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Legal Update

A WRA Publication Exclusively for the Designated REALTOR®

Inside This Issue

Improved Offer Addenda & Agency Disclosure Forms

As the practice of real estate evolves, the forms used by real estate licensees must change to keep abreast of new developments and the standards of competent practice. This *Legal Update* discusses four newly revised and improved forms that have been developed as part of that process. These new forms all come from sources that drew heavily from WRA member input.

The first newly revised form is the improved WRA Addendum A. In fact, the WRA Addendum A has been split into two forms - the revised Addendum A and a new WRA Addendum B. This "form split" was created to complement the new offer to purchase provisions, to improve the various contingency provisions (largely in response to feedback and suggestions from WRA members), to provide more flexibility to members using the addenda forms, and to produce forms that fit on letter-sized paper.

> The WRA Addendum A has been split into two forms ... to provide more flexibility to members ... and to produce forms that fit on letter-sized paper.

The new WRA Addendum A is two pages long (both sides of a single page) and contains the general supplementary provisions that may be needed with any kind of offer, whether it be residential, vacant land, farm, commercial, etc. The new WRA Addendum B, on the other hand, is one page long (one side only) and contains contingencies that will more typically pertain to rural properties.

The other two newly revised WRA forms are the basic forms for agency disclosure – the Disclosure of Real Estate Agency with Consent to Multiple Representation and the Disclosure of Real Estate Agency. These two forms have been revised primarily by adding a note of explanation at the top, requesting parties to initial (rather than sign) the form at the bottom to acknowledge receipt, and formatting the form to fit on letter-sized paper.

New Offer Addenda

The two new and improved WRA addenda draw upon the previous WRA Addendum A (1997) and the Addendum A and Addendum B developed and distributed by the REALTORS® Association of Northeast Wisconsin, Inc. (RANEW) (1997), in cooperation with the WRA. The layout of the revised WRA addenda somewhat resembles that of the RANEW addenda, with optional and fill-in-the-blank provisions on the first or front page, and standard boilerplate provisions on the second or back page. A sample copy of the revised WRA Addendum A appears on pages 11 & 12 of this *Update*, and a sample copy of the new WRA Addendum B appears at page 13.

The WRA Addendum A and Addendum B, however, are different from their predecessors because they

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have been tailored for use with the revised offer to purchase forms, such as the 1999 WB-11 Residential Offer to Purchase (optional use date April 1, 1999; mandatory use date November 1, 1999). Accordingly, they are best used with the 1999 residential offer to purchase and with the other revised offer to purchase forms that will soon follow. Use of these new WRA addenda with the 1994 version of the various offer to purchase forms may result in the inadvertent omission of optional provisions and contingencies that are helpful to the parties and the transaction.

The new WRA addenda, unlike their predecessors, do not contain blank lines where licensees can write in additional provisions when needed. Instead, licensees will need to use the Additional Provisions sections in the offer itself, or attach an additional page where additional provisions are typed or written in. Any such additional page should be labeled as an addendum or exhibit and properly incorporated by reference into the offer.

Addendum A to the Offer to Purchase

Addendum A to the Offer to Purchase is an overall, general-purpose addendum containing several general provisions and contingencies believed to be helpful in many different types of transactions. This revised two-page Addendum A replaces the previous WRA Addendum A (1997). Unlike previous addenda where each provision was optional and had to be selected by marking the provision with an "X" or in some other manner, only the Home Warranty Program, Map of the Property, and Testing Contingency are optional in the new WRA Addendum A. These three provisions must be marked in order to be included in the offer to purchase. All other provisions are automatically included in the offer unless struck or lined out. This will not often be necessary because many of the standard provisions in the new WRA Addendum A apply only under certain circumstances. For example, the Abstract provision states that "If title evidence is being provided by abstract . . ." such a provision can be left in the addendum and need not be lined out, even if the transaction does not involve an abstract, because the provision states on its face that it applies only if an abstract is being used for title evidence.

The optional Home Warranty Program, Map of the Property, and Testing Contingency appear on the first or front page of the new WRA Addendum A. The FHA Loan provision, the Reading / Understanding provision, and the lines for the parties' initials also appear on the first or front page. The following automatic provisions appear on the second or back page: Automatic provisions for VA Loan; Abstract; Underground Storage Tanks; Basement Fuel Oil Tanks; Asbestos, Lead, Lead-Based Paint, and Radon; Buyer's Responsibility to Ascertain Condition of the Property; Inspections, Tests, Appraisals, and Opinions; Municipal Code / Code Compliance; Zoning and Building Restrictions, Comprehensive Plans and Non-Conforming Property; and Flood Plains / Wetlands.

