

**Sundberg, Christopher**

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**From:** Staff, Rick -VP Legal Services [rickstaff@wra.org]  
**Sent:** Thursday, April 21, 2005 11:46 AM  
**To:** Sundberg, Christopher  
**Subject:** RE: Update of Draft

No, toss it with the rest. Thanks for the prompt response.

Rick Staff

--- Original Message ---

From: "Sundberg, Christopher" <Christopher.Sundberg@legis.state.wi.us>  
Sent: Thu 4/21/2005 11:23 am  
To: "Staff, Rick -VP Legal Services" <rickstaff@wra.org>  
Subject: RE: Update of Draft

Things are going well on the P3; your written instructions have been quite helpful. I don't think it will be a problem to get you a marked-up draft before I send it to edit, but I probably won't be able to get it to you by tomorrow. We'll see how things go.

I've got one major question. In the P2, proposed s. 452.035 creates a registration requirement for salespersons and for certain brokers. This provision arose out of the WRA's instructions to eliminate the "employment" terminology. The next draft will return to the "employment" terminology used in current law to describe relationships between brokers and salespersons and timeshare salespersons, etc. Is it still necessary for the draft to create a statutory registration requirement?

-----Original Message-----

From: Staff, Rick -VP Legal Services [<mailto:rickstaff@wra.org>]  
Sent: Thursday, April 21, 2005 7:53 AM  
To: Sundberg, Christopher  
Cc: Theo, Mike - VP Public Affairs; Malkasian, Bill - Pres; Becher, Scott  
Subject: Update of Draft

Chris,

I promised Representative Wiekert's office an update by week's end. I'm assuming that no questions means that things are going well but I'd like to see a draft ASAP, this week if possible and before it goes to editing if possible. If there are still substantive issues I hope we can avoid the delay we had while it was in editing the last two times. Unless you are prohibited from releasing it to Representative Wiekert before editing I think it would be productive for us to look at it and make sure everything is set. Let me know. Thanks,

Richard Staff  
General Counsel

Wisconsin REALTORS Association  
4801 Forest Run Rd. Suite 201  
Madison, WI 53704

04/21/2005

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Fax: 608-241-5168

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## Sundberg, Christopher

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**From:** Staff, Rick -VP Legal Services [rickstaff@wra.org]  
**Sent:** Monday, April 18, 2005 2:25 PM  
**To:** Sundberg, Christopher  
**Cc:** Becher, Scott; Malkasian, Bill - Pres; Theo, Mike - VP Public Affairs  
**Subject:** Additional thoughts based on out Thursday conversation.

Scott,

I offered to get you a definition of a showing which could be used to illustrate the fact that the activity was a subset of providing information and advice on market conditions. Unfortunately I could not find one published anywhere so I have had to invent the wheel. Here goes:

Showing: An on-site presentation of the features and condition of real estate made by a broker to a specific prospective buyer at a pre-appointed time.

I confirmed with REB staff that the elimination of the rewrite of "employ" was just fine.

If you have any questions regarding the above, my memo of April 13th or my handwritten notes we exchanged last Thursday please do not hesitate to contact me at any time

## Richard Staff

General Counsel

Wisconsin REALTORS Association  
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## Sundberg, Christopher

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**From:** Staff, Rick -VP Legal Services [rickstaff@wra.org]  
**Sent:** Monday, April 18, 2005 2:50 PM  
**To:** Sundberg, Christopher  
**Subject:** RE: Additional thoughts based on out Thursday conversation.

Interesting . . . The more I think of it the distinction is not all that relevant. Although open houses always follow listings that doesn't really matter - hosting an open house for another for compensation is a licensed activity. I think we can simply indicate that providing information and advise includes the on-site presentation of the features and condition of real estate made by a broker to a prospective buyer. As I see it it should flow ok from there. I'll be away from my computer for the balance of the afternoon so feel free to try the cell phone if you'd like.

-----Original Message-----

**From:** Sundberg, Christopher [mailto:Christopher.Sundberg@legis.state.wi.us]  
**Sent:** Monday, April 18, 2005 2:31 PM  
**To:** Staff, Rick -VP Legal Services  
**Cc:** Becher, Scott; Malkasian, Bill - Pres; Theo, Mike - VP Public Affairs  
**Subject:** RE: Additional thoughts based on out Thursday conversation.

Do you think this definition is sufficient to distinguish between an individual showing and a presentation made at an open house?

-----Original Message-----

**From:** Staff, Rick -VP Legal Services [mailto:rickstaff@wra.org]  
**Sent:** Monday, April 18, 2005 2:25 PM  
**To:** Sundberg, Christopher  
**Cc:** Becher, Scott; Malkasian, Bill - Pres; Theo, Mike - VP Public Affairs  
**Subject:** Additional thoughts based on out Thursday conversation.

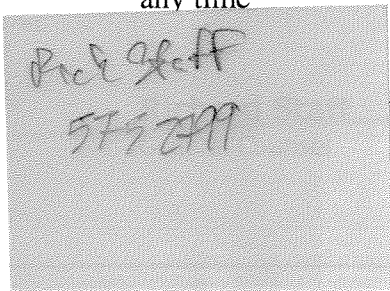
Scott,

I offered to get you a definition of a showing which could be used to illustrate the fact that the activity was a subset of providing information and advice on market conditions. Unfortunately I could not find one published anywhere so I have had to invent the wheel. Here goes:

**Showing:** An on-site presentation of the features and condition of real estate made by a broker to a specific prospective buyer at a pre-appointed time.

I confirmed with REB staff that the elimination of the rewrite of "employ" was just fine.

If you have any questions regarding the above, my memo of April 13th or my handwritten notes we exchanged last Thursday please do not hesitate to contact me at any time



Rick Staff  
5/18/05

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**Sundberg, Christopher**

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**From:** Staff, Rick -VP Legal Services [rickstaff@wra.org]  
**Sent:** Monday, April 25, 2005 12:35 PM  
**To:** Sundberg, Christopher  
**Subject:** RE: Update of Draft

The difference is that subagents are other brokers (companies and their agents) that are retained as subagents in a cooperative contractual relationship to assist the principal broker to accomplish the purposes of their agency agreements (usually to help sell a property). The term employ applies to the agents of the company. Do these revisions help?

-----Original Message-----

**From:** Sundberg, Christopher [mailto:Christopher.Sundberg@legis.state.wi.us]  
**Sent:** Monday, April 25, 2005 11:57 AM  
**To:** Staff, Rick -VP Legal Services  
**Subject:** RE: Update of Draft

I have trouble reconciling the concept of subagency with the current definitions of "employ," "employment," etc., which include brokers who "provide services to the broker as an independent contractor." As I understand your instructions, a subagent is distinguished from a broker-employee by the following:

- (1) a broker who engages a subagent is not responsible for supervising the subagent.
- (2) a subagent does not owe the broker's client the duties under 452.133 (2).

