



REAL ESTATE CONTRACTUAL FORMS ADVISORY COUNCIL
Room 121A, 1400 East Washington Avenue, Madison
Contact: Brittany Lewin (608) 266-2112
November 19, 2015

The following agenda describes the issues that the Board plans to consider at the meeting. At the time of the meeting, items may be removed from the agenda. Please consult the meeting minutes for a record of the actions and deliberations of the Board.

AGENDA

9:30 A.M.

OPEN SESSION – CALL TO ORDER – ROLL CALL

- A. Adoption of Agenda (1)**
- B. Approval of Minutes from September 30, 2015 (2)**
- C. Administrative Updates**
 - 1) Staff updates
- D. Review of Real Estate Contractual Forms for Revision:**
 - 1) **WB-28A Cooperative Agreement Irrevocable Consent (3-5)**
 - a) Original Document
 - b) Review of WRA Forms Committee Memo with Proposed Revisions to WB-28A
 - 2) **WB-1 Residential Listing Contract – Exclusive Right to Sell (6-23)**
 - a) Original Document
 - b) Review of WRA Forms Committee Memo with Proposed Revisions to WB-1
 - c) WRA Memo Regarding Commission Issues – Ash Park Case
 - 2) **WB-42 Amendment to Listing Contract (24-26)**
 - a) Original Document
 - b) Review of WRA Forms Committee Memo with Proposed Revisions to WB-42
 - 3) **WB-36 Buyer Agency/Tenant Representation Agreement (27-29)**
 - a) Original Document
 - b) Review of WRA Forms Committee Memo with Proposed Revisions to WB-36
- E. Public Comments**

ADJOURNMENT

**REAL ESTATE CONTRACTUAL FORMS ADVISORY COUNCIL
MEETING MINUTES
September 30, 2015**

PRESENT: Casey Clickner, Debra Conrad, John Drzewiecki (*joined the meeting at 9:48a.m.*), Cori Lamont, Scott Minter (*left the meeting at 12:05p.m.*), Richard Petershack (*left the meeting at 1:53 p.m.*), Michael Sewell (*joined the meeting at 9:38a.m.*), Jonathan Sayas, Gary Tritz, Thomas Weber, Pamela Widen (*left the meeting at 1:53 p.m.*)

EXCUSED: Stephen Beers, Michael Gordon, Kim Moermond

STAFF: Brittany Lewin, Executive Director; Nilajah Hardin, Bureau Assistant

CALL TO ORDER

Gary Tritz called the meeting to order at 9:32 a.m. A quorum of nine (9) members was confirmed.

ADOPTION OF AGENDA

MOTION: Richard Petershack moved, seconded by Thomas Weber, to adopt the agenda as published. Motion carried unanimously.

APPROVAL OF MINUTES

MOTION: Scott Minter moved, seconded by Jonathan Sayas, to approve the minutes of July 23, 2015 as published. Motion carried unanimously.

REVIEW OF REAL ESTATE CONTRACTUAL FORMS FOR REVISION

Michael Sewell joined the meeting at 9:38 a.m.

John Drzewiecki joined the meeting at 9:48 a.m.

Scott Minter left the meeting at 12:05p.m.

Richard Petershack and Pamela Widen left the meeting at 1:53p.m.

ADJOURNMENT

MOTION: John Drzewiecki moved, seconded by Cori Lamont, to adjourn the meeting. Motion carried unanimously.

The meeting adjourned at 2:24 p.m.

WB-28A COOPERATIVE AGREEMENT IRREVOCABLE CONSENT

1 Wis. Stat. § 452.137 requires that an out-of-state broker who is party to a cooperative agreement with a Wisconsin
2 licensed broker or firm file an irrevocable consent for service of process with the Real Estate Examining Board.
3 This separate form is intended for said filing and should be used in conjunction with a WB-28 Cooperative
4 Agreement executed by the out-of-state Cooperating Broker and the Wisconsin Broker.

5 Once this consent is filed, any process or pleading for the Cooperating Broker shall be served in duplicate upon
6 the Board or its duly authorized employee. One copy shall be filed with the Board and the other immediately
7 forwarded by certified mail to the Cooperating Broker against whom the process or pleading is directed at the last
8 address provided to the Board by the nonresident Cooperating Broker.

9 **COOPERATING BROKER NAME** (Brokerage Company or Sole Proprietor):

10 _____

11 **ADDRESS** of the Cooperating Broker:

12 _____
13 Number Street PO Box

14 _____
15 City State Zip Code

16 **The following irrevocable consent must be signed and acknowledged before a notary public by a Sole**
17 **Proprietor Cooperating Broker or by a director, manager, member, officer, owner or partner (business**
18 **representative) of a Cooperating Brokerage Company.**

19 The sole proprietor broker or business representative herein, does hereby consent irrevocably that suits and
20 actions may be commenced against the Cooperating Broker in the proper court of any county in the State of
21 Wisconsin in which a cause of action may arise or in which the plaintiff resides, by the service of any process or
22 pleading authorized by the laws of the State of Wisconsin on the Wisconsin Department of Safety and
23 Professional Services or any duly authorized employee thereof, and does hereby stipulate and agree that such
24 service of such process or pleading shall be taken and held in all courts to be valid and binding as if due services
25 had been made upon said applicant in the State of Wisconsin.

(Note: affix _____ (SEAL) _____
Corporate Seal, Signature of Sole Proprietor or Business Representative for Cooperating Broker Date
if any)

Name of Person Signing Above

ACKNOWLEDGMENT

26 State of _____ County of _____

27 Subscribed and sworn before me this _____ day of _____, _____.

28 _____
29 Notary Public Signature ▲ Print name here ►

30 My Commission (is permanent) (expires _____) Notary seal, if any

31 Submit this form to the Real Estate Examining Board by mail to P.O. Box 8935, Madison, WI 53708-8935, by fax
32 to 608-261-7083, or by Email to web@dps.wi.gov.

33 Wisconsin Department of Safety and Professional Services: Phone 608-266-2112; website: <http://dps.wi.gov>.

WB-28 SUPPLEMENT

To: DSPS Real Estate Contractual Forms Advisory Committee
From: WRA Forms Committee
Date: November 6, 2015
RE: **WB-28 Cooperative Agreement – Irrevocable Consent for Service of Process**

An inadvertent oversight was called to our attention with regard to the WB-28 Cooperative agreement.

Lines 54-61 of the WB-28 provide:

“LEGAL COMPLIANCE By signing this Agreement, Cooperating Broker and any Authorized Agents agree to abide by, and be subject to, Wisconsin law and the rules and regulations of the Wisconsin Real Estate Examining Board (REEB). In addition, Cooperating Broker, by signing this Agreement, does hereby consent irrevocably that lawsuits and actions may be commenced against Cooperating Broker in the proper court of any county in the State of Wisconsin in which a cause of action may arise or in which the plaintiff resides, by the service of any process or pleading authorized by the laws of the State of Wisconsin on the REEB or any duly authorized employee thereof, and does hereby stipulate and agree that such service of such process or pleading shall be taken and held in all courts to be valid and binding as if due service had been made upon Cooperating Broker in the State of Wisconsin.”

Wis. Stat. § 452.137(2)(c) provides: “An out-of-state broker who is a party to a cooperative agreement with a licensed broker, and any out-of-state salesperson of the out-of-state broker, shall comply with the laws of this state, and the out-of-state broker shall file with the board an irrevocable consent that actions may be commenced against the out-of-state broker in the proper court of any county in this state in which a cause of action arises or the plaintiff resides, by the service of any process or pleading authorized by the laws of this state on the board or any duly authorized employee. The consent shall stipulate and agree that such service is valid and binding as due service upon the out-of-state broker in all courts in this state. The consent shall be duly acknowledged and, if made by a corporation, shall be authenticated by the corporate seal.”

Although the WB-28 language does include language whereby the Cooperating Broker agrees to and consents to the irrevocable consent to process of service whereby legal proceedings naming the Cooperating Broker would be served on the REEB, there is no provision on the WB-28 for an acknowledgment to the consent or a corporate seal, as required in the statute. Nor are there any instructions to file the WB-28 or an irrevocable consent with the REEB, as also is required by the statute.

It would appear there may be various approaches to remedying this situation: (1) revise the WB-28 to incorporate the additional components; (2) create a separate WB-28A Cooperative Agreement Irrevocable Consent that can be filed with the REEB without filing the entire WB-28; (3) create a REEB form for the irrevocable consent of a WB-28 Cooperating Broker; or (4) another plan or combination of these ideas.

Accompanying this memo is a draft of a potential WB-28A Cooperative Agreement Irrevocable Consent. It could also be used as the starting point for a similar REEB form. Much of the content comes from the Form 813, Irrevocable Consent by Nonresident Applicant for Service of Process, at <http://dsps.wi.gov/Documents/Credentialing%20Forms/Business%20Application%20Forms/fm813.pdf>.

◆ **Corporate seal:** With regard to the corporate seal, Wis. Stat. § 452.11 regarding nonresident applicants and § 452.137(2)(c) with regard to out-of-state licensees both say, “The consent shall be duly acknowledged and, if made by a corporation, shall be authenticated by the corporate seal.” The notation regarding a corporate seal on the draft highlighted in yellow also is on the DSPS form for irrevocable consents for nonresident applicants.

At the end of the signature line it says “(SEAL)” as is seen on State Bar deed forms. Wis. Stat. § 706.05(6) says “Except as may otherwise be expressly provided, no instrument shall be denied acceptance for record because of the absence of venue, seals, witnesses or other matter of form.” And in § 706.03(2) it says “The absence of a corporate seal shall not invalidate any corporate conveyance.” So I think it is not necessary – an old-fashioned mechanism whose time is past (I actually did see one used back in the olden days when I was in private practice but don’t believe they are used much anymore).

⇒ **Maybe we don’t need the notation and the “(SEAL)” will cover any issues?**

⇒ **How should this situation be addressed?**

WB28IrrevConsDSPS11-19-15

WB-1 RESIDENTIAL LISTING CONTRACT - EXCLUSIVE RIGHT TO SELL

1 SELLER GIVES THE FIRM THE EXCLUSIVE RIGHT TO SELL THE PROPERTY ON THE FOLLOWING TERMS:

2 ■ PROPERTY DESCRIPTION: Street address is: _____

3

4 in the _____ of _____, County of _____, Wisconsin. Insert additional
5 description, if any, at lines 242-250xxx-xxx or attach as an addendum per lines 251-254xxx-xxx.

