

Listing Contract Revisions

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Introduction

The Department of Regulation and Licensing (DRL) is in the final stage of approving revisions to the residential listing contract (WB-1) and the residential offer to purchase (WB-11). The DRL is embarking upon the process of fine-tuning the approved residential listing and offer forms, which have been in effect for over five years. Similar fine-tuning revisions will also be done in upcoming months on the other approved listing and offer forms, as well as the buyer agency agreement.

All DRL revisions are predominantly intended to clarify and improve the provisions already in place, not to make any major substantive changes. The clarifications are a by-product of five years of experience with these forms, with an eye to eliminating the difficulties experienced by the licensees who have been using the forms, and by the parties, their attorneys, and the courts who have been attempting to interpret the forms. Many of the contract revisions fill in gaps found in the existing residential forms, and resolve many of the unanswered questions and issues in favor of the broker. A large number of the provisions of the WRA Listing Contract Addendum have been

incorporated into the revised residential listing contract. Many of the revisions are based, to a large extent, upon the input of WRA members who have served on WRA committees and who have called the WRA Legal Hotline with comments and suggestions.

This *Legal Update* will review the changes made to the WB-1 Residential Listing Contract - Exclusive Right to Sell, while a later *Update* will cover the revisions to the residential offer to purchase. The optional use date for the revised WB-1 is expected to be April 1, 1999, and the mandatory use date is projected to be November 1, 1999. Watch future issues of *The Wisconsin REALTOR®* for confirmation of these dates and for information about form availability. The sample copy of the revised Residential Listing Contract appearing on pages 12 - 15 of this issue is a draft, which may or may not end up being identical to the final form. It is, however, substantially the same as the final form.



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Inclusions and Exclusions

Although it is not new, it bears repeating that the property included in the list price includes all fixtures, as defined in the Definitions section of the *1999 listing*, unless explicitly excluded. As the boldfaced CAUTION in the Terms of Listing section warns, “**Exclude fixtures not owned by Seller such as rented water softeners. The terms of the Offer to Purchase will determine what property is included or excluded in the transaction.**” The listing of property inclusions and exclusions in the listing contract only controls what property is available and has been included in the list price.

The Revised Residential Listing Contract

Although the existing WB-1 Residential Listing Contract has served many licensees well throughout the past several years, there are certain provisions that have been found to not completely address certain situations that have arisen. In some other cases, additional explanation and clarification has been found to be desirable. Accordingly, the following revisions have been made to the WB-1 Residential Listing Contract. In the following discussions, the existing WB-1 (mandatory use date 2/1/94) will be referred to as the “*1994 listing*,” and the newly revised WB-1 will be referred to as the “*1999 listing*.”

Format

The *1999 listing* is on letter-sized paper and is four pages long. The DRL is changing to letter-sized paper for all new approved forms to facilitate the faxing and computer printing of documents.

Property Description

As in the *1994 listing*, the Property Description section in the *1999 listing* eliminates the presumption that a full legal description is mandatory. The *1999 listing* calls for the property’s street address to be entered in the blank lines, which will generally be a sufficient legal description. The drafter of the listing is directed to place any additional description, such as a legal description, in the blank lines of the Additional Provisions section or in an addendum.

Condition of Title

The Condition of Title section of the *1999 listing* provides, in bold, that “**Upon payment of the purchase price, Seller shall convey the Property by warranty deed (or other conveyance as provided herein).**” This represents an important promise by the person(s) signing the *1999 listing* as seller that they will deed the described property to the buyer upon payment of the purchase price. Whoever signs the listing as seller best be the owner or stand prepared to be able to produce the required warranty deed at closing. If a personal representative’s deed will be used because the owner is an estate, or if a trustee’s deed will be used because the owner is a trust, this should be noted in the Additional Provisions section or in an addendum to the listing.

Other Brokers

In the Other Brokers section, the seller agrees that the broker will cooperate and work with other agents in marketing the property, including subagents and buyer’s brokers, except

as specified in the blank line at the end of this section. This is consistent with Article 3 of the Code of Ethics and Wis. Admin. Code § RL 24.13(2)(a). Article 3 provides that REALTORS® shall cooperate with other brokers unless cooperation is not in the seller's best interests. Similarly, § RL 24.13(2)(a) states that listing brokers shall permit all buyers and their agents access to a listed property for showings, unless such access is contrary to the seller's specific written instructions.