Home Warranty Program

The Home Warranty Program provision in the updated WRA Addendum A is essentially the same as the home warranty provision in the 1997 WRA Addendum A. The Home Warranty Program provision permits the parties to fill in the cost of the home warranty, and to indicate whether the cost will be paid by the seller or the buyer and whether the listing broker or the cooperative broker will actually provide the warranty plan.

The Home Warranty Program provision also contains some new information: the buyer is advised that a home

inspection may detect conditions not covered by the warranty plan, and the broker recommends that the parties consider a home warranty program.

Map of the Property

The Map of the Property provision in the updated WRA Addendum A is different from the Map of the Property provision found in the 1997 WRA Addendum A. Rather than picking a boundary map, a mortgage inspection map, or a survey map, the parties simply select the map components and features that are desired. The parties may strike out pre-listed map features and write in additional features that will be helpful to them. The parties are cautioned to consider the cost and the real need for the various map features and components before selecting them. The parties also designate whether the buyer or the seller will be responsible for providing the map; whether the buyer or seller will pay for the map; and the deadline for the provision of the map, in terms of number of days after acceptance of the offer. The offer is contingent upon the provision of a map with the selected features, which shows no significant encroachments or information that is materially inconsistent with any prior representations.

If the buyer receives the map on or before the deadline, the buyer has five days to determine whether the map shows any significant encroachments or changes in information. The contingency fails if the buyer delivers a copy of the map and written notice identifying any encroachment or material inconsistency to the seller and the listing broker, within the five days. If the buyer does not deliver a notice and a copy of the map within five days of receipt of the map, or the deadline for the map (whichever comes first), the contingency is deemed satisfied.

It may be unwise for a buyer to have the seller obtain the map, because if the seller does not produce the map by the deadline, the buyer's five days in which to give notice runs from the deadline. If the seller does not produce the map within five days of the deadline, the buyer will be unable to provide a copy of the map along with the notice. The seller may then argue that the contingency is deemed satisfied on its face because the buyer will have been unable to give notice and furnish a copy of the map. Therefore the contingency arguably fails if the seller does not deliver the map. The seller also may be in breach of the duty to proceed with due diligence and in good faith in completing the terms and conditions of the offer. However, the potential dispute and delay may be disadvantageous for the buyer. The buyer may want to consider engaging the surveyor and obtaining the map him or herself. That way the buyer has more control over the workings of the contingency.

Testing Contingency

The Testing Contingency in the new WRA Addendum A complements the 1999 Residential Offer to Purchase, which distinguishes between inspections and testing, but which does not include a testing contingency provision. An inspection is an observation of the property that does not include testing other than testing for leaking carbon monoxide, LP gas, or natural gas. Testing, on the other hand, involves the taking of samples of materials such as soils, water, air, and building materials, and performing a laboratory analysis of the same. Therefore, the Testing Contingency may be used when the buyer wishes to have tests performed for radon, asbestos, soil contamination or composition, or other chemicals or substances. It could also be used for a water test, although there is a separate contingency for well water in the WRA's new Addendum B.

The Testing Contingency in the 1999 WRA Addendum A is modeled after the Inspection Contingency in the 1999 Residential Offer to Purchase. The parties designate whether the buyer will obtain – or the seller will provide – a written report documenting the results of the tests specified in the blank line in the contingency. The parties also specify the deadline for the test results report in terms of number of days after acceptance, and indicate whether the seller or the buyer will pay for the testing and written report. If the test results reveal a defect to which the buyer objects, the buyer must deliver a copy of the test results report and a notice of defects to the seller and listing broker. The buyer has five days from the buyer's receipt of the test results report or the deadline specified in the contingency (whichever comes first) in which to deliver the notice and the copy of the report. If these documents are not delivered within these five days, the testing contingency is deemed satisfied.

Defects are defined in the same manner as in the Inspection Contingency. A defect is defined as a structural, mechanical, or other condition that would have a significant adverse effect on the value of the property; that would significantly impair the health or safety of future occupants of the property; or, if not repaired, removed, or replaced, would significantly shorten or have a significant adverse effect on the expected normal life of the property. Defects do not include any structural, mechanical, or other conditions that the buyer knew the full extent and nature of – or had full written notice of – before signing the offer to purchase.