What else distinguishes a subagent?

It seems to me that the definitions of "employ," etc., will need to be modified to exclude subagents. Also, subagents will need to be excepted from the list of people who create vicarious liability for the broker under s. 452.12 (3), correct?

-----Original Message-----

**From:** Staff, Rick -VP Legal Services [mailto:rickstaff@wra.org]  
**Sent:** Monday, April 25, 2005 10:13 AM  
**To:** Sundberg, Christopher  
**Subject:** RE: Update of Draft

No, only the salespeople working for the broker's company.

-----Original Message-----

**From:** Sundberg, Christopher [mailto:Christopher.Sundberg@legis.state.wi.us]  
**Sent:** Monday, April 25, 2005 10:01 AM  
**To:** Staff, Rick -VP Legal Services  
**Subject:** RE: Update of Draft

Here's a question: under 452.12 (3), is a broker responsible for brokerage services provided on the broker's behalf by a subagent?

I may have something for you soon, but I'll need to clear it with Mark Kunkel, who has been reviewing my work on this draft.

-----Original Message-----

**From:** Staff, Rick -VP Legal Services [mailto:rickstaff@wra.org]

**Sent:** Monday, April 25, 2005 9:52 AM

**To:** Sundberg, Christopher

**Cc:** Becher, Scott; Theo, Mike - VP Public Affairs; Malkasian, Bill - Pres

**Subject:** RE: Update of Draft

Hello Chris,

Any questions come up on your P3 draft? If not is a draft copy available for review?

Thanks

**Richard Staff**

General Counsel

Wisconsin REALTORS Association  
4801 Forest Run Rd. Suite 201  
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FROM DRAFTING INSTRUCTIONS:

"Subagent" means a broker who is authorized by another broker to perform services in a one or more individual transactions, 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(s). The subagent's client is the other broker who is the party to the agency agreement not the other broker's client.

CURRENT 452.01

(4d) "Employ", when used in reference to a broker employing another broker, a salesperson or a time-share salesperson, means the establishment of an relationship in which the other broker, a salesperson or a time-share salesperson provides brokerage services in the name of and under the supervision of the employing broker. A broker, a salesperson or a time-share salesperson may only be employed by one broker employer at any time. Employment status under this section is not affected by the classification of the employee as an independent contractor or employee under tax, worker's compensation or other laws. ~~includes engaging the services of another broker, a salesperson or a time-share salesperson who provides services to the broker as an independent contractor.~~

Apply same concept below.

(4h) "Employe", when used in reference to an employe of a broker, includes another broker, a salesperson or a time-share salesperson who provides services to the broker as an independent contractor.

(4p) "Employer", when used in reference to a broker who is the employer of another broker, a salesperson or a time-share salesperson, includes a broker who engages the services of another broker, a salesperson or a time-share salesperson who provides services to the broker as an independent contractor.

(4t) "Employment", when used in reference to a broker's employment of another broker, a salesperson or a time-share salesperson, includes the state of providing services to the broker by the other broker, the salesperson or the time-share salesperson as an independent contractor.

Section 1. 452.01 (4d) of the statutes is amended to read:

452.01 (4d) "Employ", when used in reference to a broker employing another broker, a salesperson or a time-share salesperson, ~~includes~~ means engaging the services of another broker, a salesperson, or a time-share salesperson ~~who provides to provide brokerage services to the broker~~ broker's clients on behalf of the broker and under the broker's supervision, including a broker, salesperson, or time-share salesperson engaged by the broker as an independent contractor.



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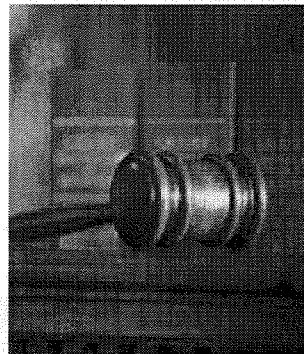
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## Wisconsin License Law Update

By Rick Staff



**Madison, WI** - On January 21, the WRA board of directors unanimously approved a proposal to modernize Chapter 452, Wisconsin's real estate license law. The WRA's License Law Task Force developed the proposal over a two-and-a-half-year period. The proposal will be one of the WRA's top legislative priorities for this session. However, because of the legislative cycle and the need to provide an adequate implementation period, it is unlikely that the new law will take effect before January 2006.

### 1. What is the purpose of the proposal?

**Someone from Madison keeps e-mailing me saying the plan was designed to hurt small brokers.**

The goal of the modernization proposal is to ensure that Wisconsin's license law meets consumer expectations for brokerage services and that it conforms to industry best practices. The task force and the WRA board of directors specifically reviewed the proposal to ensure that it did not favor any particular segment of the industry, i.e. large brokers versus small brokers. All brokers benefit by improving and simplifying Wisconsin's agency law so that it does not unreasonably interfere with relationships with consumers.

### 2. What are the primary changes in the License Law Task Force proposal?

The task force proposal recommends changes to improve Wisconsin license law by clarifying when and how a broker enters into an agency relationship; simplifying agency disclosure; minimizing unnecessary complications associated with dual agency; clarifying subagency relationships; addressing issues relating to limited-service listings and clarifying statutes creating broker liability. For detailed information and to review the task force's proposal or the member overview, visit [www.wra.org/LLTFupdate](http://www.wra.org/LLTFupdate).

**a)** How does the license law proposal clarify when and how a broker enters into an agency relationship?

The task force proposal recognizes that brokerage services begin prior to

entering into agency relationships. The task force also recognizes that brokerage services begin when a licensee provides information and advice on real estate matters to parties. In the case of listings, brokers almost always provide information and advice (e.g. CMAs) before a listing is signed. In the case of other parties (buyers, for example), the task force recognizes that it is not always necessary or appropriate to require a buyer to decide what type of agency relationship he or she will work under immediately upon being provided with information and advice.

The proposal allows a licensee to provide a party with preliminary information and advice regarding real estate matters before entering into an agency relationship. The proposal ensures that licensees in this "pre-agency" period act as neutral information providers. If a broker wishes to provide client-level services or a party wishes to begin negotiations, then an agency relationship or an agency disclosure would be required.