6 ■ LIST PRICE: _____ Dollars (\$ _____).

7 ■ INCLUDED IN LIST PRICE: Seller is including in the list price the Property, all Fixtures not excluded on lines ~~44-~~
8 ~~44xx-xx~~, and the following items: _____

9

10

11

12

13 ~~■ NOT INCLUDED IN LIST PRICE: CAUTION: Identify Fixtures to be excluded by Seller or which are rented and will~~
14 ~~continue to be owned by the lessor. (See lines 199-210):~~

15

16

17

18

19 CAUTION: Identify Fixtures to be excluded by Seller or which are rented and will continue to be owned by the

20 lessor. (See lines xxx-xxx).

21 ■ MARKETING: Seller authorizes and the Firm agrees to use reasonable efforts to **market** the Property. Seller agrees
22 that the Firm may market Seller's personal property identified on lines x-x 7-9 during the term of this Listing. The Firm's
23 marketing may include: _____

24

25 ~~Broker-The Firm~~ may advertise the following special financing and incentives offered by Seller: _____

26

27 Seller has a duty to cooperate with the FirmBroker's marketing efforts. See lines 74-80xx-xx regarding the FirmBroker's
28 role as marketing agent and Seller's duty to notify the Firm Broker of any potential buyer known to Seller. Seller agrees
29 that the Firm Broker may market other properties during the term of this Listing.

30 ■ DELIVERY OF DOCUMENTS AND WRITTEN NOTICES: Unless otherwise stated in this Listing Offer, delivery of
31 documents and written notices to a Party shall be effective only when accomplished by one of the methods specified at
32 lines xx-xx.

33 (1) Personal Delivery: giving the document or written notice personally to the Party, or the Party's recipient for delivery
34 if named at line xx or xx.

35 Seller's recipient for delivery (optional): _____

36 Firm's recipient for delivery (optional): _____

37 (2) Fax: fax transmission of the document or written notice to the following telephone number:

38 Seller: (_____) Firm: (_____)

39 (3) Commercial Delivery: depositing the document or written notice fees prepaid or charged to an account with a
40 commercial delivery service, addressed either to the Party, or to the Party's recipient for delivery if named at line xx or
41 xx, for delivery to the Party's delivery address at line xx or xx.

42 (4) U.S. Mail: depositing the document or written notice postage prepaid in the U.S. Mail, addressed either to the
43 Party, or to the Party's recipient for delivery if named at line xx or xx, for delivery to the Party's delivery address at line
44 xx or xx.

45 Delivery address for Seller: _____

46 Delivery address for Firm: _____

47 (5) E-Mail: electronically transmitting the document or written notice to the Party's e-mail address, if given below at
48 line xx or xx. If this is a consumer transaction where the property being purchased or the sale proceeds are used
49 primarily for personal, family or household purposes, each consumer providing an e-mail address below has first
50 consented electronically as required by federal law.

51 E-Mail address for Seller: _____

52 E-Mail address for Firm: _____

53 ~~**■ DELIVERY/ACTUAL RECEIPT** Delivery to, or Actual rReceipt by, any named Seller constitutes delivery to, or Actual~~
54 ~~rReceipt by, all Sellers. Delivery to, or receipt by, any agent of the Firm constitutes delivery to, or receipt by, the Firm.~~

55 **■ OCCUPANCY:** Unless otherwise provided, Seller agrees to give buyer occupancy of the Property at time of closing
56 and to have the Property in broom swept condition and free of all debris and personal property except for personal
57 property belonging to current tenants, sold to buyer or left with buyer's consent.

58 ■ **COOPERATION, ACCESS TO PROPERTY OR OFFER PRESENTATION:** The parties agree that ~~Broker-the Firm~~
59 will work and cooperate with other ~~brokers-firms~~ in marketing the Property, including ~~brokers from other firms~~ acting as
60 subagents (~~agents from other companies-firms~~ engaged by ~~Broker-the Firm~~ - See lines ~~138xxx-141xxx~~) and ~~brokers~~
61 ~~firms~~ representing buyers. Cooperation includes providing access to the Property for showing purposes and presenting
62 offers and other proposals from these ~~brokers-firms~~ to Seller. Note any ~~brokers-firms~~ with whom ~~Broker-the Firm~~ shall
63 not cooperate, any ~~brokers-firms~~ or buyers who shall not be allowed to attend showings, and the specific terms of offers
64 which should not be submitted to Seller: _____

65 _____ **CAUTION: Limiting ~~Broker's-the Firm's~~ cooperation with other**
66 ~~brokers-firms~~ may reduce the marketability of the Property.

67 ■ **EXCLUSIONS:** All persons who may acquire an interest in the Property who are Protected Buyers under a prior listing
68 contract are excluded from this Listing to the extent of the prior firm's legal rights, unless otherwise agreed to in writing.
69 Within seven days of the date of this Listing, Seller agrees to deliver to the Firm a written list of all such Protected Buyers.

70 **NOTE: If Seller fails to timely deliver this list to the Firm, then no Protected Buyers are excluded from this Listing**
71 **and Seller may potentially face paying commission to two listing firms.** The following other buyers
72 _____

73 _____ are excluded from this Listing until _____ [INSERT DATE].

74 These other buyers are no longer excluded from this Listing after the specified date unless, on or before the specified date,
75 Seller has either accepted a written offer from the buyer or sold the Property to the buyer.

76 ■ **COMMISSION:** -The Firm's commission shall be _____
77 _____
78 _____
79 _____

80 Seller shall pay the Firm's commission, which shall be earned, if, during the term of this Listing:

81 1) A Ready, Willing and Able buyer submits to Seller or Firm a written offer for the Property at the price and on
82 substantially the same terms set forth in this Listing and the current WB-11 Residential Offer To Purchase, even if
83 Seller does not accept this buyer's offer.

84 2) Seller sells or accepts an offer which creates an enforceable contract for the sale of all or any part of the Property;

85 3) Seller grants an option to purchase all or any part of the Property which is subsequently exercised;

86 4) Seller exchanges or enters into a binding exchange agreement on all or any part of the Property;

87 5) A transaction occurs which causes an effective change in ownership or control of all or any part of the Property;
88 or

89 6) One ~~seller owner~~ of the Property sells, conveys, exchanges or options an interest in all or any part of the Property to
90 another owner, except by divorce judgment.

91 Once earned, the Firm's commission is due and payable in full at the earlier of closing or the date set for closing, even if the
92 transaction does not close, unless otherwise agreed in writing.

93 A percentage commission, if applicable, shall be calculated based on the purchase price if commission is earned under 1),
94 2) or 6) above, or calculated based on the list price under 3), 4) or 5). A percentage commission shall be calculated on the
95 fair market value of the Property exchanged under 43) if the exchange involves less than the entire Property or on the fair
96 market value of the Property to which an effective change in ownership or control takes place, under 54) if the transaction
97 involves less than the entire Property.

98 **NOTE: If a commission is earned for a portion of the Property it does not terminate the Listing as to any remaining**
99 **Property.**

100 ■ **COMPENSATION TO OTHERS:** ~~Broker-The Firm~~ offers the following commission to cooperating ~~brokersfirms~~: _____
101 _____ (Exceptions if any): _____

102 ■ **EXTENSION OF LISTING:** ~~The Listing term is extended for a period of one year as to any Protected Buyer. Upon~~
103 ~~receipt of a written request from Seller or a broker who has listed the Property, Broker agrees to promptly deliver to~~
104 ~~Seller a written list of those buyers known by Broker to whom the extension period applies. Should this Listing be~~
105 ~~terminated by Seller prior to the expiration of the term stated in this Listing, this Listing shall be extended for Protected~~
106 ~~Buyers, on the same terms, for one year after the Listing is terminated.~~

107 ■ **TERMINATION OF LISTING:** Neither Seller nor ~~Broker-the Firm~~ has the legal right to unilaterally terminate this Listing
108 absent a material breach of contract by the other party. Seller understands that the parties to the Listing are Seller and the
109 ~~Broker (Firm)~~. Agents (~~salespersons~~) for ~~Broker-the (F)firm~~ do not have the authority to enter into a mutual agreement to
110 terminate the Listing, amend the commission amount or shorten the term of this Listing, without the written consent of the
111 agent(s)' supervising broker. Seller and ~~Broker-the Firm~~ agree that any termination of this Listing by either party before
112 the date stated on lines ~~259-xxx-xxx~~ shall be indicated to the other party in writing and shall not be effective until
113 delivered to the other Party in accordance with lines ~~193-198xxx-xxx~~. CAUTION: Early termination of this Listing may
114 be a breach of contract, causing the terminating party to potentially be liable for damages.

115 ■ **SELLER COOPERATION WITH MARKETING EFFORTS:** Seller agrees to cooperate with ~~Broker-the Firm~~ in
116 ~~Broker's-the Firm's~~ marketing efforts and to provide ~~Broker-the Firm~~ with all records, documents and other material in
117 Seller's possession or control which are required in connection with the sale. Seller authorizes ~~Broker-the Firm~~ to do
118 those acts reasonably necessary to effect a sale and Seller agrees to cooperate fully with these efforts which may
119 include use of a multiple listing service, Internet advertising or a lockbox system on Property. Seller shall promptly notify
120 ~~Broker-the Firm~~ in writing of any potential buyers- with whom- Seller negotiates during the term of this Listing and shall
121 promptly refer all persons making inquiries concerning the Property to ~~Brokerthe Firm~~.

122 ■ **LEASED PROPERTY:** If Property is currently leased and lease(s) will extend beyond closing, Seller shall assign Seller's
123 rights under the lease(s) and transfer all security deposits and prepaid rents (subject to agreed upon prorations) thereunder
124 to buyer at closing. Seller acknowledges that Seller remains liable under the lease(s) unless released by tenants.

125 CAUTION: Seller should consider obtaining an indemnification agreement from buyer for liabilities under the
126 lease(s) unless released by tenants.

127 ■ **BROKER DISCLOSURE TO CLIENTS:**

128 **UNDER WISCONSIN LAW, A BROKERAGE FIRM (HEREINAFTER FIRM) AND ITS BROKERS AND**
129 **SALESPERSONS (HEREINAFTER AGENTS) OWES CERTAIN DUTIES TO ALL PARTIES TO A TRANSACTION:**

- 130 (a) The duty to provide brokerage services to you fairly and honestly.
131 (b) The duty to exercise reasonable skill and care in providing brokerage services to you.
132 (c) The duty to provide you with accurate information about market conditions within a reasonable time if you request
133 it, unless disclosure of the information is prohibited by law.
134 (d) The duty to disclose to you in writing certain ~~M~~material ~~adverse fact~~Adverse Facts about a property, unless
135 disclosure of the information is prohibited by law. (See Lines 211-214xxx-xxx)
136 (e) The duty to protect your confidentiality. Unless the law requires it, the ~~broker-firm and its agents~~ will not disclose
137 your confidential information or the confidential information of other parties. (See Lines 147-163xxx-xxx)
138 (f) The duty to safeguard trust funds and other property the ~~broker-firm or its agents~~ holds.

