



LEGAL UPDATE

A MONTHLY GUIDE TO WISCONSIN REAL ESTATE LAW & POLICY

The Cooperative Agreement Alternative

The problem has been well-documented and had been growing: brokers from outside Wisconsin were entering Wisconsin and providing brokerage services in Wisconsin transactions even though they had no Wisconsin real estate license. This violates Wisconsin law and also created concerns. These Out-Of-State Licensees (OSLs) tend to make errors when trying draft contracts on Wisconsin forms because they often are unfamiliar with Wisconsin law. The OSLs typically are not familiar with Wisconsin forms, markets, property rights and land use issues. They do not understand or appreciate how title insurance works in Wisconsin – that the seller pays for the buyer’s policy in Wisconsin – or how to react when a title issue is discovered. Instead they may use forms from their home state, leaving the Wisconsin licensee in the transaction to explain to the Wisconsin party that a different form was used and refer the parties to an attorney to decipher the contract proposal. In some cases the Wisconsin licensee ends up redrafting the contract. In other words, there was concern over the lack of competency demonstrated by OSLs.

There was no specific legislative structure for brokerage services performed by OSLs in Wisconsin prior to 2015. The position of the Department of Safety and Professional Services was that any OSL could provide brokerage services in Wisconsin transactions as long as the OSL was not physically present in Wisconsin. This principle would be violated, for example, when the OSL was present and/or conducted a showing of a Wisconsin property. As long as the OSLs stayed in their own state, it was acceptable for Wisconsin brokers to cooperate with the OSLs in Wisconsin real estate transactions.

Many brokers increasingly became dissatisfied with this state of affairs given the extra work they often had to put in due to the OSLs’ lack of familiarity with Wisconsin law and forms. Wisconsin brokers were frustrated because they really had no viable way to control the situation. Although many brokers may choose to not cooperate in such situations and instead engage in referrals or secure licenses in multiple states, many others frequently engage in transactions where the buyer or commercial tenant is already working with his or her own broker from another state and is not willing to forgo that relationship.

IN THIS ISSUE

P1 State Models for Interactions with OSLs

Cooperative Agreement Legislation

The Options

OSL FAQ

The Cooperative Agreement

State Models for Interactions with OSLs

These issues are regulated to one extent or another under the various state laws across the nation using one of three basic models that address the ability of an OSL to participate in a transaction in the home or transaction state where the property is located. These include:

1. Cooperative state: In a cooperative state, an OSL is allowed to physically enter the physical borders of the home state (with certain exceptions or limitations that vary on a state-by-state basis) provided that the OSL and a home state broker enter into a written co-brokerage agreement that usually outlines the brokers’ respective duties and responsibilities, and addresses compensation. The state statute typically lists the requirements for the cooperative agreement, and states what activities an OSL may or may not perform within the home or transaction state.

Currently 26 states have this type of model, but six limit the cooperation to commercial properties. Cooperative states include, for example, Arizona, Indiana, Michigan and Ohio.

2. Physical location state: In a physical location state, an OSL may not provide brokerage services while physically located in the home or transaction state. The OSL, however, may participate in a transaction and perform services from the state where the OSL is licensed. The OSL may work on a transaction and receive commission from the home or transaction state broker provided

that all licensed services rendered by the OSL are performed while the OSL is physically located in his/her state of licensure.

Currently 21 states have this type of model. Wisconsin was a physical location state before January 1, 2015. Physical location states now include, for example, Florida, Illinois, Iowa, Minnesota and Texas.

3. **Turf state:** In a turf state, the OSL is prohibited from performing brokerage services in a transaction with regard to property located in the home or transaction state regardless of the OSL's physical location. The only real choice with a turf state is for the OSL to refer clients and customers to brokers in the home state and be paid a referral fee. The OSL may neither enter the home or transaction state nor work on the transaction from his or her state of licensure. An OSL cannot perform any brokerage services in a turf state transaction.

The three turf states are Nebraska, New Jersey and Pennsylvania.

① MORE INFORMATION

See a chart overviewing the three models and how they are applied in the various states found at www.realtor.org/letterlw.nsf/pages/LicensePortabilityChart?OpenDocument&Login.

Analysis of the OSL problem

The problem with OSLs creeping into Wisconsin or providing sub-par services was discussed on many levels within the WRA. A proposal to convert Wisconsin from a physical location state to a cooperative state was vetted in several focus groups comprised of Wisconsin border area brokers from markets adjacent to other states such as Minnesota, Michigan and Illinois. Preliminary discussions had deemed the turf model too restrictive, which is evidenced by the fact only three states have adopted the model, leaving a cooperative state model as the major alternative. As a result of these discussions and the input from CARW commercial brokers, the WRA board of directors directed staff to work on legislation that offered an alternative opportunity for OSLs to participate in Wisconsin transactions: requiring the OSL to enter into a written cooperative agreement with a Wisconsin real estate broker.

Without changing to a cooperative state, it's almost impossible for the Wisconsin broker to require certain behaviors of the OSL. The regulation of OSLs is a consumer protection issue because the unregulated OSL's lack of Wisconsin-based knowledge can result in harm to a purchaser when working with an OSL in a Wisconsin property transaction.

Benefits to changing to a cooperative state

Throughout the discussions of the OSL issue, several benefits of a cooperative state model were frequently mentioned. Those benefits include:

1. The cooperative state model creates a voluntary opportunity for the Wisconsin broker without requiring that every Wisconsin broker choose this path.
2. If the cooperative agreement must be drafted on a standard form created by the Wisconsin Real Estate Examining Board (REEB), then there will be uniformity in the basic agreement terms and

those who use the form will become increasingly familiar with the agreement terms and more adept at using the form.

3. The cooperative state model can prohibit any OSL from listing Wisconsin properties or businesses.
4. The Wisconsin broker can only enter into a written cooperation agreement for that broker's listings and not the listings of other brokers, which serves to keep this tool limited in scope and focused on the broker's immediate area of practice.
5. The Wisconsin broker benefits from maximum flexibility because the cooperative agreement is only one of a few options the broker may pursue when considering the best way to work with particular out-of-state buyers with OSLs. The Wisconsin broker may, for example, enter into a referral agreement for one listing and a cooperation agreement for another.
6. The cooperative agreement tool gives the Wisconsin broker control and empowers the Wisconsin broker to set parameters for the OSL's participation in the transaction. This would include the OSL's ability to participate in showings, advertising, negotiations and writing offers. In addition, the Wisconsin broker may require the OSL to use Wisconsin-approved forms and decide whether to allow the agents of the OSL broker to participate in the transaction.
7. Effective cooperative state legislation provides enforcement measures and penalties.
8. The cooperative proposal will give the REEB authority to create rules and regulations as well as the terms and conditions of the cooperative agreement.

