



# Legal Update

A WRA Publication Exclusively for the Designated REALTOR®

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## Revised WB-36 Buyer Agency/ Tenant Representation Agreement

The Department of Regulation & Licensing (DRL) has approved a revised WB-36 Buyer Agency/-Tenant Representation Agreement. This revised WB-36 (revised or *1999 form*) is an updated version of the WB-36 Buyer Agency Agreement with a mandatory use date of 12-1-95 (the old or *1995 form*). Members will be notified of the optional and mandatory use dates once that information becomes available.

The buyer agency agreement is the agency contract that authorizes the broker to provide brokerage services to the buyer as a client. It is, in general terms, the counterpart of the listing contract that the seller executes to authorize the listing broker to provide brokerage services to the seller as a client. The buyer agency agreement specifies the extent of the buyer's broker's authority to act on behalf of the buyer and the performance required to earn the broker his or her commission. No real estate licensee may provide brokerage services to a consumer unless they are working under an agency contract.

The revised buyer agency agreement is an updated version of the 1995 agreement. Developed by the DRL Forms Council, with extensive input by licensees specializing in buyer brokerage and other WRA members, the new form attempts to bring the buyer agency contract into closer conformance with actual buyer agency practice and to address some of the problems and abuses experienced with the

old form. These problems include brokers who sign up buyers but don't provide any brokerage services, and buyers who sign buyer agency contracts and then go out and work with selling agents.

This *Legal Update* examines the changes made in the revised WB-36 and provides an insight into the philosophy adopted by the drafters of the new form. Buyer agency practice issues and rules, as well as buyer agency questions and answers from the Legal Hotline, are also reviewed.

### **Revised WB-36 Buyer Agency/ Tenant Representation Agreement**

Although the existing WB-36 Buyer Agency Agreement has adequately served many licensees throughout the past several years, some licensees have abused the buyer agency process and some licensees working as listing agents have been confused when working with buyer's agents. The Wisconsin Department of Regulation and Licensing (DRL) convened a Buyer-Agency Advisory Committee (Committee) in 1998 to study various concerns involving the practice of buyer agency (the committee's findings are reported in *Legal Update 98.08* and in the DRL October 1998 *Regulatory Digest*).

Accordingly, the DRL has made the following revisions to the 1995 WB-36 Buyer Agency Agreement. In



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some cases, the form has been modified to more closely reflect actual practice. By far the most dramatic change made is the new provision stating that if the 1999 WB-36 calls for a success fee, that fee is earned if the buyer acquires the described property or enters into an enforceable contract to acquire such a property during the term of the WB-36, regardless of whether the buyer's agent located the property or negotiated the contract.

In the following discussions, the existing WB-36 (mandatory use date 12/1/95) will be referred to as the "1995 form," and the newly revised WB-36 will be referred to as the "1999 form." The 1999 Buyer Agency/Tenant Representation Agreement form appears on pages 13-15 of this *Update*.

### For More Than Just Buyers

The first change in the WB-36 is in the title. The WB-36 Buyer Agency Agreement (1995) has become the WB-36 Buyer Agency/Tenant Representation Agreement (1999). Although the *1995 form* was set up to be used by tenant representatives as well as by agents assisting parties looking to obtain option rights, a property exchange or some other real estate acquisition, licensees and parties felt reluctant to use a form with a title referring only to buyers. Accordingly, the title has been changed to call attention to the fact that the WB-36 can be used with tenants and other parties acquiring an interest in real estate other than by purchase.

The first line of the *1999 form* includes the word "Buyer," followed by a reference to lines 135-136 of the form, where the term "Buyer" is defined. This definition – and the early reference to it – emphasizes the many different situations in which the WB-36 may be used: **"Buyer, as used in this Agreement, is the party executing this Agreement and seek-**

**ing to acquire an interest in real estate or a business opportunity by purchase, lease, option, exchange, or any other manner."** However, rather than refer to all of these variations, both the form and this *Update* simply refer to the "buyer."

### Format

The *1999 form* is on letter-sized paper and is three pages long. The DRL is changing to letter-sized paper for all new approved forms to facilitate the faxing and computer printing of documents without having to first reduce a document on legal-sized paper to letter-sized paper. All blank lines and provisions requiring that a selection be stricken or written in appear on pages 1 & 3 of the form, which means that the form has been reorganized and reordered.

### Broker's Authorization as Sole Buyer's Agent

In the Broker's Authorization section of the revised WB-36, the buyer authorizes the broker to work as his or her exclusive buyer's agent to locate and/or negotiate the procurement of an interest in property. No one else can be a buyer's agent for the buyer, but the authorization language does not prohibit the buyer from personally contacting sellers or seller's agents regarding properties he or she may be interested in. In other words, this is an exclusive agency agreement, but it is not an exclusive right to locate and negotiate arrangement. The buyer may be discouraged from dealing with owners and other agents, however, by the provisions in the Compensation section of the revised WB-36, discussed on page 4 of this *Update*.

The Broker's Authorization section indicates that the parties to the WB-36 may "strike as applicable" to modify the broker's authorization. For example, if the buyer only needs a buyer's agent to locate a property and the buyer or the buyer's attorney will conduct the negotiations, the buyer's

agent may line out “and to negotiate the procurement of” in lines 1-2. This situation may occur in commercial transactions where the parties are more likely to be represented by legal counsel.

If the buyer only wants the buyer’s agent to negotiate the procurement of an interest in property, the phrase “to locate an interest in property and” may be crossed out. For instance, the buyer may spot a “for sale by owner” sign on a property and wants a buyer’s agent to represent him or her in negotiations on the property. It is important to note, however, that a licensee can’t simply step in to draw up the papers and do the closing. Where the buyer and the seller have already negotiated the terms of the transaction, Wis. Admin. Code § RL 16.05(3) states that a real estate broker is only authorized to complete legal contracts on behalf of another person if the form completion is incidental to the broker’s legitimate real estate practice. The broker cannot just “play attorney” but rather must also be providing some brokerage services such as making disclosures and negotiating the offer.