The seller has the right to cure if the parties so indicate by striking the phrase "shall not," or if they fail to indicate a selection. If the seller has the right to cure, the seller satisfies the contingency if the seller (1) delivers a written notice of the seller's election to cure to the buyer, within ten days of the seller's receipt of the buyer's notice of defects, and (2) completes the repairs in a good and

workmanlike manner and provides the buyer, prior to closing, with a written report detailing the work done.

The offer becomes null and void if the buyer delivers a notice of defects and copy of the test results report to the seller on time, and the seller does not have a right to cure. The offer also becomes null and void if the buyer delivers, on time, a notice of defects and copy of the test results report to a seller with the right to cure, who either delivers notice to the buyer stating that the seller will not cure, or fails to deliver a written notice of the seller's election to cure within the ten days allotted.

Under the Inspection Contingency in the 1994 Residential Offer to Purchase, the seller was not given this option to state that he or she would not cure. This meant that the seller who did not wish to cure had to wait 10 days for the offer to become null and void.

As with the Map Contingency, it may be unwise for a buyer to have the seller obtain the test results report because if the seller does not produce the report within five days of the deadline, the buyer will be unable to provide a copy of the test results report along with a notice of defects. The seller may then argue that the contingency is deemed satisfied on its face. While the seller really may be in breach of the duty to complete the terms and conditions of the offer with due diligence and in good faith, the potential dispute and delay may be disadvantageous for the buyer. The buyer may want to consider engaging the appropriate expert or contractor and obtaining the test results report him or herself. That way, the buyer has more control over the workings of the contingency.

The parties may also wish to supplement the Testing Contingency with additional provisions, precisely specifying the area or materials to be tested, the purpose of the test, any limitations on the testing, and any obligations to restore the property afterwards.

FHA Loan & VA Loan Provisions

The FHA Loan provision and the VA Loan provision in the updated WRA Addendum A contain the language required by the respective federal programs, without change or modification. The FHA Loan provision appears on the first or front page, because it contains a blank line where a minimum appraisal amount must be filled in, and because the mortgagee must sign the addendum to agree to abide by the FHA Loan provision. The VA Loan provision appears at the top of the second or back page. Neither provision applies unless the Financing Contingency in the offer to purchase specifies FHA or VA financing, respectively.

Reading/Understanding Provision

The Reading / Understanding provision in the revised WRA Addendum A makes it clear to the parties that the act of initialing and dating the form at the bottom of the first page means only that they have received a copy of the addendum and that they have read, and understand, the provisions in the addendum. As the provision states, it does not mean that they agree to, or accept any or all of the provisions in the addendum. If the parties find one or more of the provisions to be unacceptable, they may use a counter-offer to eliminate or modify those provisions.

The Reading / Understanding provision goes on to caution the parties that the standard provisions in the addendum are not necessarily appropriate, adequate, or legally sufficient for any given transaction. The provision encourages the parties to consult with legal counsel if they have questions about the legal impact of any provision contained in the addendum or the offer to purchase.

Abstract

While the revised offer to purchase forms discuss title evidence solely in terms of title insurance and no longer mention abstracts, title evidence in some transactions will undoubtedly continue to be handled with abstracts. Accordingly, the Abstract provision in the updated WRA Addendum A extracts the basic provisions from the 1994 Residential Offer to Purchase that relate to providing title evidence by abstract. The parties may need to include an additional provision if the seller is going to submit an abstract and receive credit for the surrender value of the abstract against the cost of obtaining a title insurance commitment.

Underground Storage Tanks

The Underground Storage Tanks provision in the revised WRA Addendum A indicates that any abandoned underground storage tank (UST) on the property must be cleaned and closed as required by Department of Commerce (DComm) regulations. This provision makes the offer to purchase contingent upon the seller confirming to the buyer, in writing, at least five days prior to closing, that any abandoned UST on the property was closed in compliance with all applicable regulations, and that no contamination was detected upon closure.

Per state regulation, all USTs with a capacity of more than 60 gallons must be registered with DComm. DComm maintains an inventory of active, abandoned, and closed USTs. This computer database and other valuable UST information may be accessed on the Internet at http://www.commerce.state.wi.us/ER-BSTRHomepage.html.

The term "closed" or "closure" refers to tanks that are properly deactivated by removal, or, in special cases, filled in place with a solid, inert material. An abandoned UST must be closed by a certified tank professional. The

certified UST remover can give estimates for the work needed to be done to comply with the UST regulations, handle the notifications and paperwork required, remove and properly dispose of the UST, and generally see that the job is done properly. If the UST is removed without complying with the UST regulations, licensees will generally be obligated to disclose this fact to all parties pursuant to § RL 24.07(2), and the buyer's financing may be jeopardized.