If the seller has any objections to this universal cooperation, the seller's exceptions should be listed in the blank line provided, or in an addendum to the listing. For example, if a seller had a bad experience with a particular broker and did not wish him or her to participate in the sale of the property, that broker may be named in the blank line. The listing broker should then indicate in any MLS listing that there are exceptions to cooperation. In addition, the listing broker should notify the excepted broker, preferably by letter, that the seller does not want that broker to participate in the transaction. Any exceptions listed should be the seller's own legitimate exceptions to cooperation.

If the seller and the listing broker agree to limit cooperation with other agents, the listing broker must alert the seller, preferably in writing, that non-cooperation may limit the property's market exposure and the number of potential buyers. Hence the boldface caution at the end of the Other Brokers section of the *1999 listing* that "**Limiting broker's cooperation with other brokers may reduce the marketability of the property.**"

Exclusions

The Exclusions section deals with buyers and other persons whose acquisition of the property does not earn a commission for the listing broker. The last sentence in the Exclusions section in the *1999 listing* refers to the provisions in the listing contract that permit the sellers to name certain buyers who are excluded from the listing: "Other buyers excluded from this Listing until _____ [INSERT DATE] are: _____." This provision is intended to permit sellers to exclude their family members, neighbors, and other potential buyers with whom the seller has previously negotiated without broker participation. This listing contract provision encourages the naming of an expiration date so that the exclusion does not run for the duration of the listing contract term.

The question sometimes arises what must be done by, the neighbor, for example, to take advantage of this exclusion. Will a sale to the neighbor be excluded from the listing if the neighbor submits an offer to purchase by the stated deadline, or must there be an accepted offer by this deadline? The *1999 listing* answers this question by indicating that the seller must have accepted an offer to purchase from the excluded buyer, or the seller must have sold (deeded) the property to the buyer. If either of these events occurs by the stated deadline, the listing broker does not earn his or her commission. On the other hand, if the neighbor has submitted an offer to purchase and negotiations are underway, but the seller has not accepted the offer when the stated deadline passes, the neighbor becomes subject to the listing and the seller will owe the commission if the seller ends up accepting the neighbor's offer.

Commission

The *1999 listing* adds to the list of possible ways in which the listing broker's commission may be earned by providing in the Commission section, that commission is earned if (1) the seller directly sells or exchanges a property without first having an offer to purchase, (2) if there is a change in ownership or control in a seller that is some type of business entity or organization, or (3) one seller conveys an interest in the property directly to another seller.

(1) Deed Without Offer to Purchase

The Commission section of the *1994 listing* refers to accepted offers, granted options, binding exchange agreements and procured purchasers (which, by definition, involves offers to purchase). It does not address the situation where a seller skips any preliminary purchase or acquisition agreement and simply just deeds the property directly to the buyer. The Commission section of the *1999 listing* provides that the listing broker's commission will be earned if the seller sells or exchanges an interest in all or any part of the listed property to another person during the term of the listing. Under this provision, if an elderly man in a nursing home simply quitclaims his listed house to his son during the term of the listing contract, the commission is earned. If a husband and wife deed their listed property directly to the limited liability company (LLC) controlled by the couple during the term of the listing contract, the commission is earned. If a rental property owner deeds her listed four-unit building directly to her friend in exchange for another four-unit building during the term of the listing contract, the commission is earned.

(2) Change in Ownership or Control of Entity/Owner

The *1999 listing* provides that the listing broker's commission is earned if "... a transaction occurs which causes an effective change in ownership or control of all or any part of the Property." Thus, if a corporation, LLC, or some other business entity or organization owns the listed property and the majority corporate stockholder or LLC member sells his or her ownership interest (stock, etc.) in the entity to another person, the effect is the same as if the listed property owned by the entity had been sold. The person or persons with voting control over the disposition of the property has changed, even though title to the property has remained the same. Accordingly, the *1999 listing* provides that such an occurrence will earn the listing broker his or her commission.

(3) One Seller Conveys to the Other Seller

Cousins who inherited acreage from their grandfather's estate list the property but later decide to sell the land to cousin Bob. A divorcing husband decides to buy the couple's home that has been listed for sale. Many sellers engage in these transfers by just quitclaiming the property without first entering into an offer to purchase. Without an offer, option, or exchange agreement, it is tough to argue that a commission is due under the language used in the Commission section of the *1994 listing*.