The duty, when negotiating, to present contract proposals in an objective and unbiased manner and disclose the
139 advantages and disadvantages of the proposals.

140 ■ **BECAUSE YOU HAVE ENTERED INTO AN AGENCY AGREEMENT WITH A BROKERFIRM, YOU ARE THE**
141 **BROKER'S FIRM'S CLIENT. A BROKER-FIRM OWES ADDITIONAL DUTIES TO YOU AS A CLIENT OF THE FIRM:**

- 142 (a) The ~~broker-firm or one of its agents~~ will provide, at your request, information and advice on real estate matters that
143 affect your transaction, unless you release the ~~broker-firm~~ from this duty.
144 (b) The ~~broker-firm or one of its agents~~ must provide you with all material facts affecting the transaction, not just
145 ~~A~~adverse ~~F~~facts.
146 (c) The ~~broker-firm and its agents~~ will fulfill the ~~broker's-firm's~~ obligations under the agency agreement and fulfill your
147 lawful requests that are within the scope of the agency agreement.
148 (d) The ~~broker-firm and its agents~~ will negotiate for you, unless you release ~~them~~ broker from this duty.
149 (e) The ~~broker-firm and its agents~~ will not place their ~~broker's~~ interests ahead of your interests. The ~~broker-firm and its~~
150 ~~agents~~ will not, unless required by law, give information or advice to other parties who are not the ~~broker's-firm's~~ clients,
151 if giving the information or advice is contrary to your interests.
152 (f) If you become involved in a transaction in which another party is also the ~~broker's-firm's~~ client (a "multiple
153 representation relationship"), different duties may apply.

154 ■ **MULTIPLE REPRESENTATION RELATIONSHIPS AND DESIGNATED AGENCY:**

155 ■ A multiple representation relationship exists if a ~~broker-firm~~ has an agency agreement with more than one client who
156 is a party in the same transaction. ~~In a multiple representation relationship, if all of the broker's~~ If you and the firm's other
157 clients in the transaction consent, the ~~broker-firm~~ may provide services ~~to the clients~~ through designated agency, ~~which~~
158 ~~is one type of multiple representation relationship.~~

159 ■ Designated agency means that different ~~salespersons employed by the broker~~agents with the firm will negotiate on
160 behalf of you and the other client or clients in the transaction, and the ~~broker's-firm's~~ duties ~~to you as a client~~ will remain
161 the same. Each ~~salesperson-agent~~ will provide information, opinions, and advice to the client for whom the ~~salesperson~~
162 ~~agent~~ is negotiating, to assist the client in the negotiations. Each client will be able to receive information, opinions, and
163 advice that will assist the client, even if the information, opinions, or advice gives the client advantages in the
164 negotiations over the ~~broker's-firm's~~ other clients. An ~~salesperson-agent~~ will not reveal any of your confidential
165 information to another party unless required to do so by law.

166 ■ If a designated agency relationship is not ~~in-effect~~authorized by you or other clients in the transaction you may still
167 authorize or reject a ~~different type of~~ multiple representation relationship. ~~If you authorize a multiple representation~~
168 ~~relationship in which~~ the ~~broker-firm~~ may provide brokerage services to more than one client in a transaction but neither
169 the ~~broker-firm~~ nor any of the ~~broker's salespersons~~its agents may assist any client with information, opinions, and
170 advice which may favor the interests of one client over any other client. ~~If you do not consent to a multiple~~
171 ~~representation relationship the broker will not be allowed to provide brokerage services to more than one client in the~~
172 ~~transaction. Under this neutral approach, the same agent may represent more than one client in a transaction.~~

173 ■ ~~If you do not consent to a multiple representation relationship the firm will not be allowed to provide brokerage~~
174 ~~services to more than one client in the transaction.~~

175 **INITIAL CHECK ONLY ONE OF THE THREE LINES BELOW:**

176 _____ I consent to The same firm may represent me and the other party as long as the same agent is not
177 representing us both. (multiple representation relationship with designated agency);

178 _____ I consent to The same firm may represent me and the other party, but the firm must remain neutral
179 regardless if one or more different agents are involved. (multiple representation relationships, but I do not consent
180 to without designated agency);

181 _____ The same firm cannot represent both me and the other party in the same transaction. (I reject multiple
182 representation relationships);

183 **NOTE: All clients who are parties to this agency agreement consent to the selection checked above. You may**
184 **modify this selection by written notice to the firm at any time. Your firm is required to disclose to you in your**
185 **agency agreement the commission or fees that you may owe to your firm. If you have any questions about the**
186 **commission or fees that you may owe based upon the type of agency relationship you select with your firm,**
187 **you should ask your firm before signing the agency agreement. YOU MAY WITHDRAW YOUR CONSENT TO**
188 **DESIGNATED AGENCY OR TO MULTIPLE REPRESENTATION RELATIONSHIPS BY WRITTEN NOTICE TO THE**

189 ~~BROKER AT ANY TIME. YOUR BROKER IS REQUIRED TO DISCLOSE TO YOU IN YOUR AGENCY AGREEMENT~~
190 ~~THE COMMISSION OR FEES THAT YOU MAY OWE TO YOUR BROKER. IF YOU HAVE ANY QUESTIONS ABOUT~~
191 ~~THE COMMISSION OR FEES THAT YOU MAY OWE BASED UPON THE TYPE OF AGENCY RELATIONSHIP YOU~~
192 ~~SELECT WITH YOUR BROKER YOU SHOULD ASK YOUR BROKER BEFORE SIGNING THE AGENCY~~
193 ~~AGREEMENT.~~

194 ■ ~~SUBAGENCY: The broker Your firm~~ may, with your authorization in the agency agreement, engage other ~~brokers-firms~~
195 ~~(subagent firms) to who~~ assist your ~~broker-firm~~ by providing brokerage services for your benefit. A subagent ~~firm and the~~
196 ~~agents with the subagent firm~~ will not put ~~the subagent's-their~~ own interests ahead of your interests. A subagent ~~firm will not,~~
197 unless required by law, provide advice or opinions to other parties if doing so is contrary to your interests.

198 ~~PLEASE REVIEW THIS INFORMATION CAREFULLY. An broker or salespersonagent can answer your questions~~
199 ~~about brokerage services, but if you need legal advice, tax advice, or a professional home inspection, contact an~~
200 ~~attorney, tax advisor, or home inspector. This disclosure is required by section 452.135 of the Wisconsin statutes~~
201 ~~and is for information only. It is a plain language summary of a-broker'sthe duties owed to you under section~~
202 ~~452.133 (2) of the Wisconsin statutes.~~

203 ■ ~~CONFIDENTIALITY NOTICE TO CLIENTS: Broker-The Firm~~ will keep confidential any information given to ~~Broker~~
204 ~~the Firm~~ in confidence, or any information obtained by ~~Broker-the Firm~~ that ~~he or she knows~~ a reasonable person would
205 want to be kept confidential, unless the information must be disclosed by law or you authorize ~~Brokerthe Firm~~ to
206 disclose particular information. ~~Broker-The Firm~~ shall continue to keep the information confidential after ~~Broker-the Firm~~
207 is no longer providing brokerage services to you.

208 The following information is required to be disclosed by law:
209 1) Material ~~Aadverse Ffacts~~, as defined in section 452.01 (5g) of the Wisconsin statutes (lines ~~211-214xxx-xxx~~).
210 2) Any facts known by the ~~Broker-Firm~~ that contradict any information included in a written inspection report on the
211 property or real estate that is the subject of the transaction.

212 To ensure that the ~~Broker-Firm~~ is aware of what specific information you consider confidential, you may list that
213 information below (see lines ~~158-160xxx-xxx~~). At a later time, you may also provide the ~~Broker-Firm~~ with other
214 information you consider to be confidential.

215 **CONFIDENTIAL INFORMATION:** _____
216 _____
217 _____

218 **NON-CONFIDENTIAL INFORMATION** (The following may be disclosed by ~~Brokerthe Firm~~): _____
219 _____
220 _____

221 ■ ~~REAL ESTATE CONDITION REPORT:~~ Seller agrees to complete the real estate condition report provided by ~~Broker~~
222 ~~the Firm~~ to the best of Seller's knowledge. Seller agrees to amend the report should Seller learn of any ~~Ddefect(s)~~ after
223 completion of the report but before acceptance of a buyer's offer to purchase. Seller authorizes ~~Broker-the Firm~~ to
224 distribute the report to all interested parties and agents inquiring about the Property. Seller acknowledges that ~~Broker-the~~
225 ~~Firm~~ has a duty to disclose all ~~Mmaterial Aa~~ ~~adverse Ffacts~~ as required by law.

226 ■ ~~SELLER REPRESENTATIONS REGARDING DEFECTS:~~ Seller represents to ~~Broker-the Firm~~ that as of the date of
227 this Listing, Seller has no notice or knowledge of any ~~Ddefects~~ affecting the Property other than those noted on the real
228 estate condition report.

229 **WARNING: IF SELLER REPRESENTATIONS ARE INCORRECT OR INCOMPLETE, SELLER MAY BE LIABLE FOR**
230 **DAMAGES AND COSTS.**

231 ■ ~~OPEN HOUSE AND SHOWING RESPONSIBILITIES:~~ Seller is aware that there is a potential risk of injury, damage
232 and/or theft involving persons attending an "individual showing" or an "open house." Seller accepts responsibility for
233 preparing the Property to minimize the likelihood of injury, damage and/or loss of personal property. Seller agrees to
234 hold ~~Broker-the Firm~~ harmless for any losses or liability resulting from personal injury, property damage, or theft
235 occurring during "individual showings" or "open houses" other than those caused by ~~Broker's-the Firm's~~ negligence or
236 intentional wrongdoing. Seller acknowledges that individual showings and open houses may be conducted by licensees
237 other than ~~Brokerthe Firm~~, that appraisers and inspectors may conduct appraisals and inspections without being
238 accompanied by ~~Broker-the Firm~~ or other licensees, and that buyers or licensees may be present at all inspections and
239 testing and may photograph or videotape Property unless otherwise provided for in additional provisions at lines ~~xxx-~~
240 ~~xxx~~ or in an addendum per lines ~~xxx-xxx~~.