The Underground Storage Tanks provision also indicates that any in-use UST must be registered and in compliance with applicable UST standards. This provision makes the offer to purchase contingent upon the seller confirming to the buyer, in writing, at least five days prior to closing, that any in-use UST is registered and in compliance with applicable state operating standards.

The owners of existing home-heating fuel USTs with a capacity of 4,000 gallons or less, that are currently in use, must conduct a tightness test (by an approved methodology) no later than May 1, 2001, and every two years thereafter, or implement an approved monthly release detection program by May 1, 2001. If the owner does not implement a tightness testing or release detection program by May 1, 2001, the owner has until May 1, 2006 to either permanently close the UST system, completely upgrade the UST system, or replace the old UST with a new system. Upgrading a UST entails the addition of corrosion protection and the installation of spill and overfill protection mechanisms.

Note that the UST provision does not require the seller of a property with an in-use UST to confirm that the UST does not leak. The seller is not required to test the UST for leakage or to guarantee that the UST is not leaking.

Basement Fuel Oil Tanks

The Basement Fuel Oil Tanks provision in the revised WRA Addendum A indicates that any abandoned basement fuel oil tank on the property must be cleaned and closed as required by DComm regulations. This provision makes the offer to purchase contingent upon the seller confirming to the buyer, in writing, at least five days prior to closing, that any abandoned basement fuel oil tank was closed in compliance with all applicable regulations.

DComm regulations require the closure of any aboveground tanks (ASTs), including heating oil storage tanks located in basements, which are not in use. An AST is closed by cleaning it and rendering it vapor-free. The regulations do not require that a closed AST must be removed from the site, and a heating fuel AST located at a one or two-family residence does not have to be closed by a certified tank remover/cleaner. However, it is important to have the vent and fill pipes removed if the tank is being removed from the basement. If the tank is not being removed from the basement, the fill pipe must be removed and the tank inlet must be plugged.

Asbestos, Lead, Lead-Based Paint, and Radon Gas

The Asbestos, Lead, Lead-Based Paint, and Radon Gas provision in the updated WRA Addendum A is a general representation by the seller that, to the best of the seller's knowledge, the property does not contain asbestos, lead-based paint (LBP), or any abnormal concentrations of radon gas, lead, radium, or any other toxic or harmful chemicals or substances.

This provision does not take the place of a specific provision that would be required if any of these hazardous substances was believed to be present on the property. For example, if the property is housing that was constructed before 1978, an Addendum S or other specific LBP addendum must be used, as required by federal law. See *Legal Updates 96.04 & 96.07* for a description of this process.

Specific written disclosures must be made if the seller is aware of any of the described substances on the property, e.g., high radon gas levels. Such disclosure may be made in the seller's Real Estate Condition Report (RECR), in another addendum to the offer, or in the offer to purchase itself. If the seller specifically discloses the presence of any of the described chemicals or substances on the property, this Asbestos, Lead, Lead-Based Paint, and Radon Gas provision arguably would need to be modified. The seller generally will need to strike out the disclosed substance(s) from the list of substances in the provision, or perhaps delete the provision in its entirety. If the seller does not so modify the Asbestos, Lead, Lead-Based Paint, and Radon Gas provision, the seller will be misrepresenting the condition of the property.

Buyer's Responsibility to Ascertain Condition of the Property

The Buyer's Responsibility to Ascertain Condition of the Property provision found in the revised WRA Addendum A is substantially similar to the Buyer Reliance provision found in the 1997 WRA Addendum A. The buyer acknowledges that the buyer is responsible for making sure that the property is in a condition that the buyer finds acceptable, and that the buyer has made independent inquiries to accomplish that end. The provision states that the buyer has relied only upon the buyer's independent inspection and analysis of the property, and upon the written disclosures and representations in the offer, RECR, and other written documents.

Inspections, Tests, Appraisals, and Opinions

The provision discussing Inspections, Tests, Appraisals, and Opinions indicates that the licensees in a transaction may furnish the parties with a list of contractors and other experts that may be used for the various tests and inspections called for in the offer. The provision indicates that no representations are made about the competency of those contractors and experts, unless provided by the licensee in writing. The party selecting an inspector or tester is solely responsible for checking out the qualifications of the chosen contractors. If a broker orders a test or inspection on behalf of a party, the parties agree to hold the broker harmless for any damage or liability resulting from the inspection or test, except if caused by the broker's intentional wrongdoing or negligence.

