

## 2005 DRAFTING REQUEST

### Bill

Received: **12/23/2004**

Received By: **csundber**

Wanted: **As time permits**

Identical to LRB:

For: **Steve Wieckert (608) 266-3070**

By/Representing: **Scott Becher**

This file may be shown to any legislator: **NO**

Drafter: **csundber**

May Contact: **Rick Staff of WRA**

Addl. Drafters:

Subject: **Occupational Reg. - prof lic**

Extra Copies:

Submit via email: **YES**

Requester's email: **Rep.Wieckert@legis.state.wi.us**

Carbon copy (CC:) to:

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### Topic:

Real estate practice amendments

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### Instructions:

See Attached

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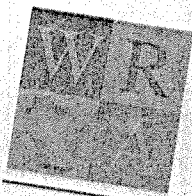
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3/13  
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**Richard J. Staff**  
Vice President and General Counsel  
rickstaff@wra.org

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WISCONSIN REALTORS' ASSOCIATION  
4801 Forest Run Road, Suite 201  
Madison, WI 53704-7337  
608-241-2047 ■ Legal Hotline: 800-799-4468 or 608-242-2296  
Fax: 608-242-2279 ■ Web site: <http://www.wra.org>

**TASK FORCE DISCUSSION DRAFT NOT FOR DISTRIBUTION  
NOT APPROVED BY TASK FORCE OR ADOPTED AS WRA POLICY  
1/15 draft**

**LICENSE LAW TASK FORCE REPORT**

**INTRODUCTION**

In 2002 WRA Chairman Robert Weber established the WRA's License Law Task Force and charged it with the task of reviewing Chapter 452 and making recommendations for revisions to ensure Wisconsin's real estate license law was consistent with current best business practices and current/future industry business models. The Task Force's Chairman Tad Gilster and the Task Force's members met many times and discussed issues ranging from agency relationships to emerging business practices. The WRA conducted extensive survey and focus group research to determine how the industry and consumers believed the license law and industry standards needed to be revised to meet the consumer's expectations and emerging business models. The WRA Board of Directors received the Task Force's Report in the summer of 2004 and directed the Task Force to continue work on refinement of the proposal as it relates to agency law issues. Under the leadership of 2004 WRA Chairman Kitty Jedwabny and 2004 Task Force Chair Kevin King the Task Force has drafted a proposal which is consistent with the current license law and industry practice paradigms but which offers revisions consistent with the charge of the original Task Force.

**LICENSE LAW TASK FORCE FINDINGS OF FACT**

Recognizing the significant evolution of Wisconsin's license law in the 1988 agency law revision bill, the Task Force began by analyzing the status of that "new" agency paradigm in light of current consumer expectations, minimum standards of competent practice, best practices, professionalism, etc. The discussion began with the recognition that the agency law revisions of the 1988 clarified many of the misunderstandings resulting from the misapplication of generic common law agency principles. The primary benefit of the rewrite was to create a statutory agency law structure that, for the first time, attempted to express agency law concepts in terms of real estate brokerage practice. While this effort was fairly radical in concept at the time it began an evolutionary process that is continued in the current License Law Task Force proposal.

**COMPLEXITY**

One of the first issues raised by the Task Force was the complexity of the current law. An examination of Chapter 452 shows that the law has developed over time through a series of bills which overlaid numerous revisions on the original license law in order to address various emerging issues. This process has resulted in a law that is overly complex, lacking consistency and subject to differing interpretations. There was an immediate recognition and agreement that the complexity of the current law is an impediment to a licensee's ability to understand and comply with the license law. Furthermore, consumers have even less ability than licensees to understand the complex relationships and

disclosures established under the law. The proposal of the Task Force seeks to minimize this complexity by simplifying both the language and the substance of Wisconsin's real estate license law. This proposal is unique in that it seeks to address best practices and new developments in the industry by simplifying the regulatory model rather than by adding additional layers of regulation.