### Exclusive Right to Negotiate

The revised WB-36 creates an exclusive agency relationship. The DRL considered making the WB-36 an exclusive right to negotiate agreement, but decided against it. It was the DRL’s view that licensees generally do not engage in “exclusive right to locate” and/or “exclusive right to negotiate” relationships, primarily because this requires a buyer’s agent to provide an exceptional level of service and essentially be available 24 hours a day.

If the WB-36 gave the buyer’s agent the exclusive right to locate, the buyer’s agent would have to be constantly scouring the market for suitable properties, and the buyers would be forbidden from driving through neighborhoods to identify interesting properties, searching for properties

on the Internet, or working with any owners or owner’s agents in identifying, evaluating, and determining the availability of properties.

If the WB-36 gave the buyer’s agent the exclusive right to negotiate, the buyer’s agent would have to be constantly available to come and write an offer — in case, for example, the buyer falls in love with a hot property they see at an open house. Buyers would be precluded from writing an offer on their dream house if the buyer’s agent wasn’t available to immediately come to the open house and get an offer in before the buyers from the next showing submit their offer. Buyers would even be unable to ask their attorneys to write the offer for them because the buyer’s broker would have the exclusive right to negotiate on behalf of the buyers.

The DRL cautions buyer’s agents who want to create exclusive rights to negotiate to consider the consequences on their own real estate practices. For example, if a buyer’s agent has eight buyer clients who all want to look for property on Sunday afternoon and four simultaneously want to write offers on “hot properties,” the buyer’s agent will either have to tell the buyer/clients that they cannot all negotiate and write their offers at that time – they will have to wait their turn – or find some other way to assist them all. This may tend to limit the number of buyer clients a buyer’s agent may have at one time, increase the number of licensed assistants employed by buyer’s agents, and possibly reduce the buyer’s agent’s income.

The DRL does not object to a broker modifying the contract to prohibit the buyer from contacting property owners or the agents of those owners as long as the buyer knowingly agrees to give up his or her rights to look for properties and negotiate on his or her own, without having the buyer’s agent along. Brokers wishing to establish a true “exclusive right to

locate or negotiate” may do this either by striking the words “act as buyer’s agent” on line 1 of the revised WB-36 (thus creating a provision that says “Buyer gives Broker the exclusive right to locate and negotiate the procurement of an interest in real estate”), or by adding language to that effect in an addendum. Many brokers may find this unnecessary under the *1999 form*, however, because their success fees are due even if the buyer works with owners and other agents.

### Property Description

The *1999 form* does not include any lines for a specific property description because the buyer’s broker’s success fee is automatically due if the buyer acquires the interest in property generally described in the contract or enters into an enforceable contract to acquire such an interest. The Property Type, Nature of Interest, and Property Characteristics/Transaction Terms sections of the *1999 form* ask only for a brief description. The buyer’s agent simply checks off all of the different property types that the buyer might be interested in, for example “Residential/Personal,” “Residential/Investment,” and perhaps “New Construction;” indicates the nature of the interest the buyer wants to acquire; and indicates the buyer’s purchase price range and any other material acquisition terms such as property size, location, seller financing availability, schools, etc.

The *1999 form* also asks for a description of excluded properties. This parallels the Exclusions section of the DRL-approved listing contracts. Buyer’s procurement of an interest in an excluded property described here will not earn the buyer’s broker his or her fee, just as a sale to an excluded buyer does not earn the listing broker his or her commission.

A property might be excluded because the buyer had previously negotiated with the owner of the property, or had been shown the

property by another agent. If the other agent was a buyer's agent, there may be a buyer agency agreement between the other agent and buyer that is still in effect as to that property or the property might be a "protected property" under an expired contract. "Protected properties" are discussed on page 8 of *Legal Update 95.09*.

Article 16 of the Code of Ethics would prohibit a broker from entering into a buyer agency contract without excluding such a property. Article 16 provides that "REALTORS® shall not engage in any practice or take any action inconsistent with the agency of other REALTORS®." A second buyer agency agreement affecting the same property would conflict with the agency relationship of the first buyer's broker and may also subject the buyer to a potential double fee situation.

If a buyer's agent is aware that a buyer has seen a property with a seller's agent or another buyer's agent, or prior to entering into the buyer agency agreement, the buyer's agent arguably has a duty to disclose the procuring cause and commission issues which might arise from the other agent's prior showing. The broker and buyer should consider whether such properties should also be excluded from the buyer agency/tenant representation agreement.

### Automatic Compensation

The Compensation section of the *1999 form* contains the most dramatic change made in the WB-36: the buyer's broker earns the success fee if the buyer, or any person acting on behalf of the buyer, acquires the interest in property described in the contract or enters into an enforceable contract to acquire such interest during the term of the WB-36. This is true even if the buyer's agent was not involved in the location of this property interest and was not involved in the negotiation of the procurement of the interest in property.

This change makes the revised WB-36 much like the listing contracts, which do not require the listing broker to procure the buyer in order to earn a commission. The buyer's broker does not have to locate or negotiate the procurement of the interest in property, but is paid if any such interest is obtained by the buyer during the contract term, regardless of who helps the buyer procure that interest in property.

As in the *1995 form*, the broker's compensation may be in the form of a success fee, another form of compensation, or both. For example, a broker may combine a success fee with a retainer fee or an hourly fee. The buyer's broker's compensation is still due even if the transaction fails to close. The broker's compensation is due at closing, or on the date set for closing if the transaction does not close.