241 ■ **DEFINITIONS:**

242 **ADVERSE FACT:** An "Adverse Fact" means any of the following:

- 243 (a) A condition or occurrence that is generally recognized by a competent licensee as doing any of the following:
244 1) Significantly and adversely affecting the value of the Property;
245 2) significantly reducing the structural integrity of improvements to real estate; or
246 3) presenting a significant health risk to occupants of the Property.
247 (b) Information that indicates that a party to a transaction is not able to or does not intend to meet his or her
248 obligations under a contract or agreement made concerning the transaction.

249 **DEADLINES – DAYS:** Deadlines expressed as a number of "days" from an event are calculated by excluding the day the
250 event occurred and by counting subsequent calendar days.

251 ~~DELIVERY:—Delivery of documents or written notices related to this Listing may only be accomplished by:~~

- 252 ~~1) giving the document or written notice personally to the party;~~
253 ~~2) depositing the document or written notice postage or fees prepaid or charged to an account in the U.S. Mail or a~~
254 ~~commercial delivery system, addressed to the party, at the party's address (See lines 265, 271 and 277.);~~
255 ~~3) electronically transmitting the document or written notice to the party's fax number (See lines 267, 273 and 279.); and,~~
256 ~~4) as otherwise agreed in additional provisions on lines 242-250 or in an addendum to this Listing.~~

257 ~~DEFECT: "Defect" means a condition that would have a significant adverse effect on the value of the Property; that~~

258 would significantly impair the health or safety of future occupants of the Property; or that if not repaired, removed or
259 replaced would significantly shorten or adversely affect the expected normal life of the premises.
260 **FIRM:** "Firm" means a licensed sole proprietor broker or a licensed broker business entity, and as appropriate in
261 context, licensees associated with the Firm.
262 **FIXTURES:** A "Fixture" is an item of property which is physically attached to or so closely associated with land or
263 buildings so as to be treated as part of the real estate, including, without limitation, physically attached items not easily
264 removable without damage to the premises, items specifically adapted to the premises, and items customarily treated
265 as fixtures, including, but not limited to, all: garden bulbs; plants; shrubs and trees; screen and storm doors and
266 windows; electric lighting fixtures; window shades; curtain and traverse rods; blinds and shutters; central heating and
267 cooling units and attached equipment; water heaters and treatment systems; sump pumps; attached or fitted floor
268 coverings; awnings; attached antennas, garage door openers and remote controls; installed security systems; central
269 vacuum systems and accessories; in-ground sprinkler systems and component parts; built-in appliances; ceiling fans;
270 fences; storage buildings on permanent foundations and docks/piers on permanent foundations.
271 **CAUTION: Exclude any Fixtures to be retained by Seller or which are rented (e.g., water softener or other water**
272 **conditioning systems, home entertainment and satellite dish components, L.P. tanks, etc.) on lines 11-14xx-xx**
273 **and in the offer to purchase.**
274 **MATERIAL ADVERSE FACT:** A "Material Adverse Fact" means an Aadverse Ffact that a party indicates is of such
275 significance, or that is generally recognized by a competent licensee as being of such significance to a reasonable
276 party, that it affects or would affect the party's decision to enter into a contract or agreement concerning a transaction or
277 affects or would affect the party's decision about the terms of such a contract or agreement.
278 **PERSON ACTING ON BEHALF OF BUYER:** "Person Acting on Behalf of Buyer" shall mean any person joined in interest
279 with buyer, or otherwise acting on behalf of buyer, including but not limited to buyer's immediate family, agents, servants,
280 employees, directors, managers, members, officers, owners, partners, incorporators and organizers, as well as any and all
281 corporations, partnerships, limited liability companies, trusts or other entities created or controlled by, affiliated with or
282 owned by buyer, in whole or in part whether created before or after expiration of this Listing.
283 **PROCURE:** A buyer is procured when, during the term of the Listing, an enforceable contract of sale is entered into between
284 the Seller and the buyer or when a ready, willing and able buyer submits to the Seller or the Listing Broker a written offer at
285 the price and on substantially the terms specified in this Listing. A buyer is ready, willing and able when the buyer submitting
286 the written offer has the ability to complete the buyer's obligations under the written offer. (See lines 46-49)
287 **PROPERTY:** Unless otherwise stated, "Property", means all property included in the list price as described on lines x-xxthe
288 real estate described at lines 2-4.
289 **PROTECTED BUYER:** Means a buyer who personally, or through any Person A-acting on Behalf of ~~for such~~ Buyer,
290 during the term of this Listing: 1) delivers to Seller or Broker-the Firm a written offer to purchase, exchange or option on the
291 Property ~~during the term of this Listing~~; 2) views the Property with Seller or negotiates directly with Seller by discussing
292 communicating with Seller ~~the regarding~~ potential terms upon which buyer might acquire an interest in the Property; or 3)
293 attends an individual showing of the Property or discusses with Broker-the Firm or cooperating brokers-firms the potential
294 terms upon which buyer might acquire an interest in the Property, but only if Broker-the Firm delivers the buyer's name to
295 Seller, in writing, no later than three days after the expiration of the Listing. The requirement in 3), to deliver the buyer's name
296 to Seller in writing, may be fulfilled as follows: a) If the Listing is effective only as to certain individuals who are identified in the
297 Listing, by the identification of the individuals in the Listing; or, b) if a buyer has requested that the buyer's identity remain
298 confidential, by delivery of a written notice identifying the broker-firm with whom the buyer negotiated and the date(s) of any
299 individual showings or other negotiations. A Protected Buyer also includes any Person Acting on Behalf of Buyer joined in
300 interest with or otherwise acting on behalf of a Protected Buyer, who acquires an interest in the Property during the extension
301 of listing period as noted on lines xxx-xxx.
302 ■ **READY, WILLING AND ABLE:** A buyer is "Ready, Willing and Able" for purposes of lines xx-xx when the submitted offer is
303 a bona fide offer and the Firm has no actual knowledge that the buyer does not have the ability to complete the buyer's
304 obligations under the written offer. The Firm is not responsible under Wisconsin statutes or regulations to qualify a buyer's
305 financial capability. Seller may negotiate inclusion of a financing, proof of funds, financial pre-approval, sale of buyer's
306 property, or other contingency in any offer to purchase or contract if Seller has concerns about buyer's financial capability.
307 ■ **EXTENSION OF LISTING:** The Listing term is extended for a period of one year as to any Protected Buyer. Upon
308 receipt of a written request from Seller or a broker who has listed the Property, the Firm agrees to promptly deliver to
309 Seller a written list of those buyers known by the Firm to whom the extension period applies. Should this Listing be
310 terminated by Seller prior to the expiration of the term stated in this Listing, this Listing shall be extended for Protected
311 Buyers, on the same terms, for one year after the Listing is terminated.
312 ■ **FAIR HOUSING:** Seller and Broker-the Firm agree that they will not discriminate against any prospective
313 buyer on account of race, color, sex, sexual orientation as defined in Wisconsin Statutes, Section 111.32-(13m),
314 disability, religion, national origin, marital status, lawful source of income, age, ancestry, familial-family status,
315 status as a victim of domestic abuse, sexual assault, or stalking, or in any other unlawful manner.
316 ■ **EARNEST MONEY:** If Broker-the Firm holds trust funds in connection with the transaction, they shall be retained by Broker
317 the Firm in Broker's-the Firm's trust account. Broker-The Firm may refuse to hold earnest money or other trust funds. Should
318 Broker-the Firm hold the earnest money, the Firm shall hold and disburse earnest money funds in accordance with Wis. Stat.
319 Ch. 452 and Wis. Admin. Code Ch. REEB 18. Seller authorizes Broker to disburse the earnest money as directed in a written
320 earnest money disbursement agreement signed by or on behalf of all parties having an interest in the trust funds. —If the
321 transaction fails to close and the earnest money is disbursed to Seller, then upon disbursement to Seller the earnest money
322 shall be paid first to reimburse Broker for cash advances made by Broker on behalf of Seller and one half of the balance, but
323 not in excess of the agreed commission, shall be paid to Broker as Broker's full commission in connection with said purchase
324 transaction and the balance shall belong to Seller. This payment to Broker shall not terminate this Listing.
325 ■ **ADDITIONAL PROVISIONS:** _____
326 _____

327 _____
328 _____
329 _____
330 _____
331 _____
332 _____
333 _____
334 _____
335 _____
336 _____
337 _____
338 _____
339 ■ **ADDENDA:** The attached addenda _____
340 _____
341 _____

342 _____ is/are made part of this Listing.
343 ■ **NOTICE ABOUT SEX OFFENDER REGISTRY:** You may obtain information about the sex offender registry and
344 persons registered with the registry by contacting the Wisconsin Department of Corrections on the Internet at
345 <http://www.doc.wi.gov> or by telephone at (608)240-5830.
346 ■ **TERM OF THE CONTRACT:** From the _____ day of _____,
347 up to ~~and including~~ the earlier of midnight of the _____ day of _____,
348 _____ or the conveyance of the Property.

349 ■ **READING/RECEIPT:** BY SIGNING BELOW, SELLER ACKNOWLEDGES RECEIPT OF A COPY OF THIS
350 LISTING CONTRACT AND THAT HE/SHE HAS READ ALL x PAGES AS WELL AS ANY ADDENDA AND ANY
351 OTHER DOCUMENTS INCORPORATED INTO THE LISTING.