### **GAPS IN THE CURRENT REGULATORY STRUCTURE**

The Task Force identified several significant gaps in the regulatory structure presented by the current Chapter 452. The first was the failure to recognize that brokerage services began prior to the negotiations of agreements. The DRL and the industry has historically recognized that brokerage services begins when a licensee provides information and advice within the scope of brokerage practices to assist parties to accomplish their goals in the transaction. Because current law defines brokerage as beginning with negotiations the task force recommendation incorporates the concept of pre-negotiation brokerage services (providing information and advice) into the definitions of "broker" and "negotiate."

The second major gap in the regulatory model was the failure to distinguish the duties owed to clients by brokers who enter into agency agreements with those clients and the duties owed those clients who accept offers of subagency. Cooperating brokers who are acting as subagents are the agents of the principal broker and should be subject to loyalty duties to the broker's client. Subagents should not be subject to other duties owed to the other broker's client because their relationship to the other broker does not subject them to the provisions of the agency agreement and both advice duties and the duty to disclose all material facts are not practical given the limited contact between a subagent and the other broker's client.

### **INITIAL NON-AGENCY RELATIONSHIPS WITH PARTIES**

In recognizing that brokerage services begin prior to negotiation the question of agency relationships with consumers in this period arose. The Task Force observed that there is an initial stage in the relationship in which it may be inappropriate to require that there be an agency relationship with the consumer. A buyer first meeting a salesperson and receiving information about the marketplace is not ready to determine if they are willing to enter into a long term buyer agency agreement until they get to know the agent a bit. Salespeople doing listing presentations provide market data and opinions of value before they (hopefully) get a listing contract. With this in mind the Task Force proposed that brokers may provide brokerage services to parties without an agency relationship prior to engaging in negotiations. This initial role of providing information and advice on real estate matters may include showings prior to negotiations but the salesperson would be required to establish an agency relationship before beginning negotiations. In this pre-agency stage the salesperson would owe all parties significant duties under the license law - the traditional duties owed to all parties as well as the duty to "not place the interests of the broker ahead of the interests of any party in the transaction or provide any party in the transaction advice or opinions that are contrary to the interests of any other party unless required by law." This latter provision would ensure that the salesperson stayed in the role of providing information and advice on real estate matters without

taking on any agency/advocacy role because no agency relationship exists with any party. ✓  
The most common example may be an out-of-town buyer who meets a salesperson at a property for a showing as an initial contact. Although the salesperson and the party could immediately elect seller or buyer agency, if they choose to simply have the salesperson provide brokerage services that day, the salesperson could provide a variety of information and advice regarding the property, the market, neighborhoods, etc. However, because the salesperson does not represent either the seller or the buyer the agent would not give either party *"opinions or advice that are contrary to the interests of another party unless required by law."* ✓ This provision protects the interests of sellers and listing brokers because they know that the salesperson conducting the showing will not give advice or opinions contrary to the interests of the seller. In summary, by recognizing that providing brokerage services to parties before the establishment of an agency relationship is necessary in some cases, or desirable in others, the Task Force recognized that salespeople in these non-agency roles must be neutral in their dealings between the parties. ✓ At such time as the salesperson is able to enter into an agency or subagency relationship, the salesperson's loyalty duties become clear and appropriate opinions and advice can be given.

### **BEST PRACTICES/EXPECTATIONS OF THE CONSUMER**

The Task Force discussed the issue of best practices and consumer expectations at great length. From those discussions the following conclusions/issues can be identified:

- The heart of the definition of "broker" and the primary brokerage service is the broker's negotiation services to a party. ✓ The emergence of brokers who, as part of their business model do not provide negotiation services, has led to the question of whether negotiation is an essential element of brokerage services. In other words, should negotiation services be mandatory for brokers providing services to clients and customers. The Task Force recommended that negotiations not be made mandatory but, to ensure consumer understanding of the significance of the waiver of this essential service, the term "negotiate" should be more fully defined. ✓ In addition, the Task Force recommended that consumers who wish to waive negotiation services should be able to do so only with an express written waiver and that the negotiation waiver by a client should extend to cooperating brokers working for the client. ✓
- Agency disclosure is still necessary and appropriate. Customers need to know that they are not being represented as clients. ✓ Customers and clients both need to understand the nature of their relationship with the broker as well as the difference between customer and client relationships. The Task Force recommends that these disclosures be made in a more meaningful way than the current agency disclosure (language taken directly from the statutes) A plain-English disclosure is recommended by the Task Force. ✓
- The duty of confidentiality to all parties is imperative to consumers. Careful examination of this duty and its application since the late 1980's put in perspective the hypothetical conflicts that led to the reduction in services owed to clients in dual agency relationships. The Task Force concluded that licensees have universally protected the confidentiality of customers who have been