As in the *1995 form*, the *1999 form* provides a place where the buyer's broker and buyer may indicate whether or not the buyer's agent may accept compensation from the owner or the owner's agent. If the buyer agrees to this, the amount the buyer owes for the buyer's broker's compensation will be reduced by any amount received from the owner or owner's agent. If no selection is made, the *1999 form* says that the broker may accept compensation from the owner or owner's agent. Note, however, that these provisions do not say that the buyer's broker is authorized to unilaterally determine who will pay his or her fee.

Some buyer's agents add additional protections for the buyer by indicating that the buyer's agent's total compensation will be whatever can be collected from the seller or seller's agents. This is perfectly legal and ethical, however, REALTORS® must be careful not to describe such a compensation structure as "free of charge." The code of Ethics in Standard of Practice 12-2 prohibits

REALTORS® from representing that their services are free or without cost if they expect to receive compensation from the seller or the seller's agent.

### Buyer's Caution

The *1999 form* contains a revised caution to buyers who consider working with the owner or agents of the owner:

**CAUTION: BUYER MAY WORK WITH OWNER OR AGENTS OF OWNER IN LOCATING AND NEGOTIATING AN INTEREST IN PROPERTY. HOWEVER, BUYER MAY BE RESPONSIBLE FOR BROKER'S FULL COMPENSATION IF BUYER'S CONTACTS WITH OWNER OR OWNER'S AGENTS RESULT IN NO COMPENSATION BEING RECEIVED BY BROKER FROM OWNER OR OWNER'S AGENT.**

This language emphasizes to the buyer that he or she is under contract to pay the buyer's broker's fee if a property interest is acquired, regardless of whether the buyer's agent was involved. If the buyer's agent can't collect from the owner or the owner's agent, the buyer is obligated to pull out his or her checkbook and pay the buyer's agent. If the buyer works with an agent of the owner to the extent that that agent is the procuring cause, the listing broker may pay the owner's agent rather than the buyer's agent because of procuring cause. It may be possible to have the owner agree to pay the fee in the offer or contract, but the owner may agree to do this only if the price is raised to cover the additional fees. The upshot is that the buyer has to pay a higher purchase price because the buyer worked with an agent of the owner. Possible payment of additional fees is one of the down sides for a buyer entering into a buyer agency relationship and it is very important that the buyer fully appreciates this fact.

## Broker's Performance

The Compensation section also sets forth minimum standards of performance for the buyer's broker. The buyer's agent must use his or her professional knowledge and skills and reasonable efforts to locate an interest in property for the buyer and negotiate the procurement of the interest in property desired by the buyer. The *1999 form* indicates that the buyer's broker shall give advice to the buyer within the scope of the broker's license, facilitate or participate in discussions about the terms of a potential contract for the acquisition of a property interest, complete appropriate contractual forms, present either party's contractual proposals with an explanation of the advantages and disadvantages, and engage in other efforts as specifically specified in the agreement. The DRL wanted to clarify that competent buyer agency practice requires that certain minimum services be provided to the buyer.

If broker does not provide these minimal services, then the broker will be in breach of the agreement and the buyer will be able to terminate the WB-36 without owing any damages to the broker. A buyer may terminate a buyer agency agreement at any time because it is a personal service contract embodying an agency relationship. Neither the principal nor the agent can be compelled to remain in an agency relationship. If there has been no breach of contract on the part of the broker, however, the buyer's termination will be considered to be a breach of contract and in "bad faith," and the broker may be entitled to damages in a court of law.

If a broker who has not provided services attempts to collect a success fee from the buyer, the broker's failure to perform in breach of contract may serve as a defense to the action. In other words, a buyer can resist and defeat a buyer's agent who tries to collect a fee without having done

anything. However, if the agent has been performing but the buyer went off to an open house and wrote an offer without giving the buyer's agent a chance, the buyer's broker's fee would arguably still be legitimately due.

As in the *1995 form*, the *1999 form* provides that in the case of litigation between the buyer and the broker, the prevailing party is entitled to attorneys' fees.

## Agency Disclosure and Consent to Multiple Representation

The disclosure of real estate agency form is incorporated into the *1999 form* in the Agency Disclosure and Consent to Multiple Representation section. The descriptions of the duties owed to all parties and the duties owed to clients, the mandatory confidentiality notice, and the explanation of multiple representation have all been stated within the body of the *1999 form*. Included is the consent to multiple representation, the waiver of confidentiality, and the blank lines for listing confidential and non-confidential information.

The contents of the agency disclosure materials found in the *1999 form* is substantially the same as that found in the 1999 version of the WB-1 Residential Listing Contract. 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 stated a bit more strongly than in the *1995 form*.

When negotiating directly with an FSBO seller, the seller will have to receive a separate agency disclosure form indicating the broker is the agent of the buyer.

The other sections of the WB-36 have been reordered but remain substantially the same. Consult *Legal Update 95.09* for detailed discussion of the remaining provisions.

## Collecting the Buyer's Broker's Fees

All of this leads to the several different methods of payment for the buyer's broker. There is no legally preferred method for the payment of buyer's broker's fees. Some brokers find that things may go more smoothly if the listing broker pays the buyer's broker's fees as a commission split. That way, there is generally no need to restructure the transaction to accommodate the payment of the fee. If the listing broker can not or will not pay the buyer's broker's fee, some buyer's brokers will then seek payment from the seller. Other brokers insist that the seller always pays the buyer's broker's fees at closing on behalf of the buyer. If this does not work out, the buyer is generally left to pay whatever part of the fee is left unpaid. The buyer's broker may receive part of his or her fee from the buyer and part from the listing broker or seller.