**b) How does the license law proposal simplify agency disclosure?**

The task force proposal requires licensees to provide parties with a plain-English agency disclosure before negotiations. The benefits of a plain-English disclosure are obvious. The requirement to provide the disclosure prior to negotiation reflects the fact that parties may not make decisions regarding agency relationships prior to negotiation. Providing the disclosure before negotiations also ensures that the party is not put at a disadvantage because the party does not understand the broker's role in the negotiations.

Note that this is the latest the disclosure can be given. All clients will get the disclosure at the time the agency agreement is signed. Customers can receive the disclosure as early as they request it or the broker wishes but no later than the time negotiations begin.

**c) How does the license law proposal minimize unnecessary complications associated with dual agency?**

The task force recognizes that confidential negotiation for multiple clients does not create conflicts that require reduced negotiation services for these clients. The task force recommends that the current dual agency model continue in the situation in which one individual agent is handling negotiations for two clients in a transaction.

Current dual agency regulations are based on the idea that a licensee would violate the loyalty and confidentiality duties owed to the licensee's client. Based on the industry's record of fair negotiations with customers since the late 80s, the task force concluded that the current dual agency model (which requires clients in dual agency relationships to accept reduced negotiation services) is not in the consumer's best interest.

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 loyalty duties, why can't two licensees from one company provide full negotiation services to both clients in a transaction? The task force notes 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 to the already too complicated law, the task force simply recommends that the limitations of dual agency be confined to individual agents who are negotiating on behalf of two clients simultaneously in the same transaction.

**d) How does the license law proposal clarify subagency relationships?**

The task force proposal clarifies that subagents are the agents of the broker offering subagency - the client of the broker offering subagency is not the client of the subagent. This proposal recognizes that the traditional view that the seller is the client of the subagent does not make sense if one

looks at the duties owed to a client. (For example, how does the subagent fulfill the duties owed to the seller under the listing contract when the subagent never sees the listing contract and never is a party to the agreements therein?)

In order to be consistent with consumer expectations and industry best practices, the proposal recognizes that subagents must have loyalty duties to the seller. Under the proposal, a subagent cannot put his or her interest ahead of the seller's nor can he or she give information or advice to other parties that is inconsistent with the best interests of the seller (unless required by law).

**e)** How does the license law proposal address issues relating to limited-service listings?

The task force proposal clarifies that a listing broker cannot waive duties owed to a seller except for negotiation duties. The proposal requires a limited-service broker to obtain from the seller an affirmative written waiver of any negotiation duties. The proposal releases cooperating brokers from any legal obligation to perform duties that the seller has waived for the listing broker. It additionally requires written disclosure to the seller that he or she may need to hire an attorney or other service provider to perform the tasks that have been waived.

Some states have attempted to prohibit waiver of negotiation services by brokers. The task force did not adopt this approach because it is not the function of a trade association to pass legislation that would prohibit lawful business models and, more importantly, because many brokers other than limited-service brokers have negotiation services waived - usually when the parties hire legal counsel to negotiate on their behalf.

**f)** How does the license law proposal clarify statutes creating broker liability?

The task force proposal makes it clear that a broker's liability for the acts of the broker's agent under Chapter 452 is limited to liability arising out of an agent's acts of brokerage services on behalf of the broker. A few years ago, a broker was sued under 452.12 (brokers are liable for the acts of their agents under current law) because an agent was in a car accident and someone was injured. While the case was dismissed, significant legal resources were expended, and no legal precedent will result from the summary judgment. This revision should eliminate any questions regarding the intended scope of broker liability under Chapter 452.

*Published: March 8, 2005*

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**Sundberg, Christopher**

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**From:** Staff, Rick -VP Legal Services [rickstaff@wra.org]  
**Sent:** Tuesday, April 26, 2005 10:16 AM  
**To:** Sundberg, Christopher  
**Cc:** Theo, Mike - VP Public Affairs; Malkasian, Bill - Pres; Becher, Scott  
**Subject:** RE: LRB-1387/P3

Attached are some revisions. There seems to be a substantive issue relating to the broker's ability to give information and advice to multiple clients. I'll give you a call but if I miss you try my cell: 608-575-2799.

-----Original Message-----

From: Sundberg, Christopher  
[mailto:Christopher.Sundberg@legis.state.wi.us]  
Sent: Tuesday, April 26, 2005 9:52 AM  
To: rickstaff@wra.org  
Subject: LRB-1387/P3

Please comment:

**BROKER DISCLOSURE TO CUSTOMERS**

Under Wisconsin real estate practice law, if you receive brokerage services from a broker or a salesperson employed by the broker, you are the broker's customer. The broker is either an agent of another party in the transaction or a subagent of another broker who is the agent of another party in the transaction. The broker owes you, the customer, the following duties:

The duty to provide brokerage services to you fairly and honestly.

The duty to exercise reasonable skill and care in providing brokerage services to you.

The duty to disclose to you in writing known defects affecting a property and other material adverse facts affecting a transaction, and to provide you with accurate information about market conditions that affect your transaction. The broker may not, however, provide information to you if the information is confidential or if providing the information would be contrary to the interests of a client of the broker or a client of another broker for whom the broker is acting as a subagent

The duty to keep confidential information given to the broker in confidence.

The duty to safeguard trust funds and other property the broker holds.

Please review this information carefully. A broker or salesperson can answer your questions about brokerage services, but if you need legal advice, tax advice, or a professional home inspection, contact an attorney, tax advisor, or home inspector.

This disclosure is required by s. 452.135 of the Wisconsin statutes.

**BROKER DISCLOSURE TO CLIENTS**

04/26/2005

Under Wisconsin real estate practice law, a broker owes certain duties to all parties to a transaction:

The duty to provide brokerage services to you fairly and honestly.

The duty to exercise reasonable skill and care in providing brokerage services to you.

The duty to disclose to you in writing known defects affecting a property and other material adverse facts affecting a transaction, and to provide you with accurate information about market conditions that affect your transaction. The broker may not, however, provide information to you if the information is confidential or if providing the information would be contrary to the interests of a client of the broker or a client of another broker for whom the broker is acting as a subagent.

The duty to keep confidential information given to the broker in confidence.

The duty to safeguard trust funds and other property the broker holds.

If you have entered into an agency agreement with a broker, you are the broker's client. A broker owes additional duties to a client.

The broker will provide, at your request, information and advice on real estate matters that affect your transaction, unless you release the broker from this duty. You are entitled to receive, upon request, all material information, not just adverse information.

The broker will fulfill the broker's obligations under the agency agreement and fulfill your lawful requests that are within the scope of the agency agreement.

The broker will negotiate for you, unless you release the broker from this duty.