negotiating with clients of that licensee's broker. Current dual agency regulations are based on the proposition that these same licensees would violate the confidentiality duties owed to a client who is negotiating with other clients of the licensee's broker. Based on the industry's record of fair negotiations with customers since the late 80's it is the Task Force's recommendation that it is not in the best interests of consumers to maintain the current dual agency model (which requires clients in dual agency relationships to accept reduced negotiation services).

In other words, if the licensees are working to accomplish the intent of the client they are working with, and the clients are protected by confidentiality and fair treatment duties, why can't two licensees from one company provide full negotiation services to both clients in a transaction? The Task Force noted the frequency with which buyers seek out listing brokers which indicates a limited consumer concern that licensees would disadvantage two clients in a transaction. Rather than adding designated agency as another complicated layer on the already too complicated law, the Task Force recommended that the dual agency/designated agency models be avoided by recognizing that confidential negotiation for multiple clients does not create conflicts which require a reduction in negotiation services for these clients.

The Task Force does recommend that the current dual agency model remains appropriate in the situation in which one individual agent is handling negotiations for two clients in a transaction. ✓

## RECOMMENDATIONS OF THE WRA LICENSE LAW TASK FORCE

### CLARIFICATION OF LANGUAGE DEFINING BROKER/BROKERAGE

**SERVICES** *Adds concept of "providing information and advice to the party on real estate matters in order to assist the party to accomplish the party's expressed goals in a transaction" to the definition of brokerage services. Consolidates several related paragraphs for clarification. Acknowledges that clients are served by two types of brokers, those who enter into agency agreements with the client and those that work for the client in a more limited subagency capacity.*

**452.01 Definitions.** In this chapter:

(2) "Broker" means any person not excluded by sub. (3), who does any of the following:

(a) For a party, and for commission, money or other thing of value, provides information and advice to the party on real estate matters in order to assist the party to accomplish the party's expressed goals in a transaction. For the purpose of this subsection providing information and advice includes showing a party real estate or a timeshare. For the purpose of this subsection real estate matters are matters material to a party's transaction which are within the scope of the knowledge, skills and training required for

licensure as a broker or salesperson under this chapter and include, but are not limited to, market information as well as contract, legal and regulatory issues.

(b) For ~~another~~ a party, and for commission, money or other thing of value, negotiates or offers or attempts to negotiate a sale, purchase, exchange or rental of an interest or estate in real estate, a time share, or any business, its goodwill, inventory, fixtures or an interest therein regardless of whether the business includes real estate.

(c) Is engaged wholly or in part in the business of selling or exchanging real estate, a time share, or any business, its goodwill, inventory, fixtures or an interest therein regardless of whether the business includes real estate to the extent that a pattern of real estate sales or exchanges is established, ~~whether or not such real estate is owned by such person.~~ Five sales or exchanges in one year or 10 sales or exchanges in 5 years is presumptive evidence of a pattern of sales or exchanges.

~~(d) For another and for commission, money or other thing of value, negotiates or offers or attempts to negotiate a sale, exchange, purchase or rental of any business, its goodwill, inventory, fixtures or an interest therein.~~

~~(e) Is engaged wholly or in part in the business of selling business opportunities or goodwill of an existing business or is engaged wholly or in part in the business of buying and selling, exchanging or renting of any business, its goodwill, inventory, fixtures or an interest therein.~~

~~(f) For another, and for commission, money or other thing of value, negotiates or offers or attempts to negotiate a sale, exchange or purchase of a time share.~~

~~(g) Is engaged wholly or in part in the business of selling time shares to the extent that a pattern of sales is established, whether or not the time shares are owned by such person.~~

~~(h)~~ For ~~another~~ a party, and for a commission, money or other thing of value, promotes the sale, exchange, purchase, option, rental or leasing of real estate, a time share or business opportunities or any business, its goodwill, inventory, fixtures or an interest therein regardless of whether the business includes real estate. This paragraph does not apply to a person who only publishes or disseminates verbatim information provided by another person.