The buyer and the buyer's agent agree contractually upon the buyer's broker's fees. The buyer should also have the power to direct the buyer's agent concerning where the fees should be sought and to control what provisions appear in the offer to purchase. The buyer needs to be educated by the buyer's broker about agency relationships, compensation alternatives, company policies, and possible consequences before he or she can make informed decisions. The buyer is entitled to choose whatever is in the best interests of him or herself, and need not be bound by the buyer's broker's preferences or biases for compensation. The buyer is concerned with purchasing or acquiring an interest in the property and making sure that the buyer's agent is paid. The buyer's agent should serve

the best interests of his or her client by assisting the buyer in reaching those goals as expeditiously as possible.

Standard of Practice 1-13 provides that “When entering into buyer/tenant agreements, REALTORS® must advise potential clients of:

- 1) the REALTOR®’s general company policies regarding cooperation and compensation; and
- 2) any potential for the buyer/tenant representative to act as a disclosed dual agent, e.g. listing broker, subagent, landlord’s agent, etc.”

Standard of Practice 1-4 provides that “REALTORS®, when seeking to become a buyer/tenant representative, shall not mislead buyers or tenants as to savings or other benefits that might be realized through use of the REALTOR®’s services.”

Likewise, the seller does not set the buyer’s broker’s fees, but may certainly choose what provisions are acceptable in the offer to purchase or other real estate acquisition contract. The seller needs to be educated by the listing broker about agency relationships, compensation alternatives, company policies, and possible consequences before he or she can make informed decisions. The seller is entitled to choose whatever is in the best interests of him or herself, and need not be bound by the listing broker’s preferences or biases regarding cooperation and compensation. The seller is concerned with selling the property and achieving a certain level of net proceeds. The listing agent should serve the best interests of his or her client by assisting the seller in reaching those goals as expeditiously as possible.

Standard of Practice 1-12 provides that “When entering into listing contracts, REALTORS® must advise sell-

ers/landlords of: 1) the REALTOR®’s general company policies regarding cooperation with and compensation to subagents, buyer/tenant agents, and/or brokers acting in legally recognized non-agency capacities; 2) the fact that buyer/tenant agents or brokers, even if compensated by listing brokers, or by the sellers/landlords may represent the interests of buyers/tenants; and 3) any potential for listing brokers to act as a disclosed dual agents, e.g. buyer/tenant agents.”

### **Listing Broker Pays Commission Split**

A commission split from the listing broker may arise from the buyer’s broker’s acceptance of the listing broker’s offer of cooperation and compensation made through the MLS. Note that a listing broker’s offer to co-broke through the MLS on a sub-agency basis is not an offer to share a listing commission with a buyer’s broker, but many MLS listings also include an offer to cooperate and compensate buyer’s brokers. A commission split from the listing broker also may arise by virtue of a policy letter the listing broker has issued to the buyer’s broker, or as a specific compensation agreement the two brokers have entered into for the particular transaction.

### **Seller’s Payment of Fees**

If the listing broker does not offer any compensation to buyer’s brokers or does not offer the same amount of compensation for buyer’s brokers as is offered to selling agents, the buyer’s broker may seek payment of all or part of his or her fee from the seller. This may also happen if the buyer’s broker has had trouble receiving prompt payment of commissions and wants to be sure he or she is paid at closing, or if the buyer’s broker anticipates a procuring cause dispute. This situation might arise if the buyer’s broker has signed a buyer to a WB-36, but the buyer has been working with sellers and seller’s

agents in locating a property. The buyer has returned to the buyer’s broker to have him or her write the offer, and the buyer’s broker fears that the agent the buyer worked with will claim procuring cause. If the seller pays the fee, the issue of procuring cause may be avoided because the seller’s contractual obligation to pay the buyer’s broker’s fee is not subject to procuring cause unless it is specifically so stated.

There is a right way and a wrong way for the buyer’s broker to secure the seller’s agreement to pay the buyer’s broker’s fee. The offer to purchase is not the place for brokers to negotiate commission splits or other payments among themselves. Standard of Practice 16-16 also indicates that REALTORS® may not use the terms of an offer to purchase or lease to attempt to modify the listing broker’s offer of compensation to subagents or buyer’s brokers. It also forbids the submission of an offer contingent upon the listing broker’s agreement to modify the offer of compensation. For example, a buyer’s broker may not submit an offer which is contingent upon the listing broker reducing the commission received from the seller by the amount offered to subagents on the MLS, and contingent upon the seller paying the buyer’s broker’s fee. This would violate Article 16 of the Code of Ethics.

However, a buyer may request in the offer that the seller pay the buyer’s broker’s fee on behalf of the buyer. This payment would become a seller expense paid at closing. If the amount of the fee is requested as a credit to buyer, this may have the effect of reducing the purchase price and causing problems with the lender. This payment by seller would be an economic adjustment only and would not create an agency relationship between the seller and the buyer’s broker. It is similar to the scenario where the buyer asks the seller to pay mortgage points or mortgage closing costs except in this case the

expense being paid is the buyer's broker's fee. Because this type of request for payment is made between the parties and not to the brokers, and doesn't directly address the listing contract, NAR considers it to be ethical and not in violation of Article 16.

## **Seller Responses to Fee Payment Provisions**

The seller should be permitted to make an informed decision regarding how to respond to a provision in the offer (or other contract under negotiation) asking the seller to pay the buyer's broker's fees on behalf of the buyer. The seller may agree to pay those fees and ask the listing broker to reduce his or her commission by a like amount; or the seller may counter the offer to increase the purchase price; or the seller may counter the offer to delete the provision and try to make the buyer's agent accept the compensation offered by the listing broker; or the seller may make some other response.

