the principal broker.

Per § REEB 24.05(1)(a), any other fee or compensation related to a transaction requires the prior written consent from all parties to that transaction. This would include any referral fees paid by other “persons” including a builder or another broker or service provider who is obligated to, or who intends to, compensate the licensee in relation to the transaction. Presumably the licensee/employee will receive any such fees from the employing broker, so it is the broker-employer who appears to need the written party consents for the receipt of the referral fee from a third party.

This provision is consistent with Article 6 of the Code of Ethics, which provides in relevant part that, “REALTORS® shall not accept any commission, rebate, or profit on expenditures made for their client, without the client’s knowledge and consent.”

The other twist here is the Real Estate Settlement Procedures Act’s (RESPA) prohibition of referral fees for settlement services. Section 8 of RESPA prohibits a person from giving or accepting anything of value in exchange for the referral of settlement service business. Please review the November 2006 *Legal Update*, “RESPA and the Real Estate Broker,” at www.wra.org/LU0611, and the May 2007 *Legal Update*, “Referrals to Service Providers,” at www.wra.org/LU0705, for an in-depth discussion of RESPA and referrals to service providers.

When this comes up:


- **A buyer’s broker being paid by the seller under a provision negotiated in the offer.** A buyer’s broker may ethically suggest or recommend that the buyer ask the seller to pay some or all of the buyer’s broker’s fee pursuant to Article 16 of the Code of Ethics and National Association of REALTORS® Case Interpretation #16-17. The buyer may condition the offer upon the seller paying the buyer’s broker’s fee on behalf of the buyer, as a seller’s expense at closing. Wis. Admin. Code § REEB 24.05(1) provides that the buyer’s broker must have the prior written consent of the buyer and seller to collect the fee from the seller because the seller is not the buyer’s broker’s client. The WB-36 Buyer’s Agency Agreement provides a means for the buyer to authorize the buyer’s broker to accept compensation from the owner/seller. The seller’s consent may be obtained in the offer.


See *Legal Update 05.09*, “Buyer Agency Practice,” at www.wra.org/LU0509, and *Legal Update 99.06*, “Revised WB-36 Buyer Agency/Tenant Representation Agreement,” at www.wra.org/LU9906, for further discussion of the issue.


- **A licensee working both as an agent and in a loan origination capacity who receives compensation relative to the loan as well as**

real estate commission from the employing broker.

- **A lot is being purchased from a separate seller in a transaction where the broker’s agent is acting as a seller’s agent and at the same time the construction contract is being negotiated.** If the agent is receiving fees from the builder as well as the listing broker, it could be argued the agent is being compensated by more than one party and must accordingly obtain the written consent of all parties. Wis. Admin. Code § REEB 24.05(1) would require disclosure and written consents if the word “person,” as used in that compensation rule, is interpreted to include the builder.

 **REALTOR® Practice Tip:** Full disclosure and transparency is the best protection here.

 **REALTOR® Practice Tip:** REALTORS® should always obtain the prior written consent of the parties in the contract, in an amendment or in a separate consent document, any time a licensee will receive compensation relative to a transaction from anyone other than the employing broker, the client or the principal broker.

 **REALTOR® Practice Tip:** REALTORS® should not fall into the trap of requesting party consent for the payment of a referral fee that is illegal under RESPA in the first place.

(b) Recommending Service Providers: Prior Written Disclosure

The second provision relating to compensation matters in Wis. Admin. Code § REEB 24.05(1) indicates that, “(b) A licensee acting as an agent in a real estate or business opportunity transaction may not recommend or suggest to a party to the transaction the services of another individual or entity from which the licensee may

receive compensation for a referral or in which the licensee has an interest, unless the licensee, prior to or at the time of the referral, discloses to the party in writing the fact that he or she may receive compensation for the referral or that he or she has an interest in the individual or entity providing the services. This paragraph does not apply when the licensee makes a referral to another licensee for real estate services under s. 452.19, Stats.”

This revised rule is substantially similar to its predecessor that appeared before as § REEB 24.05(3) with the heading “referral of services.” There is one difference. While before a licensee could disclose an interest in the referred service provider or the potential for a referral fee payment verbally, now the rule requires that these disclosures be made to the party in writing. As before, the disclosure must be made before or concurrently with the recommendation or suggestion that the party consider utilizing the services of the service provider.

This provision is consistent with Article 6 of the Code of Ethics, which provides in relevant part that, “When recommending real estate products or services (e.g., homeowner’s insurance, warranty programs, mortgage financing, title insurance, etc.), REALTORS® shall disclose to the client or customer to whom the recommendation is made any financial benefits or fees, other than real estate referral fees, the REALTOR® or REALTOR®’s firm may receive as a direct result of such recommendation. (Amended 1/99)”

Standard of Practice 6-1: REALTORS® shall not recommend or suggest to a client or a customer the use of services of another organization or business entity in which they have a direct interest without disclosing such interest at the time of the recommendation or suggestion. (Amended 5/88)

Clients and customers may ask REALTORS®, either listing or selling agents, to refer them to contractors, home inspectors, lenders, title companies and other real estate settlement service providers. Although it may be beneficial to the consumer to have such a recommendation, this practice could lead to licensee liability if the referral is not handled properly. Depending on the referral, Code of Ethics, license law and RESPA compliance is required. As previously stated, Article 6 and Standard of Practice 6-1, states REALTORS® shall not recommend or suggest to a client or a customer the use of services of another organization or business entity in which they have a direct interest without disclosing such interest at the time of the recommendation or suggestion.

Any business, financial, or personal company or agent affiliations with service providers should be disclosed when the referral is made.

RESPA Compliance

In addition, brokers must avoid illegal referral fees and assure RESPA compliance. Section 8 of RESPA prohibits a person from giving or accepting anything of value in exchange for the referral of settlement service business. When giving a referral, a real estate settlement service provider who has an affiliated business arrangement is required by RESPA to give the federally required affiliated business arrangement disclosure form.

A real estate broker who has an interest in a title company or some other settlement service provider can refer a customer to that entity without violating RESPA, but only if:

1. The broker provides the required Affiliated Business Arrangement (ABA) Disclosure Form.
2. The customer is not required to use the affiliated title company’s or other settlement service provider’s services.

3. Nothing of value, other than a possible return on an ownership interest or franchise relationship, is paid to or received by the broker in return for the referral.
4. The ownership interest or franchise relationship does not involve any sham companies.

“Settlement service providers” provide services in connection with the purchase or sale of a property that is paid for, directly or indirectly, out of the funds at settlement. RESPA regulates all settlement service providers involved in the home buying process. A settlement service is defined as “any service provided in connection with a real estate settlement” including, but not limited to:

1. The origination, processing or funding of a federally related mortgage loan
2. Mortgage broker services such as counseling, taking applications, obtaining verifications and appraisals, lender-borrower communications, etc.
3. Title searches, title examinations, title commitments, title insurance, abstracts and other related services
4. An attorney’s legal services
5. Closing document preparation
6. Credit reports
7. Appraisals
8. Property inspections
9. Pest and fungus inspections
10. Property surveys
11. Conducting the closing or settlement
12. Mortgage insurance
13. Hazard, flood or casualty insurance; and home warranties
14. Flood zone certification
15. Mortgage life, disability or similar insurance

16. Real property taxes and assessments

17. Real estate brokerage services

This list is broad but not all-inclusive. Services that occur at or prior to the purchase of a home are typically considered settlement services. Anything listed on a HUD-1 form and paid for by the buyer or seller could be a settlement service, making the company providing it a settlement service provider. Services that occur after closing are usually not considered settlement services. This generally, but not always, includes moving companies, gardeners, painters, interior decorators and home improvement contractors.

Please review the November 2006 *Legal Update*, “RESPA and the Real Estate Broker,” at www.wra.org/LU0611, and the May 2007 *Legal Update*, “Referrals to Service Providers,” at www.wra.org/LU0705, for an in-depth discussion of RESPA and referrals to service providers.