(3e) "Brokerage service" means any service described under sub. (2) (a) to ~~(h)~~ provided by a broker to ~~another person a party~~.

(3m) "Client" means a party to a transaction who is has entered into an agency agreement between the party and a broker. The agent of the client is the broker who is a party to the agency agreement. Other brokers who are acting as subagents of the broker are agents of the broker but owe the client the duties specified in 452.133(1) and (3).

(3s) "Customer" means a party to a transaction who is provided brokerage services by a broker but who is not a client.

#### **CLARIFICATION OF DEFINITION OF NEGOTIATION**

*The term "negotiate" is the key to the definition of a broker. DRL staff has been using the concept of "intermediary" to distinguish activities that require a license from activities that do not. An example is a FSBO Website that does pure publication as opposed to a broker who publishes ads but also acts as an intermediary between the parties. The first*

addition reflects this regulatory philosophy by clarifying that negotiations include these pre-contract "intermediary" interactions between the parties. In order to ensure the language does not appear to expand the scope of current regulation the introduction makes it clear that the regulation of persons who "negotiate" is limited to those working within the scope of Chapter 452. ✓

The second revision is designed to eliminate confusion related to the language "advantages and disadvantages" which many believe could be interpreted by a court as a subjective standard (what does the party think is an advantage). The concept of giving a general explanation of the provisions of a proposal is less subjective and reflects current administrative rule language (RL 16.05(2)). ✓

(5m) "Negotiate" means to assist the parties in developing proposals and agreements within the scope of the knowledge, skills and training required for licensure as a broker or salesperson under this chapter including but not limited to:

- (a) Acting as an intermediary to facilitate or participate in communications between the parties related to the parties' interests in a transaction. Providing information and advice to the party on real estate matters or showing a party real estate does not, in and of itself constitute acting as an intermediary to facilitate or participate in communications between the parties.
- (b) (ab) Facilitating or participating in the parties' discussion of the terms of a contract or agreement concerning a transaction.
- (bc) 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.
- (ed) Presenting to a party the proposals of other parties to the transaction and informing the party receiving a proposal of the advantages and disadvantages of the proposal giving a general explanation of the provisions of the proposal.

## **ADDITIONAL CLARIFICATIONS TO CHAPTER DEFINITIONS**

*Additional non-substantive clarifications.*

(5r) "Party" means a person seeking to sell, exchange, buy, option or rent an interest in real estate, a timeshare, a business or a business opportunity. ~~"Party" includes a person who seeks to grant or accept an option to buy, sell or rent an interest in real estate, a business or a business opportunity.~~

(7) "Salesperson" means any licensee under this chapter ~~other than a broker~~ who is employed by a broker to perform any act authorized by this chapter to be performed by a broker.

(?) "Subagent" means a broker who is authorized by another broker to perform services in a transaction, on behalf of the other broker, under the authority of and within the scope of an agency agreement between the other broker and the other broker's client in the transaction. The subagent's client is the other broker who is the party to the agency agreement not the other broker's client.

*defined to mean a party to a T.*

(10) "Transaction" means the series of negotiations and other actions culminating in the sale, exchange, purchase or rental of, or the granting or acceptance of an option to sell,

exchange, purchase or rent, an interest in real estate, a timeshare, a business or a business opportunity.

### **BROKER'S LIABILITY FOR ACTS OF EMPLOYEES**

*A year or so ago a broker was sued under 452.12 because an agent was in a car accident and someone was injured. While the case was dismissed significant legal resources were expended and no interpretation of 452.12 will result from the summary judgment. There are plenty of legal theories under which broker liability could be established when appropriate. The revision makes it clear that broker liability under chapter 452 is limited to liability arising out of an agents acts of brokerage services.*

#### **452.12 Licenses.**

(3) BROKER'S LIABILITY FOR ACTS OF EMPLOYEES. (a) Each broker is responsible for the real estate brokerage services provided on behalf of the broker by acts of any broker, salesperson or time-share salesperson licensed or registered under the broker employed by the broker.