### **Seller Pays Fees and Listing Broker Reduces Commission**

This approach may be disruptive for the seller and the listing broker because they will typically be pressured into reducing the listing commission with respect to this transaction to accommodate the seller's payment of the buyer's broker's fee. The seller does not want to pay, for example, a 6% commission to the listing broker plus 3% to the buyer's broker. If the listing broker agrees to reduce the commission to accommodate the seller's payment of the buyer's broker's fee, he or she may end up with nothing if a selling agent arrives on the scene, successfully claiming procuring cause. The listing broker would usually prefer to directly compensate the buyer's broker and have the compensation subject to procuring cause.

This is the situation addressed in the Code of Ethics in Standard of Practice (SOP) 17-4(2). SOP 17-

4(2) applies only if the buyer's Broker B was paid by the seller, and the listing Broker A has reduced the commission owed by the seller before the cooperating Broker C appears on the scene with his or her claim as procuring cause. Under SOP 17-4(2), Broker C may initiate arbitration directly against Broker B without having to involve listing Broker A. If Broker C does bring arbitration against listing Broker A, Broker A can name Broker B as an additional party without having to go through the consolidation process. The hearing panel's decision as to procuring cause is conclusive.

This remedy, however, does not apply if the agent who was working with the buyer is an agent of the listing broker – the listing broker is procuring cause, and there is no Broker C. It also does not apply if listing Broker A is aware of the procuring cause claim of Broker C at the time Broker A reduces his listing commission. In that case, Broker A may prefer to not make any reductions or payments of commission and instead submit the matter to arbitration. If Broker A has to pay Broker C, then either the seller or buyer will have to pay Broker B. In such a case, raising the purchase price to cover the buyer's broker's fees be a good choice.

### **Increase the Price**

Some brokers believe that the appropriate response from a seller being asked to pay the buyer's broker's fees as a condition of the offer to purchase is to counter and increase the price to cover the buyer's broker's fees and preserve the seller's net proceeds.

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The following is an excerpt from an article by James R. Imhoff, Jr., Chairperson of the Wisconsin Real Estate Board, from the June, 1998 Wisconsin Regulatory Digest:

"Some of the letters sent to me focused on the issue of offers being drafted by

buyer agents where the buyer requests that the seller, as a condition of the offer, pay the buyer's agent's fee. This issue has been confusing for some licensees.

However, we must remember that inserting such a condition is being done at the buyer's request. Therefore, it is an appropriate condition of the offer. The buyer has every legal right to include such a condition. This is similar to the buyer requesting a seller to pay other closing costs, financing fees or a dollar allowance for repairs or improvements to be made to the property at closing. The concept is simply that the buyer is writing an offer at a price high enough to give the seller the seller's price, plus the additional fees.

When the agents in our company receive such offers, we have instructed them to never become involved in what the buyer's agent's fees are or what other closing costs are asked for in the offer, but simply to discuss with the seller the net that will satisfy the seller, and then to counter the offer at a price that includes the fees or costs.

Let's take, for example, an offer at \$100,000 which requests closing costs or buyer's agent's fees of \$3,000. The seller is agreeable to an offer of \$98,000, but without the extra \$3,000. The mistake would be to counter out the \$3,000, as the buyer may walk away because the buyer is, in effect, financing a portion of the fees by including them in the offer. The proper way to proceed here would be to counter at \$101,000, leaving the \$3,000 of fees in the price. Everybody wins.

The question comes up as to the listing broker's commission. Does the listing broker have to reduce his or her commission by what the buyer's agent is asking in the offer? The answer is no. At our company we give our agents the authority to reduce the commission by only the amount that we offered the co-broker in cooperation, but only if necessary.

For example, if we have the property listed at 6% and are offering the co-broker 3%, and we receive an offer asking the seller to pay 4%, our agent can amend our listing, if necessary, down to 3%. But we always suggest to the seller not to make any counter-offer affecting the buyer's fee of 4%, but simply to counter the price high enough to cover the seller's net and the fees.

The real issue is that the agent for the seller should never be concerned with the fee negotiated between the buyer and the buyer's agent. Likewise, the buyer's agent should never be concerned with the fee negotiated between the seller and the seller's agent."

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The bottom line in this process appears to be that the buyer ends up paying the buyer's broker's fees via the increase in the purchase price. The listing broker, on the other hand, is paid the full commission, which some may consider to be a windfall, but which also protects the listing broker should some other broker claim to be procuring cause.

#### Fees Provision Modified or Countered Out

If the seller counters the fee payment provision to modify it or to delete it from the offer or other contract, there generally is a risk that the seller will lose the buyer. This action is often intended to cause the buyer's broker to accept the compensation the listing broker has offered and avoid adjustments to the listing contract and the offer. It may force the buyer's broker into the procuring cause arena where only the broker who procured the buyer will be paid.

Countering to delete the fees payment provision will preserve the monetary structure established by the seller and the listing broker as to price range, seller's net proceeds, and the compensation to the cooperating broker. In other words, the message in such an action may be to take it the

way it is or the seller won't sell to you.

#### Fees Paid by Buyer

If the seller resists paying the buyer's broker's fees, the buyer may make an offer based upon a net purchase price, that is, a price computed by deducting the amount of the buyer's broker's fee from the price the buyer would otherwise offer. This may again pressure the seller and listing broker into adjusting the listing commission, and is viewed by some as undesirable because it distorts the actual purchase price for purposes of financing, transfer fees, percentage commissions and fees, insurance, and title insurance.

This is the situation described in the Code of Ethics in Standard of Practice (SOP) 17-4(3). SOP 17-4(3) applies only if the buyer's Broker B was paid by the buyer and the listing Broker A has reduced the commission owed by the seller before the cooperating Broker C appears on the scene with his or her claim as procuring cause. Under SOP 17-4(2), Broker C may initiate arbitration directly against Broker B without having to involve listing Broker A. If Broker C does bring arbitration against listing Broker A, Broker A can name Broker B as an additional party without having to go through the consolidation process. The hearing panel's decision as to procuring cause is conclusive.

