

CR 92-206

CERTIFICATE

STATE OF WISCONSIN


DEPARTMENT OF REGULATION AND LICENSING

TO ALL TO WHOM THESE PRESENTS SHALL COME, GREETINGS:

I, Marlene A. Cummings, Secretary of the Wisconsin Department of Regulation and Licensing and custodian of the official records of the Department, do hereby certify that the annexed rules were duly approved and adopted by the Department of Regulation and Licensing on the 2nd day of June, 1993.

I further certify that said copy has been compared by me with the original on file in this office and that the same is a true copy thereof, and of the whole of such original.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the official seal of the Department at 1400 East Washington Avenue, Madison, Wisconsin this 2nd day of June, 1993.



Marlene A. Cummings
Secretary
Department of Regulation
and Licensing

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8-1-93

STATE OF WISCONSIN
DEPARTMENT OF REGULATION AND LICENSING

IN THE MATTER OF RULE-MAKING	:	ORDER OF THE
PROCEEDINGS BEFORE THE	:	DEPARTMENT OF REGULATION AND LICENSING
DEPARTMENT OF REGULATION	:	ADOPTING RULES
AND LICENSING	:	(CLEARINGHOUSE RULE 92-206)

PROPOSED ORDER

An order of the Department of Regulation and Licensing to repeal RL 16.04 (2m), (3) and (3m); to renumber RL 24.07 (2), (3) and (4); to renumber and amend RL 16.04 (4); to amend RL 16.04 (1) and (2), 16.06 (4), 24.03 (1), 24.08, 24.12 and 24.13 (3) (b); to repeal and recreate RL 18.09, 24.02 (1), 24.05, 24.07 (1) and 24.13 (2); and to create RL 24.03 (2) (d) and 24.07 (2), (3) and (4) of the administrative code relating to disbursement of trust funds, self-dealing, inspection and disclosure duties, confidentiality of offers to purchase, definition of adverse facts and approved forms.

Analysis prepared by the Department of Regulation and Licensing.

ANALYSIS

Statutes authorizing promulgation: ss. 227.11 (2), 452.04 (2) 452.07, Stats.

Statutes interpreted: ss. 452.05 (1) (b), 452.13, 452.14 (3) and 452.23, Stats.

Sections 1 to 3 revisit the issue of the type of forms which licensees may use for those types of transactions for which the Department of Regulation and Licensing has not prepared contractual forms or formally approved contractual forms prepared by others. These sections go one step farther than earlier amendments by proposing one single policy statement which applies regardless of whether the licensee is acting as an agent for another or acting as a party to the transaction: the licensee may use contractual forms drafted by a party to the transaction or an attorney. The revision of RL 16.04 also replaces "principal" with "party" and states that a broker who enters into a listing contract with a seller is a party to the listing contract transaction.

Section 4 amends existing provisions pertaining to when licensees may use pre-prepared addenda or otherwise set forth on attached pages provisions relating to the blanks on an approved form. The amendment is necessary because new forms for offer to purchase, offer to exchange and option to purchase property being prepared by the department will contain provisions relating to secondary offers and provisions for a financing contingency, a sale of buyer's property contingency, and an inspection contingency. Such provisions in these forms appear to fall under s. RL 16.04 (5). However, to avoid that conclusion, the new forms will refer to these provisions as "optional," so that the new forms and the amended s. RL 16.06 (4) will inform licensees that, even though these provisions are in the forms, licensees may prepare and use pre-prepared addenda containing such provisions.

Section 5 repeals and recreates a section in the current rules which pertains to disbursement of trust funds. The primary thrust of these requirements remains the same. The sections were reordered and several clarifications were provided.

Section 6 revises the definition of "adverse facts" as pertaining to disclosure requirements imposed on real estate licensees. The definition parallels the definition of "defect" in 1991 Wisconsin Act 162 and avoids creation of a shopping list of specific defects.

Section 7 amends a provision which pertains to illegal discrimination by real estate licensees and brings the language into conformity with the new fair housing laws.

Section 8 simply states a concept which has been emerging during the past few years; that is, that real estate licensees are not expected to have technical knowledge, skill and training possessed by third party inspectors and investigators of real estate.

Section 9 repeals and recreates a section on self-dealing. Some of the subsections were reordered. Others were rephrased for clarity. Several provisions more clearly distinguish between when a licensee is acting as an agent or as a principal in a transaction. Several sections now state that the disclosure must be in writing.