When this comes up:

- **A real estate licensee has an ownership interest in a basement contractor business, the real estate licensee’s family owns a surveying company, or the referral is to the real estate licensee’s uncle, the home inspector.** All of these would trigger a § REEB 24.05(1)(b) disclosure and the ownership situations may also require a RESPA disclosure. According to Wis. Admin. Code § REEB 24.05(1)(b), a licensee acting as an agent in a transaction may not recommend or suggest that a party use the services of another individual or entity from which the licensee may receive compensation unless the licensee discloses the potential referral fee to the party before or at the time of the referral.
- **The real estate brokerage owns an interest in a settlement service company, such as a mortgage broker or title insurance company.** The referral of a party to a broker’s

affiliated settlement service provider is not considered an illegal kickback or unearned fee under RESPA if the following conditions are met:

1. The broker making the referral has provided each party receiving the referral with a written disclosure in the format of the ABA disclosure statement. The required content of the ABA disclosure statement is found at Appendix D on the U.S. Department of Housing and Urban Development website at portal.hud.gov/hudportal/HUD?src=/program_offices/housing/ramh/res/resappd. A copy of the mandatory ABA Disclosure Statement also can be found on Page 16 of the February 2005 *Legal Update*, “Common Practice Pitfalls,” at www.wra.org/LU0502.
2. The broker making the referral generally cannot require any party to use any particular provider of settlement services.
3. The only thing of value that is received from the arrangement is a return on an ownership interest or franchise relationship.
4. The affiliated company must be a bona fide, stand-alone business with sufficient capital, employees and separate office space, and must perform core services associated with that industry.

After the broker gives the buyer an ABA disclosure statement, the buyer may agree to draft the offer to state, for example, that the referred title company will prepare the owners’ policy of title insurance. The ABA disclosure statement also serves to fulfill the disclosure requirements under Wis. Admin. Code § REEB 24.05(1)(b).

When it is not a RESPA issue, but REEB 24 may apply:

- A local home painting business or landscaping company wants to pay a referral fee to agents who refer business to the company. Under RESPA, painters and landscapers

generally are not settlement service providers, so this particular type of referral is not subject to RESPA. If a referral to the painter is made in the context of a transaction, then the licensee must follow the § REEB 24.05(1)(b) rule and disclose that the licensee will receive a fee from the painter. If the licensee is not acting as an agent and the referral occurs outside of a transaction, then it is not subject to license law. It may be prudent, however, to disclose the referral fee in all cases to avoid any possibility that a transaction may later occur with the party. This disclosure must be in writing and, as per § REEB 24.05(1)(a), consented to in writing by all the parties to the transaction.

Careful, both § REEB 24.05(1)(b) and RESPA may come into play!

 **REALTOR® Practice Tip:**

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

- **Prepare a written list of professional service providers.** Do not recommend or endorse one particular provider. Instead, maintain a list with the names and contact information of at least three professionals in each field, and include any available references from past users. Put the list on a sheet of company letterhead, and include a disclaimer that the company’s agents cannot personally endorse these professionals.
- **Disclose relationships and compensation.** Any business, financial or personal company, or agent relationships or affiliations with any listed service providers should be stated on the list, as well as any referral fee arrangements. This should help eliminate conflicts of interest. Wisconsin law requires disclosure if the agent making the referral has any

interest in the service provider being referred and if the agent may receive compensation for the referral, before or at the time of the referral. If a licensee will receive compensation from anyone other than his or her client, principal broker or employing broker, the prior written consent of all parties is required per Wis. Admin. Code § REEB 24.05(1)(a).

- **Avoid referral fees.** It is wise to not ask for or accept a referral fee from any name on the referral list. Earning a fee just for referring business (except to other real estate brokers) violates RESPA if the contractor or company is a settlement service provider like a home inspector, appraiser or title company. The best policy is to not accept fees unless actual goods or services are provided.

REALTOR® Practice Tip: REALTORS® should not fall into the trap arranging for referral fees that are illegal under RESPA.


Wis.Admin. Code § REEB 24.05(2) Disclosure of Interest

Prior written consent now must be obtained from all parties in the offer or other contract if a licensee acts as an agent on his or her own behalf or on behalf of his or her immediate family or firm, or any other organization or business entity in which the licensee has an interest.

Wis. Admin. Code § REEB 24.05(2) now provides: “DISCLOSURE OF INTEREST. A licensee acting as an agent in a real estate or business opportunity

transaction may not act in the transaction on the licensee’s own behalf, on behalf of the licensee’s immediate family or firm, or on behalf of any other organization or business entity in which the licensee has an interest without the prior written consent of all parties to the transaction. For the purpose of this subsection, a licensee shall obtain the written consent in the offer to purchase, option, lease or other transaction contract.”

Similarly, Article 4 of the Code of Ethics provides: “REALTORS® shall not acquire an interest in or buy or present offers from themselves, any member of their immediate families, their firms or any member thereof, or any entities in which they have any ownership interest, any real property without making their true position known to the owner



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or the owner's agent or broker. In selling property they own, or in which they have any interest, REALTORS® shall reveal their ownership or interest in writing to the purchaser or the purchaser's representative. (Amended 1/00)"

Code of Ethics Standard of Practice 4-1 indicates that these written disclosures should be made before the signing of any contract.

A licensee may list his parents' home or write an offer for an LLC of which the licensee is a member. In this second example, the purchaser of the properties is an LLC of which the broker happens to be a member. Because the LLC, not the broker, is purchasing the property, the broker may act as an agent of the LLC. Pursuant to Wis. Admin. Code § REEB 24.05(2), a licensee acting as an agent in a real estate transaction may not act in the transaction on behalf of any organization or business entity in which the licensee has an interest without the prior written consent of all the parties in the transaction. This written consent must be obtained in the offer, option, lease or other transaction document. The licensee who is a member of that LLC must disclose that the licensee is a member of the LLC and obtain the prior written consent of all parties to the transaction.

A buyer may be a member of the LLC and be an agent of the seller because there is no specific rule or law against it. At the same time, it is not without risk and an agent endeavoring to be an agent of the seller (from the same company as the listing broker) or a subagent and yet have an interest in the entity purchasing the property would appear to be asking for conflict of interest allegations if there is trouble in the transaction.

A "subagent" is defined in Wis. Stat. § 452.01(7r) as "a broker who is engaged by another broker to provide brokerage services in a transaction, but who is not the other broker's employee." A subagent owes customer-level duties to all persons in the transaction, and the subagent may not place his or her interests ahead of the interests of the seller or provide advice or

opinions contrary to the interests of the seller, unless required by law, per Wis. Stat. § 452.133(4). This would be difficult to do in the described scenario since the subagent has a substantial interest in the buyer.

It would likely be much better if the agent with an interest in the LLC would work as a buyer's agent for the LLC. The § REEB 24.05(2) consent must still be obtained, but if the agent's client is the buyer, then the conflict of interest issues fade away.

A licensee who has an interest in a company may also enter into a listing contract with the entity/owners to provide brokerage services. The governing documents of the entity should be reviewed to determine which partner(s) has the authority to act on behalf of the entity. The broker must also make proper disclosure of interest and obtain consent to act in the transaction as an agent per Wis. Admin. Code § REEB 24.05(2).

If the agent has a buyer agency agreement with her sister and wants to write an offer on a property that is not listed, does the agent have to indicate on the offer that agent is related to the buyer?

The agent may wish to first review company policy relating to purchases by family members to assure compliance with any company policy.

Wis. Admin. Code § REEB 24.05(2) provides: "A licensee acting as an agent in a real estate or business opportunity transaction may not act in the transaction ... on behalf of the licensee's immediate family ... without the prior written consent of all parties to the transaction. For the purpose of this subsection, a licensee shall obtain the written consent in the offer to purchase, option, lease or other transaction contract."

In addition, Wis. Admin. Code § REEB 17.02(3g) defines "immediate family" as:

"(a) Parents, stepparents, grandparents, foster parents, children, stepchildren, grandchildren, foster children, brothers and their spouses, sisters and their spouses, of a licensee or a licensee's spouse.