The Commission section in the *1999 listing*, however, makes it clear that these types of transfers will cause the commission to be earned: "Broker's commission also shall be earned if, during the term of the Listing, one owner of the Property sells, exchanges or options an interest in all or any

part of the Property to another owner, except by divorce judgment." In these types of cases, however, the commission earned will arguably be proportional to the price or value of the property interest actually transferred. Note that with a divorcing couple, the commission is earned if one spouse voluntarily sells his or her interest in the house to the other spouse, but not if such conveyance is required by the divorce judgment.

Extension of Listing

Some of the most significant revisions to the listing contract are found in the Extension of Listing section of the *1999 listing*. This is the section that establishes listing protection. As is stated in the *1999 listing*, "The Listing term is extended for a period of one year as to any buyer who . . . either negotiated to acquire an interest in the property or submitted a written offer to purchase, exchange or option during the term of this Listing (protected buyer)."

Buyers generally may qualify for listing protection in one of four ways, and that has not changed in the *1999 listing*. However, the steps that brokers must take to complete the listing protection process or "perfect" the listing protection have changed a little. The manner in which the notice to perfect listing protection may be given has been expanded in order to make listing protection easier to achieve in certain situations.

Listing Protection Background and Basics

Under the *1994 listing*, if (1) the buyer submits a written offer to purchase or (2) negotiates directly with the seller during the term of the

listing, listing protection is automatic and the listing broker is not required to perform any additional steps to initially protect the buyer for the one-year override period. On the other hand, if (3) the buyer attends an individual showing or (4) negotiates with a broker during the term of the listing, the buyer is protected only if the listing broker delivers the buyer's name to the seller no later than three days after the expiration of the listing contract (the three-day deadline). "Negotiate," for these purposes, means that the buyer discussed the potential terms upon which the buyer might acquire an interest in the property. Note that attendance at an open house is not the same thing as attendance at an individual showing and generally will not, in and of itself, be sufficient to establish listing protection.

If the buyer is protected under the listing, the listing broker then has, in essence, a one-party listing for the protected buyer during the one-year override period. This broker must present any offer the protected buyer writes to the seller, and will earn the listing commission if the offer is accepted and closes. This is true even if the property subsequently has been listed with another broker. If the seller does not wish to work any longer with the first listing broker, the first listing broker, the second listing broker and the seller may agree to a procedure that will recognize the contract rights of the first listing broker and ensure that the offer is presented to the seller without delay. This may mean that the second listing broker will handle the presentation and negotiation of the offer and the first listing broker will pay him or her a reasonable sum for these services. The seller would still pay the commission to the first listing broker.

Showing notices

It is not necessary that the listing broker submit the list of names of buyers who attend individual showings or who negotiate with the broker between the date of expiration and the three-day deadline. Names of buyers may be delivered to the seller sooner than that — at any time from the first day of the listing contract term up until midnight of the third day following expiration of the listing contract. The listing broker may submit these names to the seller on an ongoing basis, such as with a showing notice. The showing notice, however, should explicitly indicate, along with the general showing and buyer reaction information, that the notice does create listing protection under the listing contract. References to specific contract provisions may be helpful in this regard.

Obtaining names of buyers from cooperating agents

Listing brokers sometimes have difficulty obtaining the names of the buyers who have attended individual showings. When an agent accepts an offer of subagency (i.e., responding to a MLS listing, setting up and conducting a showing without disclaiming subagency), he or she accepts full duties of loyalty and disclosure to the principals (the seller and listing broker). The selling agent is bound to provide the information requested if the information could be legally given. For example, the selling agent could not legally provide the name of the buyer if the buyer has indicated his name is confidential information on the agency disclosure form. This duty to provide the buyer's name does not apply with respect to buyer's agents, unless they are so obligated pursuant to a policy letter or cooperation agreement with the listing broker.

Although Wisconsin's licensing laws

do not specifically address this type of policy, NAR's Code of Ethics Standard of Practice 3-5 states that subagents must provide listing agents with all pertinent facts relating to the transaction. Because the name of a prospective buyer is arguably a pertinent fact, a subagent should provide this name if requested by the listing agent. However, if the buyer has requested that his or her name remain confidential, the subagent's duty of confidentiality owed to all parties would override the duty of cooperation owed to the listing agent. Again, this duty does not necessarily apply to buyer's agents.