The provision also advises that buyer and buyer's representatives may be present during any inspections and tests at the property. If the buyer receives any report that was prepared for another person, the buyer is cautioned to carefully review the report and consider the report's age, purpose, standards of inspection / testing, and liability limitations. In conclusion, this provision recommends that the buyer retain a Wisconsin-registered home inspector for a home inspection, and other qualified, independent contractors and inspectors for other inspections and testing that may be required.

Municipal Report/Code Compliance

In the Municipal Report / Code Compliance provision in the revised WRA Addendum A, the seller agrees to obtain a written statement from the municipality where the property is located. This statement, if available, should indicate the real estate taxes, current and planned special assessments, and any other municipal charges applicable to the property. This statement shall be furnished to the buyer and the buyer's lender's closing agent prior to closing. The seller must also provide a Certificate of Code Compliance or an Occupancy Permit, if required by applicable municipal code, at – or before – closing. All such documentation must be furnished at seller's expense.

Zoning and Building Restrictions, Comprehensive Plans and Non-Conforming Property

The Zoning and Building Restrictions, Comprehensive Plans and Non-Conforming Property provision in the new WRA Addendum A explains to the buyer that the municipality in which the property is located may have zoning and building restrictions that may affect the use of the property. The municipality may also have a comprehensive plan that may affect the future use or value of the property by influencing future development. The buyer is also advised that some properties may not conform to current zoning if municipal zoning regulations have changed since the structure was built. These non-conforming properties (grandfathered properties) may be subject to restrictions that limit the property owner's ability to build, rebuild, remodel, replace, or enlarge a structure on the property, or to change the nature of the owner's use of the property. The buyer is encouraged to consult with local municipal zoning officials concerning applicable zoning, building and use restrictions, and any comprehensive plan that may affect the property.

Flood Plains/Wetlands

The final provision of the WRA's revised Addendum A cautions the buyer that flood plain maps and wetlands maps may be difficult to read and interpret. Accordingly, the Flood Plains / Wetlands provision encourages the buyer to consult with appropriate government officials for assistance in reading and interpreting these maps if this information is material to the buyer's decision to purchase the property. The buyer also agrees to pay the cost of any flood insurance that may be required by the buyer's lender.

Addendum B to the Offer to Purchase

The WRA's new Addendum B to the Offer to Purchase is an addendum that most typically will be used in transactions involving rural properties and other properties not served by municipal sanitary and water systems. This new one-page specialized addendum contains optional and standard provisions relating to wells, sanitary systems, and sanitary districts.

The Active or Abandoned Wells provision, Well Water Contingency, Well System Inspection Contingency, and Private Sanitary System Inspection Contingency are optional provisions that must be marked in order to be included in the offer to purchase. The Contingency Satisfaction / Right to Cure, Sanitary District, and Reading / Understanding provisions are automatically included in the offer, unless struck or lined out.

The Well Water Contingency, Well System Inspection Contingency, and the Private Sanitary System Inspection Contingency are specific purpose inspection contingencies modeled after the optional Inspection Contingency in the 1999 Residential Offer to Purchase and the Testing Contingency in the new WRA Addendum A. In each of these provisions, the parties may specify the number of days after acceptance when the buyer must receive the required inspection report, and indicate (by striking) which party is to provide the respective report. The provisions dictating when these contingencies are deemed satisfied, and whether the seller will have a right to cure, appear separately in the

Contingency Satisfaction / Right to Cure provision.

Each of these contingency provisions requires that a specific type of professional or expert perform the inspection to determine whether the stated standard is met. These specific types of inspectors have been designated, some at the suggestion of the Department of Natural Resources (DNR) and the Department of Commerce (DComm), to prevent situations where reports are rendered by unqualified parties.

Active or Abandoned Wells

In the optional Active or Abandoned Wells provision in the new WRA Addendum B, the first paragraph regarding active wells, the second paragraph regarding abandoned wells, or both paragraphs may be selected by marking the paragraph(s).

The first paragraph is selected when there is an active well on the property. The parties may indicate whether this well is – or is not – located entirely on the property, and whether or not the well is a shared well. If the well is shared, the offer is contingent upon the seller providing the buyer with an acceptable shared well agreement no later than ten days prior to closing. The shared well agreement must be in a recordable form, if the agreement has not already been recorded. The contingency is deemed satisfied unless the buyer delivers a notice, listing the buyer's objections, to the seller within five days of the buyer's receipt of the shared well agreement. The seller is given ten days to cure the buyer's objections, with the time for closing extended accordingly. The seller must pay all expenses in providing the shared well agreement, including any recording fees.