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(b) The spouse of a licensee.

(c) Aunts and uncles, sons-in-law or daughters-in-law of a licensee or a licensee's spouse."

Accordingly, the agent will need the written consent of the parties in the offer regarding the agent's representation of her sister.

If an agent in the office is buying a bank property for rehabbing and either renting it out or re-selling, and the agent is purchasing in his own name and not as an entity, can the office still collect a commission from the listing broker? And, after the agent re-sells the home, is there any restriction on commissions or any required disclosures?

Under the law of agency, the agent is prohibited from competing with the principal. A licensee can be either a principal or an agent in a transaction, but conflicts of interest occur when a licensee tries to be both. When acting as the actual buyer of real estate, the licensee is a principal in the transaction and not the agent for anyone. Therefore, the buyer/licensee cannot collect a commission from the seller because the buyer/licensee cannot perform services on behalf of the seller with undivided loyalty when the licensee has his or her own interest as the buyer at stake. It is also inconsistent for a buyer/licensee to act as his or her own agent and collect a commission for representing oneself. Instead, a buyer/licensee can negotiate a buyer's incentive to be paid by the listing broker or the seller. This incentive can be for the amount of the co-broke commission, which would otherwise be paid to the selling broker in the transaction.

The buyer's incentive should be properly documented in writing before closing, preferably before the offer to purchase is executed. An incentive from the listing broker should be documented in a separate letter or

memo because it is a separate agreement between the licensee/buyer and the listing broker. Under Wis. Admin. Code § REEB 24.05(4), the seller also must consent in writing to this incentive, so a recitation in the offer regarding the incentive from the listing broker to the licensee/buyer may be the most efficient way to meet this requirement and avoid any possible DSPS enforcement actions.

There is no "secret" form or language for the incentive agreement. However, the agreement should identify the parties and the transaction, and indicate how the incentive is earned, when it is paid and who will pay it. For example, an incentive agreement might provide, "as an inducement to Barry Buyer to purchase the property at 123 Main Street, Salestown, Wisconsin, Real Good Realty, Inc., promises to pay to Mr. Buyer an incentive in the amount of \$3,000 to be applied to closing costs at the time of closing provided the closing occurs on or before December 31, 2012. It is agreed that this incentive shall be paid in lieu of any commission offered on the MLS or otherwise, that commission being hereby declined." Including the waiver of MLS commission, although extraneous, clearly informs the listing company that there is no expectation of any commission offered via the MLS.

In the offer, a licensee must disclose his or her interest as required by Article 4 of the Code of Ethics and Standard of Practice 4-1. In the interest of full disclosure, the licensee also may wish to write in the offer that he or she is a licensed real estate agent/broker purchasing the property for personal use, investment, speculation or resale, as the case may be.

As an alternative, the broker of the licensee/buyer could act as a sub-agent of the listing broker or as a buyer's broker, write the offer for the licensee/buyer and claim the coop-

erative commission as the "procuring cause" of the sale. If the licensee's broker acts as a subagent, the broker must fulfill his or her normal agency duties representing the interests of the listing broker and seller. In addition, Wis. Admin. Code § REEB 24.05(2) and Article 4 of the Code of Ethics require disclosure of the relationship between the subagent and the licensee/buyer and the prior written consent of the all parties in the offer.


If the licensee's broker acts as a buyer's broker, the broker must fulfill his or her normal agency duties representing the interests of the licensee/buyer. Pursuant to Wis. Admin. Code § REEB 24.07(8)(a) and Standards of Practice 16-10 and 16-11, the buyer's broker must disclose the buyer agency upon first contact. In addition, pursuant to Wis. Admin. Code § REEB 24.05(2) and Article 4 of the Code of Ethics, the buyer's broker must disclose the relationship between the buyer's broker and the licensee/buyer and obtain the written consent of the parties in the offer.

The broker and the licensee/buyer may have an agreement whereby the broker pays the licensee/buyer an incentive or this may be required by the broker's office policies and procedures.

See "Best of the Legal Hotline: Personal Purchases & Sales," in the March 2004 edition of the *Wisconsin Real Estate Magazine*, at www.wra.org/WREM/March04/LegalHotline.

 **REALTOR® Practice Tip:**

Full disclosure and transparency is the best protection here. Such disclosure could be, "All parties understand licensee, _____, serving as a real estate agent in this transaction with the consent of the Parties to this Offer, which is hereby acknowledged, has an interest in the (Buyer) (Seller) [strike one] entity (State name of entity, e.g., name of LLC, partnership, corporation, etc.): _____."

 **REALTOR® Practice Tip:** While listing your own property may not be a violation of licensee law, it may be a conflict of interest to write the offer for the buyer.

Wis. Admin. Code § REEB 24.05(4) Disclosure to Seller

This newly titled provision requires the seller's prior written consent if the listing broker will pay a commission or an incentive to the buyer/licensee. For example, when a buyer/licensee has requested the listing broker pay an incentive to the buyer/licensee, § REEB 24.05(4) clearly requires the seller to consent to such an agreement. Therefore, the easiest way to achieve this consent is to include the incentive language into the offer to purchase. The rewritten Wis. Admin. Code § REEB 24.05(4) provides: "DISCLOSURE TO SELLER. A listing broker may not pay any compensation or incentive to a licensee who is acting as a buyer in a transaction without prior written consent from the seller."

Under the law of agency, the agent is prohibited from competing with the principal. Conflicts of interest occur when a licensee tries to be both a licensee and a principal in a transaction. When acting as a buyer of real estate, the licensee is a principal in the transaction and not the agent for anyone. Therefore, the buyer/licensee cannot collect a commission from the seller because the buyer/licensee cannot perform services on behalf of the seller with undivided loyalty when the licensee has his or her own interest as the buyer at stake. It is also inconsistent for a buyer/licensee to act as his or her own agent and collect a commission for representing oneself. Instead, a buyer/licensee can negotiate a buyer's incentive to be paid by the listing broker or the seller. This incentive can be for the amount of the co-broke commission, which would otherwise be paid to

the selling broker in the transaction.

The buyer's incentive should be properly documented in writing before closing, preferably before the offer to purchase is executed. An incentive from the listing broker is now clearly required to be documented in a separate letter or memo. This revision now clearly matches the DSPS interpretation of the former version of Wis. Admin. Code § RL 24.05(4), "Disclosure of Profits." Under the previous rule the seller was required to consent in writing to this incentive no later than the time that the offer is accepted.

§ REEB 24.05(4) now focuses on the DSPS Primary Concern: Licensee/Principals Need Prior Consent from Seller to Receive Incentives

Past enforcement of the old § RL 24.05(4) seemed to be concentrated on cases where buyers/licensees received funds from the listing broker, as the following case illustrates:

A WRA member (W) was the buyer in a vacant land offer to purchase drafted by another real estate broker (B). W intended to form an LLC with a non-broker partner as the ultimate buyer. The offer names the buyers as W and his partner and/or assigns, but is signed only by W. W accepted the seller's counter-offer, and later an amendment was accepted that waived the remaining buyer's contingencies and provided that, "Buyer requires and Seller agrees the broker B shall be paid a commission by seller in the amount of 5 percent of the selling price. W, as a licensed real estate broker, discloses that W shall receive a portion of that commission (50%)." The LLC was formed and the seller deeded the vacant parcel to the LLC, with W and his partner as members. At closing the seller paid broker B a commission, one-half of which broker B later paid W.

The DSPS filed a complaint against W, contending that broker

B could not pay W any fee under Wis. Stat. § 452.19 unless the seller consented to the fee split prior to the seller's execution of the offer.

The DSPS maintained that this conduct violated Wis. Admin. Code § RL 24.05(4): "DISCLOSURE OF PROFITS. A licensee acting as a principal in a real estate or business opportunity transaction shall not accept any commission, rebate, or profit on expenditures made by any other party to the transaction without the written consent of the party. The written consent shall be provided no later than the party's execution of the offer to purchase, option, exchange agreement, lease or other contract creating an interest in the real estate or business opportunity."