Obtaining names of buyers from sellers

When a broker lists a property that was previously listed by another broker, it may sometimes be difficult to ascertain what buyers, if any, were protected under the previous listing. Sellers may not understand when asked about protected buyers. Thus, the new listing broker may need to review correspondence the seller has received from the prior listing broker, if the seller has saved anything and is willing. The new listing broker may also want to contact the previous listing broker and ask for the list of protected buyers.

As part of this process, the new listing broker may need to explain the listing protection provisions of the listing contract to the seller. If the seller has questions about his or her legal rights, however, these questions must be directed to the seller's attorney.

Determining whether listed buyers are really qualified

Once the list of protected buyers has been obtained, the next problem may be that the list is very long or the seller does not think that all the listed people really saw the property. One approach may be for the seller and the second listing broker to simply

proceed with the listing and not attempt to analyze the qualifications or eligibility of any buyers on the list until and unless one of the named buyers attends another showing or writes an offer. The Exclusions section of the listing contract states that "all persons whose purchase, exchange or exercise of grant of option would earn a prior listing broker a commission under a prior listing contract are excluded from this Listing to the extent of the prior broker's legal rights, unless otherwise agreed to in writing." Accordingly, the seller need not list the names of the buyers protected by the prior listing broker in the second listing contract, and the only names that are legally protected are those of buyers who really qualify for listing protection. Therefore the seller and the second listing broker can just defer the issue.

Another approach is for the first and second listing brokers to sit down with the seller and reach an agreement about what named buyers are properly qualified for listing protection. However, this may not be a very practical use of time and resources in most cases.

The second listing broker should always be on guard against giving the seller any legal advice about the legal status of any named buyer and the seller's legal rights. The second listing broker must also guard against taking any action that would subject the seller to a double commission or otherwise take advantage of the seller. The courts take a dim view of brokers who take advantage of consumers for the sake of their own financial benefit.

1999 Listing Protection Revisions

Two classes of buyers generate a fair amount of confusion and uncertainty when it comes to figuring out if and how they can be protected for listing protection. These are the (1) buyers named in one-party listings and (2) buyers who have requested that their identity remain confidential. There also is uncertainty in the *1994 listing* regarding (3) to whom a written offer to purchase must be submitted in order to establish automatic listing protection; (4) what listing protection is available in cases of early termination of the listing contract; and (5) the obligation to provide the second list of protected buyers to the seller. There also have been some questions about (6) whether listing protection is established if the seller simply was present at a showing. These issues are all addressed in the 1999 revisions.

(1) Buyers in One-Party Listings

There has been a debate among brokers and in the courts over whether it is necessary to give a notice or list of buyers' names when the buyers' name(s) are stated in the listing contract. The strict constructionist school of thought insists that the listing protection process must be strictly construed and followed to the letter. This group therefore believes that if the buyer named on a one-party listing contract does attend an individual showing of that property, the listing agent must still provide the seller with that buyer's name before the three-day deadline, despite the fact that the seller knows the buyer's name already because it is stated in the one-party listing contract. Listing protection, this group believes, is a contractual right created by and benefiting listing brokers, and must be precisely interpreted against the brokers and in

favor of the consumers/sellers.

The other school of thought looks at the purpose behind the list of buyer names. If the purpose is to make sure that the seller has the buyer's name, in writing, then giving the name to the seller who has a one-party listing is arguably redundant. Why, this group contends, must the listing agent give the seller the name again?

The *1999 listing* takes the position of the latter group. It provides that if a one-party listing contract specifically names the buyer(s) to which it relates, any such buyer qualifying for listing protection (attends a showing, negotiates purchase contract terms, etc.) is automatically protected by virtue of his or her name appearing on the contract.

(2) Confidential Buyers

The buyer, pursuant to his or her rights under Wisconsin agency law, may indicate to the selling agent or the buyer's broker with whom the buyer is working that his or her identity is to remain secret. In this situation, either the listing broker is not going to have this buyer's name or, if he or she does have it, is legally obligated to not disclose it to the seller because it is confidential information. If this buyer attends an individual showing or negotiates with the broker and thus qualifies for listing protection, the listing broker is unable to furnish this buyer's name to the seller and establish listing protection.