The proposed concept was vetted by the WRA Public Policy Committee and the specific bill also received that committee's approval. 2013 Wis. Act 259, creating the new Wis. Stat. § 452.137, went into effect on January 1, 2015. Some technical difficulties delayed the introduction of the cooperative agreement, but upon approval by the REEB on April 16, 2015, the WB-28 Cooperative Agreement shown on pages 11-12 of this *Update* officially became available for those who choose to use this technique when working on transactions involving OSLs.

Cooperative Agreement Legislation

The new Wis. Stat. § 452.137 makes Wisconsin a cooperative state effective January 1, 2015, and regulates cooperation with OSLs.

Change Wisconsin to a cooperative state

Wisconsin real estate brokers have the opportunity to work with OSLs and allow them to provide limited brokerage services in Wisconsin transactions if the OSL enters into a written cooperative agreement with the Wisconsin broker. The legislation encourages out-of-state purchases of Wisconsin properties, while putting the Wisconsin broker at the helm of the transaction, and thus protects both the consumer and the integrity of the transaction.

If a Wisconsin broker chooses to enter into a cooperative agreement with an OSL, the statute provides as follows:

- **Cooperative agreement:** Wis. Stat. § 452.137(2)(a)1 provides that the OSL may not act as a broker in Wisconsin unless the OSL

has entered into a cooperative agreement (WB form) with the Wisconsin broker who has the property listed.

- **One listing per cooperative agreement:** A separate cooperative agreement must be entered into for each listing per Wis. Stat. § 452.137(2)(a)1. A Wisconsin broker cannot have a blanket form that applies with one OSL across all properties listed over a long period of time, and cannot enter into a cooperative agreement based on other Wisconsin brokers' listings. A cooperative agreement may only be entered into regarding listings and not buyer agency agreements.
- **Valid broker's licenses:** Wis. Stat. § 452.137(1)(b) requires that the Wisconsin broker must have a valid broker's license and § 452.137(2)(a)2 requires that the OSL provide evidence that the OSL is licensed in good standing to engage in real estate brokerage in the OSL's state of licensure.
- **OSL listings prohibited:** Wis. Stat. § 452.137(2)(b)1 prohibits an OSL from listing Wisconsin property.
- **OSL advertising of Wisconsin property prohibited:** OSLs are prohibited from promoting the sale or rental of Wisconsin property per Wis. Stat. § 452.137(2)(b)2.
- **Wisconsin law applies:** Under Wis. Stat. § 452.137(2)(c) OSLs and any OSL salespersons must comply with Wisconsin law, and all lawsuits must be filed in Wisconsin, including commission disputes.
- **Document retention:** OSLs who are parties to cooperative agreements with Wisconsin brokers must maintain the originals or copies of all documents the OSL receives, maintains or generates in connection with any transaction subject to the cooperative agreement for at least three years after closing or completion of the transaction, or if no closing or completion occurs, three years after the date of the cooperative agreement. In addition the OSL shall provide copies of all such documents to the Wisconsin broker unless otherwise agreed in writing, all as stated in Wis. Stat. § 452.137(2)(e).
- **Conditions for payment of commission:** Wis. Stat. § 452.137(2)(f) specifies that "No person may pay an out-of-state broker a commission, money, or other thing of value for brokerage services unless the out-of-state broker is a party to a cooperative agreement with a licensed broker."
- **OSL showing of Wisconsin rental property prohibited:** OSLs are prohibited, for compensation or other thing of value, from showing a property in Wisconsin offered exclusively for rent unless the OSL is authorized to do so in a cooperative agreement, per Wis. Stat. § 452.137(2)(g).
- **OSL salespersons:** The Wisconsin broker may choose to allow the salesperson(s) of the OSL broker to participate in the transaction pursuant to § 452.137(3). The OSL salesperson must work under the direct supervision of the OSL broker, provide proof of licensure in good standing, and only represent the OSL that is party to the cooperative agreement.
- **REEB-created agreement creates uniformity and allows customization:** Under Wis. Stat. § 452.137(4), the written cooperative agreement is created by the REEB. The agreement



must establish the terms of the cooperation between the brokers, the OSL's compensation, and require that all client funds be deposited in a trust account maintained by the Wisconsin broker. This is a WB form because it was created by the REEB.

- **All types of properties and transactions covered:** The law applies to sales and rental transactions and all types of properties – residential, commercial, farm, vacant land and businesses.
- **Penalties and enforcement:** Wis. Stat. § 452.137(5) is the penalty section. Any person who violates any provision of Wis. Stat. § 452.137 or a rule promulgated thereunder may be fined, for each violation, not more than the greater of: (a) \$5,000; (b) 1 percent (1%) of the purchase price in a sales transaction subject to a cooperative agreement; or (c) 1 percent (1%) of the total lease or rental value of the property in a lease or rental transaction subject to a cooperative agreement. Therefore a purchase price or lease value of \$500,000 triggers the 1 percent (1%) computation.

Note that Wis. Stat. § 452.137(2)(f) states that no person may pay an OSL any compensation or other thing of value for brokerage services unless the OSL broker is a party to a cooperative agreement with a Wisconsin broker. Arguably, "no person" includes a Wisconsin broker, a seller, a title company or a closing attorney. Therefore any person paying an OSL who is not a party to a cooperative agreement with a Wisconsin broker would be subject to a fine of at least \$5,000.

The Options

Wisconsin REALTORS® should understand that they do not ever have to use the REEB-created form and enter into a cooperative agreement. The cooperative route is purely optional, but if the option to cooperate with an OSL is chosen, the cooperative agreement form developed by and approved by the REEB must be used.