On December 1, 2005, the Real Estate Board determined that W had violated § RL 24.05(4) and ordered W to complete 16 hours of continuing education and pay costs in excess of \$15,000. W appealed this matter to the circuit court, asking that the department decision be reversed. Legal counsel for W requested that the WRA file an *amicus* brief in circuit court. Upon Legal Action Committee approval, the brief was filed. The circuit court, however, upheld the DSPS decision.

Now the new § REEB 24.05(4) is streamlined and prohibits one crucial activity: a licensee/buyer receiving monies from the listing broker without prior written seller consent. Note that this consent is no longer required in the offer and can be obtained later, clearly before any payment.

Impact for REALTORS®

- **Incentive from the listing broker.** If the buyer/licensee is going to write his or her own offer to purchase, the buyer/licensee may first negotiate an incentive with the listing broker. The amount of the incentive is negotiable. The buyer's incentive should be properly documented in writing before closing, preferably before the offer to

purchase is executed. The agreement would be documented on a separate sheet of paper and signed by the buyer/licensee and the listing broker. The seller also must consent in writing to this incentive before the payment is made. A recitation in the offer regarding the incentive from the listing broker to the licensee/buyer is most likely the most efficient way to meet this requirement and avoid any possible DSPS enforcement actions. Sample incentive language appears in the previous section.

- **Incentive from the seller.** A seller's agreement to pay an incentive should be documented in the offer to purchase. For example, the buyer/licensee may provide in the offer: "As an incentive for Lucy Licensee to purchase the property at 234 5th Street, Anytown, Wisconsin, the seller promises to pay Ms. Licensee an incentive in the amount of \$3,000 at the time of closing."
- **Incentive from the licensee's broker.** Some office policies require that the broker or office manager act as the agent on behalf of the licensee/buyer or licensee/seller. In this scenario, the broker drafts the offer to purchase on behalf of the licensee and earns any commission offered by the listing broker. The broker and the licensee may enter into their own internal incentive agreement regarding the transaction.
- **When the licensee drafts the offer.** When the licensee is the actual buyer, line 1 of the offer should be crossed out or modified to indicate the drafting licensee is the buyer. In addition, the licensee should confirm his or her licensee status to comply with § REEB 24.07(8). In the interest of full disclosure, the licensee also may wish to write in the offer that he or she is a licensed real estate agent/broker purchasing the property for personal use, investment, speculation or resale, as the case may be.

See "Best of the Legal Hotline: Personal Purchases & Sales," in the March 2004 edition of the *Wisconsin Real Estate Magazine*, at www.wra.org/WREM/March04/LegalHotline.

 **REALTOR® Practice Tip:**

Keep it simple by including language regarding any compensation or incentive that the listing broker is paying to a licensee/principal in the transaction in the offer to purchase to obtain the seller's consent. For example, "All parties understand Buyer is a Wisconsin real estate licensee with _____ and consent to Buyer purchasing the property for (residential) (speculation) (investment) [strike two] purpose and that he or she may realize a profit from the subsequent sale. Seller is aware that Buyer will be paid a portion of the brokerage commission on this transaction or an incentive fee and consents to such payment."

Can a real estate agent who writes his or her own offer as a buyer collect a commission?

Under the law of agency, the agent is prohibited from competing with the principal. A licensee can be either a principal or an agent in a transaction, but conflicts of interest may occur when a licensee tries to be both. When acting as a buyer of real estate, the licensee is a principal in the transaction. It is best that a buyer/licensee not act as a subagent or agent of the seller and collect a commission from the listing broker because the buyer/licensee cannot perform services on behalf of the listing broker and for the benefit of the seller when the buyer/licensee has his or her own interest as the buyer at stake. Instead, a buyer/licensee can negotiate a buyer's incentive to be paid by the listing broker or the seller. This incentive can be for the amount of the co-broke commission, which would otherwise be paid to the selling broker in the transaction. Under Wis. Admin. Code § REEB 24.05(4), the seller also must consent

in writing to this incentive before the incentive is paid. A recitation in the offer regarding the incentive from the listing broker to the licensee/buyer may be the most efficient way to meet this requirement and avoid any possible DSPS enforcement actions.

When drafting the offer, line 1 of the offer should be crossed out or modified to indicate the drafting licensee is the buyer. In addition, the licensee should disclose his or her interest as the buyer to comply with Article 4 of the Code of Ethics and Standard of Practice 4-1. In the interest of full disclosure, the licensee also may wish to write in the offer that he or she is a licensed real estate agent/broker purchasing the property for personal use, investment, speculation or resale, as the case may be.

As an alternative, the broker of the licensee/buyer could act as a subagent of the listing broker or as a buyer's broker, write the offer for the licensee/buyer, and claim the cooperative commission as the "procuring cause" of the sale.

If the licensee's broker acts as a subagent, the broker must fulfill his or her normal agency duties as the subagent under Wis. Stat. § 452.133(4): the subagent provides the duties owed to all persons with respect to the licensee/buyer and a subagent cannot place the subagent's interests ahead of the seller's interests or provide advice or opinions that are contrary to the interests of the seller. In addition, Wis. Admin. Code § REEB 24.05(2) and Article 4 of the Code of Ethics require disclosure of the relationship between the broker/subagent and the licensee/buyer and the prior written consent of the all parties obtained in the offer.

If the licensee's broker acts as a buyer's broker, the broker must fulfill his or her normal agency duties owed to a client in representing the interests of the licensee/buyer. Pursuant to Wis. Admin. Code

§ REEB 24.07(8)(a) and Standards of Practice 16-10 and 16-11, the buyer's broker must disclose the buyer agency upon first contact. In addition, pursuant to Wis. Admin. Code § REEB 24.05(2) and Article 4 of the Code of Ethics, the buyer's broker must disclose the relationship between the buyer's broker and the licensee/buyer and obtain the written consent of the parties in the offer.

The broker and the licensee/buyer may have an agreement whereby the broker pays the licensee/buyer an incentive or this may be required by the broker's office policies and procedures.

A broker who is compensated by any person other than the broker's client must comply with Wis. Admin Code § REEB 24.05(1), which requires licensees to obtain the written consent of all parties. This includes a buyer's broker who is being paid by the seller.

Wis.Admin. Code § REEB 24.05(5) Disclosure of Licensure

When a licensee acts as principal, the licensee must disclose to the other party or the other party's agent any (a) licensee status and (b) intent to act as a principal, upon (1) first contact where information exchanged, (2) a showing or (3) other negotiation. In the revision of this rule only two words were added to § REEB 24.05 (5): "in writing." The language now clearly requires all licensees to disclose licensee status and the intent to act as a party in writing to the other party or the agent representing the other party in the transaction.

Wis. Admin. Code § REEB 24.05(5) provides: "DISCLOSURE OF LICENSURE. (a) A licensee acting as a principal in a real estate or business opportunity transaction shall disclose his, her, or its license status and intent to act in the transaction as a principal at the earliest of all of the following:

1. The first contact with the other party or an agent representing the other party where information regarding the other party or the transaction is being exchanged.
2. A showing of the property.
3. Any other negotiation with the seller or the listing broker.
 - (b) The disclosure under this subsection shall be made in writing to the other party in a transaction or to an agent representing the other party."

Under Standard of Practice 3-7 to Article 3 of the REALTOR® Code of Ethics, a similar obligation of early disclosure is required – when seeking information from another REALTOR® concerning property under a listing agreement, a REALTOR® shall disclose his or her REALTOR® status and whether his or her interest is personal or on behalf of a client, and if on behalf of a client, his or her representational status.

The obligation mirrors the Wis. Admin. Code § REEB 24.05(5) rule, which requires licensee principals engaged in a real estate or business opportunity transaction to disclose their licensee status and intent to act in the transaction as a principal at the earliest of the following: (1) first contact with the other party or an agent representing the other party where information regarding the other party or the transaction is being exchanged, or (2) a showing of the property or (3) any other negotiation with the seller or the listing broker. Again, this disclosure must be made in writing.