This remedy, however, does not apply if the listing broker is procuring cause - there is no Broker C. It also does not apply if listing Broker A is aware of the procuring cause claim of Broker C at the time Broker A reduces his listing commission. In that case, Broker A may prefer to not make any reductions or payments of commission and instead submit the matter to arbitration.

## Buyer Agency Practice

Much confusion often surrounds the practice of buyer agency. Two of the most misunderstood issues involve agents of the seller dealing with buyers under a buyer agency agreement, and the disclosure of buyer agency status to listing agents and sellers.

### Dealing with Buyers under Buyer Agency Agreements

The present § RL 24.13(5) states:

"NEGOTIATION THROUGH LISTING BROKER. Licensees shall not negotiate a sale of real estate directly with an owner if the licensee knows that such owner has an unexpired written contract in connection with such property which grants to another licensee an exclusive right to sell. All negotiations shall be conducted with the listing broker, and not with the owner, except with the consent of the listing broker or where the absence of the listing broker, or other similar circumstances, reasonably compels direct negotiation with the owner."

This rule clearly makes no reference to buyer's brokers or buyers. It applies only in cases where the listing broker has an exclusive right to sell listing contract. The DRL has proposed an amendment to this rule to cover buyer's brokers and buyers under limited circumstances. The current draft proposal reads:

"NEGOTIATION THROUGH LISTING BROKER. Licensees shall not negotiate a sale or lease of real estate directly with ~~an owner~~ a party if the licensee knows that such ~~owner~~ party has an unexpired written contract in connection with such property which grants to another licensee an exclusive right to sell, lease, or to negotiate. All negotiations shall be conducted with the listing broker holding the exclusive right to sell, lease, or to negotiate, and not with the ~~owner party~~, except with the consent of the ~~listing~~ broker or where the



absence of the listing broker, or other similar circumstances, reasonably compels direct negotiation with the owner party. A listing broker has no duty to investigate whether a buyer has granted a buyer's agent an exclusive right to negotiate. Note: the Department-approved WB-36 does not grant the buyer's agent an exclusive right to negotiate."

Adoption of this rule proposal will clarify the status quo with respect to buyer agency practice. Agents of the seller or owner will continue to be able to negotiate directly with a buyer under the *1999 form*. The only time that other agents will be compelled to negotiate with the buyer's agent is when the buyer or the buyer's agent has made the other agent aware that the WB-36 has been modified to provide for the exclusive right to negotiate, or when the buyer refuses to work with anyone else. The other agents are not obligated to ask the buyer whether he or she has a buyer agency agreement or whether that agreement contains an exclusive right to negotiate.

As the *1999 form* and this rule draft were being drafted, it became apparent that the *1995 form* and the *1999 form* are exclusive only in the sense that the buyer cannot enter into another buyer agency agreement with another broker. As far as locating properties for the buyer and negotiating an offer or other acquisition contract, there is no exclusivity and the buyer may work with other agents. This is stated right on the face of the *1995 form* and the *1999 form*.

Other agents approached by buyers under buyer agency agreements arguably should caution the buyer to check the provisions of his or her buyer agency agreement to determine whether the buyer may work with other agents and whether the buyer will still be obligated to pay the buyer's broker's fees. Under the *1995 form*, the agreement may have been modified to provide for exclusive

rights to locate and/or negotiate, and for payment of the buyer's broker's fees regardless of the buyer's agent's involvement in the transaction. The other agent, however, need not take on this responsibility to confirm what the agreement does in fact provide. Under the *1999 form*, the buyer will be responsible for payment of the buyer's broker's fees regardless of the buyer's agent's involvement in the transaction. The *1999 form* may also be modified to provide for exclusive rights to locate and/or negotiate.

Many brokers make it a practice to honor a buyer agency agreement and decline to work with a buyer who is under a buyer agency agreement. This is a professional and courteous practice. In the absence of such gracious brokers, there is no guarantee under current Wisconsin law, or the proposed revision of § RL 24.13(5), that the buyer agency agreement will be honored unless the buyer or buyer's agent informs the other agent that there is a buyer agency agreement containing exclusive rights, or unless the buyer refuses to work with anyone else.

This all points to the conclusion that a buyer agency agreement is not as powerful as some may think. It is exclusive only in the sense of precluding a concurrent buyer agency relationship, unless modified. The WB-36 establishes that the buyer's broker will earn his or her compensation if the broker performs as designated in the agreement, as does a listing contract. But a WB-36 is not exclusive in the same way as an exclusive right to sell listing contract because there is no exclusive right to locate or negotiate.

The result under Standard of Practice 16-13 is not as clear. Standard of Practice 16-13 provides that "All dealings concerning property exclusively listed, or with buyer/tenants who are subject to an exclusive agreement shall be carried on with the client's agent or broker, and not with

Many brokers make it a practice to honor a buyer agency agreement and decline to work with a buyer who is under a buyer agency agreement. This is a professional and courteous practice.

the client, except with the consent of the client's agent broker or except where such dealings are initiated by the client."

Neither the Code of Ethics, the Standards of Practice, or NAR's case interpretations make it clear what is meant by "exclusive agreement" and whether it includes an exclusive agency agreement such as the WB-36. Accordingly, the WRA will ask NAR to clarify what an "exclusive agreement" means with respect to the Wisconsin WB-36 and the proposed revisions to § RL 24.13(5). It remains clear, however, that if the buyer initiates dealings with other agents, the other agents may work with the buyer. Whether the Code of Ethics permits other agents to initiate dealings with buyers under a WB-36 will have to be resolved by local board hearing panels on a case-by-case basis until clarification from NAR is received. Non-REALTOR® licensees, however, will be able to approach these buyers because they are not bound by the Code of Ethics.

### Disclosure of Buyer Agency

Another area where the rules are often not followed involves the disclosure of agency to listing agents and sellers.