When it comes to OSLs, Wisconsin brokers have three choices:

1. Do not cooperate with OSLs and do not allow them to participate in transactions.
2. Enter into a referral agreement with the OSL and provide brokerage services to the OSL's clients or customers – or refer those clients and customers to another Wisconsin broker.
3. Use the WB-28 Cooperative Agreement to regulate the OSL's activities as they participate in transactions regarding the Wisconsin broker's listings.

Can a broker pay a referral fee to a licensee from another state?

Yes, so long as the broker receiving the referral is regularly and lawfully engaged in real estate brokerage. The broker paying the referral should request written confirmation from the OSL that documents the OSL's regular and lawful engagement in real estate brokerage in their state.

MORE INFORMATION

See *Legal Update* 02.01, "Getting Paid Outside of the MLS," at www.wra.org/LU0201 regarding referral fee agreements as well as the checklist for referral fee agreements on page 15 of *Legal Update* 02.12, "2002 REALTOR® Highlights," at www.wra.org/LU0212.

REALTOR® Practice Tips

Wis. Stat. § 452.137 gives Wisconsin brokers a choice between different options including a referral fee arrangement or a written cooperative agreement. Under the cooperative agreement option, Wisconsin brokers set the parameters as to the OSL's brokerage services.

FAQ: Practice by Out-of-State Licensees

1. When did the new law for cooperation with OSLs (2013 Wis. Act 259) law go into effect?

The new legislation created Wis. Stat. § 452.137 effective January 1, 2015.

2. How does this law impact how a Wisconsin broker interacts with OSLs?

The new legislation offers the opportunity for a Wisconsin listing broker to enter into a referral arrangement with the OSL, enter into a cooperative agreement with the OSL, or decline cooperation.

3. How will the new law for cooperation with OSLs affect a Wisconsin broker's current business and transactions?

The intent is to offer the Wisconsin broker an opportunity to work at the helm of the transaction and to give the Wisconsin broker flexibility in structuring the parameters of the cooperative relationship with the OSL.

4. How does a Wisconsin broker communicate the regulations from the OSL cooperation law to current and potential clients?

Brokers may choose to send information created by their local boards or the WRA. For instance, see the resources at the end of this *Update*.

5. How does this differ from other states' OSL laws?

There are 26 other states that have a form of cooperation. In some states the cooperation is limited only to commercial transactions. As of January 1, 2015, Wisconsin law allows cooperation in all types of transaction, not just commercial.

6. What documentation is needed for a Wisconsin broker to ensure compliance with the OSL cooperation law?

The Wisconsin REEB created the cooperation form, which is a WB form and required for use by any Wisconsin broker wishing to enter into a cooperative agreement. Statutorily the form must establish the terms of cooperation between the OSL and the Wisconsin broker, establish the terms of the OSL's compensation, and provide that all client funds be deposited in a trust account maintained by the Wisconsin broker. The REEB form also addresses license numbers, promises to abide by Wisconsin law and REEB rules, as well as the parameters imposed on OSL activities permitted by the Wisconsin broker such as showings, writing offers to purchases, using Wisconsin forms, OSL agent participation, and proof of errors and omissions insurance.

7. What governing body will cite violators of the OSL law?

The Wisconsin REEB and the Department of Safety and Professional Services will be the regulatory bodies. To file a complaint, go to dpsps.wi.gov/Complaints-andInspections/Professions-Complaints.

8. What are the consequences for brokers who violate the OSL cooperation law?

Wis. Stat. § 452.137(5)(b) provides that any person who violates § 452.137 or a rule promulgated under that statute may be fined, for each violation, not more than the greater of: (a) \$5,000; (b) 1 percent (1%) of the purchase price in a sales transaction subject to a cooperative agreement; or (c) 1 percent (1%) of the total lease or rental value of the property in a lease or rental transaction subject to a cooperative agreement. Therefore a purchase price or lease value over \$500,000 triggers the 1 percent (1%) computation.

Additionally, Wis. Stat. § 452.137(5)(f) states, "No person may pay an out-of state-broker a commission, money, or other thing of value for brokerage services unless the out-of-state broker is a party to a cooperative agreement with a licensed broker." Arguably, "no person" includes a Wisconsin broker, a seller, a title company or a closing attorney. If they pay an OSL, they would be violating the law unless the OSL has entered into a cooperative agreement with a Wisconsin broker.

9. Are there any activities an OSL can NEVER do?

Wis. Stat. § 452.137(2)(b) provides that an OSL may not take a Wisconsin listing or promote the sale or rental of real estate in Wisconsin.

10. Where does a Wisconsin broker go if he or she has questions about the OSL?

Each state has a regulatory body and should have a resource where the broker can confirm that an OSL and any respective agents licensed with the OSL are authorized to participate in transactions and see whether any disciplinary actions have been taken against them. One place to start is with the state REALTOR® association, which will likely have a link to the state regulatory body or can direct the broker to the proper site. See www.realtor.org/leadrshp.nsf/StatesOnly?OpenView&Login (login required). Or see the ARELLO directory of state regulatory agencies at www.arello.org/index.cfm/resources/regulatory-agencies/#region.1.

11. Who is responsible for paying penalties if there is a violation of the new law?

As noted in question 8, Wis. Stat. § 452.137(2)(f) states that no person may pay an OSL a commission unless the OSL has entered into a cooperative agreement with a Wisconsin broker. Therefore, anyone who violates Wis. Stat. § 452.137 will be fined for each violation \$5,000 or one percent (1%) of the purchase price of the property or total lease or rental value of the property, whichever is greater.

The Cooperative Agreement

The Wisconsin REEB was charged with the task of creating and approving the cooperative agreement in accordance with Wis. Stat. § 452.137(4). The REEB has, within the statutory guidelines, created a standard form that needs to be used whenever a Wisconsin broker enters into a cooperative agreement.



REALTOR® Practice Tip

The WB-28 Cooperative Agreement is a REEB-approved form but that does not mean that every Wisconsin licensee is compelled to use it. This form is mandatory only in the sense that if a Wisconsin broker wishes to engage in a transaction with an OSL then the Wisconsin broker must use the REEB-approved WB-28 Cooperative Agreement.

See the SAMPLE copy of the WB-28 Cooperative Agreement on pages 11-12 of this *Update*. The form is available on the REEB website at dps.wi.gov/Licenses-Permits/RealEstateBroker/REBRforms and can be used by brokers in transactions where they wish to cooperate with OSLs. The WRA will also make it available to Wisconsin REALTORS® on zipForm®.