The *1999 listing* provides a solution by providing that such buyers may be protected if the listing broker timely delivers to the seller a notice identifying the broker with whom the buyer was working, and the date(s) of any showings or other negotiations.

(3) Submitting an Offer

The *1994 listing* grants automatic listing protection to buyers who have "submitted a written offer to purchase, exchange or option during the term of this Listing." The question is — submitted to whom? Some contend that the buyer's offer must have been submitted to the seller. This makes sense if the object is to make the seller aware of the buyer's name. On the other hand, if the listing broker has accomplished the goal of producing an offer, it is not fair to penalize the listing broker for delays or problems that might occur in completing delivery to the seller.

The *1999 listing* provides that the buyer has "submitted an offer" and thus is automatically protected if the offer has been delivered to the seller or the listing broker (this will include the listing agent).

(4) Extension of Listing Term upon Early Termination

Sellers do have the power (but not the right) to terminate a listing contract at any time. An agency contract, such as a listing contract, is a personal services contract based upon a relationship of trust and confidence in the broker. Therefore, a seller cannot be compelled to remain in that relationship. If a seller directs a listing broker to terminate the listing, the broker must follow the seller's instructions by ceasing to market the property and terminating the listing contract.

When there has been an early termination, brokers often wonder if they still have listing protection rights and, if so, when the override period starts to run. The language used in the approved listing contracts generally leads to the conclusion that the one-year override runs for one

year, beginning on the early termination date.

The *1999 listing* provides that “Should this Listing be terminated by Seller prior to the expiration of the term stated in this Listing, Broker shall have a Listing for one year after the Listing is terminated for “protected” buyers.” This makes it clear that an override period will be in effect, and that the override period will begin upon the early termination date for qualified protected buyers. Arguably, brokers must follow the standard procedure for protecting buyers — only the early termination date is used, instead of the expiration date, for measuring the three-day deadline for submitting any list of buyer names.

Accordingly, REALTORS® who are requested to terminate a listing should keep careful track of the early termination date. This generally will be the date of any verbal notice or the date on which a written notice was personally delivered, unless the notice specifies a later date. The REALTOR® will have three days from that time to deliver a list of buyers’ names to the seller, assuming this has not already been done.

(5) Providing the Second List of Buyers’ Names

While most REALTORS® are familiar with the *1994 listing* provisions requiring that a list of protected buyers be delivered to the seller no later than the three-day deadline, some licensees overlook the provision requiring a second list of protected buyers whenever the property is listed with another listing broker. This second list of protected buyers may or may not be the same as the list of buyers delivered to the seller to establish listing protection. The list delivered prior to the three-day deadline must only include the

names of buyers who attended individual showings or who discussed purchase terms with a broker or salesperson. If the seller negotiated directly with the buyer or received an offer to purchase from the buyer, the buyer’s name does not have to go on the first list.

However, the second list — given at the time the property is listed with another broker — may need to be more extensive and include all protected buyers, regardless of how listing protection was established. This second list is intended to help avoid double commissions for sellers, and thus will be more effective and more useful for the new listing broker if all protected buyers are listed.

The *1999 listing* changes the circumstances under which a broker is responsible for giving the second list of all protected buyers to the seller. Under the *1994 listing*, the listing broker was to provide the second list of protected buyers “upon notice that the Property has been listed with another broker during the extension period.” This “upon notice” standard was not well defined, created uncertainty among licensees, and proved to be difficult to implement. Accordingly, the *1999 listing* provides that “Upon receipt of a written request from Seller or a broker who has listed the Property, Broker agrees to promptly deliver to Seller a written list of those buyers known by Broker to whom the extension period applies.” This second list is no longer required unless the first listing broker has received a written request for it.

(6) Sellers Present at Showings

Some confusion was generated under the *1994 listing* about whether the name of a buyer who attended an individual showing where the seller was present needed to be included on the list of buyers delivered to the

seller by the three-day deadline. Inclusion on this list was arguably not required if the seller had been directly involved in negotiations with the buyer. “Negotiate” was defined to mean to discuss potential purchase terms or attend an individual showing. Thus, the argument went, if the seller was directly involved in the individual showing, the buyer’s name did not need to appear on the list.