The seller has her real estate license (she is a commercial broker), but decided to list her home with a limited service broker. She will be showing her property. Does the listing broker need to represent that the seller has a license in the MLS or in flyers for her property?

The obligations in play belong to the seller/broker and not to the limited

service listing broker, but the broker can certainly assist in ensuring that all needed disclosures are made. One way the listing broker can help the seller get the ball rolling is to include the disclosure in the MLS remarks and in other advertising. To meet the obligation of § REEB 24.05(5) and Standard of Practice 3-7, a statement also may be included in the offer reciting that the seller has a real estate broker's license, which helps head off any buyer claims that they did not see the MLS or other disclosures documents. However, if the seller conducts her own showing, she must be prepared to give buyers and agents a written disclosure of her licensee status and intent.

If an agent owns a property and has listed it for sale with the real estate company where he works, must this be disclosed in all advertising? Disclosure of the agent's ownership status is being made in the Real Estate Condition Report (RECR) provided to all prospective buyers. In media advertising, the property is promoted within the company advertisement in the same manner as the other listings.

Wis. Adm. Code § REEB 24.04(2) provides that a licensee under a broker shall advertise under the supervision and in the name of the broker. One exception to this rule is that the licensee may advertise the occasional sale of personally owned real estate without disclosing the broker's name provided the licensee is clearly identified as a real estate licensee in the advertisement (applies to FSBO sales, for example). By advertising this particular listed property within the company ad along with the other company listings, it would appear that the exception does not apply and that the requirements of § REEB 24.04(2) have been met.

Under §§ REEB 24.05(2), the licensee may not act on his or her own behalf without the prior written consent of


all parties to the transaction. This written consent shall be obtained in the offer to purchase. Thus, if a contract received by the licensee for the purchase of his or her home does not contain this provision, the licensee should counter the offer to include the appropriate language in order to obtain the buyers' consent (or otherwise obtain the consent in writing before the contract is accepted). Providing the disclosure of the licensee's status and ownership within the RECR – copies of which are available at the property – certainly helps with meeting this disclosure obligation.


Additionally, Article 12 obligates REALTORS® to be honest and truthful in their communications and to present a true picture in their advertising, marketing and other representations. REALTORS® shall ensure that their status as real estate professionals is readily apparent in their advertising, marketing and representations. Standard of Practice 12-6 states that when advertising unlisted property for sale in which the REALTOR® has an ownership interest, the REALTOR® shall disclose both his or her ownership interest and licensed status in the advertisement. However, because the property in question is listed and being marketed and advertised under the name of the broker, an additional disclosure within the property ad itself of "licensee-owner" or words to that effect are not mandated by the Code of Ethics.

When this comes up:

- A buyer/licensee gives a typed written disclosure to the listing agent at a showing when the buyer/licensee shops for a vacation property.
- A buyer/licensee writes on the back of her business card that she is a real estate broker and looking for a new home for herself when she stops at a FSBO yard sign to talk to the seller.
- A FSBO licensee/seller creates an information sheet and indicates his status on the yard sign.

- The owner/licensee states he is a broker and the landlord when placing ads for the rental of the premises.

 **REALTOR® Practice Tip:** Don't forget to disclose licensee status when drafting the offer as a principal. The statement can be as simple as "All parties consent to and understand (Buyer)(Seller) [strike one] is a real estate licensee with _____, and that Buyer is purchasing the property for (personal) (speculation) (investment) [strike as applicable] purposes and he or she may realize a profit from the subsequent sale."

 **REALTOR® Practice Tip:** REALTORS® renting their personally owned properties would be wise to include a short statement in their leases and rental contracts that the landlord is a real estate licensee.

Conflicts of Interest

All of these discussions about disclosure of compensation and interests do play into a very important conversation about conflicts of interest. Just because the law does not prohibit specific acts does not always mean that executing them is a good idea. Even though you think you are being fair to the consumer, the best offense is the best defense – have another licensee or attorney participate in the transaction.

When this comes up:

- In any case where the listing agent plans to submit an offer on one of her listings, she should request that her broker or manager present her offer.
- When the listing agent has chosen to list his own home, unrepresented buyers should be encouraged to have another agent in the office, a broker or manager, an agent from another company or an attorney write the offer.

See the 2006 April *Broker Supervision Newsletter*, "Rules for Licensees Purchasing Listed Properties," at www.wra.org/bsnapr06 for more information.

Wis. Admin. Code § REEB 24.07(8) Disclosure of Agency

One area where the revisions aim for sharper focus is the requirements for providing disclosure of agency. These rules for giving the Broker Disclosure to Customers and the Broker Disclosure to Clients forms to the parties in various real estate transactions are found in Wis. Admin. Code § REEB 24.07(8).

Disclosure of Agency to Customers – Forms Use

The updated Wis. Admin. Code § REEB 24.07(8) provides: "DISCLOSURE OF AGENCY. (a) General requirements. 1. A broker may not negotiate on behalf of a party who is not the broker's client unless the broker provides to the party a copy of the broker disclosure to customers required under s. 452.135 (1), Stats. If the brokerage services are related to real estate primarily intended for use as a residential property containing one to 4 dwelling units, the broker shall request the party's signed acknowledgement that the party has received a copy of the written disclosure statement."

The broker cannot negotiate on behalf of a party who is a customer unless the broker first provides the Broker Disclosure to Customers. That is really nothing new because the statutes say the same thing therefore the change was made for greater consistency.

However, under the July 1, 2012, revisions to the Wis. Admin. Code § REEB 24.07(8), if the transaction is for a property with one to four dwelling units, the broker is

required to ask for “the party’s signed acknowledgement” – in other words, a signature. The previous rule said the broker had to ask for the party’s written acknowledgement (initials or signature). The old WRA Broker Disclosure to Customers form asks for the customers’ initials.

Starting July 1, 2012, brokers working in transactions with one-to-four-family properties will have to do one of three things: (1) use existing paper copies of the old WRA Broker Disclosure to Customers form and ask customers to sign the form instead of just initialing it, (2) use the WRA Addendum to Broker Disclosure to Customers along with the old form, or (3) use the WRA’s revised Broker Disclosure to Customers form that will be available in paper copies and on zipForm by mid-July.

The WRA Addendum to Broker Disclosure to Customers is available at www.wra.org/FormsUpdate and is intended to allow those who have paper copies of the old WRA Broker Disclosure to Customers to use the form they have now before replenishing their supply with the updated version.

Remember that this change only applies to transactions where the “brokerage services are related to real estate primarily intended for use as a residential property containing one to 4 dwelling units.” Agents do not need to request signatures in commercial, retail, industrial or transactions with five or more dwelling units.

Broker Disclosure to Customers

The revised § REEB 24.07(8) gives guidance for specific circumstances when brokers must give a Broker Disclosure to Customers. The Broker Disclosure to Customers must be used in transactions when the buyer or seller is a customer. The Broker Disclosure to Customers must be given before negotiation begins.

Listing Broker to Buyer

Wis. Admin. Code § REEB 24.07(8)(d)1 was created to indicate: “Subagency arrangements. 1. A listing broker shall provide a broker disclosure statement to a customer as required in s. 452.135 (1), Stats., to the buyer if negotiations are being conducted directly with the buyer and not through a buyer’s broker.”

Most REALTORS® realize that a listing broker must provide a Broker Disclosure to Customers to the buyer in the transaction if the listing broker is negotiating directly with the buyer and not through a selling agent or a buyer’s broker. In this case, the listing broker is the only broker involved with the parties, which makes it important that the buyer understand that the listing broker is working for the seller.

Buyer’s Broker to Seller

The new Wis. Admin. Code § REEB 24.07(8)(a)2 states: “A buyer’s broker shall provide a broker disclosure statement to a customer as required in s. 452.135(1), Stats., to a seller if negotiations are being conducted directly with the seller and not through a seller’s broker.”