The broker will not place the broker's interests ahead of your interests. The broker will not, unless required by law, give other parties information or advice if doing so is contrary to your interests.

If you become involved in a transaction in which another party is also the broker's client, different duties may apply. If different salespersons employed by the broker negotiate on behalf of you and the other client, the broker's duties will remain the same. If the same salesperson negotiates on behalf of you and the other client, the salesperson may not favor the interests of either client.

The broker may, with your authorization in the agency agreement, enter into agreements with subagents. A subagent is another broker who works for your broker by providing brokerage services to you. A subagent will not put the subagent's own interests ahead of your interests. A subagent will not, unless required by law, provide advice or opinions to other parties if doing so is contrary to your interests.

Please review this information carefully. A broker or salesperson can answer your questions about brokerage services, but if you need legal advice, tax advice, or a professional home inspection, contact an attorney, tax advisor, or home inspector.

This disclosure is required by s. 452.135 of the Wisconsin statutes.

Christopher Sundberg  
Legislative Attorney  
Legislative Reference Bureau  
(608) 266-9739  
christopher.sundberg@legis.state.wi.us

BROKER DISCLOSURE TO CUSTOMERS

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. ~~Under Wisconsin real estate practice law, if you receive brokerage services from a broker or a salesperson employed by the broker, you are the broker's customer. The broker is either an agent of another party in the transaction or a subagent of another broker who is the agent of another party in the transaction. The broker owes you, the customer, the following duties:~~

The duty to provide brokerage services to you fairly and honestly.

The duty to exercise reasonable skill and care in providing brokerage services to you.

The duty to disclose to you in writing certain known defects affecting a property ~~and other known as~~ material adverse facts affecting a transaction, and to provide you with accurate information about market conditions that affect your transaction. The broker may not, however, provide information to you if the information is confidential ~~or if providing the information would be contrary to the interests of a client of the broker or a client of another broker for whom the broker is acting as a subagent~~ Note: This duty supercedes client duties

The duty to keep confidential information given to the broker in confidence.

The duty to safeguard trust funds and other property the broker holds.

Please review this information carefully. A broker or salesperson can answer your questions about brokerage services, but if you need legal advice, tax advice, or a professional home inspection, contact an attorney, tax advisor, or home inspector.

This disclosure is for information only and restates the broker's statutory duties in plain-English. This disclosure is required by s. 452.135 of the Wisconsin statutes. The broker's statutory duties can be found at 452.133.

~~This disclosure is required by s. 452.135 of the Wisconsin statutes.~~

BROKER DISCLOSURE TO CLIENTS

Under Wisconsin real estate practice law, a broker owes certain duties to all parties to a transaction:

The duty to provide brokerage services to you fairly and honestly.

The duty to exercise reasonable skill and care in providing brokerage services to you.

The duty to disclose to you in writing certain known defects affecting a property ~~and other known as~~ material adverse facts affecting a transaction, and to provide you with accurate information about market

conditions that affect your transaction. The broker may not, however, provide information to you if the information is confidential ~~or if providing the information would be contrary to the interests of a client of the broker or a client of another broker for whom the broker is acting as a subagent~~

The duty to keep confidential information given to the broker in confidence.

The duty to safeguard trust funds and other property the broker holds.

~~If~~ Because you have entered into an agency agreement with a broker, you are the broker's client. A broker owes additional duties to a client.

The broker will provide, at your request, information and advice on real estate matters that affect your transaction, unless you release the broker from this duty. You are entitled to receive, upon request, all material information, not just adverse information.

The broker will fulfill the broker's obligations under the agency agreement and fulfill your lawful requests that are within the scope of the agency agreement.

The broker will negotiate for you, unless you release the broker from this duty.

The broker will not place the broker's interests ahead of your interests. The broker will not, unless required by law, give other non-client parties information or advice if doing so is contrary to your interests.

If you become involved in a transaction in which another party is also the broker's client, different duties may apply. If different salespersons employed by the broker negotiate on behalf of you and the other client, the broker's duties will remain the same. If the same salesperson negotiates on behalf of you and the other client, the salesperson may not favor the interests of either client.

The broker may, with your authorization in the agency agreement, enter into agreements with subagents. A subagent is another broker who works for your broker by providing brokerage services to benefit you. A subagent will not put the subagent's own interests ahead of your interests. A subagent will not, unless required by law, provide advice or opinions to other parties if doing so is contrary to your interests.

Please review this information carefully. A broker or salesperson can answer your questions about brokerage services, but if you need legal advice, tax advice, or a professional home inspection, contact an attorney, tax advisor, or home inspector.

This disclosure is for information only and restates the broker's statutory duties in plain-English. This disclosure is required by s. 452.135 of the Wisconsin statutes. The broker's statutory duties can be found at 452.133.

MEMORANDUM

TO: CHRIS SUNDBERG

FROM: RICK STAFF

DATE: April 13, 2005

SUBJECT: LRB-1387/P2 and LRB-1387/P2dn

The following is an analysis of LRB-1387/P2 and LRB-1387/P2dn. My broad comment on the draft is that it is very well drafted but that there are a significant number of substantive revisions made to the drafting instructions. If this draft was creating a new body of law the changes would be much easier to work with. Unfortunately, the revisions are being made to a long established body of law. The drafting instructions are based on three years of industry study that resulted in a proposal that is uniformly well understood and is recognized nationally as reflecting industry best practices and consumer expectations. I will respond to the questions in the drafter's notes first and then analyze the draft in sections based on topic.

**DRAFTER'S NOTES**  
**LRB-1387/P2dn**

1. In order to eliminate references to "employment" and "employees" from ch. 452, this version includes a requirement that salespersons and brokers who provide brokerage services on behalf of another broker register with the department the name of the broker on whose behalf the salesperson or broker will be providing brokerage services. The registration provision is based on current RL 17.03. In this draft, a subagent must register with the department under proposed s. 452.035 (2) as a broker who is providing brokerage services on behalf of another broker. This draft also prohibits a subagent from registering to provide brokerage services on behalf of more than one broker. Is this your intent? Should the draft be changed so that a subagent is distinguished from a broker who is registered to provide brokerage services on behalf of another broker?