### **BROKERAGE SERVICES AND AGENCY RELATIONSHIPS**

#### **452.132 Agency Relationships**

##### (1) Agency Relationships.

(a) A broker shall not be required to have an agency relationship with a party or a subagency relationship with a broker when providing brokerage services prior to conducting negotiations on behalf of a party in a transaction.

(b) When conducting negotiations on behalf of a party in a transaction the broker shall be acting under the authority of an agency agreement with a party in the transaction or a subagency relationship with a broker who has an agency agreement with a party in the transaction.

### **DUTIES TO ALL PARTIES TO A TRANSACTION**

*The proposal seeks to clarify language.*

#### **452.133 DUTIES OF BROKERS.**

(1) DUTIES TO ALL PARTIES TO A TRANSACTION. ~~When in providing brokerage services to a party to a transaction, a broker shall provide the brokerage services to the party~~ owes the following duties to the party:

(a) ~~To provide brokerage services to all the parties to the transaction~~ honestly, and fairly ~~and in good faith.~~

(b) ~~Diligently exercise~~ To provide brokerage services with reasonable skill and care in providing brokerage services to all parties.

(c) To safeguard any trust funds or other property held by the broker as required by department rules.

(d) ~~To disclosing to each party~~ all material adverse facts that the broker knows and that the party does not know or cannot discover through reasonably vigilant observation, unless the disclosure of a material adverse fact is prohibited by law.

(e) To keep confidential any information given to the broker in confidence, or any information obtained by the broker that he or she knows a reasonable party would want to be kept confidential, unless the information must be disclosed ~~under par. (c) or s. 452.23~~

~~or is otherwise required by law to be disclosed~~ or the party whose interests may be adversely affected by the disclosure specifically authorizes the disclosure of particular ~~confidential~~ information. A broker shall continue to keep the information confidential after the transaction is complete and after the broker is no longer providing brokerage services to the party.

(f) When requested by the party, provide accurate information about market conditions that affect a the party's transaction, to any party who requests the information, within a reasonable time of the party's request, unless disclosure of the information is prohibited by law.

~~(f) Account for all property coming into the possession of a broker that belongs to any party within a reasonable time of receiving the property.~~

### **DUTIES TO A CLIENT/SUBAGENCY/NONAGENCY**

*The Task Force proposes adding the duty to provide information and advice to a client to assist the client to accomplish the client's goals in the transaction. However, recognizing that licensees can provide information and advice to customers as a service, the Task Force clarified that loyalty duties to a client prohibited licensees working with a customer to give that customer advice which was contrary to the best interests of the licensee's client.*

*(3) recognizes that subagents, as agents of the principal broker, cannot put their interests or the interests of customers in the transaction ahead of the interests of the client. This provision is consistent with current practice and is necessary to protect the interests of the principal broker's client who has authorized the subagency relationship. Subagents do not owe the principal broker's client the balance of the duties owed to a client (these duties relate to the principal broker's relationship arising out of the agency agreement).*

*(4) clarifies that a broker, prior to engaging in negotiations, may provide brokerage services to a party. In other words, before obtaining a listing or a buyer agency agreement or accepting an offer of subagency, a broker can provide a consumer information and advice regarding real estate matters. In order to assure that the consumers do not lose protections afforded under agency relationships a broker cannot put any party's interests ahead of another party during this initial period of brokerage services.*

*Section (5) establishes the fact the duties to provide information and advice negotiation (unlike other duties owed to the parties) are waivable with express written consent of the party, a referral to legal counsel and an acknowledgement that the waived duties are also waived for cooperating brokers.*

**(2) DUTIES TO A CLIENT UNDER AGENCY AGREEMENT.** In addition to ~~his or her~~ the duties under sub. (1), a broker ~~providing brokerage services to his or her client who has an agency agreement with a client shall owe the following duties to the client when providing brokerage services to the client within the scope of the agency agreement:~~

(a) When requested by the client, to provide information and advice to the client on real estate matters within the scope of the knowledge, skills and training required for licensure

as a broker or salesperson under this chapter in order to assist the client to accomplish the party's expressed goals in the transaction. For the purpose of this subsection real estate matters are matters material to a party's transaction and include, but are not limited to, market information as well as contract, legal and regulatory issues.