If you flip the case to where there is only a buyer’s broker participating in the transaction, then the buyer’s broker needs to provide a Broker Disclosure to Customers to the seller if the buyer’s broker is negotiating directly with the seller and not through a listing broker. This occurs when a buyer represented by a buyer’s broker negotiates with a FSBO seller.

When a broker’s buyer-client writes an offer on a FSBO property, the buyer’s agent would be required to present the Broker Disclosure to Customers form to the seller/customer if the broker will provide brokerage services to the seller. Thus, line 51 on the Broker Disclosure to Customers form presented to that seller would indicate that the licensee is acting a “Buyer’s/Tenant’s Agent or Buyer’s/Broker’s Agent.”

Note that in these instances the requirement to provide a Broker Disclosure to Customers is triggered by negotiation. Negotiations begin when the discussions with the person exit the “providing information” phase and enter the “offer or proposal development” phase. Negotiations occur when an agent works on developing proposals for the other party’s consideration or works on reaching an agreement between the parties. Negotiations, simply stated, would include acting as an intermediary, drafting approved forms and presenting approved forms. Therefore, a buyer’s agent would be responsible to provide the seller-customer with a copy of the Broker Disclosure to Customers form if the agent was going to present the buyer’s offer to purchase to the seller because presenting party proposals and providing a general explanation of the proposal is within the definition of “negotiate” found in Wis. Stat. § 452.01(5m).

Subagent to Customer

The new § REEB 24.07(8)(d)3 provides: “A subagent shall provide a broker disclosure statement to a customer, as required in s. 452.135 (1), Stats., with whom he or she is working, but not to the principal broker’s client.”

When a broker is working with a buyer not as a buyer’s agent but rather as a subagent, the subagent broker shall provide a Broker Disclosure to Customers to the buyer customer with whom he or she is working. Subagency occurs when a broker is engaged by another broker to provide brokerage services in a transaction, but is not the other broker’s employee. For example, a cooperating broker who works for a listing broker in attempting to find a buyer and sell the property is a subagent.

The subagent does not need to provide any disclosures to the principal broker’s client. For example,

the subagent of a listing broker gives a disclosure to the buyer, but not to the seller. Similarly, principal brokers are not required to provide a Broker Disclosure to Customers to the customers of their subagents. For example, the listing broker does not give disclosure to a buyer working with a subagent.

The broker has a property listed. A broker/owner of a cooperating office has brought in an offer for a buyer. The offer states he is the agent of the seller/listing broker. The listing broker asked for a copy of the Broker Disclosure to Customers and the broker/owner said he hasn't used that form for a long time because it is not necessary anymore. The brokers are disagreeing since there is no buyer representation but would like to know who is correct.

The Broker Disclosure to Customers is not obsolete. A broker working with a buyer-customer must provide a Broker Disclosure to Customers before beginning any negotiation. If the real estate in the transaction contains one to four dwelling units, the broker must request that the buyer acknowledge receipt of the disclosure, in writing, per Wis. Admin. Code § REEB 24.07(8).

The WB-36 Buyer Agency Agreement and the updated WB listing contracts contain the current required Broker Disclosure to Clients (not customers) verbiage. When working with a buyer-client, the buyer's agent provides the Broker Disclosure to Clients in the WB-36. The broker then, upon first contact with the listing broker or seller, discloses that the broker is a buyer's agent. Then, when the offer is drafted, the buyer agency status is reconfirmed on lines 1-2 of the offer to purchase.

For discussion of the agency law revisions that went into effect in 2006, including the agency disclosures,

see the June 2006 *Legal Update*, "Revised Agency Law Implementation, at www.wra.org/LU0606.

Principal Broker Not Obligated to Give Disclosure to Subagent's Customer

The new § REEB 24.07(8)(d)4 provides: "A principal broker is not required to provide a broker disclosure statement to a customer as required in s. 452.135 (1), Stats., to a customer of their subagents."

This rule clarifies that the principal broker need not provide a Broker Disclosure to Customer to a customer of the subagent. Most commonly, this means that the listing broker would not have to provide the buyer-customer of the cooperating broker from another company a Broker Disclosure to Customer form. The presumption is that as a competent licensee the subagent will fulfill the agency disclosure obligations. However, as risk reduction measure, the listing broker may request evidence from the subagent of the disclosure to the customer to ensure that it was properly done.

Rental and Lease Transactions

The Broker Disclosure to Customers is not just for sales transactions.

Manager to Tenant If Negotiating Lease Terms

The new § REEB 24.07(8)(e)2 provides: "A licensee shall provide to prospective tenants a broker disclosure statement as required in s. 452.135 (1), Stats., when negotiating the terms of a lease on behalf of the client."

A licensee shall provide a Broker Disclosure to Customers to prospective tenants when negotiating lease terms on behalf of the client (owner or landlord). The trigger here will be whether the licensee is actually negotiating lease terms or whether a completed, nonnegotiable lease is simply presented to tenants.

Disclosure of Agency to Clients

The new § REEB 24.07(8)(a)1g and 1r provide: "A broker may not negotiate on behalf of a client unless the broker gives the client a copy of the broker disclosure required under s. 452.135(2), Stats.

1r. If a client enters into an agency agreement with a broker to receive brokerage services related to real estate primarily intended for use as a residential property containing one to 4 dwelling units, and the broker disclosure to clients is not incorporated into the agency agreement, the broker shall request the client's signed acknowledgement that the client has received a copy of the written disclosure statement required in s. 452.135 (2), Stats."

A broker cannot negotiate on behalf of a client unless the broker first provides Broker Disclosure to Clients. This normally is not a problem because most of the listing contracts and the WB-36 buyer agency agreements contain the language of the Broker Disclosure to Clients. The rule indicates that if the Broker Disclosure to Clients is not within the agency agreement, then the broker must first provide the Broker Disclosure to Clients and ask the party to sign it to acknowledge receipt if the property has one to four dwelling units. Fortunately the WRA Broker Disclosure to Clients calls for the client to sign, so no changes are necessary with that form. This form may need to be used separately with, for example, REO listings where the asset manager provided a listing contract for the broker to sign that does not contain the Wisconsin agency disclosure provisions.

The revised § REEB 24.07(8)(b) requires: "Agency agreements. Brokers or their salespeople shall explain to their clients the responsibilities of seller's agents, buyer's

agents and subagents before entering into an agency agreement.

No broker or broker's salesperson may permit other brokers to act as subagents in a transaction unless the broker's client has authorized the use of a subagent in the agency agreement."

In addition to the broker providing the Broker Disclosure to Clients, the law also continues to require the brokers and their salespersons to explain to their clients the responsibilities of the agents before entering into an agency agreement. Under the previous version of the rule, this section was named "listing contracts;" the change was made to capture all agency agreements, not just listing contracts. As stated earlier, the definition of "agency agreements" was modified to clarify that the term includes a written agreement between the broker and client in which the client authorizes the broker to provide brokerage services to the client. In addition, the rule continues to emphasize that a broker must have the client's authority to engage the services of a subagent.

Manager to Owner

The newly created § REEB 24.07(8)(e)1 instructs: "Agency agreements for lease and property management contracts. 1. –A licensee who is entering into agency agreements for lease or property management contracts shall provide to his or her clients the broker disclosure statement as required in s. 452.135 (2), Stats."

In the rental world, a licensee entering into a lease listing or a property management contract must provide the client with a Broker Disclosure to Clients. This may be provided separately as some agency agreements have not yet been updated to include the Broker Disclosure to Clients language, and a signature may be needed if there are one to four units.

Whether or not the licensee is going to disclose the agency relationships should not be in doubt because the revised chapter REEB 24 makes it eminently clear that disclosures in writing are required in a wide array of situations. Any time there is even a possibility that there may be negotiation, prudent practice will dictate giving a Broker Disclosure to Customers to parties who are not clients. Providing those written disclosures will go a long way toward keeping an agent off the DSPS Division of Enforcement's radar screen.