352 (x) _____
353 Seller's Signature ▲ _____ Print Name Here: ▲ _____ Date ▲ _____

354 _____
355 Seller's Address ▲ _____ Seller's Phone # ▲ _____

356 _____
357 Seller's Fax # ▲ _____ Seller's E-Mail Address ▲ _____

358 (x) _____
359 Seller's Signature ▲ _____ Print Name Here: ▲ _____ Date ▲ _____

360 _____
361 Seller's Address ▲ _____ Seller's Phone # ▲ _____

362 _____
363 Seller's Fax # ▲ _____ Seller's E-Mail Address ▲ _____

364 (x) _____
365 Seller's Signature ▲ _____ Print Name Here: ▲ _____ Date ▲ _____

366 _____
367 (x) _____
368 Seller's Signature ▲ _____ Print Name Here: ▲ _____ Date ▲ _____

369 _____
370 Seller Entity Name (if any): _____

371 _____
372 (x) _____
373 Authorized Signature ▲ _____ Print Name & Title Here ► _____ Date ▲ _____

374 (x) _____
375 Agent for Broker/Firm ▲ _____ Print Name Here: ▲ _____ Broker/Firm Name ▲ _____ Date ▲ _____

376 _____
377 Broker/Firm Address ▲ _____ Broker/Firm Phone # ▲ _____

378 _____
379 Broker/Firm Fax # ▲ _____ Broker/Firm E-Mail Address ▲ _____

WB-1 REVISIONS

To: DSPS Real Estate Contractual Forms Advisory Committee

From: WRA Forms Committee

Date: November 9, 2015

RE: **WB-1 Residential Listing Contract – Exclusive Right to Sell**

The following are possible revisions to the WB-1 Residential Listing Contract – Exclusive Right to Sell (mandatory use date 7-1-08) suggested by the WRA Forms Committee, as noted below. The line numbers in this memo refer to the line numbers in the accompanying draft of proposed WB-1 modifications (20150930 REF WB-1wraNov15).

RECAP (agreed upon by both committees):

- ◆ Update the top of the form to say Approved by the Wisconsin Real Estate Examining Board.
- ◆ **Chapter 452 Terminology.** The terminology throughout this form is modified in anticipation of the Wis. Stat. chapter 452 revisions wherein the proposed terminology would refer to a Firm to mean either a broker entity or a sole proprietor broker. Those revisions additionally refer to salespersons, licensed individual brokers, and licensed broker entities, but here the choice was to refer to the Firm and the agents of the Firm. We may need to add a definition of “Firm” to make it clear that this includes agents of the Firm acting on behalf of the Firm or something similar – this may need to be decided after working through the form a bit and adjusting to the terminology is selected.

◆ **Property Definition (Lines 290-291):**

If we want to have commission computed upon the total sales price we may wish to make it clear that all property – real and personal – is included in the purchase price. The DSPS Real Estate Contractual Forms Advisory Committee chose to do this by modifying the definition of Property on lines 290-291:

PROPERTY: Unless otherwise stated, “Property“, means all property included in the list price as described on lines x-xx~~the real estate described at lines 2-4.~~

In addition, the Not Included in List Price section on lines 13-20 was modified to move the CAUTION regarding fixtures to the end of the subsection.

NOT INCLUDED IN LIST PRICE: ~~CAUTION: Identify Fixtures to be excluded by Seller or which are rented and will continue to be owned by the lessor. (See lines 199-210):~~

CAUTION: Identify Fixtures to be excluded by Seller or which are rented and will continue to be owned by the lessor. (See lines xxx-xxx).

- ◆ **Delivery (lines 30-52):** Add in the Delivery of Documents and Written Notices from the WB-6 Business Listing Contract. Delete the Delivery definition from lines 253-258. As shown in tracking on the next page of this memo, one line was removed from the e-mail subsection of the Delivery provisions to simplify the provision and make it more generic without removing the meaning and required action item.

DELIVERY OF DOCUMENTS AND WRITTEN NOTICES: Unless otherwise stated in this ~~Offer Listing~~, delivery of documents and written notices to a Party shall be effective only when accomplished by one of the methods specified at lines xx-xx.

(1) Personal Delivery: giving the document or written notice personally to the Party, or the Party's recipient for delivery if named at line xx or xx.

Seller's recipient for delivery (optional): _____

~~Broker's Firm's~~ recipient for delivery (optional): _____

(2) Fax: fax transmission of the document or written notice to the following telephone number:

Seller: (_____) _____ ~~Broker Firm~~: (_____) _____

(3) Commercial Delivery: depositing the document or written notice fees prepaid or charged to an account with a commercial delivery service, addressed either to the Party, or to the Party's recipient for delivery if named at line 38 or 39, for delivery to the Party's delivery address at line xx or xx.

(4) U.S. Mail: depositing the document or written notice postage prepaid in the U.S. Mail, addressed either to the Party, or to the Party's recipient for delivery if named at line xx or xx, for delivery to the Party's delivery address at line xx or xx.

Delivery address for Seller: _____

Delivery address for ~~Broker Firm~~: _____

(5) E-Mail: electronically transmitting the document or written notice to the Party's e-mail address, if given below at line xx or xx. If this is a consumer transaction where the property being purchased or the sale proceeds are used primarily for personal, family or household purposes, each consumer providing an e-mail address below has first consented electronically ~~to the use of electronic documents, e-mail delivery and electronic signatures in the transaction~~, as required by federal law.

E-Mail address for Seller ~~(optional)~~: _____

E-Mail address for ~~Broker Firm~~ ~~(optional)~~: _____

◆ **Modifications to Exclusions section (Lines 67-75):**

The following warns the seller that failing to give the list of protected buyers from a prior listing could result in double commission:

■ **EXCLUSIONS:** All persons who may acquire an interest in the Property ~~as a~~ who are Protected Buyers under a prior listing contract are excluded from this Listing to the extent of the prior ~~broker's firm's~~ legal rights, unless otherwise agreed to in writing. Within seven days of the date of this Listing, Seller agrees to deliver to ~~Broker the Firm~~ a written list of all such ~~prospective Protected B~~ buyers.

NOTE: If Seller fails to timely deliver this list to the Firm, then no Protected Buyers are excluded from this Listing and Seller may potentially face paying commission to two listing firms. The following other buyers _____ are excluded from this Listing until _____ [INSERT DATE]: _____. These other buyers are no longer excluded from this Listing after the specified date unless, on or before the specified date, Seller has either accepted ~~an~~ written offer from the buyer or sold the Property to the buyer.

◆ **Commission (Lines 76-99)**

The DSPS Committee removed the following commission item for leases from the Commission section that this Committee had approved. They thought it was best to allow licensees to rely on the effective change in ownership in those cases where it applies, and also thought that the specific lease language may be appropriate for the commercial listing but not for residential – will create too much confusion. If there will be residential rentals the parties should use the WB-37.

~~5) Seller enters into lease(s) involving all or any part of the Property during the term of this Listing, other than in the ordinary course of business.~~

Commission considerations

The *Ash Park* commission case decision by the Wisconsin Supreme Court is favorable, holding the broker is entitled to commission because the parties' offer was an "enforceable contract" within the meaning of the listing contract where an individual can compel observance of the contract by seeking a remedy for a breach (as would be the case with virtually all accepted offers).

However, the concurring opinion by Chief Justice Roggensack raises some potential issues (although not sure her analysis of the case law is correct because she does not seem to take account of the fact that what had to be done to earn the commission varied over time because different listing contracts have different requirements, but nonetheless the sentiment is real). She expresses concern about sellers instead of brokers being responsible for investigating the financial ability of a proposed buyer, especially in residential transactions involving consumers not working with legal counsel. This is disconcerting because other than having a lender pre-approve a buyer or vet the buyer before the offer is entered into, brokers do not perform this function nor are they authorized to perform financial analyses of potential buyers. Having a financing contingency does not appear to solve the issue. *Ash Park* involved a one-party listing so that may be part of the reason for her comment.

She is also concerned that brokers could sue home sellers who have no idea that commission can be due if the home is not sold, per the WB-1 language. What this points out is that once a home seller is in contract with an accepted offer that the commission is earned per the *Ash Park* holding. However, in *Ash Park* the contract had all of its contingencies resolved. If an offer becomes null and void in accordance with the financing contingency, inspection contingency, etc., then there no enforceable contract left so the commission is not earned. But the language in the WB-1 says commission is earned when the seller accepts the offer (an enforceable contract). See the Wisconsin State Bar article discussing the *Ash Park* decision and the decision at <http://www.wicourts.gov/sc/opinion/DisplayDocument.pdf?content=pdf&seqNo=143998>. Clearly attorneys who read their publications will be aware of the issues raised and may be very likely to advise all sellers to add language to listing contracts stating that commission is due only if there is a closing and the property is sold. They may also recommend other modifications, but attorneys do not often confer with sellers at the listing contract stage, especially with residential transactions.

- ❖ Should the listing contract direct the listing Firm to not entertain any offers not accompanied by a pre-approval or at least a pre-qualification? **WRA Forms Committee said no.**
- ❖ Should the commission language be made clearer – it is complex and convoluted! Should there be more caution or warning language for the consumer?
- ❖ Should the definition of "enforceable contract from the *Ash Park* case be added to the WB-1? An "enforceable contract" is one where an individual can compel observance of the contract by seeking a remedy for a breach.
- ❖ Should there be a definition for what is a "ready, willing and able buyer?" **See proposed preliminary definition below and in draft.**
- ❖ Other ideas?

Below is the reworked COMMISSION section (shown in tracking in the WB-1 draft) where the DSPS Committee ended at its last meeting. Some additional ideas are shown in tracking and discussed below. In this version, the full price offer item is placed at the beginning of the section. **Is there a concern that this placement calls too much attention or puts a reader in mind of "ready, willing and able" such that may cause a reader to assume that standard applies to every commission-earning event? Should it be number 6 in the list instead of number 1?**

In this item number 1 regarding a full price offer it says commission can be due without an accepted offer (and clearly no closing then) and in the language regarding when commission is due and payable (after the list of 6 commission triggering events), it overtly says that a commission may be due without a

closing. The commission “due and payable” item was taken out of the middle of the paragraph where it was before and placed directly after the list of commission triggering events that now includes the item for when one owner buys out the other, except by divorce judgment. In addition, the definition of “Procure” was collapsed into the commission event number 1 and the word “Procure” itself has otherwise been eliminated from the WB-1 draft.

■ **COMMISSION:** The Firm's commission shall be _____

Seller shall pay the Firm's commission, which shall be earned, if, during the term of this Listing:

- 1) A ~~R~~eady, ~~W~~illing and ~~A~~ble buyer submits to Seller or Firm a written offer for the Property at the price and on substantially the same terms set forth in this Listing and the current WB-11 Residential Offer ~~t~~o Purchase, even if Seller does not accept this buyer's offer.
- 2) Seller sells or accepts an offer which creates an enforceable contract for the sale of all or any part of the Property;
- 3) Seller grants an option to purchase all or any part of the Property which is subsequently exercised;
- 4) Seller exchanges or enters into a binding exchange agreement on all or any part of the Property;
- 5) A transaction occurs which causes an effective change in ownership or control of all or any part of the Property; or
- 6) One seller of the Property sells, conveys, exchanges or options an interest in all or any part of the Property to another owner, except by divorce judgment.