(b) To loyally represent the client's interests by not placing the interests of the broker ahead of the client's or providing non-client parties in the transaction information or advice that is contrary to the interests of the client unless required by law. ~~placing the client's interests ahead of the interests of any other party, unless loyalty to a client violates the broker's duties under sub. (1) or s. 452.137 (2).~~

(c) To disclose to the client all information known by the broker that is material to the transaction and that is not known by the client or discoverable by the client through reasonably vigilant observation, except for confidential information under sub. (1) (e) and other information the disclosure of which is prohibited by law.

(d) To fulfill any obligation required by the agency agreement, and any order of the client that is within the scope of the agency agreement, that are not inconsistent with another duty that the broker has under this chapter or any other law.

(e) To negotiate as defined in 452.01(5m)(a)-(d).

(3) DUTIES UNDER SUBAGENCY RELATIONSHIP. In addition to his or her duties under sub. (1), a broker who is acting as the subagent of another broker in a transaction shall not place the interests of the broker ahead of the interests of the other broker's client in the transaction or provide non-client parties in the transaction advice or opinions that are contrary to the interests of the broker's client unless required by law.

(4) DUTIES WITHOUT AGENCY OR SUBAGENCY RELATIONSHIP In addition to his or her duties under sub. (1), a broker who does not have an agency relationship with any party or a subagency relationship with any broker in the transaction shall not place the interests of the broker ahead of the interests of any party in the transaction or provide any party in the transaction advice or opinions that are contrary to the interests of any other party unless required by law.

(5) WAIVABILITY OF DUTIES The duties at 452.133(1)(a)-(g), (2) (b)-(d) and (3) are not waivable. All or part of the duties at 452.133(2)(a) and (e) may be waived by a client. A broker shall ensure that when a client waives all or part of the duties under 452.133(2) (a) or (e) for a broker who is a party to an agency agreement with the client that the party is provided with a written statement, which includes the full text of the duty waived, the elements of the duty being waived, a statement that no other broker owes the waived duties to the client and that the waiver of broker duties may require the party to retain legal counsel or other service providers to assist the party to fulfill the client's transactional goals and contractual duties through the conclusion of the transaction.

## **AGENCY DISCLOSURE**

*The proposal defines the agency relationships brokers can be a party to and establishes statutory plain-English agency disclosures for clients and customers.*

**452.135 Agency Disclosure Confirmation and disclosure of relationship.**

(1) No broker may provide brokerage services without an agency agreement that authorizes the broker to provide those brokerage services. The agency agreement shall contain a statement of the terms and conditions of the brokerage services that the broker will provide, including a statement required under s. 452.138, if applicable.

(2) No broker may provide brokerage services to a party to a transaction unless the broker has provided to the party a written agency disclosure form containing all of the following:

(a) A statement of which party is the broker's client or, if the broker is providing brokerage services to more than one client under s. 452.137, a statement of which parties are the broker's clients.

(b) A statement of the broker's duties to his or her client under s. 452.133 (2).

(c) A statement of the broker's duties to a party under s. 452.133 (1).

(d) A statement regarding confidentiality that shall be in the following form:

**NOTICE TO CLIENTS AND CUSTOMERS**

A BROKER IS REQUIRED TO MAINTAIN THE CONFIDENTIALITY OF ALL INFORMATION GIVEN TO THE BROKER IN CONFIDENCE AND OF ALL INFORMATION OBTAINED BY THE BROKER THAT HE OR SHE KNOWS A REASONABLE PARTY WOULD WANT TO BE KEPT CONFIDENTIAL, UNLESS THE INFORMATION IS REQUIRED TO BE DISCLOSED BY LAW. THE FOLLOWING INFORMATION IS REQUIRED TO BE DISCLOSED BY LAW:

1. MATERIAL ADVERSE FACTS, AS DEFINED IN SECTION 452.01 (5g) OF THE WISCONSIN STATUTES.

2. ANY FACTS KNOWN BY THE BROKER THAT CONTRADICT ANY INFORMATION INCLUDED IN A WRITTEN INSPECTION REPORT ON THE PROPERTY OR REAL ESTATE THAT IS THE SUBJECT OF THE TRANSACTION.