Disclosure of Buyer's Agent Status to Seller or Listing Broker

Buyer's agents helping buyers in a transaction for one-to-four-family residential purposes must disclose their buyer agency status at the earliest of the first contact, a showing of the property, or any other negotiation with the seller or listing broker. Disclosure of buyer agency status is not difficult. In addition, this information will be reiterated on the first lines of the offer to purchase.

The amended § REEB 24.07(8)(a)2 provides: "Licensees acting as agents of potential buyers of real estate that is used or intended to be used principally for one to 4 family residential purposes, who are negotiating directly with the seller or who are aware that the owner of the real estate has granted a listing broker the exclusive right to sell, shall notify the seller or the listing broker, as applicable, of the licensee's buyer agency relationship at the earlier of all of the following:

- a. The first contact with the seller or the listing broker where information regarding the seller or transaction is being exchanged.
- b. A showing of the property.
- c. Any other negotiation with the seller or the listing broker."

See *Legal Update 05.09*, "Buyer Agency Practice," at www.wra.org/LU0509, and *Legal Update 99.06*, "Revised WB-36 Buyer Agency/Tenant Representation Agreement," at www.wra.org/LU9906, for further discussion of this issue.

Wis. Admin. Code § REEB 24.075 Tie-In Arrangements

The only modification to § REEB 24.075 was made to include the proper references to earlier rule provisions. Specifically, § REEB 24.075 (3) (a) and (b), now accurately refer to § REEB 24.05(1) (b), as opposed to the old reference to § REEB 24.05 (3).

Wis. Admin. Code § REEB 24.09 Securing Agency Agreements

Wis. Admin. Code § REEB 24.09 has been revised so it is easier to read. While the intent of the section is exactly the same as the previous version, the language has been structured differently; now it is broken down into two clear sections: 1) Licensees may not mislead potential clients regarding the benefits which might be realized through the use of the licensee's services, and 2) a licensee may not mislead a potential client regarding the market value of real estate to be leased, rented, purchased, optioned or sold under an agency agreement. In this second part, the language was modified to specifically include references to "rented," "purchased" and "optioned." The last change made was the replacement of "listing contract" with "agency agreement" to provide a broader application of the rule to all agency agreements as opposed to just listing contracts.

Wis. Admin. Code § REEB 24.13 Drafting and Submission of Written Proposals

This section received a number of changes. First, the title to § REEB 24.13 was changed from “Drafting and submission of offers,” to “Drafting and submission of written proposals.” “Written proposals” is a term defined in the revised § REEB 24.02.

Refusal to Draft or Submit Prohibited

The revised Wis. Admin. Code § REEB 24.13(1) provides: “Refusal Prohibited. Licensees shall not refuse to draft or submit any written proposal unless the terms of the written proposal would be contrary to specific instructions of the other party.”

The changes made to this section of the rule were made to emphasize a more broad application. The terms “offer to purchase,” “exchange agreement” or “options contract proposal” were replaced with “written proposal.” The other modification replaced the words “the owner” to “the other party.” The objective is to ensure that this obligation applies regardless of whether the consumer is the seller/owner of the property or the buyer of the property; licensees must draft or submit any written proposal unless the written proposal would be contrary to specific instructions of the other party.

Access for Showings

There were no revisions to Wis. Admin. Code § REEB 24.13(2)(a). Listing brokers shall permit access to listed property for showings to all buyers and persons assisting or advising buyers without unreasonable delay, unless the buyer’s or other person’s access is contrary to specific written instructions of the seller.

When this comes up:

- At the time of executing the listing contract or sometime following, the seller may have indicated to the listing agent that there were certain times that showings would not be feasible at the property. For example, the seller has a small child that has a bed time after 7:00 pm and therefore does not wish to have any showings after that time. Therefore, the listing agent would indicate this in the listing or per an amendment to the listing to ensure they have documented the seller’s specific written instructions and then would be able to share that information in the MLS remarks section with other brokers. If any consumer or broker challenged the listing agent as to being treated fairly in gaining access to the property, the agent would be able to have a defensible response that no showings are allowed after 7:00 p.m. per the written instruction of the seller.
- Occasionally, the seller may not wish to have any showings until he or she has had an opportunity to prepare the property for showings. Thus, the seller and listing agent may document that the seller’s intention is to have the property listed, but no showings will occur until a stated date. Again, the listing agent needs to have this instruction documented in writing to comply with this section of § REEB 24.13 (2)(a).

Withholding Written Proposals and Prompt Presentation

The modified Wis. Admin. Code § REEB 24.13(2)(b) states: “Withholding written proposals prohibited. (b) Licensees shall promptly present all written proposals received to the licensee’s client or customer. Licensees shall not withhold any written proposal from presentation pending the party’s action on a written proposal previously presented.”

Again, the words “written proposals” replaced “offers” to ensure broad application. In addition, the language

now indicates that a licensee shall promptly present all written proposals received to the licensee’s client or customer. In the previous version of the rule, that language only directed prompt presentation to the seller or seller’s agent. However, sellers are not the only individuals who receive written proposals in a transaction. The rule now clearly states that licensees are required to promptly present all written proposals to their clients and customers, in other words, buyers, sellers, owners, tenants and others seeking an interest in real estate or a business opportunity.

When this comes up:

- A buyer submits a written offer to purchase to the seller, which is promptly presented, and then the seller counters the buyer’s offer. The agent working with or representing the buyer must promptly present the counter-offer to the buyer or the agent will be in violation of § REEB 24.13(2)(b).

Additionally, the rule emphasizes that licensees cannot withhold any written proposal from presentation pending the party’s action on a written proposal previously presented.

When this comes up:

- A seller receives two offers within a one-day time period. The licensee sits down to present the two offers. The licensee is obligated to present the two offers to the seller and provide the advantages and disadvantages of each as required under § REEB.24.13(3), allowing the seller to compare and contrast the two offers. A licensee who presented offer #1 with the advantages and disadvantages, and then waited until the seller made a decision to present offer #2 would be in violation of the rule.

Fair Presentation of Proposals

The updated Wis. Admin. Code § REEB 24.13(3) indicates: “FAIR PRESENTATION OF WRITTEN PROPOSALS. (a) Licensees shall

present all written proposals in an objective and unbiased manner to their clients and customers. Licensees shall inform their clients and customers of the advantages and disadvantages of all submitted written proposals.”

In § REEB 24.13(3)(a), the term “principals” was switched out to include “clients and customers,” for consistency in terminology. “Clients” and “customers” are defined in Wis Stat. § 452.01.

An agent in the office received an offer on a property he has listed. The offer was written for a husband and wife, but only the wife signed, and the husband would sign within 24 hours. The listing agent said the offer was not complete without both signatures and refused to present it until the husband signed. The other agent is stating that it must be presented. What is the correct practice?

Wis. Admin. Code § REEB 24.13(1) provides: “REFUSAL PROHIBITED. Licensees shall not refuse to draft or submit any written proposal unless the terms of the written proposal would be contrary to specific instructions of the other party.” § REEB 24.13(2)(b) states, “Licensees shall promptly present all written proposals received to the licensee’s client or customer.” § REEB 24.13(3)(a) indicates, “Licensees shall present all written proposals in an objective and unbiased manner to their clients and customers. Licensees shall inform their clients and customers of the advantages and disadvantages of all submitted written proposals.”

Likewise, the REALTOR® Code of Ethics provides in Standard of Practice 1-6, “REALTORS® shall submit offers and counter-offers objectively and as quickly as possible. (Adopted 1/93, Amended 1/95)”

Accordingly, the best course of action may be to promptly present the offer, pointing out to the seller that it generally is better to make sure

that both buyers are really on board with the offer before responding. The seller could then wait for the husband’s signature if time permits, or reject the offer or let it lapse and request that the buyers resubmit with both signatures. The seller could also counter the offer and require both buyer signatures that way.