**COMMENT: It is appropriate to replace the term "employ" and its variations in the draft. Rather than use the term "authorizing broker" a term with more "street" meaning such as "company" should be used. Ultimately this is a regulatory matter and DRL staff should have input (e.g. William Black, REB counsel).**

**However, the modifications to the term "salesperson" and the definition of subagent are more problematic. The definitions of the terms should be carefully drawn to refer to these relationships as we know them in the industry today. Subagency should be affirmatively limited to the relationship between brokers in the sense of one broker (company) offering subagency to other brokers (companies) to assist the principal broker through cooperative brokerage activities. Although agency law may identify salespeople as subagents of their company this usage should be**



**explicitly avoided in the draft as it will create unnecessary confusion. The definition of salesperson needs to be limited to the authorizing broker (company) concept as brokers retain others (such as subagents) to provide brokerage services. As drafted a salesperson is difficult to distinguish from a subagent.**

2. Regarding the duties a broker owes to all parties in a transaction under proposed s. 452.133 (1), some of these duties relate to the provision of brokerage services. By definition, a party who receives brokerage services in a transaction is either a broker's client or a broker's customer. In this draft, a broker owes the duties to provide brokerage services honestly and fairly (proposed s. 452.133 (1) (a)) and to provide brokerage services with reasonable skill and care (proposed s. 452.133 (1) (b)) to all parties to a transaction, not just the customer or client for whom the broker is providing brokerage services. Is this your intent?

**COMMENT:**

**The duties identified in the draft as owed to all parties are consistent with the intent however the reclassification of certain duties (owed to all parties in the drafting instructions) as duties owed to customers is not. The drafting instructions maintain the current statutory paradigm (duties to parties and clients) with the addition of clarifications related to subagency and non-agency relationships. The distinction creating certain duties to "customers" rather than "parties" does not reflect industry practices or the intent of the drafting instructions. Unless there is a legal problem with the drafting instruction model the duty to provide market information should continue to be a duty owed to all parties. The "neutrality" duty under subagency cannot be applied to customers because that change eliminates the limited "pre-negotiation" application of the duty.**

3. Similarly, in this draft a broker's duty to preserve confidentiality (proposed s. 452.133 (1) (d)) applies to information the broker receives from or about a party who is not the broker's customer or client. Is this correct? Should a broker's duty to preserve confidentiality apply only to information received from a person to whom a broker is providing brokerage services?

**COMMENT:**

**It is correct. Confidentiality duties currently and under the drafting instructions maintain confidentiality as a duty owed to all parties. The "customer/client" distinction applied frequently throughout the draft is not an appropriate substitute for "parties" absent compelling legal rationale making the use of the term "party" incorrect.**

4. Please note that I have moved the duty to provide accurate information about market conditions (proposed s. 452.133 (1) (e)) to the duties owed to a customer under subsection (1m). It appears that a broker can only fulfill this duty with respect to a customer or client, because the provision of such information amounts to a brokerage

service under proposed s. 452.01 (2) (am). Is this okay?

**COMMENT:**

**No. The drafting instructions maintain the current statutory paradigm with the addition of clarifications related to subagency and non-agency relationships which should be included. The duty to provide market information should continue to be a duty owed to all parties. Consumers will continue to receive disclosures addressing duties owed to all parties and duties owed to clients. The paradigm in the drafting instructions reflect many years of consumer and industry experience and absent legal necessity should not be changed.**

5. The draft provides that a client may waive certain duties owed by brokers. Should a customer be permitted to waive any of the duties owed by the broker under proposed s. 452.133 (1m)? Note that in this version, the broker's duties to a customer is limited to the duty to provide information about market conditions under proposed s. 452.133 (1m) (a).

**COMMENT:**

**The only waiver should be client waiver of the duties as outlined in the drafting instructions. There should be no duties designated specifically for "customers."**

6. Should proposed s. 452.137 (1m), which involves brokers providing brokerage services to more than one client in a transaction, also apply to brokers providing brokerage services to more than one customer in a transaction, or to some combination of clients and customers?

**COMMENT:**

**No. The draft (Section 50) incorrectly creates duties relating to loyalty for customers which are to be limited to subagents per the drafting instructions. The rules applicable to subagency relationships are different in application than the draft's duties owed to customers. These issues should remain in the context of subagency as set forth in the drafting instructions.**

Finally the drafter did not note that the agency disclosure provisions of 452.135 have not yet been drafted. It is assumed that the reason was uncertainty regarding the above questions. The WRA is always willing to assist with questions regarding industry practices should it assist te drafter in formulating language.

**COMPARISON: DEFINITIONS**

**COMMENTS: COMMENTS OFFERED FOLLOWING EACH DEFINITION.**

**BILL DRAFT:**

**SECTION 1.** 452.01 (1m) of the statutes is amended to read:

452.01 (1m) "Agency agreement" means a written agreement between a broker and a client ~~under s. 452.135 (1)~~ that authorizes the broker to provide brokerage services to the client and that discloses the terms and conditions under which the broker will provide those services.

**Comment: Strike “and that discloses the terms and conditions under which the broker will provide those services.” The agency agreement does not and can not disclose all of the terms and conditions under which the broker will provide brokerage services. Many of these standards are found outside the agency agreement such as in statutes, administrative rules, common law, etc. A similar but narrower provision under current law was removed in the WRA’s proposal because the standard is impractical and unnecessary.**

**SECTION 2.** 452.01 (1p) of the statutes is created to read:

452.01 (1p) “Authorizing broker” means any of the following:

- (a) The broker identified in the register under s. 452.12 (4) (b) as the broker on whose behalf a salesperson or broker is authorized to provide brokerage services.
- (b) The broker on whose behalf a time–share salesperson is registered under s. 452.025 to provide brokerage services.

**Comment: “authorizing broker” is not a term that readily communicates the nature of the relationship between a salesperson and the “employing broker.” An alternate term should be used. The most common term in the industry and the public is “company” I would use the term “company” rather than “authorized broker.” If necessary the definition could be expanded to ensure that it included corporeal as well as entity brokers.**

**SECTION 3.** 452.01 (2) (a) of the statutes is amended to read:

452.01 (2) (a) For ~~another~~ a client or customer, and for commission, money, or other thing of value, negotiates or offers or attempts to negotiate a ~~sale, exchange purchase, or rental of an interest or estate in real estate~~ transaction.

**Comment: The draft replaces terms such as “another” and “party” with “client and customer.” In most cases the term used should be “party.” Clients and customers are subsets of “party” and comprise all persons who are “parties.” Repeatedly stating “client and customer” is both unnecessary but it causes confusion in many applications. Many will question the intent of the change which appears to have no substantive purpose. Future use of the term will be italicized when it appears to be unnecessary.**

**SECTION 4.** 452.01 (2) (am) of the statutes is created to read:

452.01 (2) (am) For a *client or customer*, and for commission, money, or other thing of value, provides information and advice on matters that are material to the client’s or customer’s transaction and that are within the scope of the knowledge, skills, and training required under s. 452.09 (2) (a) and (3) (a).