The *1999 listing* provides that “If the extension is based on negotiation, the extension shall be effective only if the buyer’s name is delivered to Seller, in writing, no later than three days after the expiration of the Listing, unless Seller was directly involved in discussions of the potential terms upon which buyer might acquire an interest in the Property.” Accordingly, a buyer must be named on the list of buyers submitted to the seller if the buyer attended an individual showing where the seller was present, unless the buyer also engaged in serious discussions about purchase terms with the seller.

Termination of Listing

The Termination of Listing section is new on the *1999 listing*. This new section actually addresses two different issues. The first is the absence of a legal right to terminate the listing contract. The second is the absence of authority on the part of salespersons to mutually agree with the seller to terminate the listing, shorten the listing term, or change the commission amount without the written consent of the agent’s supervising broker.

Right versus Power to Terminate Listing

The *1999 listing* states that “Neither Seller or Broker have the legal right

to unilaterally terminate this listing absent a material breach of contract by the other Party.” This has always been true. There is, however, a distinction between the legal right to terminate the listing and the power to do so.

Sellers have the power to revoke a listing contract at any time. This is because an agency contract, such as a listing, is a personal service contract based upon a special fiduciary relationship of trust and confidence in the broker. Because the contract reflects the agency relationship, the seller possesses the power to revoke or terminate the listing contract at any time. The seller (the principal) cannot be compelled to remain in the agency relationship with a broker (the agent) with whom the seller no longer wishes to work.

The power to revoke or cancel the listing contract, however, must be distinguished from the right to do so. The seller always has the power to cancel the listing contract, but may not have the right to declare an early termination to the listing. Canceling the listing before its expiration date will typically constitute a breach of the contract terms and thus violate the broker’s rights. In that event, the broker may demand compensation for the damages sustained as a result of the listing cancellation. The broker cannot, however, sue the seller for specific performance because of the agency relationship. In other words, the broker cannot compel the seller to remain in the relationship or as a party to the listing contract.

The broker’s damages, in general terms, might include the costs of advertising, reimbursement for other expenses incurred by the broker in the process of listing and marketing the property, and the value of services rendered, assuming the broker can sufficiently prove this. Commission will be due only if the

broker can prove that the broker had procured a buyer ready, willing, and able to purchase the property upon the terms and conditions specified in the listing contract or on terms otherwise acceptable to the seller.

The Wisconsin Civil Jury Instructions #3740 DAMAGES: TERMINATION OF REAL ESTATE LISTING CONTRACT (EXCLUSIVE) BY SELLER: BROKER’S RECOVERY state:

“ If the defendant improperly terminated the real estate listing contract, then you must determine the amount of recovery by the plaintiff. If you find that the plaintiff had procured a buyer ready, willing, and able to purchase the property upon the terms specified in the listing contract (or on terms acceptable to the owner), then the plaintiff is entitled to recover the commission. If, on the other hand, you find that the broker had not produced a buyer, then the broker’s recovery is an amount sufficient to compensate the plaintiff for his losses. That is, those losses which have been proven by the plaintiff to have flowed directly and necessarily from the improper termination of the listing contract by the defendant. In determining this amount, you may take into consideration the time spent by him in the performance of the work undertaken on seller’s behalf, the difficulties involved, and the plaintiff’s standing in the profession. You may also consider any profits which plaintiff could show would have accrued to the plaintiff had the contract not been improperly terminated, taking into account the probability of procuring a buyer on the seller’s terms, and all other relevant circumstances.

COMMENT: To recover lost profits, the broker must prove with reasonable certainty, that he would

have earned the commission but for the seller’s breach.”

Some brokers add provisions to their listing contracts specifically describing a procedure for the early termination of the listing. If so, as long as the seller follows the contract provisions for termination, the seller may generally cancel the listing without fear of being charged for any damages. That is not the case, however, if the early termination provision calls for an early termination fee or other specified damages.

The seller may cancel the listing without risk of damages if the termination is for cause, that is, based upon a material breach of contract by the listing broker. If the listing broker fails to perform according to the terms of the listing contract or otherwise fails to act in good faith, then the seller will have the right, not just the power, to terminate the listing. The broker cannot claim any damages based upon the early termination if the broker was in breach.

The seller may terminate the listing by verbal notice, by written letter or notice, or by an amendment to the listing contract that changes the expiration date to a current date. Upon receipt of any such notice from the seller, the broker has no right to refuse the seller or exact any price or penalty for the cancellation unless originally stated in the listing contract (other than the action for damages discussed above).