TO ENSURE THAT THE BROKER IS AWARE OF WHAT SPECIFIC INFORMATION YOU CONSIDER CONFIDENTIAL, YOU MAY LIST THAT INFORMATION IN THE SPACE BELOW THAT IS MARKED "CONFIDENTIAL INFORMATION". AT A LATER TIME, YOU MAY ALSO PROVIDE THE BROKER WITH OTHER WRITTEN NOTIFICATION OF WHAT INFORMATION YOU CONSIDER TO BE CONFIDENTIAL.

**CONFIDENTIAL INFORMATION: \_\_\_\_\_**

(e) Any additional information that the broker determines is necessary to clarify the broker's relationship to his or her client or customer.

**(1) Disclosure of Agency Relationships and Duties To Parties**

(a) Prior to negotiating for a customer the broker shall provide the customer the following disclosure in writing.

**BROKER DISCLOSURE TO CUSTOMERS**

It is important for you to understand the duties the broker owes a customer under Wisconsin license law. You are a customer of the broker and may receive services from the broker or a salesperson acting on behalf of the broker. The broker's duties to you apply whenever the broker is providing you brokerage services. Note that the broker is either the agent of another party in the transaction or the subagent of another broker who is an agent of another party in the transaction. The duties the broker owes you as the broker's customer are:

- To treat you fairly and honestly.
- To use reasonable skill and care when providing you brokerage services.

- To protect your confidentiality. Unless the law requires it the broker will not disclose your confidential information or the confidential information of other parties.
- To disclose in writing known defects affecting the property and other material adverse facts affecting the transaction. The broker may also provide you with information and advice to help you in the transaction. This information and advice cannot be contrary to the interests of the broker's client or the broker offering subagency (or that broker's client) unless required by law
- To safeguard any trust funds or other property held by the broker.

Please review this information carefully. If you have any questions please ask your agent or contact your attorney for additional information or legal advice, as appropriate. This disclosure is required by Wisconsin law and is based on the statutory language found at Wisconsin statute sections 452.133 and 452.135. Please note that a broker's role is limited to providing brokerage services. You should consult your attorney for legal advice, your tax advisor for tax advice, a home inspector for a professional inspection, etc.

- (b) Prior to negotiating for a client the broker shall provide the customer the following disclosure in the agency agreement or other writing.

#### **BROKER DISCLOSURE TO CLIENTS**

By entering into an agency agreement with broker (i.e. a listing or buyer agency, etc.) you have become the broker's client. The broker's duties owed to all parties are:

- To treat you fairly and honestly.
- To use reasonable skill and care when providing you brokerage services.
- To protect your confidentiality. Unless the law requires it the broker will not disclose your confidential information or the confidential information of other parties.
- To disclose in writing known defects affecting the property and other material adverse facts affecting the transaction. To safeguard any trust funds or other property held by the broker.

The additional duties owed a client by the broker are:

- When you request it the broker will give you information and advice regarding real estate matters affecting your transaction unless you release the broker from this duty.
- The agent must provide you with information about all material facts affecting the transaction (not just adverse material facts).
- The broker will fulfill all obligations under your agency agreement, as well as fulfilling your other lawful requests within the scope of the agency agreement.
- The broker will negotiate on your behalf unless you release the broker from this duty.
- The broker will not put the broker's interests ahead of yours or give non-client parties information or advice that is contrary to your interests (unless required by law). If broker has agency agreements with more than one party in the transaction and different agents are negotiating for each client there will be no change in the services and duties of the broker. If one agent is negotiating on behalf of more than one client in a transaction the agent may not place the interests of any client ahead of the interests of another client during the negotiations.