**SECTION 5.** 452.01 (2) (b) of the statutes is amended to read:

452.01 (2) (b) Is engaged wholly or in part in the business of selling or exchanging interests or estates in real estate; time shares; or businesses or their goodwill, inventory, or fixtures 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.

SECTION 6. 452.01 (2) (bm) of the statutes is created to read:

452.01 (2) (bm) For a *client or customer*, and for commission, money, or other thing of value, shows a client or customer real estate or a time share.

**Comment: The drafting instructions identified showings as a subset of providing information and advice on real estate matters. In this context the plain meaning definition of a showing is relatively clear. Out of that context I am not sure what the meaning of a showing is. I'd recommend that the original construction be retained.**

SECTION 7. 452.01 (2) (d) of the statutes is repealed.

SECTION 8. 452.01 (2) (e) of the statutes is repealed.

SECTION 9. 452.01 (2) (f) of the statutes is repealed.

SECTION 10. 452.01 (2) (g) of the statutes is repealed.

SECTION 11. 452.01 (2) (h) of the statutes is amended to read:

452.01 (2) (h) For ~~another~~ a client or customer, and for a commission, money, or other thing of value, promotes the ~~sale, exchange, purchase, option, rental or leasing of real estate or business opportunities~~ a transaction. This paragraph does not apply to a person who only publishes or disseminates verbatim information provided by another person.

**Comment: I don't think "transaction" works here. Instead of promoting a sale we are now promoting actions leading to a sale. I'd retain the original statute as the drafting instructions recommended.**

SECTION 12. 452.01 (3e) of the statutes is amended to read:

452.01 (3e) "Brokerage service" means any service described under sub. (2) (a) to (h) provided by a broker to ~~another person~~ a client or customer.

**Comment: A party, as recommended in the drafting instructions would be a preferred term.**

SECTION 13. 452.01 (3m) of the statutes is amended to read:

452.01 (3m) "Client" means a party to a transaction who has entered into an agency agreement with a broker ~~for brokerage services~~.

**Comment: The draft fails to maintain the clarification that a subagent is not the agent of the other broker's client.**

SECTION 14. 452.01 (4d) of the statutes is repealed. SECTION 15. 452.01 (4h) of the statutes is repealed. SECTION 16. 452.01 (4p) of the statutes is repealed. SECTION 17. 452.01 (4t) of the statutes is repealed.

SECTION 18. 452.01 (5m) (intro) of the statutes is amended to read:

452.01 (5m) (intro) "Negotiate" means to ~~act as an intermediary between the parties to a transaction~~ provide to a client or customer assistance within the scope of the knowledge, skills, and training required under s. 452.09 (2) (a) and (3) (a) in developing a proposal or agreement relating to a transaction, including doing any of the following:

SECTION 19. 452.01 (5m) (b) of the statutes is amended to read:

452.01 (5m) (b) Completing, when requested by a ~~party~~ client or customer,

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appropriate department-approved forms or other writings to document the party's client's or customer's proposal consistent with the party's client's or customer's intent.

**SECTION 20.** 452.01 (5m) (c) of the statutes is amended to read:

452.01 (5m) (c) Presenting to a party client or customer the proposals of other parties to the transaction and ~~informing the party receiving a proposal of the advantages and disadvantages~~ giving the client or customer a general explanation of the provisions of the proposal.

**SECTION 21.** 452.01 (5m) (d) of the statutes is repealed.

**SECTION 22.** 452.01 (5m) (e) of the statutes is created to read:

452.01 (5m) (e) Acting as an intermediary to facilitate or participate in communications between a client or customer and another party related to the client's or customer's interests in a transaction.

**SECTION 23.** 452.01 (5p) of the statutes is created to read:

452.01 (5p) "Negotiate" does not include providing to a client or customer advice or opinions that relate to real estate or showing real estate or a time share to a client or customer.

**Comment: The drafting instructions intentionally used the terms "information and advice." Is there a legal problem with these terms? Also, the draft indicated that showings and information and advice do not, in and of themselves constitute negotiation. The draft says negotiation does not include these things which is not correct. Negotiation can include these things but these things alone are not negotiation.**

**SECTION 24.** 452.01 (5r) of the statutes is amended to read:

452.01 (5r) "Party" means a person seeking to ~~sell, exchange, buy or rent an interest in real estate, 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 engage in a transaction.

**SECTION 25.** 452.01 (7) of the statutes is amended to read:

452.01 (7) "Salesperson" means any person other than a broker ~~or time-share salesperson who is employed by a broker to perform any act authorized by this chapter to be performed by a broker~~ authorized by a broker to provide brokerage services on the broker's behalf.

**This definition fails to limit the definition to the old "employee" model and needs to be narrowed – it would include subagents.**

**SECTION 26.** 452.01 (7g) of the statutes is created to read:

452.01 (7g) "Subagency agreement" means a written agreement between a broker and a subagent that authorizes the subagent to provide brokerage services in a transaction on behalf of the broker within the scope of the agency agreement between the broker and the broker's client.

**SECTION 27.** 452.01 (7r) of the statutes is created to read:

452.01 (7r) "Subagent" means a broker who has entered into a subagency agreement with another broker.

Sections 26 and 27 are a significant departure from the drafting instructions and should be limited to the application set forth there, i.e. broker to broker cooperative relationships. Furthermore the draft fails to maintain the clarification that a subagent is not the agent of the other broker's client. 2

(?) **"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.**

SECTION 28. 452.01 (9) of the statutes is amended to read:

452.01 (9) "Time-share salesperson" means a person, other than a person licensed under s. 452.09, who is ~~employed by a licensed~~ registered under s. 452.025 and authorized by an authorizing broker to sell or offer or attempt to negotiate an initial sale or purchase of a time share but who may not perform any other acts authorized by this chapter to be performed by a broker or salesperson.

SECTION 29. 452.01 (10) of the statutes is amended to read:

452.01 (10) "Transaction" means actions, including negotiations, intended to result 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, or a business or a ~~business opportunity~~ its goodwill, inventory, or fixtures, whether or not the business includes real estate.

SECTION 30. 452.025 (1) (b) 3. of the statutes is amended to read:

452.025 (1) (b) 3. Certification from the ~~licensed~~ authorizing broker employing the applicant that the applicant is competent to act as a time-share salesperson.

SECTION 31. 452.025 (3) (a) of the statutes is amended to read:

452.025 (3) (a) A time-share salesperson registered under this section may act as a time-share salesperson only when *employed* by a licensed to the extent authorized by the authorizing broker.