Once the seller has notified the broker that the listing is terminated, preferably in writing, the seller is free to list the property with another broker. The first listing broker will have no further rights with respect to the listing, other than any listing protection or override rights it establishes with respect to properly qualified buyers.

One common source of confusion in

this regard surrounds the use of the term “withdrawal.” Some may interpret the term to mean that the listing contract is still in effect but that the property is being temporarily withdrawn from the MLS and other active marketing. Others will interpret this term to mean that the listing contract is completely canceled and the seller may list with another broker. Accordingly, use of this term is to be avoided. If the term is used, clarification should be immediately sought to avoid headaches down the line.

Authority of Agent to Act for Broker

The second part of the new Termination of Listing section in the *1999 listing* deals with a salespersons’ lack of authority to mutually agree with the seller to terminate the listing, shorten the listing term, or change the commission amount. That provisions states that “Agents (salespersons) for Broker (firm) do not have the authority to enter into a mutual agreement to terminate the Listing, amend the commission amount or shorten the term of this Listing, without the written consent of the agent’s supervising broker.”

This provision is designed primarily to protect the broker from the unauthorized conduct of unscrupulous agents. A sales associate planning to leave one broker/company and go to another may want to take “his or her” listings with them. The listing, however, is a contract between the seller/client and the broker/company. The sales associate enters into the listing contract as the agent of the broker and on behalf of the broker. The fact that the associate leaves the broker does not terminate the listing nor permit the associate to take the listing with him or her to a new firm.

Enter the unscrupulous agent who plans to find a way to take listings with him or her. The agent may advise the seller that “I’m going to leave this company and go to XYZ.” This much may be legitimate. When it is followed by “Here’s what you do to terminate this listing contract so you can come and list with me again at XYZ,” the agent has just opened the door to license law and Code of Ethics Article 16 complaints and a possible lawsuit for damages, all based upon the unlawful giving of legal advice and wrongful interference with the broker’s listing contract.

A crafty agent may plan things out in advance, and have the seller sign an amendment to the listing contract that shortens the term of the listing to coincide with the agent’s planned departure. An impulsive agent may be a bit bolder and have the seller sign an amendment on the day the agent is leaving, to terminate the listing on the spot. These unscrupulous agents may also be on the receiving end of Code of Ethics Article 16 complaints and lawsuits seeking damages for wrongful interference with the listing contract.

The provision in the Termination of Listing section of the *1999 listing* is designed to stop these agents by alerting the seller that the listing agent has no authority to sign amendments to the listing contract that terminate the listing or shorten the term of the listing. This provision requires that the agent first obtain the written consent of his or her supervising broker. This may be best accomplished by having the manager sign the listing contract amendment itself, but other internal office policies and procedures may be developed for this situation as well.

The other potential abuse addressed by this provision is the greedy agent who attempts to modify the amount of commission due from the seller,

generally to the detriment of the broker and to the benefit of the agent. For example, an associate could negotiate changes in the types of compensation due (referral fees, bonuses, commission, etc.) so that the associate would receive more money and the firm, pursuant to its internal office policies, would receive less. Overeager associates may also be inclined to agree to overly generous commission reductions or otherwise exercise poor judgment when faced with making commission concessions in order to make the deal come together.

Real estate brokerage firms may be well advised to consider establishing internal rules prohibiting associates from altering the expiration date and amount of commission in accepted listing contracts without some kind of prior approval by the broker or the manager. This will complement the new *1999 listing* provision.

Internet Publication

The provisions in the Seller Cooperation with Marketing Efforts section include, in the *1999 listing*, a provision that authorizes the listing broker to market the seller’s property on the Internet. This is an authorization which the listing broker and seller might not always think to address, particularly where the MLS provides the property data to the Internet. This *1999 listing* provision addresses the issue, and helps protect listing brokers from the claims of sellers who potentially may become upset upon realizing that data concerning their home is basically available world-wide via the Internet. Some have suggested that a broker may be in trouble if the property is on the Internet and the broker does not have seller authorization.