**SUBAGENCY** Note that if you authorize it in your agency agreement the broker may enter into agreements with other brokers to provide you additional brokerage assistance on broker's behalf. These brokers are known as subagents and they are agents of broker. Subagents working under broker will not put their interests ahead of yours or give non-client parties advice or opinions that are contrary to your interests (unless required by law).

Please review this information carefully. If you have any questions please ask your agent or your attorney for additional information or legal advice, as appropriate. This disclosure is required by Wisconsin law and is based on the statutory language found at Wisconsin statute sections 452.133 and 452.135. Please note that a broker's role is limited to providing brokerage services. You should consult your attorney for legal advice, your tax advisor for tax advice, a home inspector for a professional inspection, etc.

### **BROKERS PROVIDING SERVICES TO MORE THAN ONE CLIENT IN A TRANSACTION**

*Current dual agency regulations are based on the concern that licensees would violate the confidentiality duties owed to a client who is negotiating with other clients of the licensee's broker. The result of the current regulations regarding dual agency is that both "dual agency" clients sacrifice significant negotiation services when they enter into a dual agency situation. The Task Force noted the frequency with which buyers seek out listing brokers which indicates a limited consumer concern for dual agency conflicts. Given that there is no evidence that agents working with customers negotiating on company listings are violating the customer's confidentiality or fair treatment rights the Task Force's does not see that there is a greater risk of abuse when a broker has two agents negotiating on behalf on two clients in a transaction. In other words, if all licensees are working to accomplish the intent of the parties they are working with and the parties are protected by confidentiality duties the Task Force believes that two licensees from one company can provide full negotiation services to both clients in a transaction without violating confidentiality of good faith duties owed to either client.*

*Rather than adding designated agency as another complicated layer on the already too complicated law, the proposal would simply provide that there be no reduction of services if two different agents from one company are negotiating on behalf of two clients of the company. On the other hand, the Task Force continues to support the current dual agency model in the situation where one individual agent is negotiating on behalf of two clients in a transaction.*

#### **452.137 Brokers providing services to more than one client in a transaction.**

(1) ~~No~~ A broker ~~may provide~~ who has an agency agreement with and is providing brokerage services to more than one client in a transaction ~~without an agency agreement under s. 452.135 (1) with each client and a written consent to multiple representation. The consent to multiple representation shall contain a statement of the broker's duties under s. 452.133 (1) to a party to the transaction who is not a client; a statement of the~~

broker's duties to the client under s. 452.133 (2); and a statement that the clients understand the broker's duties and consent to the broker providing brokerage services to more than one client. The consent to multiple representation may contain additional disclosures by the broker or additional agreements between the broker and the clients that do not violate any duty of a broker under this chapter.

~~—(2) A that a broker who represents more than one client in a transaction owes all clients the duties as specified in s. 452.133 (1) and (2) except that when the broker, acting through an individual licensee, other than a business entity, is negotiating on behalf of more than one client in a transaction the licensee may not place the interests of any client ahead of the interests of another client during the negotiations.~~

(2) If a broker is providing brokerage services to more than one client in a transaction, no client may be considered to know any information that the broker knows unless the broker informs the client of that information or the client has other actual knowledge of that information.

### **CHANGES IN COMMON LAW AGENCY DUTIES AND LIABILITIES**

*The '88 license law only referred to "fiduciary duties" when it stated that any conflicts between common law agency and the statute would be resolved in favor of the statute. Because common law agency is broader in scope than the definition of "fiduciary duties" (see the title which refers to duties and liabilities of brokers and parties) the revision addresses any additional conflicts that might exist between the statute and common law.*

### **452.139 Changes in common law duties and liabilities of brokers and parties.**

(1) ~~COMMON LAW FIDUCIARY DUTIES OF BROKER.~~ The duties of a broker specified in this chapter or in rules promulgated under this chapter shall supersede ~~any fiduciary duties of a broker to a party based on~~ common law duties or obligations to the extent that those common law ~~fiduciary duties or obligations~~ are inconsistent with the duties specified in this chapter or in rules promulgated under this chapter.