Note that this provision is a "subject to satisfaction" provision, because the buyer is left to determine what constitutes an "acceptable shared well agreement." In this provision, however, the buyer agrees that he or she will not unreasonably withhold approval of the shared well agreement. No specific standards for the shared well agreement are stated, because the provisions of an adequate and appropriate shared well agreement will vary widely from case to case. In general, such an agreement should address issues such as operational costs, water testing, well maintenance, major improvements, the eventuality of well closure, and a method for allocating all responsibilities, liabilities, costs, and expenses.

If the parties cannot agree upon a reasonable shared well agreement, the contingency will fail. Thus it is incumbent upon the seller to provide a reasonable shared well agreement, and the buyer cannot unreasonably withhold his or her approval. If the buyer is unreasonable in this regard, or if the parties do not proceed in good faith and with due diligence, they arguably will be in breach of the contract.

The second paragraph is selected when there is an abandoned well on the property. If the well has been closed, the seller shall provide the buyer with documentation confirming that the well was closed in conformance with all applicable codes. If the well has not been closed, the seller must do so, at seller's expense, prior to closing, and provide the proper documentation.

Well Water Contingency

If the Well Water Contingency in the new WRA Addendum B is selected, the offer is contingent upon either the seller providing, or the buyer obtaining (by a deadline stated in terms of days after acceptance) a current well water report from a state-approved or other qualified lab. The report must indicate that the well water is bacteriologically safe for human consumption and that the concentration or level of other designated substances in the drinking water meets federal and state standards for human health and safety. The parties may designate the other substances to be included in the water test by writing them in on the provided blank line. The Well Water Contingency suggests that such substances may include nitrates, arsenic, inorganic or organic substances, pesticides, herbicides, radionuclides, and metals. The party responsible for obtaining the water report must pay all costs. The contingency requires that a licensed plumber or other independent, qualified person take all water samples from the well for those tests.

Well System Inspection Contingency

The Well System Inspection Contingency in the new WRA Addendum B remains essentially the same as the well contingency in the 1997 WRA Addendum A. If the Well System Inspection Contingency is selected, the offer is contingent upon either the seller providing, or the buyer obtaining (by a deadline stated in terms of days after acceptance) a current report from a licensed well driller, a licensed pump installer, or a master plumber, competent to inspect well systems. The report must indicate that the well and the well pressure system conform to either the code in effect when the well was installed or current code, as designated by the parties. The party responsible for obtaining the report shall pay all costs.

Private Sanitary System Inspection Contingency

The Private Sanitary System Inspection Contingency in the new WRA Addendum B also remains essentially the same as the septic system contingency in the 1997 WRA Addendum A. The offer is contingent upon either the seller providing, or the buyer obtaining (by a deadline stated in terms of days after acceptance) a current report from any of the following: a county sanitarian,

licensed master plumber, licensed master plumber-restricted sewer, licensed plumber designer, licensed engineer, licensed plumbing inspector II, or a certified soils tester. There is no blank line for designating any other type of expert to provide the report, as was the case in the 1997 addendum. The expert's report must indicate that the private sanitary system is not disapproved for current use. The private sanitary system must be pumped at the time of the inspection, at the seller's expense. The party responsible for obtaining the report shall pay all other costs.

Contingency Satisfaction/Right to Cure

The Contingency Satisfaction / Right to Cure provision in the new WRA Addendum B automatically applies to the Well Water Contingency, Well System Inspection Contingency, and Private Sanitary System Inspection Contingency, if they have been selected by the parties. Each of these contingencies is deemed satisfied unless the buyer delivers a copy of the pertinent report and a written notice stating why the report does not meet the applicable standards, to the seller and listing broker. The copy of the report and the notice must be delivered within five days of the buyer's receipt of the report or the deadline specified for that report, whichever comes first.

The Contingency Satisfaction / Right to Cure provision allows the parties to indicate whether or not the seller has the right to cure. If no selection is indicated, the seller will automatically have the right to cure. If the seller has the right to cure, the seller satisfies the contingency if the seller (1) delivers a written notice of the seller's election to cure to the buyer, within ten days of the seller's receipt of the buyer's notice, and (2) completes the repairs in a good and workmanlike manner which satisfies the standards set forth in the respective contingency, and provides the buyer, prior to closing, with a written report detailing the work done.