Sections 10 to 12 significantly revise the provisions pertaining to the licensee's duties to inspect properties and to disclose adverse facts material to the transaction. These sections refer to provisions in 1991 Wisconsin Act 162 and they further emphasize what is stated in Section 8.

Section 13 is a technical change which does not remove the licensee's responsibility to put all agreements in writing.

Section 14 responds to many inquiries about the confidentiality of offers to purchase and provides that, while the licensee may not disclose the terms of any offer, the licensee may, nevertheless, disclose to a prospective buyer whether other offers relating to a specific property have been received, whether the seller has accepted another offer, whether another offer has contingencies and other related information. The proposed rule emphasizes that a licensee is not required to provide such information.

Section 15 imposes a new requirement on listing brokers. It requires them to permit all prospective buyers or brokers assisting them to look at a property, except when a seller provides written instructions to the listing broker which prohibit the listing broker from providing such access to the property.

Section 16 prohibits a listing broker or a listing broker's employe from submitting an offer to purchase on a property which the broker has listed, if the broker or broker's employe has knowledge of any pending offer, except that the broker may arrange for a guaranteed sale at the time of listing.

TEXT OF RULE

SECTION 1. RL 16.04 (1) and (2) are amended to read:

RL 16.04 (1) Except as provided in subs. (2) ~~and (3)~~, a licensee shall use approved forms when acting as an agent or a principal party in a real estate or business opportunity transaction.

(2) ~~Except as provided in sub. (2m), for~~ For those kinds of real estate or business opportunity transactions for which the department has not approved contractual forms a licensee ~~may~~, when acting as an agent or a party, may use contractual forms drafted by a ~~client~~ party or an attorney, ~~but only for that client's transactions~~, if the name of the drafter is imprinted on the form before use by a licensee. For the purpose of this subsection, a listing broker is a party to the listing contract transaction.

SECTION 2. RL 16.04 (2m), (3) and (3m) are repealed.

SECTION 3. RL 16.04 (4) is renumbered RL 16.04 (3) and amended to read:

RL 16.04 (3) A licensee may in any ~~real-estate~~ transaction where the licensee is acting as an agent, negotiate an agreement and permit the parties or an attorney for one or other of the parties to draft or prepare a contractual agreement which embodies all of the negotiated terms and conditions.

SECTION 4. RL 16.06 (4) is amended to read:

RL 16.06 (4) A licensee may use a pre-prepared addendum or otherwise set forth on attached pages provisions relating to the blanks on an approved form, or which alters or supplants optional secondary offer provisions or optional contingencies for financing, sale of buyer's property or inspection which are set forth in an offer, offer to exchange or option prepared and approved by the department, if the licensee properly incorporates the attachment by reference into the approved form and relates the approved form and the attached pages to one another. For purposes of this subsection a pre-prepared addendum may be prepared by the broker or the broker's attorney.

SECTION 5. RL 18.09 is repealed and recreated to read:

RL 18.09 DISBURSEMENT OF TRUST FUNDS. (1) PROPER DISBURSEMENT. A broker who disburses trust funds from his or her real estate trust account under the following circumstances shall not be deemed to have violated s. 452.14 (3) (i), Stats.:

(a) To the payor upon the rejection, expiration or withdrawal prior to binding acceptance of an offer to purchase, lease, exchange agreement or option on real estate or a business opportunity;

(b) As directed in a written earnest money disbursement agreement signed by all parties having an interest in the trust funds. A closing statement is a written earnest money disbursement agreement for the purposes of this subsection. An offer to purchase, lease, exchange agreement or option is not a written earnest money disbursement agreement for the purpose of this subsection.

(c) To a court having jurisdiction over a civil action involving all parties having an interest in the trust funds;

(d) As directed by order of a court;

(e) Upon a good faith decision based upon advice of an attorney not representing any party to the contract;

- (f) Upon authorization granted within the contract; or
- (g) As otherwise provided by law.

(2) NOTIFICATION OF DISBURSEMENT. Prior to making a disbursement of trust funds under sub. (1) (a) where the broker has knowledge that not all parties agree that the rejection or withdrawal occurred prior to binding acceptance, and prior to making a disbursement under subs. (1) (e), (f) and (g) where the broker has knowledge that either party disagrees with the disbursement, the broker shall attempt to notify all parties in writing of the intent to disburse. The notice shall be delivered by certified mail to the parties' last known addresses and shall state to whom and when the disbursement will be made. The disbursement may not occur until 30 days after the date on which the notice is sent.