Once earned, the Firm's commission is due and payable in full at the earlier of closing or the date set for closing, even if the transaction does not close, unless otherwise agreed in writing.

A percentage commission, if applicable, shall be calculated based on the purchase price if commission is earned under 1), 2) or 6) above, or calculated based on the list price under 3), 4) or 5). A percentage commission shall be calculated on the fair market value of the Property exchanged under 3) if the exchange involves less than the entire Property or on the fair market value of the Property to which an effective change in ownership or control takes place, under 4) if the transaction involves less than the entire Property.

NOTE: If a commission is earned for a portion of the Property it does not terminate the Listing as to any remaining Property.

~~NOTE: Firm is not qualified under Wisconsin law or responsible to qualify a buyer's financial capability. Confirmation of a buyer's financial ability to complete the buyer's obligations under an offer or other contract may be addressed in the offer or contract by contingencies or conditions negotiated by the parties.~~

~~NOTE: Seller may wish to require that all offers or contract proposals the Firm submits to Seller be accompanied by buyer's financial pre-approval or pre-qualification or contain a provision requiring same.~~

~~NOTE: A contract is not enforceable if it includes contingencies that are not satisfied or waived.~~

Of the three concepts (Notes) above highlighted in yellow, the second two were rejected by the WRA Forms Committee and the ideas from the first one is blended into a proposed definition of “ready, willing and able.” See lines 302-306 and below.

Should the WB-1 continue to use the “ready, willing and able” language, and if so, should it be defined in the WB-1 or should it left to case law to supply the meaning?

■ **READY, WILLING AND ABLE:** A buyer is “Ready, Willing and Able” for purposes of lines xx-xx when the submitted offer is a bona fide offer and the Firm has no actual knowledge that the buyer does not have the ability to complete the buyer's obligations under the written offer. The Firm is not responsible under Wisconsin statutes or regulations to qualify a buyer's financial capability. Seller may negotiate inclusion of a financing, proof of funds, financial pre-approval, sale of buyer's property, or other contingency in any offer to purchase or contract if Seller has concerns about buyer's financial capability.

In the existing WB-1 it says that a buyer is “ready, willing and able” when the buyer submitting the offer has the ability to complete the buyer's obligations under the offer. The proposal above indicates that if the

broker does not know the buyer can't buy then the buyer is still ready, willing and able – does that beg the question of what the broker could or should do to know about the buyer's financial capability? If the standard is what the Firm knows about the buyer's capability but this provision says the broker is not responsible under law or via licensure to investigate the buyer's finances, does that make sense? The provision shifts the responsibility to the seller to include contract provisions regarding the buyer's finances.

⇒ **Is this language appropriate? Better language? Should this information be tucked away here?**

Another version for discussion purposes:

■ **READY, WILLING AND ABLE:** A buyer is “Ready, Willing and Able” for purposes of lines xx-xx when the submitted offer is a bona fide offer and the ~~Firm has no actual knowledge that the~~ buyer ~~does not submitting the written offer has~~ve the ability to complete the buyer's obligations under the written offer. The Firm is not responsible under Wisconsin statutes or regulations to qualify a buyer's financial capability. ~~The Firm recommends that Seller may negotiate inclusion of a~~ financing, proof of funds, financial pre-approval, sale of buyer's property, or other contingencies ~~in any offer to purchase or contract if Seller has concerns about to assess~~ buyer's financial capability.

This version does not make the standard what the broker knew or did not know about the buyer's capabilities but rather the basic ready, willing and able standard now in the listing contracts and in case law. It tries to indicate that it is not the broker's job to financially evaluate the buyer but that the seller should include contingencies whereby lenders and others can to help evaluate the buyer's financial status. When the language says it is not the broker's job to do financial evaluations does it seem stronger to have an affirmative solution to the issue via a recommendation rather than laying the burden on the seller?

⇒ **Is this language appropriate? Better language?**

The teachings of case law

On the bottom of this page and on pages 5-6 of this memorandum are snippets of what “procure” and “ready, willing and able” mean to the courts.

1. Multiple cases state that a “broker, employed ‘to procure a purchaser’ for real estate, is entitled to his commission when he produces a person ready, willing and able to purchase upon the terms specified by the owner in the brokerage contract.” **This is essentially what the full price offer item 1 in the draft states, except that the word procure has been removed altogether from the WB-1 draft. It seems that “procure a purchaser” triggers the “ready, willing and ready” standard which it may be well to avoid because this seemingly leads the courts to indicate that licensees must ensure the buyer has financial ability to purchase.**

2. Financial ability.

Case law says that, ‘Pecuniarily able’ in this connection, must of course have a reasonable construction. It cannot mean that the proposed purchaser must necessarily have all the money in his pocketbook or to his credit at the bank, but that he is **able to command the necessary money to close the deal** on reasonable notice, or within the time limited by the vendor, if a time be limited. Aside from immediate cash payments, **the ability of a purchaser is not to be judged exclusively with reference to money in his possession or to his credit in a bank; consideration should also be given to his assets, credit, financial rating, enforceable agreements for loans, and anything else indicating ability or lack of ability on his part to command the requisite funds at the required time.** A purchaser may have ability to meet the terms of the contract of sale notwithstanding it is inconvenient for him to raise money or he owns real estate on which a homestead has been taken out. On the other hand, a customer is not invested with the requisite

financial ability by an unenforceable offer or promise of a third person to furnish funds or make a loan to him, . . . Therefore, it is the established rule in this state that the purchaser does not need the necessary cash in hand but must be able to ‘command’ the necessary funds. . . . A proposed purchaser cannot be said to be able to purchase when he is dependent upon third parties who are in no way bound to furnish the funds.” **This interpretation of financial ability seems to be fairly logical.**

Shell Oil Co. v. Kapler, 235 Minn. 292, 298, 50 N.W.2d 707, 712 (1951) which states:

‘Generally speaking, a purchaser is financially ready and able to buy: (1) If he has the needed cash in hand, or (2) if he is personally possessed of assets-which in part may consist of the property to be purchased-and a credit rating which enable him with reasonable certainty to command the requisite funds at the required time, or (3) if he has definitely arranged to raise the necessary money-or as much thereof as he is unable to supply personally-by obtaining a binding commitment for a loan to him for that purpose by a financially able third party, irrespective of whether such loan be secured in part by the property to be purchased. . . .’

3. Wis. Stat. § 240.10 “Real estate agency contracts. (1) Every contract to pay a commission to a real estate agent or broker or to any other person for selling or buying real estate shall be void unless such contract or note or memorandum thereof describes that real estate; expresses the price for which the same may be sold or purchased, the commission to be paid and the period during which the agent or broker shall **procure** a buyer or seller; is in writing; and is subscribed by the person agreeing to pay such commission, except that a contract to pay a commission to a person for locating a type of property need not describe the property.” **We cannot completely escape the “procure” standard since it appears in this statute, but it does not appear in Wis. Stat. ch. 452 or in the REEB rules except with reference to buyer/tenant representatives providing brokerage services for the procurement of an interest in property (see Wis. Admin. Code § REEB 16.02(1m), (2m) & (2s)).**
4. The listing contract whereby the broker contracts to ‘procure a purchaser’ does not require final consummation of the sale. Generally it is stated that when a real estate broker procures a purchaser and a valid and enforceable contract is entered into between them the commission for procuring a purchaser is earned, even though the purchaser may later default. **This is similar to the enforceable contract standard from *Ash Park*.**
5. For example, in *Wauwatosa Realty Co. v. Paar*, 274 Wis. 7, 15-16, 79 N.W.2d 125, 130 (1956), . . . this court stated: “(I)f a contract provides that a broker shall be entitled to a commission when he has procured a purchaser ready, willing, and able to buy, then when the broker acts in good faith, and the principal accepts his customer and enters into a valid and enforceable contract with him for the purchase of the property, the matter of the customer's ability, readiness, and willingness is no longer open to question.” In *Walter Kassuba, Inc., v. Bauch*, 38 Wis.2d 648, 653, 158 N.W.2d 387, 390 (1968), this court intimated that an “acceptance of the purchaser by the seller is conclusive on the issue of readiness, willingness, and ability.” However, this is not so when the offer to purchase, as here, contains a “subject to financing clause.” Subject to financing clauses are common and have frequently been construed by this court as constituting a condition precedent to the **buyer's** performance. *Gerruth Realty Co. v. Pire*, 17 Wis.2d 89, 91, 115 N.W.2d 557 (1962). . . . As such, the condition operates to delay “the enforceability of the contract until the condition precedent has taken place.” *Locke v. Bort*, 10 Wis.2d 585, 588, 103 N.W.2d 555, 558 (1960); Restatement of Contracts, s 250(a) (1932). **This tells us that ready, willing and able issue should go away when there is an accepted offer; and that an offer with an unsatisfied contingency is not yet an enforceable contract.**

⇒ We should give thought to how much should be explained so that a home seller understands how a buyer's financial ability is determined. Also, so they are not scared away by the revelation that commission may be due without a closing.

◆ **Marketing Language (Line 21):**

The first sentence of this section says, "Seller authorizes and ~~Broker-the Firm~~ agrees to use reasonable efforts to **Procure** a buyer for the Property." The definition of "procure" interjects consideration of whether a buyer is "ready, willing and able" and thus brings the consideration of financial ability into the picture. The existing language could be seen as suggesting it is part of the Firm's job to bring only buyers who are financially able to complete the purchase to the table to write offers, meaning that brokers are authorized and capable of assessing a prospect's financial capability.

The word "market" is used in place of "procure a buyer for," such that the sentence on line 21 of the WB-1 draft says, "Seller authorizes and the Firm agrees to use reasonable efforts to market the Property."

◆ **Modifications to Seller Cooperation section (Lines 115-121):**

Should sellers have to tell brokers about all prospects they talk to about the property for sale without the conversation having to meet the standards for "negotiation?" This Committee preferred to leave this standard as it is now (and rejected language that the seller report potential purchasers who contact seller) for fear it would become too great a task and unreasonable for the seller to report to the broker every time a person at the grocery store or church asks about the home being for sale, although idle inquiries are not from potential purchasers. The problem may be how to tell them apart unless there is serious conversation, i.e. negotiation.

The WRA Forms Committee is concerned that a seller would not know what "negotiate" is intended to mean or assign it the meaning used by the courts in protected buyer cases. In the cases, the courts are interpreting the language used for protected buyers when discussing what negotiate means.