Real Estate Condition Report

An added provision in the Real Estate Condition Report section of the *1999 listing* reminds sellers that they are required by Wis. Stat. § 709.035 to update any report they have completed if they come upon information or become aware of any condition that would change a response on the completed report. The update may be an amended report or an amendment document, accompanied by a copy of the original completed report. The requirements for an amendment are stated in § 709.035, and are met by the WRA Amendment to Real Estate Condition Report. This obligation to amend runs up to the time that an offer or option agreement is accepted. See *Legal Update 96.09* at page 6 for further information.

Appraisers and Inspectors

The Open House and Showing Responsibilities section in the *1999 listing* contains a new bold-faced cautionary statement that “**Seller acknowledges that individual showings may be conducted by licensees other than Broker, that licensed appraisers and inspectors may conduct appraisals and inspections without being accompanied by Broker or other licensees, . . .**” Brokers have no duty to escort appraisers or home inspectors through the listed property. It may be prudent, however, for licensees to consider that appraisers and inspectors may take buyers with them when they conduct their respective jobs. Individual brokers/companies may wish to establish company policies concerning whether such other professionals accompanying buyers on site should or should not be accompanied by a

licensee. Brokers may need to alter the listing contract or add additional language to the listing to make it consistent with office policy and/or the wishes of individual sellers.

Definitions

The *1999 listing* includes the definitions found in the *1994 listing*. In the definition of Conditions Affecting the Property or Transaction, the item concerning underground storage tanks (USTs) and aboveground storage tanks (ASTs) adds the qualifier that USTs or ASTs “which are currently or which were previously located on the Property” are considered conditions affecting the Property or transaction. A UST that has been removed without an accompanying cleanup of any resulting contamination, or even without the proper paperwork and tank registration, may be considered a condition affecting the Property or transaction.

The item concerning conditions constituting a significant health or safety risk includes, in the *1999 listing*, a bold-faced note that “**Specific federal lead paint disclosure requirements must be complied with in the sale of most residential properties built before 1978.**” This will remind sellers and listing brokers to make sure the seller completes an appropriate lead-based paint disclosure document as required by federal law. See *Legal Updates 96.04 & 96.07* and WRA Addendum S for further information.

The definition of Delivery has been supplemented in the *1999 listing* to include delivery by UPS and other similar commercial delivery services where the fees are charged to an account instead of being prepaid. The definition of Fixtures, on the other hand, was discussed but not changed.

Some brokers had expressed concerns about situations where sellers remove items that are bolted on but do not leave any significant damage when removed. Licensees must continue to deal with these situations on a case-by-case basis using the definition given. Where items that were bolted on are removed, the parties may need to examine whether the item was customarily treated as a fixture or specifically adapted to the premises. Ultimately, the only sure way to avoid these issues is, of course, to draft the offer to purchase to specifically list all items that might be questioned by the parties at some point in the transaction as included or excluded. The offer and not the listing contract will control in this regard. The *1999 listing* also adds the definitions of Adverse Fact and Material Adverse Fact as these terms are defined in Wis. Stat. § 452.01.

Agency Disclosures & Consent to Multiple Representation

The Disclosure of Real Estate Agency with Consent to Multiple Representation form essentially is incorporated into the *1999 listing* in the new Agency Disclosure Provisions section. The descriptions of the duties owed to all parties and the duties owed to clients, the mandatory confidentiality notice, and an explanation of multiple representation have all been stated within the body of the *1999 listing*. A consent to multiple representation and blank lines for listing confidential and non-confidential information are also included. Accordingly, agents listing a property will no longer need to have the seller complete a separate Real Estate Agency Disclosure form.

The contents of the agency disclosure

materials found in the *1999 listing* are substantially the same as those found in the WRA agency disclosure forms. One difference of note is that the explanation of multiple representation makes it clear that a broker in a multiple representation situation is not allowed to place the interests of either party ahead of the other in negotiations. This outright prohibition against favoring one party over the other is a bit stronger than the recommendation to that effect found in other WRA agency disclosure forms.

Notes

Conclusion

The revised *1999 listing* was designed to improve its use by licensees and sellers alike. The revisions, additions and fine-tuning changes should make the day-to-day practice of members a bit easier. This soon will be true for not just residential but for all licensees as the remaining listing and offer forms are similarly revised. These will be addressed in future *Legal Update* issues.

This Legal Update and other Updates beginning with 92.01 can be found in the Members Section of the WRA website at <http://www.wra.org>.

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