(3) WITHDRAWAL OF COMMISSIONS. A broker shall withdraw commissions or fees earned by the broker from real estate trust accounts maintained by the broker within 24 hours after transactions are consummated or terminated, or after the commissions or fees are earned in accordance with the contract involved.

SECTION 6. RL 24.02 (1) is repealed and recreated to read:

RL 24.02 DEFINITIONS. (1) "Adverse facts" are conditions or occurrences generally recognized by competent licensees as significantly reducing the value of real estate, the structural integrity of improvements to real property, or presenting a significant health risk to occupants of the property.

SECTION 7. RL 24.03 (1) is amended to read:

RL 24.03 (1) Licensees may not discriminate against, nor deny equal services to, nor be a party to any plan or agreement to discriminate against any person ~~because of sex, race, color, handicap, as defined in s. 51.01(5), Stats., religion, national origin, sex or marital status of the person maintaining a household, lawful source of income, sexual orientation as defined in s. 111.32(13m), Stats., age or ancestry~~ in any manner unlawful under applicable federal, state or local fair housing law.

Note: The primary references for federal and state fair housing laws are the 1988 amendments to the Federal Fair Housing Act (Title VII of the Civil Rights Act of 1968) and 1991 Wisconsin Act 295.

SECTION 8. RL 24.03 (2) (d) is created to read:

RL 24.03 (2) (d) Licensees are not required to have the technical knowledge, skills or training possessed by competent third party inspectors and investigators of real estate and related areas.

SECTION 9. RL 24.05 is repealed and recreated to read:

RL 24.05 SELF-DEALING. (1) DUAL COMPENSATION. A licensee acting as an agent in a real estate or business opportunity transaction shall not accept any fee or other valuable consideration related to the transaction from any person, other than the licensee's principal, without prior written consent from all parties to the transaction.

(2) DISCLOSURE OF INTEREST. A licensee acting as an agent in a real estate or business opportunity transaction shall not also act on behalf of his or her self, his or her immediate family, or on behalf of any other individual, organization or business entity in which the licensee has an interest without the prior written consent of all parties to the transaction.

(3) REFERRAL OF SERVICES. A licensee acting as an agent in a real estate or business opportunity transaction shall not recommend or suggest the use of services of another individual, organization or business entity in which the licensee has an interest or from whom the licensee may receive a referral fee or other compensation for the referral, other than referrals to other licensees for real estate services under s. 452.19, Stats., without disclosing at the time of the recommendation or suggestion, his or her interest or the fact that a referral fee may be received.

(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.

(5) DISCLOSURE OF LICENSURE. A licensee acting as a principal in a real estate or business opportunity transaction shall disclose his or her license status prior to entering into a binding purchase agreement, option, exchange agreement, lease or other contract creating an interest in the real estate or business opportunity.

SECTION 10. RL 24.07 (1) is repealed and recreated to read:

RL 24.07 INSPECTION AND DISCLOSURE DUTIES. (1) INSPECTION OF PROPERTY. A licensee acting as an agent in a real estate or business opportunity transaction shall conduct a reasonably competent and diligent inspection of accessible areas of the structure and immediately surrounding areas of the property to detect observable, adverse facts, material to the transaction as follows:

(a) Listing broker. When listing a property and prior to execution of the listing contract, a licensee shall conduct a reasonably competent and diligent inspection of accessible areas of the property to detect observable, adverse facts material to the transaction, and shall make inquiries of the seller on the condition of the structure, mechanical systems and other relevant aspects of the property. The licensee shall request that the seller provide a written response to the licensee's inquiry.

(b) Other licensees. When negotiating the sale of a property, and before or during the showing of the property, licensees shall, if given access, conduct a reasonably competent and diligent inspection of accessible areas of the property to detect observable, adverse facts material to the transaction.

(c) Inconsistencies. If a licensee's reasonably competent and diligent inspection reveals facts materially inconsistent with, or materially contradictory to, the seller's statements or the inspection report of a third party, the inconsistency shall be disclosed in writing and in a timely manner to all interested parties.

(d) Specific conduct regarding inspections. A reasonably competent and diligent inspection does not require the operation of mechanical equipment; the opening of panels, doors or covers for access to mechanical systems; or the moving of furniture, boxes or other property; nor does it require a licensee to observe areas of the property for which entry presents an unreasonable risk of injury or areas accessible only by ladder, by crawling or other equivalent means of access. A licensee is not required to retain third party inspectors or investigators to complete a reasonably competent and diligent inspection.