The offer becomes null and void if the buyer delivers the appropriate notice and copy of the report to the seller on time, and the seller does not have a right to cure. The offer also becomes null and void if the buyer delivers the notice and copy of the report – on time – to a seller with the right to cure, who either delivers written notice to the buyer stating that the seller will not cure, or fails to deliver a written notice of the seller's election to cure within the allotted ten days. A private sanitary system defect may be cured only by repairing the existing system, or by replacing the existing system with the same type of sanitary or septic system. Any replacement sanitary system must not be disapproved for current use. The seller may install a different type of private sanitary system only with the specific written agreement of the buyer.

Sanitary District

The Sanitary District provision in the new WRA Addendum B informs the buyer that the property may be located in a sanitary district which may impose taxes, special assessments or other charges for sewer planning and construction, user fees, or other costs upon the owner of the property. The buyer is encouraged to contact the sanitary district officials to inquire about such potential costs.

Reading/Understanding Provision

The Reading / Understanding provision in the new WRA Addendum B makes it clear to the parties that the act of initialing and dating the form at the bottom of the first page means only that they have received a copy of the addendum and that they have read, and understand, the provisions in the addendum. As the provision states, it does not mean that they agree to, or accept any or all of the provisions in the addendum. If the parties find one or more of the provisions to be unacceptable, they may use a counter-offer to eliminate or modify those provisions.

The Reading / Understanding provision goes on to caution the parties that the standard provisions in the addendum are not necessarily appropriate, adequate, or legally sufficient for any given transaction. The provision encourages the parties to consult with legal counsel if they have questions about the legal impact of any provision contained in the addendum or the offer to purchase.

Revised Agency Disclosure Forms

The WRA's Disclosure of Real Estate Agency with Consent to Multiple Representation form and the WRA's Disclosure of Real Estate Agency form have been updated and revised.

The agency disclosure form is contained within the WB-36 Buyer Agency Agreement, the 1999 WB-11 Residential Listing Contract, and the WB-6 Business Listing Contract.

Agency disclosure forms like these are required by the Wis. Stat. § 452.135(2) to try to make sure that every party to a real estate transaction receives a meaningful explanation of the duties owed to client and non-client parties. The agency disclosure form required by that statute must be given to a party, regardless of whether the party is a client or customer, before brokerage services can be provided. Brokerage services are defined as any services that require a real estate license.

An agency disclosure form must identify the broker's client, state the broker's duties to clients, state the broker's duties to all parties, and contain mandatory language concerning the confidentiality rights of the parties. The disclosure form asks the parties to list the information that they con-

sider confidential to ensure that a disclosure of this information, which may not appear confidential to the licensee, is not made. The agency disclosure form may also provide for a waiver of confidentiality so that a buyer may authorize the release of information that might otherwise be considered confidential. For instance, a buyer who has prequalified for financing may approve the release of this financial information to the seller to support the buyer's qualifications for purchasing the property.

The agency disclosure form is given to clients when the agency agreement is executed. In fact, the agency disclosure form is contained within the WB-36 Buyer Agency Agreement, the 1999 WB-11 Residential Listing Contract, and the WB-6 Business Listing Contract, and will be incorporated into the other DRL-approved listing contracts as they are updated and revised over the next several months. Accordingly, the WRA's newly revised Disclosure of Real Estate Agency with Consent to Multiple Representation form and Disclosure of Real Estate Agency form (short form) will generally be used only by subagents or agents of the seller who are working with buyers, and buyer's agents who are working with sellers.

With respect to buyers who are customers, or non-client parties, the agency disclosure form must be given prior to providing any brokerage services. This means the disclosure must be given as soon as possible once the customer's specific needs and specific properties begin to be identified. When initial contacts are by telephone, the best time to give the disclosure may be difficult to identify. Where the telephone conversations are preliminary and lead only to a mailing of materials describing a variety of different properties, the agency disclosure form may be useful but is not necessarily required. Once a particular property becomes the subject of further conversations, a prudent agent may verbally discuss agency relationships and mail the agency disclosure form to the party, with a return envelope, if no face-to-face meetings are planned within the next few days.

While agency disclosure forms must be used in all residential, commercial, industrial, farm and vacant land transactions, licensees must ask for a party's written acknowledgement of his or her receipt of the agency disclosure form only in transactions involving residential properties with one to four dwelling units or land intended for that purpose.

The Revised Agency Disclosure Forms

A draft copy of the WRA's updated Disclosure of Real Estate Agency With Consent to Multiple Representation form appears on pages 14 & 15 of this *Update*. This newly revised form appears quite different from its predecessor, originally published in 1994.