For instance, in *First Weber Group v. Guyant*, 2011 WI App 84 at <http://www.wicourts.gov/ca/opinion/DisplayDocument.pdf?content=pdf&seqNo=64865>, a prospective buyer stopped by the property after seeing it online and asked if the sellers would sell without a REALTOR®. After expiration, Mrs. Guyant called the prospect and arranged a showing. The home was listed with another brokerage, and the prospect bought the home. To determine whether the buyer was protected under the first listing, the court applied the listing contract definition of "negotiate" to the facts: did the Guyants and the prospect discuss potential terms by which the prospect might purchase the property? The court found the requisite two-way communication within their discussion of: 1) whether the prospect would purchase the home if a broker was involved, and 2) when such a sale might occur (the sellers were to contact the prospect after the listing expired). The potential purchase terms discussed do not need to include price, the court noted, although the extent of broker involvement potentially affects price. Note that the elements of "negotiate" in the case are the bare-bones minimum.

Should the language "any potential purchasers with whom Seller negotiates" be clarified so the home seller would better know who to report to the broker? "With any potential purchasers with whom Seller discusses potential terms upon which buyer might acquire an interest in the Property?" Inquiries about potential purchase terms? Conversation about acquiring an interest in the Property or about purchase terms?

■ **SELLER COOPERATION WITH MARKETING EFFORTS:** Seller agrees to cooperate with ~~Broker-the Firm~~ in ~~Broker's-the Firm's~~ marketing efforts and to provide ~~Broker-the Firm~~ with all records, documents and other material in Seller's possession or control which are required in connection with the sale. Seller authorizes ~~Broker-the Firm~~ to do those acts reasonably necessary to effect a sale and Seller

agrees to cooperate fully with these efforts which may include use of a multiple listing service, Internet advertising or a lockbox system on Property. Seller shall promptly notify ~~Broker~~ the Firm in writing of **any potential purchasers with whom Seller negotiates** during the term of this Listing and shall promptly refer all persons making inquiries concerning the Property to ~~Broker~~ the Firm.

◆ **Disclosure to Clients (Lines 127-202):**

There will be statutory changes coming to this language to make it more user friendly and understandable for the property owners. This section now shows in tracking the changes expected to be proposed. **Note that have been a few more modifications since the first draft of the WB-1 – the tracking changes have been updated a touch. Look at the section where the client selects an agency model and the note following thereafter for the most notable language changes.**

◆ **Definitions (Lines 241-301):**

Since the term “defects” is mentioned in lines 221-228, should the definition of “Defects” from the offer be included in the WB-1? Note: the definition below is identical to the one used in the WB-11 Residential Offer to Purchase. It is also the same as the language appearing in the Real Estate Condition Report language laid out in Wis. Stat. § 709.03 but for the initial caps on the word “Property.”

DEFECT: “Defect” means a condition that would have a significant adverse effect on the value of the Property; that would significantly impair the health or safety of future occupants of the Property; or that if not repaired, removed or replaced would significantly shorten or adversely affect the expected normal life of the premises.

⇒ **Accepted by both Committees**

Should we add a definition of Firm? As you read through the draft, the language at times may seem like it is referring to agents of the listing Firm rather than the Firm itself, for example in the definition of Protected Buyer it mentions a buyer discussing potential terms with the Firm. The expected statutory definition contains only the language through the first comma below (in **yellow**), but not sure if that should be modified for purposes of this listing with the additional language.

FIRM: **“Firm” means a licensed sole proprietor broker or a licensed broker business entity**, and as appropriate in context, licensees associated with the Firm.

⇒ **Questioned by the DSPS Committee. Especially since the language in the Disclosure to clients section refers to “the Firm and its agents” in several places, it may be that the Firm definition should not include the added reference to agent and that we will have to read through the WB-1 and suggest where additional language mentioning “the agents of the Firm” or the “Firm’s agents” should be inserted.**

Should we add the definition of Person Acting on Behalf of Buyer and the modified definition of Protected Buyer from the WB-6? As you may recall, those changes were made to try to ward off protected buyers who create an LLC and then purchase the property, claiming that the LLC is not a protected buyer.

PERSON ACTING ON BEHALF OF BUYER: “Person Acting on Behalf of Buyer” shall mean any person joined in interest with buyer, or otherwise acting on behalf of buyer, including but not limited to buyer's immediate family, agents, servants, employees, directors, managers, members, officers, owners, partners, incorporators and organizers, as well as any and all corporations, partnerships, limited liability companies, trusts or other entities created or controlled by, affiliated with or owned by buyer, in whole or in part whether created before or after expiration of this Listing.

⇒ **Accepted by both Committees**

For the Protected Buyer definition: shouldn't the buyer be considered protected if the seller shows the property to the buyer, for instance, the buyer who drives by and sees the sign and stops in when no broker is around. It would be easier to prove that the buyer saw the house with the seller than it is to establish that they had a conversation meeting the criteria for "negotiation." If this idea is favored we may need more eloquent language!

PROTECTED BUYER: "Protected Buyer" means a buyer who personally, or through any Person Acting on Behalf of Buyer, during the term of this Listing: 1) delivers to Seller or ~~Broker-the Firm~~ a written offer to purchase, exchange or option on the Property; 2) sees the Property with the Seller or negotiates directly with Seller by discussing with Seller the potential terms upon which buyer might acquire an interest in the Property; or 3) attends an individual showing of the Property or discusses with ~~Broker-the Firm~~ or cooperating ~~brokers-firms~~ the potential terms upon which buyer might acquire an interest in the Property, but only if ~~Broker-the Firm~~ delivers the buyer's name to Seller, in writing, no later than three days after the expiration of the Listing. The requirement in 3), to deliver the buyer's name to Seller in writing, may be fulfilled as follows: a) If the Listing is effective only as to certain individuals who are identified in the Listing, by the identification of the individuals in the Listing; or b) if a buyer has requested that the buyer's identity remain confidential, by delivery of a written notice identifying the ~~broker-firm~~ with whom the buyer negotiated and the date(s) of any showings or other negotiations. A Protected Buyer also includes any Person Acting on Behalf of Buyer joined in interest with or otherwise acting on behalf of a Protected Buyer, who acquires an interest in the Property during the extension of listing period as noted on lines xxx-xxx.

After further discussion during the WRA Forms Committee, below is another alternative. A buyer is protected under three different circumstances: an offer is submitted (seller knows the name of the buyer from the offer), there is seller contact, or there is broker contact (showing or negotiations – broker must give seller the name of the buyer). A word other than "discussing" was wanted to make sure it included email, text or other exchanges – the idea is to not limit this to face-to-face conversations which might be suggested by "discussing." However, the cases have included other communications when finding the requisite two-way exchange needed in the case law for negotiation.

PROTECTED BUYER: "Protected Buyer" means a buyer who personally, or through any Person Acting on Behalf of Buyer, during the term of this Listing: 1) delivers to Seller or ~~Broker-the Firm~~ a written offer to purchase, exchange or option on the Property; 2) views the Property with Seller or negotiates directly with Seller by discussing communicating with Seller ~~the-regarding~~ potential terms upon which buyer might acquire an interest in the Property; or 3) attends an individual showing of the Property or discusses with ~~Broker-the Firm~~ or cooperating ~~brokers-firms~~ the potential terms upon which buyer might acquire an interest in the Property, but only if ~~Broker-the Firm~~ delivers the buyer's name to Seller, in writing, no later than three days after the expiration of the Listing. The requirement in 3), to deliver the buyer's name to Seller in writing, may be fulfilled as follows: a) If the Listing is effective only as to certain individuals who are identified in the Listing, by the identification of the individuals in the Listing; or b) if a buyer has requested that the buyer's identity remain confidential, by delivery of a written notice identifying the ~~broker-firm~~ with whom the buyer negotiated and the date(s) of any showings or other negotiations. A Protected Buyer also includes any Person Acting on Behalf of Buyer joined in interest with or otherwise acting on behalf of a Protected Buyer, who acquires an interest in the Property during the extension of listing period as noted on lines xxx-xxx.

⇒ **Questioned by this Committee which seemed to prefer leaving the current structure which requires either an individual showing or negotiation, but no clear resolution. It is true that the case law standard for negotiation is fairly low, only requiring a two way conversation about possible terms or conditions of a possible offer. This is based on the language from the current listings: "negotiates directly with Seller by discussing with Seller the potential**

terms upon which buyer might acquire an interest in the Property” so maybe this phrase should be left alone?

The deleted language below in the definition of Procure is redundant with line 78. See lines 83-86 where the term “procure” is used. The added language speaks to the point that brokers should not be responsible to ensure a buyer’s financial capability into the future.

PROCURE: A buyer is procured ~~when, during the term of the Listing, an enforceable contract of sale is entered into between the Seller and the buyer or~~ when a ready, willing and able buyer submits to the Seller or the ~~Listing Broker Firm~~ a written offer at the price and on substantially the terms specified in this Listing. A buyer is ready, willing and able when the buyer submitting the written offer at that time has the ability to complete the buyer's obligations under the written offer. (See lines xx-xx)

In the draft part of the definition of “Procure” was folded into the full price commission item and the balance has been eliminated.

⇒ **Accepted by both Committees: delete the definition of “procure” since the word has been removed from the WB-1. In addition this Committee asked that the Extension of Listing section be moved and placed immediately after the Protected Buyer definition. See this in the draft highlighted in yellow.**

******* THIS IS AS FAR AS THIS COMMITTEE WENT LAST TIME *******

◆ **Fair Housing (Lines 307-310):** the protected class of status as a victim of domestic abuse, sexual assault or stalking was added.

◆ **Earnest Money (Lines 311-319):** The first change is from the WB-6. The inserted language is broader and refers to license law standards rather than making it sound as if the only way the broker can disburse earnest money is with a written earnest money disbursement agreement – there are several safe harbors for disbursement in Wis. Admin. Code § REEB 18.09(1) in addition to a CAMR.

Also should the other provisions shown as lined out in the WB-1 draft be retained regarding the division of the earnest money between the broker and the seller? Are they desirable and do they serve a purpose that benefits any one? Are they often used?

There are pros and cons but there may be many brokers who want to have this retained and it is useful because it shows that the commission the seller has to pay in a failed transaction is relatively small and not out of pocket for the seller in those cases where the earnest money comes to the seller. These disbursements do create issues in terms of what must go on the CAMR in these instances. The provision below shows the language splitting the earnest money as being retained.