**COMMENT: Modifications to "employed" need to be made consistently throughout the draft.**

SECTION 32. 452.025 (3) (b) 2. g. of the statutes is amended to read:

452.025 (3) (b) 2. g. The signature of the time-share salesperson and the name of the ~~employing~~ authorizing broker.

SECTION 33. 452.025 (4) of the statutes is renumbered 452.025 (4) (a) and amended to read:

452.025 (4) (a) A time-share salesperson registered under this section may apply at any time to transfer ~~employment~~ registration to another ~~licensed~~ authorizing broker by submitting to the department an application in the form prescribed by the department and the transfer fee specified in s. 440.05 (7).

SECTION 34. 452.025 (4) (b) of the statutes is created to read:

452.025 (4) (b) A time-share salesperson may not provide brokerage services on behalf of an authorizing broker while the authorizing broker's license is suspended or revoked. Notwithstanding par. (a), a time-share salesperson may not

apply for transfer to another authorizing broker if the time-share salesperson is a party to the activities causing the suspension or revocation of the license of the authorizing broker.

## **ANALYSIS: MULTIPLE REPRESENTATION**

### **BILL DRAFT:**

**SECTION 60.** 452.137 (1) and (2) of the statutes are consolidated, renumbered 452.137 (1m) and amended to read:

#### **SECTION 60**

452.137 (1m) ~~No~~ A broker ~~may provide~~ who 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 broker who ~~represents more than one client in a transaction~~ owes to each client the duties specified in s. 452.133 (2) to each client but (1) and (2), except that if a salesperson *employed* by a broker is negotiating on behalf of more than one of the broker's clients in a transaction, the salesperson may not place the interests of any client ahead of the interests of another client in the transaction during the negotiations.

**COMMENT: Modifications to "employed" need to be made consistently throughout the draft.**

### **WRA PROPOSAL:**

**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.~~

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*(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.*



## ANALYSIS: AGENCY RELATIONSHIPS WITH PARTIES

Current law requires the broker to have an agency relationship whenever a broker is providing brokerage services to any party.

The WRA proposal required that a broker have an agency relationship prior to negotiating on behalf with any party. A proposal consistent with the WRA's would satisfy the substantive goals of the drafter without the unnecessary complexity in the draft.

The draft begins by authorizing brokerage services to a customer. This is not necessary. If the drafter believes there is insufficient authority for brokers to provide brokerage services to customers elsewhere in Chapter 452 it should be addressed separately from this section. The function of this section is to determine at what point in time the broker providing brokerage services to a party must identify and disclose agency relationships with a party. The intent of the draft was to clarify that this must be done no later than the time negotiation services are provided to the party. Although the drafter correctly recognizes that the mechanisms for identifying and disclosing agency relationships is different for customers and clients, there is no need to depart from a simple standard that agency issues must be addressed before negotiations are provided to any parties.

If the drafter believes that there is no need to address client agency issues because the process of becoming a client incorporates agency and agency disclosure a far simpler approach should be considered. The construction of the draft is simply far too complex.

I would recommend that if the draft only addresses customers (I do not) the drafter consider language more like:

SECTION 41. 452.132 of the statutes is created to read:

**452.132 Brokerage services; customers.** (1) ~~Subject to sub. (2), a broker may provide brokerage services to a customer.~~

(2) ~~A broker may not negotiate on behalf of a customer who is not a client of another broker with whom the broker has entered into a subagency agreement, unless all of the following apply:~~

(a) ~~Another party to the transaction is the broker's client or is the client of another broker with whom the broker has entered into a subagency agreement.~~ The broker is acting as an agent of a client or the subagent of another broker in the transaction

(b) ~~The broker has provided to the customer a copy of the disclosure required under s. 452.135.~~

### BILL DRAFT:

SECTION 41. 452.132 of the statutes is created to read:

**452.132 Brokerage services; customers.** (1) Subject to sub. (2), a broker may provide brokerage services to a customer.

(2) A broker may not negotiate on behalf of a customer who is not a client of another broker with whom the broker has entered into a subagency agreement, unless all of the following apply:

(a) Another party to the transaction is the broker's client or is the client of another broker with whom the broker has entered into a subagency agreement.

(b) The broker has provided to the customer a copy of the disclosure required under s. 452.135.

**WRA PROPOSAL:**

**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.*

**ANALYSIS: DUTIES TO ALL PARTIES**

**COMMENT:** Eliminate substitutions of "client or customer" for "party." Per the drafting instructions the duties are not owed to other parties, the duty is to the party receiving the brokerage service. Finally, the duty to provide market information is a duty owed to all parties, not a duty owed to customers.

**BILL DRAFT:**

**SECTION 42.** 452.133 (1) (intro.) of the statutes is amended to read:

452.133 (1) **BROKER'S DUTIES TO ALL PARTIES TO A TRANSACTION.** (intro.) ~~In A~~ broker who is providing brokerage services to a party to client or customer in a transaction, a broker shall do all of the following owes all of the following duties to the other parties to the transaction:

**SECTION 43.** 452.133 (1) (a) of the statutes is amended to read:

452.133 (1) (a) ~~Provide~~ The duty to provide brokerage services ~~to all parties to the transaction~~ honestly, and fairly and in good faith.

**SECTION 44.** 452.133 (1) (b) of the statutes is amended to read:

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

**SECTION 45.** 452.133 (1) (c) of the statutes is amended to read:

**SECTION 45**

452.133 (1) (c) ~~Disclose to each party~~ The duty to disclose all material adverse facts that the broker knows and that the a party does not know or cannot discover through reasonably vigilant observation, unless the disclosure of a material adverse fact is prohibited by law.

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**SECTION 46.** 452.133 (1) (d) of the statutes is amended to read:

452.133 (1) (d) ~~Keep~~ The duty to keep confidential any information given to the broker in confidence, or any information obtained by the broker that he or she knows a reasonable party would want to be kept confidential, unless the information must be disclosed ~~under par. (e) 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 a party in the transaction.

**SECTION 47.** 452.133 (1) (e) of the statutes is repealed.

**SECTION 48.** 452.133 (1) (f) of the statutes is amended to read:

452.133 (1) (f) ~~Account for all~~ The duty to safeguard trust funds and other property coming into the possession of a held by the broker that belongs to any party within a reasonable time of receiving the property as required by rules promulgated by the department under s. 452.13 (5).