§ RL 24.08(8)(a)2 provides that:

- (8) DISCLOSURE OF AGENCY.
  - (a) General requirements.
    - 2. Licensees acting as agents of

potential buyers of real estate used or intended to be used principally for one to 4 family residential purposes, who are aware that the owner of the real estate has granted another licensee the exclusive right to sell, shall notify the listing broker of the licensee's buyer agency relationship at the earlier of all of the following:

- a. The first contact with the listing broker where information regarding the seller or transaction is being exchanged.
- b. A showing of the property.
- c. Any other negotiation with seller or listing broker.

Similarly, Standard of Practice 16-10 states that "REALTORS®, acting as agents of, or in another relationship with, buyers or tenants, shall disclose that relationship to the seller/landlord's agent or broker at first contact and shall provide written confirmation of that disclosure to the seller/landlord's agent not later than execution of a purchase agreement or lease." Standard of Practice 16-11 indicates that "On unlisted property, REALTORS® acting as buyer/tenant agents or brokers shall disclose that relationship to the seller/landlord at first contact for that client and shall provide written confirmation of such disclosure to the seller/landlord not later than execution of any purchase or lease agreement. REALTORS® shall make any request for anticipated compensation from the seller/landlord at first contact."

All of this indicates that buyer's agents must tell listing agents and sellers at first contact that they are buyer's agents. This is later confirmed in the offer to purchase or other real estate acquisition contract. While the DRL rule is limited to one-to four-family residential properties and listing brokers with exclusive right to sell contracts, the Code of Ethics provisions apply to all properties and all brokers.

## LEGAL HOTLINE Questions & Answers

The following questions concerning buyer agency recently were asked of the WRA Legal Hotline:

*An agent has a customer who wants to purchase a commercial property. The customer does not want the owners of the property to know their identity. How to proceed?*

Under the general principles of agency law, an agent can act for an unidentified principal. In such cases, it is generally inferred that both the agent and the unidentified principal are parties to the contract. The agent and the other party, however, can agree in the contract that the unidentified principal is the real party. This would arguably permit a buyer's agent, upon proper authorization from the buyer in a power of attorney or some other written format, to execute an offer to purchase on behalf of the buyer who would be referenced only as the unidentified principal.

Wis. Stat. §§ 706.02 & 706.03, however, cast substantial doubt on whether this practice is valid in Wisconsin. § 706.03(1) states that, "A conveyance signed by one purporting to act as agent for another shall be ineffective as against the purported principal unless such agent was expressly authorized, and unless the authorizing principal is identified as such in the conveyance or in the form of signature or acknowledgment."

The Wisconsin courts have interpreted this to require that the authorizing principal must be identified in the text of the offer, deed or other conveyance, or in the signature block or acknowledgment section of the conveyance. § 706.02(1) also requires that all parties be identified in order for a conveyance such as an offer or deed to be valid.

Consequently, an agent who signs an offer as "agent for unidentified principal" risks being held personally liable on the contract. In other words, if the buyer skips to Rio, the agent becomes the proud new owner of the property. There also is a risk that the contract will be found invalid for lack of mutuality, that is, there is no real buyer who is entering into an agreement with the seller. The buyer may then lose the property.

Alternatively, the buyer could find a person to enter into an offer as "straw man and/or assigns." At closing, the offer could be assigned to the buyer who would then take title in his or her own name. The straw man and the buyer may wish to have an underlying agreement stating the straw man's promise to assign the offer to the buyer at closing and the buyer's promise to protect the straw man from liability.

A second alternative is for the straw man to enter into an offer to purchase in his or her own name and then enter into a second offer to purchase whereby he or she would deed the property to the buyer immediately following the straw man's closing with the seller. In both of these alternatives, it generally is not advisable for the real estate agent to be the straw man because there is a substantial risk of liability. The straw man may be forced to purchase the property even if the real buyer has backed out of the deal.

If the buyer is willing to reveal his or her identity after the seller accepts the offer, an offer to purchase may be written with the buyer to be named upon the seller's acceptance. Another idea is to draft an "offer to sell" with the seller signing first without knowing the buyer's identity. In these cases, the agent could draft these offers as a subagent under the new agency law's confidentiality provisions. A buyer agency would not be necessary.

*An agent has been working with a buyer under buyer agency on a particular property. The agent spoke with the woman who would be the seller, who is in a nursing home. Some prices were negotiated, but the seller needed some time. The buyer's agent found out that buyers were contacted by another company who told them that the "property was up for bids." The other agent told the buyer's agent that they have an exclusive office contract and anyone can sell the property, but no one will get paid except her company. Is this legal?*

If the buyer will pay the buyer's broker's fee, the agent need not worry about not getting paid. The buyer could ask the seller to pay the buyer's broker's fee in the offer. Arguably, the listing agent is not serving the best interests of her client because this practice limits market exposure dramatically and the seller should be informed of this impact.

*Is it illegal to accept a commission for property that a licensee is purchasing for him or herself? If an agent wrote an accepted offer on a property for him or herself, could the agent accept the co-broke commission?*

Under the law of agency, the agent is prohibited from competing with the principal. A licensee can be either a principal or an agent in a transaction, but conflicts of interest occur when a licensee tries to be both. When acting as a buyer of real estate, the licensee is a principal in the transaction and not the agent for anyone. Therefore, the buyer/licensee cannot collect a commission from the seller because the buyer/licensee cannot perform services on behalf of the seller with undivided loyalty when the licensee has his or her own interest as the buyer at stake. It is also inconsistent for a buyer/licensee to act as his or her own agent and collect a commission for representing oneself. Instead, a buyer/licensee can negotiate a buyer's incentive to be paid by the listing broker or the seller. This incentive can be for the amount of

the co-broke commission that would otherwise be paid to the selling broker in the transaction.