First of all, this form has been formatted to fit onto letter-sized paper. The first, or front page includes: a new bold-faced advisory telling consumers that the disclosure form is required by law; the same introductory paragraph as appeared in the original disclosure form; the mandatory Confidentiality Notice to Clients and Customers; the Waiver of Confidentiality; the Client's Consent to Multiple Representation; and a new format for the party's written acknowledgement that he or she has received the form. On the second or back page, the Duties to All Parties and Duties to Clients sections appear, along with the definitions of "adverse fact" and "material adverse fact."

The revised agency disclosure form begins with a new bold-faced advisory to the consumers reading and using the form: WISCONSIN LAW (WI. ADM. CODE §RL 24.07(8)) REQUIRES REAL ESTATE BROKERS TO DELIVER A COPY OF A WRITTEN AGENCY DISCLOSURE FORM TO YOU PRIOR TO SHOWING YOU PROPERTIES OR PROVIDING OTHER BROKERAGE SERVICES. BROKER IS ALSO REQUIRED BY LAW TO REQUEST YOU TO ACKNOWLEDGE RECEIPT OF A COPY OF THIS FORM BY INITIALING BELOW. This is an attempt to try and make the agency disclosure process less imposing for consumers. If the consumers can realize that the broker is compelled to give them the form and ask for their acknowledgement, perhaps it will be a bit less threatening.

The other component in the effort to make the agency disclosure form more user-friendly is found at the bottom of the first or front page. There it now states that: BY INITIALING AND DATING BELOW I/WE ACKNOWLEDGE RECEIPT OF A COPY OF THIS DISCLOSURE (PAGES 1 AND 2) AND THAT [Redtown Realty] and [Sam Salesperson] are working as [Owner's Agent]. INITIALING THIS FORM TO ACKNOWLEDGE RECEIPT CREATES NO CONTRACTUAL OR OTHER LEGAL OBLIGATIONS OF ANY KIND.

This change in having parties initial, instead of sign, the agency disclosure form comes from a new interpretation of Wis. Admin. Code § RL 24.07(8)(a)1, which states that "Prior to providing brokerage services to a party, each licensee shall provide a copy of the agency disclosure form required under s 452.135, Stats. If the services are for the sale of real estate used for or intended to be used primarily for one to 4 family residential purposes, the licensee shall, at the time the disclosure is provided, request the party to acknowledge in writing the receipt of a copy of the disclosure form." The phrase "acknowledge in writing," as used in this rule, has now been interpreted to mean that a party's initials are sufficient and that a full signature is not required. Perhaps consumers will be less intimidated and put off by the agency disclosure form if they only

have to initial it, instead of sign it, and if they understand that initialing it only means that they have received a copy, not that they are agreeing to it or entering into some sort of contract.

Licensees should permit the parties to decide for themselves whether or not they consent to multiple representation. The parties should generally be the ones who complete the form, not the licensee. The idea is to let the parties receive the information about agency relationships and then make an informed decision — not for the licensee to dictate what they should do or give them legal advice.

The Disclosure of Real Estate Agency with Consent to Multiple Representation form is designed primarily for those brokers who practice buyer brokerage. They may accordingly encounter dual agency situations where a buyer, under a buyer agency contract with the broker / company, wants to buy a property listed with the broker / company. In such a company, all buyer clients and all seller clients may, as a matter of company policy, be asked to complete the multiple representation consent section of the agency disclosure form.

For offices with few or no buyer agency contracts, or who practice buyer agency or seller agency exclusively, the revised and updated Disclosure of Real Estate Agency (short form) may be a more appropriate option. It has no multiple representation section, and contains the same new consumer advisory language at the top and at the bottom of the form as appear in the Disclosure of Real Estate Agency with Consent to Multiple Representation.

All of the newly revised WRA forms are available from the WRA. An order form has been enclosed with this *Legal Update* in the DR package. Alternatively, you can call us at (608) 241-2047, or go to our Web site at www.wra.org/realtor.

Conclusion

As real estate laws and practices change, it is necessary that the forms used by licensees also change to keep pace with this fast-moving industry. The updates and revisions made to the WRA Addendum A, the new WRA Addendum B, and the WRA's Disclosure of Real Estate Agency with Consent to Multiple Representation form and Disclosure of Real Estate Agency form should assist members in simplifying the documentation they must use in their daily business.

All of the newly revised WRA forms discussed in this *Legal Update* are available from the WRA. An order form has been enclosed with this *Legal Update* in the DR package envelope. Alternatively, you may call the WRA at (608) 241-2047 or 1-800-279-1972, or go on line at www.wra.org / realtor.

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