**WRA PROPOSAL:**

**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. (e) 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.~~

## ANALYSIS: DUTIES OWED TO CUSTOMERS.

**COMMENT: Duties owed to customer provisions need to be struck and the paradigm in the drafting instructions must be maintained. The creation of the duties to customers not only create different relationships than contemplated by current law or the drafting instructions, the draft creates new complexity without any apparent legal need.**

### BILL DRAFT:

SECTION 50. 452.133 (1m) of the statutes is created to read:

452.133 (1m) **BROKER'S DUTIES TO CUSTOMERS.** (a) A broker providing brokerage services to a customer owes the customer the duties that a broker owes to a party under sub. (1) and the duty to provide, when requested by a customer, accurate

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information about market conditions that affect the customer's transaction, within a reasonable time after the customer's request, unless disclosure of the information is prohibited by law.

(b) If a broker is providing brokerage services to a customer in a transaction in which no party is the broker's client and no party is the client of another broker with whom the broker has entered into a subagency agreement, then all of the following apply:

1. The broker owes all parties the duty not to place the broker's interests ahead of the interests of any party to the transaction.
2. The broker may not provide advice or opinions to any party, if providing such advice or opinions is contrary to the interests of the customer or any party.

## ANALYSIS: DUTIES OWED TO CLIENTS

**CONCLUSION: The loyalty duty creates the generic application of a term which is often misinterpreted. Loyalty must be defined statutorily. Section 54 substitutes "advice and opinions" for "information and advice." This differs from both the current law and the drafting instructions. Is there a reason for this substitution?**

### BILL DRAFT:

SECTION 51. 452.133 (2) (intro.) of the statutes is amended to read:

452.133 (2) **BROKER'S DUTIES TO A CLIENT.** (intro.) ~~In addition to his or her duties under sub. (1), a~~ A broker providing brokerage services to his or her client shall do **owes the client the duties that the broker owes to a party under sub. (1) and to a customer under sub. (1m) (a) and** all of the following duties:

SECTION 52. 452.133 (2) (a) of the statutes is renumbered 452.133 (2) (a) (intro.) amended to read:

452.133 (2) (a) (intro.) ~~Loyally~~ The duty to loyally represent the client's interests ~~by placing~~ and not to do any of the following:

1. Place the client's ~~broker's~~ interests ahead of the client's ~~of any other~~

party, unless loyalty to a client violates the broker's duties under sub. (1) or s. 452.137 (2).

**SECTION 53.** 452.133 (2) (a) 2. of the statutes is created to read:

452.133 (2) (a) 2. Disclose to other parties in the transaction information or advice the disclosure of which is contrary to the client's interests, unless disclosure is required by law.

**SECTION 54.** 452.133 (2) (am) of the statutes is created to read:

452.133 (2) (am) The duty to provide, when requested by the client, advice and opinions to the client on matters that are material to the client's transaction and that are within the scope of the knowledge, skills, and training required under s. 452.09 (2) (a) and (3) (a). These matters include the real estate market and contractual, legal, and regulatory issues.

**SECTION 55.** 452.133 (2) (b) of the statutes is amended to read:

452.133 (2) (b) ~~Disclose~~ The duty 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) (d) and other information the disclosure of which is prohibited by law.

**SECTION 56.** 452.133 (2) (c) of the statutes is amended to read:

452.133 (2) (c) ~~Fulfill~~ The duty 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~~ is not inconsistent with another duty that the broker has under this chapter or any other law.

**SECTION 57.** 452.133 (2) (d) of the statutes is created to read:

452.133 (2) (d) The duty to negotiate on behalf of the client.

## **ANALYSIS: SUBAGENT DUTIES**

**COMMENT:** (a) and (b) must be limited the transaction in which the subagent is providing brokerage services as a subagent.

## **BILL DRAFT:**

**SECTION 58.** 452.133 (4) of the statutes is created to read:

452.133 (4) **SUBAGENT'S DUTIES.** A subagent owes all parties the duties specified in sub. (1) and may not do any of the following:

### **SECTION 58**

- (a) Place the subagent's interests ahead of the interests of a client of a broker with whom the subagent has entered into a subagency agreement.
- (b) Provide advice or opinions to parties in the transaction if providing such advice or opinions is contrary to the interests of a client of the broker with whom the subagent has entered into a subagency agreement, unless required by law.

## **WRA PROPOSAL:**

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(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.

**ANALYSIS: WAIVER OF DUTIES**

**COMMENT: OK**

**BILL DRAFT:**

**SECTION 59.** 452.133 (5) of the statutes is created to read:

452.133 (5) **WAIVER OF DUTIES.** The duties imposed by subs. (1), (2) (a), (b), and (c), and (4) may not be waived. A client may waive, in part or in full, the broker's duties under sub. (2) (am) and (d), except that a waiver under this subsection is not effective unless the broker provides to the client a written disclosure containing all of the following:

(a) If the client intends to waive the broker's duty under sub. (2) (am), a copy of the text of that subsection, and a statement that, as a consequence of the client's waiver, that broker will have no legal duty to perform the duty imposed by sub. (2) (am).

(b) If the client intends to waive the broker's duty under sub. (2) (d), a copy of the text of that subsection and s. 452.01 (5m) and (5p), and a statement that, as a consequence of the client's waiver, that broker will have no legal duty to perform the duty imposed by sub. (2) (d).

(c) An statement that as a consequence of the client's waiver, the client may require the assistance of an attorney or another service provider to assist the client to fulfill the client's goals and contractual duties in the transaction.

**WRA PROPOSAL:**

(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.

**ANALYSIS:**

452.12 (3) **BROKER'S VICARIOUS LIABILITY FOR ACTS OF EMPLOYEES.** Each broker shall supervise, and is responsible for, the acts of, brokerage services provided on

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behalf of the broker by any broker, salesperson, or time-share salesperson employed by authorized by the broker to provide brokerage services on behalf of the broker.

**SECTION 38.** 452.12 (4) (title) of the statutes is amended to read:

**COMMENT: REGISTRATION/AUTHORIZING BROKER**

The general concern is that sections like 452.035(3) may be interpreted too broadly. Do they apply to cooperative relationships between brokers? This problem exists under current law but stating the law in terms of a company maintaining a roster of licensees providing brokerage services on behalf of the broker to the broker's clients and customers may be clearer.

**BILL DRAFT:**

**SECTION 35.**

**SECTION 36**

**SECTION 36**

**SECTION 37.**

**SECTION 39.**

**SECTION 40**

**COMMENT: COMMON LAW DUTIES**

Fiduciary should not be in the title.

**SECTION 62** 452.139 (1) ~~FIDUCIARY~~ 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~~ duties or obligations under common law principles of agency 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.

**SECTION 63.**

**SECTION 64.**

**SECTION 65.**

**OK except for the need for a more descriptive term.**

**SECTION 66. Initial applicability. 6 months effective date**