Cooperation agreement terms

The Cooperation Agreement (WB-28) is designed to empower the Wisconsin broker to set the parameters of the limited brokerage services that the OSL would be allowed to contribute to the transaction. This would apply to functions such as showings, advertising, negotiations, forms choice and writing offers. The WB-28 subjects the OSL to Wisconsin law, requires that all trust funds be deposited in the Wisconsin broker's trust account, sets the OSL's commission, and establishes the terms of cooperation. This WB-28 should be flexible enough to address all Wisconsin sales and rental transactions, regardless of the property type, and allow brokers entering into a WB-28 to customize and tailor the agreement to the specific situation. The WB-28 allows out-of-state buyers to purchase Wisconsin properties, but the Wisconsin broker will be at the helm of the transaction to protect both the consumer and the integrity of the transaction. Nothing in the WB-28 eliminates the option

to instead have referral fees paid under Wis. Stat. § 452.19.

WB-28 Cooperative Agreement

The line directly below the form title advises that the form is to be used only for cooperation with OSLs involved in the purchase or lease of Wisconsin property listings. This highlights the fact that this form can be used in lease transactions as well as sales.

Preliminary information, lines 1-11

- Line 1 indicates the date of the WB-28 Cooperative Agreement.
- Lines 2-5 first provide the names of the brokers who are the parties to the Cooperative Agreement and the state of licensure for the OSL. The Wisconsin real estate broker is referred to throughout the balance of the WB-28 as the "Wisconsin Broker," and the OSL is referred to throughout the balance of the WB-28 as the "Cooperating Broker."
- Lines 7-11 identify the Wisconsin property listed by the Wisconsin Broker to which the WB-28 applies.
- Line 12 reminds the brokers that a WB-28 can only be entered into with respect to one listing contract. If there are multiple properties subject to multiple listing contracts that the brokers wish to be able to cooperate on, then a separate WB-28 will be needed for each listing contract.

Broker identification, lines 14-23

This section includes specific information that the brokers may wish to know about each other before they embark on their cooperative journey. In some situations, the brokers may know each other or be familiar with one another based on past dealings or word of mouth; in other cases, they may be strangers. The brokers may wish to check into some basic information about each other, including the opportunity to contact the respective regulatory agency to see if the other's license is in good order. In fact, the OSL is required to submit to the Wisconsin Broker evidence that the OSL is licensed in good standing to engage in real



estate brokerage in a jurisdiction other than Wisconsin.

Line 14 calls for the name of the Wisconsin brokerage company or sole proprietor who is the Wisconsin Broker under the WB-28. Line 15 asks for the business entity or sole proprietor license number. This does give the OSL a chance to go to the department website and check on the Wisconsin Broker's license status, if so desired.

Cooperating broker information

Line 16 calls for the name of the cooperating brokerage company or sole proprietor who is the Cooperating Broker under the WB-28. Line 17 asks for the address of the Cooperating Broker. Line 18 asks for the business entity or sole proprietor license number. Thus the Wisconsin Broker can contact the respective regulatory agency or go to the agency website and check on the Cooperating Broker's license status, if so desired, notwithstanding that the OSL is to provide proof of licensure in good standing as reiterated on lines 27-30 and 97-100.

Continuing in this subsection, more information is asked of the Cooperating Broker to help make sure that the Wisconsin Broker is dealing with a properly licensed and legitimate company. The more detailed information that is provided, the more reassuring it is for the Wisconsin Broker. This information will also help facilitate the completion of closing statements and IRS Form 1099. Thus line 19 asks for the federal tax identification number of the Cooperating Broker.

Lines 20-22 turn to the subject of any agents working for the Cooperating Broker who will be allowed to participate in the transaction. The names and license numbers of the agents may be filled in on lines 21-22, while line 20 asks for the name and license number of the individual supervising broker, that is, the person who is responsible on behalf of the Cooperating Broker to watch over and supervise the agents.

Authorized agents

The Authorized Agents provision on lines 24-26 states: "Authorized Agents may act as a salesperson in this state only if Cooperating Broker with whom they are affiliated satisfies all requirements of this Agreement and Wis. Stat. § 452.137(2), and Authorized Agents work under the direct supervision of Cooperating Broker and represent only Cooperating Broker in the transaction."



REALTOR® Practice Tip

The Wisconsin Broker does not have to allow any agents of the Cooperating Broker to participate in the transaction regarding the broker's listing. If the Wisconsin Broker allows this, the WB-28 is requiring license numbers and supervision details. This gives the Wisconsin Broker the means to check into the agents' and supervisor's licensing history. The supervisor's information gives the Wisconsin broker another contact to help impart Wisconsin rules and procedures, receive Wisconsin forms that should be used, confirm that Wisconsin forms are being used, or otherwise gain reassurance that the agents are being monitored by another broker who has been advised of applicable Wisconsin law and has an apparent role in making that happen.

Evidence of good standing

The Evidence of Good Standing provision on lines 27-30 states: "Cooperating Broker and any Authorized Agents have provided Wisconsin Broker with evidence, including but not limited to copies of valid license(s), in good standing and are regularly and lawfully engaged to practice real estate in their state of licensure (such as a link to current online records, contact information for the state licensing agency, etc.)."

Accordingly, the WB-28 is sending the message that only legitimate, responsible, serious OSLs need consider participating with a Wisconsin broker in a Wisconsin transaction.



REALTOR® Practice Tip

The Wisconsin Broker may determine what evidence of good standing is sufficient by specifying what proof of licensure is expected in the Additional Provisions section on lines 82-95. This may be a photocopy of the license, a copy scanned and forwarded by email or text message, a link to the license confirmation website for the OSL's regulatory agency or other confirming information provided by the regulatory agency in the OSL's state. In Wisconsin, for instance, the information on the Wisconsin Credential/License Search site at <https://app.wi.gov/licensesearch> is considered to be the conclusive authority.

Terms of Cooperation, Lines 32-43

This section gives the Wisconsin Broker the opportunity to set limits on the extent of the Cooperating Broker's participation in the transaction and establish what roles will be permitted under what circumstances. Lines 33-41 provide a series of check box items describing some of the activities a Wisconsin broker might want a Cooperating Broker to engage in.