After an agent listed a home, two full-price offers came in and were presented at same time. The listing agent said “here are two offers on your property; take either one.” The seller opted to take the listing agent’s offer after being told that the listing agent’s clients were a nice family and the other buyers would be using the property for a secondary home. The seller was not aware and was not informed that it may be in the seller’s best interest to present a multiple counter-offer, which would bring the seller more money. Did the listing agent represent the seller’s best interests? Or did the listing agent represent her own best interest? Was the listing agent ethical in her presentation of the offers? What recourse could the seller take in a court of law?

The WB-46 Multiple Counter-Proposal presents a viable legal method to continue negotiations with all buyers. The WB-46 allows the seller to issue a non-binding proposal to each buyer; it is really a more formal alternative to simply telling the buyers to each write a new and better offer. Different proposals may go to different buyers. For example, one WB-46 issued by the seller may increase the price while another changes the closing date. If the buyer accepts the seller’s multiple counter-proposal, it becomes an offer from the buyer to the seller that can be confirmed (accepted) by the seller to create a binding sales contract. The seller may receive more than one accepted multiple counter-proposal back, at which time the seller would consider which offer was more attractive. The best

offer could be accepted, and the others could either be allowed to lapse or be countered back as secondary.

The seller is not required to respond to all offers, but should be careful that any decisions to not respond to an offer are based upon legitimate reasons; the seller does not want to risk any accusations of fair housing law violations. For example, if the concern is price, all offers could be addressed on a multiple counter-proposal that asks for a higher price, and buyers not in that range would drop out. Ultimately it is the seller’s decision whether or not to sell his or her property, to whom and at what terms.

The buyer may wish to file a complaint with the DSPS with respect to the following provisions:

§ REEB 24.13(2)(b): “Licensees shall promptly present all written proposals received to the licensee’s client or customer. Licensees shall not withhold any written proposal from presentation pending the party’s action on a written proposal previously presented.”

§ REEB 24.13(3)(a): “Licensees shall present all written proposals in an objective and unbiased manner to their clients and customers. Licensees shall inform their clients and customers of the advantages and disadvantages of all submitted written proposals.”

The buyer may also wish to confer with a private attorney regarding potential legal action that might be filed against the seller and/or the listing agent.

Actions on Written Proposals

The revised Wis. Admin. Code § REEB 24.13(4) provides: “NOTIFICATION OF ACTION ON WRITTEN PROPOSAL. Licensees shall promptly inform their clients and customers whether the other party has accepted, rejected, or countered their written proposal. A licensee shall immediately provide a

written statement to the other party's broker that includes the date and time when the written proposal was presented when such a statement is requested by the other party or the other party's broker. A licensee shall immediately provide a written statement to the other party's broker that includes the date and time when the written proposal was rejected or had expired without acceptance when such a statement is requested by the other party or the other party's broker."

As in the other revisions of § REEB 24.13, the revisions to Wis. Admin. Code § REEB 24.13(4) substituted "clients and customers" for "prospective buyers," "written proposals" for "offers" and "other party" for "seller," "prospective buyer," "buyer's agent" or "selling broker," when applicable.

Repeatedly, the Legal Hotline has heard frustration from agents working with or representing buyers who never had confirmation of the seller's action, let alone that the buyer's offer was presented or seen by the seller. The rule requires all licensees to promptly advise their clients and customers whether the other party has accepted, rejected or countered the party's written proposal. A licensee must immediately provide a written statement to the other party's broker stating the date and time when the written proposal was presented if the other party or the other party's broker request such a statement; hence the lines in the offer to purchase detailing the presentation timeline. In addition, the licensee must immediately provide the same information regarding any rejection or expiration without acceptance when such a statement is requested.

Again, these modifications were made with the intent to hold licensees working with the buyers in the transaction to the same standards and expectation as those working with sellers. Lease transactions and rentals are also

included within the rule. The new provision in the rule regarding proof of presentation to the party generates written evidence that a written proposal was presented to the other party.

When this comes up:

- The buyer's agent submits an offer to purchase to the listing broker. The listing agent did not represent that the seller has an accepted offer to purchase. However, the day after the buyer's agent submitted the offer, the MLS shows an accepted offer. The listing agent said the offer was presented to and rejected by the seller, but will not indicate on the offer as the buyer's agent requested. The buyer's agent is suspicious that the listing agent never presented the offer, not only because the listing agent represented there were no offers prior to the submission of the buyer's agent offer, but also because the listing agent was the agent that wrote the accepted offer.

The customer made an offer on a listed REO house. The listing agent's assistant sent an e-mail message that simply stated the counter-offer amount, the closing cost amount (not stating who pays those closing costs), a selling bonus amount and a closing date. The customer is willing to make a counter-offer back. Should the cooperating broker write it up on a counter-offer form, e-mail the listing agent's assistant with the customer's new terms, or amend the customer's original offer with the new terms since there is no counter-offer form from the listing agent with a deadline for acceptance?

The customer is wondering if his original offer was ever even presented. Is this proper protocol for the listing agent just because her listing is a "bank foreclosure"?

Generally the listing broker drafts counter-offers for the seller, but if the listing broker refuses to do so or the seller refuses to sign, the party interested in continuing the negotiations may initiate the next counter.

According to license law, the listing broker, including REO listing brokers, is required to present all offers to the seller unless it is contrary to the seller's instructions. Wis. Admin. Code § REEB 24.13(4) provides: "NOTIFICATION OF ACTION WRITTEN PROPOSALS. Licensees shall promptly inform their clients and customers whether the other party has accepted, rejected or countered their written proposal. A licensee shall immediately provide a written statement to the other party's broker that includes the date and time when the written proposal was presented when such a statement is requested by the other party or the other party's broker. A licensee shall immediately provide a written statement to the other party's broker that includes the date and time when the written proposal was rejected or had expired without acceptance when such a statement is requested by the other party or the other party's broker."

If the agent has made such a request and the listing agent does not respond promptly with a written statement, a complaint may be filed with the DSPS for violation of this rule. If the agent believes that the offer was not presented, the agent may want to contact the listing broker.

Modified and New § REEB 24.17 Miscellaneous Requirements

Generally § REEB 24.17 relates to violations of the law; convictions; violations of statutes, administrative code and disciplinary orders; and impaired practice. However, two substantial changes were made in the revision to the rule. One provision modified the time frame for a licensee to report a conviction. The other is a new provision requiring a licensee to cooperate with the Real Estate

Examining Board and the DSPS when information is being requested from the licensee or a license applicant.

Wis. Admin. Code § REEB 24.17(1) was modified to provide: “VIOLATIONS OF LAW. Licensees may not violate, or aid or abet the violation of, any law the circumstances of which substantially relate to the practices of a real estate broker or salesperson. A licensee who has been convicted of a crime shall send to the board within 48 hours after the judgment of conviction a copy of the complaint or other information which describes the nature of the crime and the judgment of conviction in order that the board may determine whether the circumstances of the crime of which the licensee was convicted are substantially related to the practice of a real estate broker or salesperson, pursuant to s. 111.335 (1) (c), Stats.”

A licensee who has been convicted of a crime now has only 48 hours (previously 30 days) after a judgment of conviction to send a copy of the complaint or other information describing the nature of the crime, and a copy of the judgment of conviction to the REEB. This change was made to provide consistency between chapter REEB 24 and Wis. Admin. Code § SPS 4.09(2), which already required other DSPS credential holders, including real estate salespersons and brokers, to meet the 48 hour time frame.

Wis. Admin. Code § REEB 24.17(5) was created to indicate: “DUTY TO COOPERATE WITH THE BOARD AND THE DEPARTMENT. Licensees and applicants shall respond to the department and the board regarding any request for information within 30 days of the date of the request.”

The REEB and the DSPS agreed that one of the greatest challenges in investigating complaints or license applications is the lack of cooperation and prompt responses from

licensees and applicants. Therefore, § REEB 24.17 (5) was added to establish a clear time frame for responses (within 30 days of the request for information). It would appear that the REEB will be able to charge an additional violation if a licensee fails to timely respond to DSPS requests for information.

To see the revised Wis. Admin. Code chapter REEB 24, visit https://docs.legis.wisconsin.gov/code/admin_code/reeb/24.pdf.

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