SECTION 11. RL 24.07 (2), (3) and (4) are renumbered RL 24.07 (5), (6) and (7).

SECTION 12. RL 24.07 (2), (3) and (4) are created to read:

RL 24.07 (2) DISCLOSURE OF ADVERSE MATERIAL FACTS. A licensee shall not exaggerate or misrepresent facts in the practice of real estate. A licensee acting as an agent in a real estate or business opportunity transaction shall disclose any adverse facts material to the transaction, which the licensee becomes aware of through the licensee's inspection or through any other means, in writing and in a timely manner, to the buyer, seller or other interested parties. This provision is not limited to the condition of the property, but includes other adverse facts material to the transaction, including but not limited to defects and conditions included within the report form under s. 709.03, Stats.

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

(4) STANDARD OF CARE. In performing an inspection and in making a disclosure in connection with a real estate transaction, a licensee shall exercise the degree of care expected to be exercised by a reasonably prudent person who has the knowledge, skills and training required for licensure as a broker or salesperson under ch. 452, Stats.

SECTION 13. RL 24.08 is amended to read:

RL 24.08 AGREEMENTS TO BE IN WRITING. ~~Licensees~~ A licensee shall put in writing all listing contracts, guaranteed sales agreements, buyer agency agreements, offers to purchase, property management agreements, option contracts, financial obligations and any other commitments regarding transactions, expressing the exact agreement of the parties unless the writing is completed by the parties or their attorneys or the writing is outside the scope of the licensee's authority under ch. RL 16.

SECTION 14. RL 24.12 is amended to read:

RL 24.12 CONFIDENTIALITY OF OFFERS. ~~Licensees~~ A licensee acting as a principal or an agent in a real estate or business opportunity transaction shall not disclose any of the terms of one prospective buyer's offer to purchase, exchange agreement or option contract proposal to any other prospective buyer or to any person with the intent that this information be disclosed to any other prospective buyer. Licensees shall encourage all ~~prospective~~ prospective buyers to submit their highest-~~and~~ best offers. A licensee may, but is not required to, disclose information known by the licensee regarding the existence of other offers on the property, the fact that a seller has accepted an offer, that the offer is subject to contingencies and that the offer is subject to a clause requiring removal of certain contingencies upon the occurrence of an event such as receipt, acceptance or conditional acceptance of another offer.

SECTION 15. RL 24.13 (2) is repealed and recreated to read:

RL 24.13 (2) (title) WITHHOLDING OFFERS PROHIBITED. (a) Listing brokers shall permit access to listed property for showing purposes, 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.

(b) Licensees shall present promptly all offers received to the seller or seller's agent for consideration. Licensees shall not withhold any offer from presentation pending the seller's action on an offer previously presented.

SECTION 16. RL 24.13 (3) (b) is amended to read:

RL 24.13 (3) (b) A listing broker or the listing broker's employe may not submit his or her own offer to purchase a property which the broker has listed ~~until all pending offers have been rejected by the seller, if the broker or broker's employe has knowledge of any pending offer,~~ except that a broker may arrange for a guaranteed sale at the time of listing.

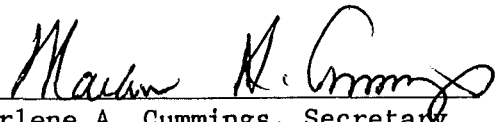
(END OF TEXT OF RULE)

The rules adopted in this order shall take effect on the first day of the month following publication in the Wisconsin administrative register pursuant to s. 227.22 (2) (intro.), Stats.

Dated _____

6/2/93

Agency _____


Marlene A. Cummings, Secretary
Department of Regulation
and Licensing

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JUN 2 1993

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CORRESPONDENCE/MEMORANDUM

STATE OF WISCONSIN

DATE: June 2, 1993

TO: Gary Poulson
Assistant Revisor of Statutes

FROM: Pamela Haack, Administrative Assistant
Department of Regulation and Licensing

SUBJECT: Final Rulemaking Order

RECEIVED

JUN 2 1993

Revisor of Statutes
Bureau

Agency: DEPARTMENT OF REGULATION AND LICENSING

Clearinghouse Rule: 92-206

Attached is a copy and a certified copy of a final order adopting rules.
Would you please publish these rules in the code.

Please stamp or sign a copy of this letter to acknowledge receipt.

Thank you.