Showings

For example, the Wisconsin Broker can choose to allow the Cooperating Broker to conduct showings of the property listed by the Wisconsin Broker only when the Wisconsin Broker is present, without the Wisconsin Broker being present, or only with the advance consent of the Wisconsin Broker (see lines 33-35). The Wisconsin Broker can put other limitations on the Cooperating Broker's ability to conduct showings using the additional limitations/qualifications area on lines 41-43 or Additional Provisions on lines 82-94.

Negotiation

Line 36 can be checked if the Wisconsin Broker wishes to have the Cooperating Broker negotiate only through the Wisconsin broker and not, for instance, directly with the owner/client. Since this generally would be required under Wisconsin law, this item may have educational value for the Cooperating Broker and remind them that this is how real estate is practiced in Wisconsin.

Wis. Admin. Code § REEB 24.13(5) provides in relevant part, "Negotiation through broker. A licensee may not negotiate a sale or lease of real estate directly with a party if the licensee knows that the party has an unexpired written contract in connection with the

real estate which grants to another licensee an exclusive right to sell, lease, or negotiate. All negotiations shall be conducted with the broker holding the exclusive right to sell, lease, or negotiate, and not with the party, except with the consent of the broker or where the absence of the broker, or other similar circumstances, reasonably compels direct negotiation with the party.” In a similar vein, Standard of Practice 16-13 provides that, “All dealings concerning property exclusively listed, or with buyer/tenants who are subject to an exclusive agreement shall be carried on with the client's representative or broker, and not with the client, except with the consent of the client's representative or broker or except where such dealings are initiated by the client.”



REALTOR® Practice Tip

Unless there is a situation where the Wisconsin Broker's client wants to negotiate directly with the Cooperating Broker, the box on line 36 would typically be checked whenever the WB-28 is being completed.

Confidentiality

Line 37 was included so that the Wisconsin Broker can require the Cooperating Broker to sign whatever confidentiality agreement the seller/owner might require before they enter into negotiations and disclosures of sensitive or proprietary business or financial information. This would be more likely, of course, in a commercial or business setting. This item is assuming that the owner or the owner's attorney will be providing the confidentiality agreement.

Proposals and forms

The box on line 38 can be checked if the Cooperating Broker will be allowed to write offers, leases or other proposals such as an option or letter of intent. In other words, the OSL is authorized to draft proposals in the transaction. If, on the other hand, the Wisconsin Broker does not wish to extend this authorization, it is not clear if simply leaving the box on line 38 unchecked is enough to make this clear to the Cooperating Broker.



REALTOR® Practice Tip

If the Wisconsin Broker requires that all proposals be drafted by the attorney for the prospective buyer or tenant, or that the Wisconsin Broker shall prepare all documentation, it may be wise for the Wisconsin Broker to write such requirements in the additional limitations/qualifications area on lines 41-43 or Additional Provisions on lines 82-94.

The box on line 39 is checked if the Cooperating Broker will be allowed to use Wisconsin-approved forms and addenda provided by the Wisconsin Broker. If the Wisconsin Broker prefers that the Cooperating Broker use only Wisconsin forms, it may be prudent to furnish the Cooperating Broker with a selection of Wisconsin forms that may be appropriate to the transaction or provide the link to the department website where the approved forms can be found: dps.wi.gov/Licenses-Permits/RealEstateBroker/REBRforms.



REALTOR® Practice Tip

If the Wisconsin Broker requires that only Wisconsin forms be used, it may be wise for the Wisconsin Broker to write that in the additional limitations/qualifications area on lines 41-43 or Additional Provisions on lines 82-94 so there is no mistake: the use of Wisconsin forms is a requirement and not merely an option for the Cooperating Broker.

Record retention

In the Documentation section of the WB-28 on lines 64-69, the Cooperating Broker is required to maintain the originals or copies of all documents that the Cooperating Broker receives, maintains or generates in connection with any transaction for at least three years after the date of closing or completion of the transaction, or, if no closing or completion occurs, three years after the date on which the parties executed the WB-28. In many respects, this resembles the requirements of the Wisconsin record retention rules. Wis. Admin. Code § REEB 15.04, “Retention of Records,” states that a broker shall retain, for at least three years, exact and complete copies of all listing contracts, offers to purchase, leases, closing statements, deposit receipts, cancelled checks, trust account records and other documents or correspondence, including inspection reports, received or prepared by the broker in connection with any transaction. The retention period runs from the transaction closing date or, if the transaction has not closed, from the date of the listing. It is prudent to require the OSL to retain copies of transaction documents for the protection of the parties and the OSL as well, in case there may be a question or dispute later on.

In addition, the Cooperating Broker is required to provide the Wisconsin Broker with copies of all documents the Cooperating Broker is required to maintain unless the brokers agree in writing that the Cooperating Broker is not required to do so. Line 41 may be checked if the Wisconsin Broker is willing to forgo this requirement that the Cooperating Broker forward copies of all documents to the Wisconsin Broker.

Compensation, lines 44-46

This section simply provides blank lines whereby the broker can fill in what the cooperative compensation for the Cooperating Broker will be. Obviously filling in a percentage commission or a dollar amount is something the Cooperating Broker will be most interested in. The blank lines provide plenty of space to write in, for example, “x% of the purchase price,” or “x% of the gross rental over the first zz months of the lease,” whatever the case may be.

The blank lines in this section can also be used to state the standard of performance, in other words, what the Cooperating Broker must do to earn the offered compensation. After all, these are two brokers from different states who may be accustomed to different benchmarks that create entitlement to commission. If procuring cause will be the standard of performance, then that must be specifically stated in WB-28. Outside of the MLS, however, brokers may agree to whatever performance standard they believe is appropriate. They may decide that writing an offer that closes earns the commission, or that showing the property to a buyer who purchases the property triggers the commission. Therefore, the Wisconsin Broker and the Cooperating Broker will be wise to determine the amount of commission that the listing broker will pay,

what the cooperating broker must do to earn the commission, when it will be paid and any other terms and conditions of the compensation agreement. The January 2002 *Legal Update*, “Getting Paid Outside the MLS,” may be reviewed at www.wra.org/LU0201 for more information about commissions in non-MLS transactions.