The buyer's incentive should be properly documented in writing before closing, preferably before the offer to purchase is executed. There is no "secret" form or language for the incentive agreement. However, the agreement should identify the parties and the transaction, and indicate how the incentive is earned, when it will be paid, and who will pay it. For example, an incentive agreement might provide: "As an inducement to Larry Licensee to purchase the property at 123 Main Street, Salestown, Wisconsin, Real Good Realty, Inc., promises to pay to Mr. Licensee an incentive in the amount of \$2,000 at the time of closing provided the closing occurs on or before December 31, 1992. It is agreed that this incentive shall be paid in lieu of any commission offered on the MLS or otherwise, any commission being hereby declined due to Mr. Licensee's status as a principal/party to this transaction."

When drafting the offer, line 1 of the offer should be crossed out because the buyer/licensee is acting as a principal/party and not as a licensee. In addition, the buyer/licensee must disclose his or her licensee status as required by § RL 24.05(5). The licensee may wish to write in the offer that he or she is a licensed real estate agent purchasing the property for personal use/investment/speculation/resale, as the case may be.

*Re: Buyer agency agreement. Another company is requesting evidence of the agency disclosure provided by the buyer's agent to the buyer. The offer has already been accepted. Is this mandatory?*

No. Wisconsin law does not require a buyer's agent to provide the listing agent with evidence of the agency disclosure. In fact, because the agency disclosure provisions are part

of the WB-36 Buyer Agency Agreement, the buyer's agent arguably is prohibited from providing a copy of this form without permission from the buyer, due to the confidential nature of its contents. The listing broker does not have a right to see the actual buyer agency agreement, but may request a written verification from the buyer's broker confirming that the broker is working under a buyer agency agreement.

*Re: Buyer agency. If buyer agency is not disclosed when the agent makes the showing appointment and an offer is then written, is any compensation due to the agent?*

§ RL 24.07(8)(a)2 provides that:

2. Licensees acting as agents of potential buyers of real estate used, or intended to be used, principally for one- to 4-family residential purposes, who are aware that the owner of the real estate has granted another licensee the exclusive right to sell, shall notify the listing broker of the licensee's buyer agency relationship at the earlier of all of the following:

- a. The first contact with the listing broker where information regarding the seller or transaction is being exchanged.
- b. A showing of the property.
- c. Any other negotiation with seller or listing broker.

A failure to make a timely disclosure of buyer agency, however, does not preclude compensation unless the listing broker has made timely disclosure a condition of the offer of compensation.

*An offer was received from a buyer's broker. The property is currently listed at a 6% commission with a 50% split to cooperating agents. In Addendum A it states that the buyer's broker rejects any offer of compensation offered by the listing broker and, therefore, seller agrees to pay at closing, on behalf of buyer, the buyer's broker fee of \$385.00 plus 3.5%*

of the final sales price. After a couple of counter-offers, negotiations are at a standstill. The listing broker maintains that the seller can dictate the buyer brokerage fee or get the buyer's broker to change the fee. The buyer's broker does not agree - he suggests that the seller just increase the price. How to proceed?

This is a matter of negotiation. The seller can (a) choose to accept the provision for the buyer's broker's fee and cover it out of the sale proceeds, (b) accept the provision for the buyer's broker's fee and ask the listing broker to amend the listing contract to reduce the listing broker's commission, (c) counter out the provision for the buyer's broker's fee, (d) offer to pay a different amount to the buyer's broker, (e) raise the purchase price to cover the requested fees, and/or (f) make some other response. The seller cannot dictate the buyer's broker fee because that is set in the buyer agency agreement, but the seller can choose what he or she wants to agree to during offer negotiations.

*Re: Buyer agency. An agent lists a property that is an estate and procures a buyer. The buyer decides to write an offer to purchase while the agent was out of the state and had someone else handling her transactions. The buyer writes his offer with his brother who is a licensee in Madison instead of with the agent assisting the listing agent. The agent who wrote the offer says that he is a buyer's agent, and the offer calls for the seller to pay the buyer agent's fee. The buyer's agent has never seen the property. The offer has been accepted. Who is procuring cause?*

Because the listing agent is claiming to be the procuring cause (as opposed to an agent from another company), Caller does not have an arbitrable matter with the buyer's agent who wrote the offer. Standard of Practice 17-4(2) does not apply because the procuring cause is the listing office and not a different company. On the other hand, while there

is no procuring cause issue, there are several license law issues that are raised.

The buyer's agent never inspected the property (even though he had access if he wished), in violation of § RL 24.07(1)(c). The buyer's agent may also be engaged in the unlicensed practice of law if the buyer's agent "just wrote up the offer" without providing any legitimate brokerage services, as required by the Wisconsin Supreme Court in the Dinger case. An agent cannot "play attorney" and write an offer to purchase under the guise of a buyer agency agreement without providing brokerage services. The seller or the listing agent may wish to file a complaint against the "buyer's agent" for these apparent license law violations. In retrospect, perhaps the seller could have raised these points during negotiations and resisted paying the fee of the non-MLS buyer's agent.

Pages 13 - 15 of this *Legal Update* contain a SAMPLE DRAFT of the revised WB-36 Buyer Agency/Tenant Representation Agreement.

## Conclusion

Buyer agency continues to cause some confusion among some licensees and consumers. The new WB-36 Buyer Agency/Tenant Representation Agreement will hopefully serve to remind all concerned that buyers under a buyer agency contract should carefully consider the possible consequences when they work with other agents - they may have to pay the buyer's agent even if the buyer's agent is not involved in the transaction so they may want to work more closely with that buyer's agent. REALTORS® should carefully educate their clients about the agency and compensation issues they may encounter in real estate transactions so that those clients may make informed decisions.

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