Note regarding compensation, lines 47-50

The Note in bold type on lines 47-50 drives home one strong enforcement weapon under Wis. Stat. § 452.137: “No person may pay Cooperating Broker a commission, money, or other thing of value for brokerage services except pursuant to this Agreement.”



REALTOR® Practice Tip

No commission is to be paid by anyone to an OSL in a transaction unless that broker is a party to a WB-28 with regard to the property listed by the Wisconsin Broker that is the subject of the transaction.

In turn, the Note continues by emphasizing one of the key qualifications for an OSL that is going to be paid under a Wisconsin Cooperative Agreement: the “Cooperating Broker must be licensed or regularly and lawfully engaged in the real estate brokerage business in another state, a territory or possession of the United States or a foreign country.”

Trust account, lines 51-53

Lines 51-53 of the WB-28 echo the directive in § 452.137 that all client funds received by Cooperating Broker or the Wisconsin Broker in a transaction subject to the Cooperative Agreement must be deposited in the Wisconsin Broker’s trust account. “Client funds” means all downpayments, earnest money deposits or other money related to a conveyance of real estate that is received by a broker, salesperson or any other person. “Client funds” does not include promissory notes. For the Wisconsin brokers, this should seem like the normal course of action since they are the listing brokers in these cooperative transactions.

Legal compliance, lines 54-61

The Legal Compliance section confirms that the Cooperating Broker and any Authorized Agents who are party to the WB-28 are bound by Wisconsin law and agree to abide by Wisconsin law, including all rules and regulations of the REEB. Thus, a Cooperating Broker in a transaction with regard to a Wisconsin property is subject to Wisconsin law.

In addition, the Cooperating Broker signing the WB-28 is irrevocably consenting that lawsuits or legal actions may be commenced against Cooperating Broker. These lawsuits may originate in any county where either the plaintiff resides, where the property is located, or where the cause of action arises. This consent says that any such lawsuits can be served against the Cooperating Broker by serving the pleadings on the

REEB (or any duly authorized employee thereof). In other words, the REEB stands in place of the Cooperating Broker in regard to receiving legal papers. Such service is deemed to be valid and binding as if due service had been made on Cooperating Broker in the Cooperating Broker’s home state. This is favorable in that should anyone need to take legal action against the Cooperating Broker, they need not go through time and expense and frustration of locating and serving the Cooperating Broker in another state. The REEB undertakes the responsibility to get the pleadings to the Cooperating Broker.

This is similar to the Irrevocable Consent signed by nonresident applicants for real estate licenses. See Form # 813 at dsps.wi.gov/Licenses-Permits/RealEstateBroker/REBRforms.

Agency disclosure, lines 62-63

This section indicates that the Wisconsin Broker may have, and that the Cooperating Broker will have a responsibility to provide a Wisconsin written agency disclosure to buyers. This may be significant because the duties of brokers to parties, and the rights of the parties, may differ dramatically. For instance, the duty of confidentiality is uncommon and not found in other states.

Broker disclosure to clients

With respect to the Wisconsin Broker, the Broker Disclosure to Clients will most likely be contained in the Wisconsin Broker’s listing contract or agency agreement regarding the listed Wisconsin property. The Wisconsin Broker would have no need to give a Broker Disclosure to Clients to the other party — such as a buyer or lessee — because a listing broker in a cooperative transaction would not have a client relationship with that other party.

With respect to the Cooperating Broker, the Wisconsin Broker Disclosure to Clients would need to be given to the Cooperating Broker’s party if that party is a client of the Cooperating Broker. The Wisconsin Broker may consider

giving the Cooperating Broker a form to use for this purpose as the OSL may not be familiar with this requirement of Wisconsin law. One way to accomplish this would be to direct the Cooperating Broker to the department form # 2877 available online at dsps.wi.gov/Licenses-Permits/RealEstateBroker/REBRforms. A broker could also choose to provide the WRA version of the Broker Disclosure to Clients as well.

Broker disclosure to customers

With respect to the Wisconsin Broker, that broker might find itself in the somewhat unusual position of providing a Broker Disclosure to Customers to the party working with the Cooperating Broker, depending on the level of participation authorized for the Cooperating Broker. If the Cooperating Broker is limited such that they cannot show the property or draft proposals, in some cases those tasks might fall to the Wisconsin Broker. In any situation where the Wisconsin Broker might be called upon

“The Wisconsin Broker and the Cooperating Broker will be wise to determine the amount of commission that the listing broker will pay, what the cooperating broker must do to earn the commission, when it will be paid and any other terms and conditions of the compensation agreement.”



to negotiate on behalf of the Cooperating Broker's party, the Wisconsin Broker should first give a Broker Disclosure to Customers to that party.

With respect to the Cooperating Broker, the Wisconsin Broker Disclosure to Customers would need to be given to the Cooperating Broker's party if that party is the customer of the Cooperating Broker. The Wisconsin Broker may consider giving the Cooperating Broker a form to use for this purpose. One way to accomplish this would be to direct the Cooperating Broker to the department form # 2876 available online at dps.wi.gov/Licenses-Permits/RealEstateBroker/REBRforms. A broker could also choose to provide the WRA version of the Broker Disclosure to Customers to the OSL to help ensure the party receives the proper required disclosure.

The Broker Disclosure to Customers must be given before negotiation begins. Brokers must remember that Wis. Stat. § 452.02(5m) defines "negotiate" to mean to "provide to a party assistance within the scope of the knowledge, skills, and training required under this chapter in developing a proposal or agreement relating to a transaction, including doing any of the following:

(a) Acting as an intermediary by facilitating or participating in communications between parties related to the parties' interests in a transaction. In this paragraph, providing advice or opinions on matters that are material to a transaction in which a person is engaged or intends to engage or showing a party real estate does not, in and of itself, constitute acting as an intermediary by facilitating or participating in communications between parties.

(b) Completing, when requested by a party, appropriate department-approved forms or other writings to document the party's proposal consistent with the party's intent.

(c) Presenting to a party the proposals of other parties to the transaction and giving the party a general explanation of the provisions of the proposal."

Also, the Broker Disclosure to Customers is not only for sales transactions. The Wisconsin Broker would provide a Broker Disclosure to Customers to the Cooperating Broker's prospective tenants if the Cooperating Broker's authorized participation did not include negotiation of lease terms and the Wisconsin Broker was negotiating lease terms on behalf of the owner or lessor.

① MORE INFORMATION

For discussion of agency disclosure requirements see pages 12-15 of the June 2012 *Legal Update*, "REEB 24 Regulatory Revisions," at www.wra.org/LU1206, "To Disclose or to Not Disclose, Is that the Question?" in the July 2012 *Wisconsin Real Estate Magazine* at www.wra.org/WREM/Jul12/Disclosure and the June 2006 *Legal Update*, "Revised Agency Law Implementation," at www.wra.org/LU0606.

Documentation, lines 64-49

In the Documentation section of the WB-28 on lines 64-69, the Cooperating Broker is required to maintain the originals or copies of all documents that the Cooperating Broker receives, maintains or generates in connection with any transaction for at least three years after the date of closing or completion of the transaction, or, if no closing or completion occurs, three years after the date on which the parties executed the WB-28, similar to the Wis. Admin. Code § REEB 15.04 record retention requirements, as discussed above.

In addition, the Cooperating Broker is required to provide the Wisconsin Broker with copies of all documents the Cooperating Broker is required to maintain unless the brokers to this agreement agree in writing that the Cooperating Broker is not required to do so. Line 41 may be checked if the Wisconsin Broker is willing to forgo this requirement that the Cooperating Broker forward copies of all documents to the Wisconsin Broker.

Cooperating broker prohibitions, lines 70-74

This section reminds the brokers of two things an OSL can never do, regardless of whether the OSL is a party to a WB-28 Cooperative Agreement or not. One is that an OSL cannot list Wisconsin property. The other is that that an OSL cannot, for commission, money or other thing of value, promote or advertise in Wisconsin the sale, exchange, purchase, option, rental or leasing of real estate or a business located in Wisconsin. This means that Wisconsin licensees should never see any For Sale signs posted by any broker who is not licensed in Wisconsin on any Wisconsin real estate or business.

In addition, a Cooperating Broker and any Authorized Agents may not act under the Cooperative Agreement on behalf of a broker who is not a party to the agreement.

Errors and omissions insurance, lines 75-78

This section requires that the Cooperating Broker confirm that he has adequate E&O insurance that will be maintained in force throughout the duration of any transaction occurring under the auspices of the WB-28. If the parties wish to state what policy limits would be considered adequate, they may do so in an addendum attached per line 81 or in Additional Provisions on lines 82-94.

The Errors and Omissions Insurance section also provides a choice regarding whether the Cooperating Broker will provide the Wisconsin Broker with a certificate of insurance demonstrating such adequate coverage, with the default indicating that the Cooperating Broker will have the obligation to furnish this proof of coverage.

Term, lines 79-80

The Term provision confirms that the cooperative relationship established in the WB-28 extends only for the time period that the Wisconsin Broker's listing remains in force and does not extend indefinitely or pertain to other listings or properties. It confirms, in another way of speaking, the line 12 note reminding the broker that each cooperative agreement may cover only one listing.

Addenda, line 81

As is the case with the offers to purchase and other approved forms used by Wisconsin licensees, there is a check box item that may be used to signify that the addenda listed in the blank line are made part of the Cooperative Agreement.

Entire agreement, lines 95-96

Lines 95-96 confirm that the WB-28 and any addenda incorporated therein by reference comprise the entire agreement between the brokers. The brokers are also reminded that the WB-28 cannot have any terms or provisions that violate Wis. Stat. § 452.137.

Evidence of licensure in good standing, Lines 97-100

The lines directly above the signature lines confirm the emphasis upon obtaining proof that the Cooperating Broker is duly licensed and in good standing in their state of licensure. The signature of the Cooperating Broker attests that the Cooperating Broker and any Authorized Agents are licensed in good standing or are otherwise authorized to act as a broker or salesperson in their home jurisdiction. In addition, as a prerequisite or precondition to the validity of the WB-28, this section states that the Cooperating Broker must have provided the Wisconsin Broker with evidence of this licensure in good standing.



REALTOR® Practice Tip

There is no doubt that the WB-28 places great emphasis on the Cooperating Broker attesting to and providing evidence of licensure in good standing as a precondition to participation in the cooperative transaction.

RESOURCES

Wis. Stat. § 452.137 at docs.legis.wisconsin.gov/statutes/statutes/452/137.

“Mother, May I? Come over as an out-of-state licensee and provide brokerage services?” in the January 2015 *Wisconsin Real Estate Magazine* at www.wra.org/WREM/Jan15/OSL.

4-part LegalTalks video series including an Overview, Penalties, What OSLs can never do and the OSL Cooperative Agreement at www.wra.org/LegalTalks/OSL.

March 2014 *Legal Update*, “Legislative Update 2014,” at www.wra.org/LU1403.

“Red Rover, Red Rover! Let Out-of-State Brokers Come Cover – Regulating out-of-state brokers and keeping Wisconsin brokers at the helm of the transaction” in the October 2013 *Wisconsin Real Estate Magazine* at www.wra.org/WREM/Oct13/OSL.

“A Message from the President with Mike Theo” in the June 2013 *Wisconsin Real Estate Magazine* at www.wra.org/WREM/Jun13/PresidentMessage.

Watch the Legal Update Video Online:



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WB-28 COOPERATIVE AGREEMENT

For cooperation with out-of-state brokers involved in purchase/lease of Wisconsin property listings

1 This agreement is made this _____ day of _____, 20_____,
2 between _____
3 _____, a Wisconsin licensed real estate broker (Wisconsin Broker)
4 and _____,
5 a licensed real estate broker from the state of _____ (Cooperating Broker),
6 pursuant to Wis. Stat. § 452.137, regarding cooperation with respect to the following property listed by the Wisconsin
7 Broker: _____
8 _____ [Street Address] in the
9 _____ of _____,
10 County of _____, Wisconsin (insert additional description, if any, in additional
11 provisions at lines 82-94 or attach an addendum per line 81) (Property).

12 **NOTE: Each cooperative agreement may cover only one listing contract of the Wisconsin Broker.**

BROKER IDENTIFICATION

14 Name of Wisconsin Brokerage Company or Sole Proprietor: _____
15 Business Entity or Sole Proprietor License Number: _____
16 Name of Cooperating Brokerage Company or Sole Proprietor: _____
17 Address of Cooperating Brokerage Company: _____
18 Business Entity or Sole Proprietor License Number: _____
19 Federal Tax ID Number of Cooperating Brokerage Company: _____
20 Name of Individual Supervising Broker: _____ License Number: _____
21 Name(s) of Authorized Salesperson Agent(s), if any, of Cooperating Broker (Authorized Agent(s)):
22 Name: _____ License Number: _____
23 Name: _____ License Number: _____

24 ■ **Authorized Agents.** Authorized Agents may act as a salesperson in this state only if Cooperating Broker with whom
25 they are affiliated satisfies all requirements of this Agreement and Wis. Stat. § 452.137(2), and Authorized Agents work
26 under the direct supervision of Cooperating Broker and represent only Cooperating Broker in the transaction.

27 ■ **Evidence of Good Standing.** Cooperating Broker and any Authorized Agents have provided Wisconsin Broker with
28 evidence, including but not limited to copies of valid license(s) in good standing, and are regularly and lawfully engaged
29 in real estate practice in their state of licensure (evidence might include a link to current online records, contact
30 information for the state licensing agency, etc.).

TERMS OF COOPERATION

32 Cooperating Broker, and any Authorized Agents permitted by this Agreement to participate in the transaction, may:

- 33 Conduct showings (only when Wisconsin Broker is present)
- 34 Conduct showings (without Wisconsin Broker being present)
- 35 Conduct showings (with advance consent of Wisconsin Broker)
- 36 Negotiate only through Wisconsin Broker
- 37 Participate in this transaction only after a seller provided confidentiality agreement is signed
- 38 Write offers, leases and other proposals
- 39 Use Wisconsin-approved forms and addenda provided by Wisconsin Broker
- 40 Forgo copies of documents (see lines 64-69)
- 41 Additional limitations/qualifications: _____

44 **COMPENSATION** Compensation to Cooperating Broker shall be _____
45 _____
46 _____

47 **NOTE: No person may pay Cooperating Broker a commission, money, or other thing of value for brokerage**
48 **services except pursuant to this Agreement. For a Wisconsin Broker to legally compensate Cooperating Broker**
49 **under this Agreement, Cooperating Broker must be licensed or regularly and lawfully engaged in the real estate**
50 **brokerage business in another state, a territory or possession of the United States or a foreign country.**

51 **TRUST ACCOUNT** All client funds, as defined in Wis. Stat. § 452.13(1)(a), received by Cooperating Broker or
52 Wisconsin Broker in connection with a transaction subject to this Agreement shall be deposited in a trust account
53 maintained by Wisconsin Broker.

54 **LEGAL COMPLIANCE** By signing this Agreement, Cooperating Broker and any Authorized Agents agree to abide by,
55 and be subject to, Wisconsin law and the rules and regulations of the Wisconsin Real Estate Examining Board (REEB).
56 In addition, Cooperating Broker, by signing this Agreement, does hereby consent irrevocably that lawsuits and actions
57 may be commenced against Cooperating Broker in the proper court of any county in the State of Wisconsin in which a
58 cause of action may arise or in which the plaintiff resides, by the service of any process or pleading authorized by the
59 laws of the State of Wisconsin on the REEB or any duly authorized employee thereof, and does hereby stipulate and
60 agree that such service of such process or pleading shall be taken and held in all courts to be valid and binding as if
61 due service had been made upon Cooperating Broker in the State of Wisconsin.

62 **AGENCY DISCLOSURE** Wisconsin Broker may have, and Cooperating Broker does have, a responsibility to provide
63 a written agency disclosure to all buyers, under Wis. Stat. Ch. 452.

64 **DOCUMENTATION** Cooperating Broker shall maintain the originals or copies of all documents Cooperating Broker
65 receives, maintains, or generates in connection with any transaction regarding the Property for at least 3 years after the
66 date of closing or completion of the transaction, or, if no closing or completion occurs, 3 years after the date on which
67 the parties executed this Agreement. Cooperative Broker shall deposit with Wisconsin Broker copies of all documents
68 Cooperating Broker is required to maintain unless the Brokers to this Agreement agree in writing that Cooperating
69 Broker is not required to do so.

70 **COOPERATING BROKER PROHIBITIONS** Cooperating Broker may not under any circumstances enter into a listing
71 contract concerning Wisconsin real estate or businesses, or for commission, money, or other thing of value, promote or
72 advertise in this state the sale, exchange, purchase, option, rental, or leasing of real estate or a business located in this
73 state, including by posting signs on the property. Cooperating Broker and any Authorized Agents may not act under this
74 Cooperative Agreement on behalf of a broker who is not a party to this Agreement.

75 **ERRORS AND OMISSIONS INSURANCE** Cooperating Broker represents that adequate Errors and Omissions
76 insurance coverage will be maintained throughout any transactions relative to the Property. Cooperating Broker (shall)
77 (shall not) **STRIKE ONE** ("shall" if neither is stricken) provide Wisconsin Broker a certificate of insurance demonstrating
78 this coverage.

79 **TERM** This Agreement continues as long as Wisconsin Broker's listing for the Property is in force, unless otherwise
80 agreed in writing.

81 **ADDENDA:** The attached _____ is/are made part of this Agreement.

82 **ADDITIONAL PROVISIONS** _____
83 _____
84 _____
85 _____
86 _____
87 _____
88 _____
89 _____
90 _____
91 _____
92 _____
93 _____
94 _____

95 The terms of this Agreement, including any addenda and additional provisions, contains the entire Agreement between
96 the brokers and shall not include terms that violate Wis. Stat. § 452.137.

97 **By signing this Agreement Cooperating Broker agrees to and attests that Cooperating Broker and Authorized**
98 **Agent(s) is/are licensed in good standing or are otherwise authorized to act as a broker or salesperson in a**
99 **jurisdiction other than this state. This Agreement is only valid if Cooperating Broker has provided Wisconsin**
100 **Broker with evidence of licensure(s) in good standing.**

101 Wisconsin Brokerage Company Name (if any): _____

102 (x) _____
103 Wisconsin Broker's Signature ▲ Print Name ► Date ▲

104 Cooperating Broker Company Name (if any): _____

105 (x) _____
106 Cooperating Broker's Signature ▲ Print Name ► Date ▲



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