■ **EARNEST MONEY** If ~~Broker the Firm~~ holds trust funds in connection with the transaction, they shall be retained by ~~Broker the Firm~~ in ~~Broker's the Firm's~~ trust account. ~~Broker The Firm~~ may refuse to hold earnest money or other trust funds. Should ~~Broker the Firm~~ hold the earnest money, ~~Broker the Firm shall hold and disburse earnest money funds in accordance with Wis. Stat. Ch. 452 and Wis. Admin. Code Ch. REEB 18.~~ If the transaction fails to close and the earnest money is disbursed to Seller, then upon disbursement to Seller the earnest money shall be paid first to reimburse ~~Broker the Firm~~ for cash advances made by ~~Broker the Firm~~ on behalf of Seller and one half of the balance, but not in excess of the agreed commission, shall be paid to ~~Broker the Firm~~ as ~~Broker's~~ full commission in connection with said purchase transaction and the balance shall belong to Seller. This payment to ~~Broker the Firm~~ shall not terminate this Listing.

⇒ Is this acceptable or are there additional changes?

◆ **Notice About Sex Offender Registry (Lines 339-341):** The corrected web address should be inserted:

■ **NOTICE ABOUT SEX OFFENDER REGISTRY:** You may obtain information about the sex offender registry and persons registered with the registry by contacting the Wisconsin Department of Corrections on the Internet at <http://www.doc.wi.gov> <http://www.widocoffenders.org> or by telephone at (608)240-5830.

⇒ Is this acceptable or are there additional changes?

◆ **Term of the Contract (Lines 342-344):** Language was added to try to clarify that the listing contract ends once the property is conveyed, in other words, upon closing. At present this is not addressed and may be helpful when dealing with consumers or in court to have a clear indication when the Firm's duties end in a transaction timeline.

TERM OF THE CONTRACT: From the _____ day of _____, _____, up to the earlier of midnight of the _____ day of _____, _____, or the conveyance of the Property.

⇒ Is this acceptable or are there additional changes?

◆ **Signature block:** This should be modified because the contact information need not be here – it has been replaced with the delivery information in the Delivery section. Is it helpful to include the firm's contact information for any reason? **No per the WRA Forms Committee.** Would seem it is not necessary in our world of technology – what do you think? Should there be spaces for sellers who are entities? **Yes, per the WRA Forms Committee, for example, for a trust.**

(x) _____
Seller's Signature ▲ Print Name Here: ▲ Date ▲

Seller's Address ▲ Seller's Phone # ▲

Seller's Fax # ▲ Seller's E-Mail Address ▲

(x) _____
Seller's Signature ▲ Print Name Here: ▲ Date ▲

Seller's Address ▲ Seller's Phone # ▲

Seller's Fax # ▲ Seller's E-Mail Address ▲

(x) _____
Seller's Signature ▲ Print Name Here: ▲ Date ▲

(x) _____

Seller's Signature ▲ Print Name Here: ▲ Date ▲

Seller Entity Name (if any):

(x)

Authorized Signature ▲ Print Name & Title Here ► Date ▲

(x)

Agent for Broker/Firm ▲ Print Name Here ▲ Broker/Firm Name ▲ Date ▲

Broker/Firm Address ▲ Broker/Firm Phone # ▲

Broker/Firm Fax # ▲ Broker/Firm E-Mail Address ▲

⇒ Is this acceptable or are there additional changes?

◆ **Attorney Fees Provision?** There used to be attorney's fees provisions in many of the Department listings years ago. That provision was removed from the other listing contracts when they were updated in 2008-2009. Should an attorney's fees provision be added again, such as "In the event either party hereto shall commence legal proceedings against the other to enforce the terms hereof, or to declare rights hereunder, as a result of a breach of any covenant or condition of this Contract, the prevailing party in any such proceeding shall be entitled to recover from the losing party its costs of suit, including reasonable attorney's fees, as may be fixed by the court." The prior provision in the 1999 listing said: "ATTORNEY FEES: SHOULD LITIGATION ARISE BETWEEN THE PARTIES IN CONNECTION WITH THIS LISTING, THE PREVAILING PARTY SHALL HAVE THE RIGHT TO RECOVER REASONABLE ATTORNEY FEES." **NOTE:** We should keep attuned to the legislature because there is a bill that would effectively remove the ability to make the seller responsible to pay the broker's attorney's fees. See 2015 Senate Bill 61, proposed § 134.495(2)(b) at <http://docs.legis.wisconsin.gov/2015/related/proposals/sb61> **The WRA Forms committee was in favor of leaving this out.**

⇒ Is this acceptable or are there additional changes?

What other changes should be made to the WB-1?

NOTE: We also need to proof the WB-1 to make sure that all defined terms have initial caps, as has become the custom of this Committee.

WB-42 AMENDMENT TO LISTING CONTRACT

1 It is agreed that the Listing Contract dated _____, between the undersigned, for sale/rental of the
2 property known as (Street Address/Description) _____
3 _____ in the _____ of
4 _____, County of _____, Wisconsin, is amended as follows:

5 The list price is changed from \$ _____ to \$ _____.

6 The expiration date of the contract is changed from midnight _____, _____ to
7 midnight _____.

8 The following items are (added to)(deleted from) **STRIKE ONE** the list of property to be included in the list price:
9 _____
10 _____

11 Other: _____
12 _____
13 _____
14 _____
15 _____
16 _____
17 _____
18 _____
19 _____
20 _____
21 _____
22 _____
23 _____
24 _____
25 _____
26 _____
27 _____
28 _____
29 _____
30 _____
31 _____
32 _____
33 _____
34 _____
35 _____

36 ALL OTHER TERMS OF THIS CONTRACT AND ANY PRIOR AMENDMENTS REMAIN UNCHANGED.

37 ~~CAUTION: Agents (brokers and salespersons) for Broker (firm) do not have the authority to enter into a mutual~~
38 ~~agreement to terminate a listing contract, amend the commission amount or shorten the term of a listing~~
39 ~~contract, without the written consent of the Agent(s)' supervising broker.~~

40 _____ (x) _____
41 ~~Broker/Firm~~ ▲ Date ▲ Seller's/Owner's Signature ▲ Date ▲
42 Print name ►

43 (x) _____ (x) _____
44 By ~~Agent~~ ▲ Date ▲ Seller's/Owner's Signature ▲ Date ▲
45 Print name ►

46 **CAUTION: This Listing belongs to the Firm. Agents for Firm do not have the authority to enter into a mutual**
47 **agreement to terminate a listing contract, amend the commission amount or shorten the term of a listing**
48 **contract, without the written consent of the Agent(s)' supervising broker.**

49 This written consent may be obtained with the supervising broker's signature below or a separate consent.

50 (x) _____
51 Supervising Broker's Signature ▲ Print name ► Date ▲

WB-42 REVISIONS

To: DSPS Real Estate Contractual Forms Advisory Committee
From: WRA Forms Committee
Date: November 6, 2015
RE: **WB-42 Amendment to Listing Contract**

This memo relates to proposed changes to the WB-42 Amendment to Listing Contract.

WB-42 Amendment to Listing Contract

Changes were made so the WB-42 may be used to amend the WB-37 Residential Listing Contract – Exclusive Right to Rent and commercial lease listings. Line 2 is changed to refer to the “sale/rental” instead of just “sale.”

➤ **PRIOR CHANGES: The check boxes should be removed from lines 5-11**

The language on line 39 was modified in anticipation of the Wis. Stat. chapter 452 revisions wherein the proposed terminology would refer to a firm to mean either a broker entity or a sole proprietor broker. There may be further discussion regarding this caution once the WB-1 revisions are completed so this form is being held back until then.

➤ **PRIOR CHANGES: The language on line 39 was modified: “CAUTION: This Listing belongs to the Firm. Agents for the Firm do not”**

➤ **PRIOR CHANGES: On line 44 the term “Broker” is removed so it just refers to Firm. On line 47, it now says “By Agent.”**

Now that the WRA committee has been through the WB-1 Residential Offer to Purchase, they took the opportunity to look at the WB-42 amendment to Listing contract once again. It was their understanding that the remaining issue had to do with whether there should be a place on the WB-42 where a supervising broker could sign to give written consent if there was an amendment to terminate a listing contract, amend the commission amount or shorten the term of a listing contract. The WRA Committee was favorable to that concept and proposed a signature section at the very bottom of the form after the other signature so that no one would get the wrong impression that a supervising broker had to sign every amendment.

➤ **NEW PROPOSALS: The CAUTION from lines 37-39 was moved to follow the signature block for the Firm and the Seller. A sentence was added to say, “This written consent may be obtained with the supervising broker’s signature below or a separate consent.” And this is followed by a signature line for the supervising broker.**

The intent was to indicate that the supervising broker’s signature on the WB-42 was optional and not the only way that this written consent could be obtained.

WB-36 REVISIONS

To: DSPS Real Estate Contractual Forms Advisory Committee
From: WRA Forms Committee
Date: November 10, 2015
RE: **WB-36 Buyer Agency/Tenant Representation Agreement**

The following are possible revisions to the WB-36 Buyer Agency/Tenant Representation Agreement (mandatory use date 7-1-08). The line numbers in this memo refer to the line numbers in the accompanying draft of proposed WB-36 modifications, labeled wb-36 wraNov15draft.

DISCUSSION ITEMS: At present the WB-36 is used for buyers, both residential and commercial and everything in between, as well as for both residential and commercial tenants. The question is whether having one approved form for this is sufficient. If it is not, please explain why it is not and provide examples. If there were to be more than one form, would there be one just for tenants and one just for buyers, or one just for commercial and one for residential?

The WRA Forms Committee favors leaving the WB-36 for purchases and creating a separate approved form for tenant representation designed primarily for commercial situations but also capable of being used in residential situations. Commercial brokers need this badly; they say the WB-36 cannot be used for commercial tenants (which technically is not true), but it is easy to see why a business looking for commercial rental space would decline to enter into the WB-36 because the majority of the form is focused on buyers. In addition, using the WB-36 for tenant representation may be problematic in the Compensation section because the WB-36 is not structured to readily describe commission based upon a rental rather than a sale.

⇒ **Is this acceptable? Should a separate tenant representation form be drafted?**

- ◆ Update the top of the form to say Approved by the Wisconsin Real Estate Examining Board.
- ◆ **Chapter 452 Terminology.** The terminology throughout this form is modified in anticipation of the Wis. Stat. chapter 452 revisions wherein the proposed terminology would refer to a Firm to mean either a broker entity or a sole proprietor broker. Those revisions additionally refer to salespersons, licensed individual brokers, and licensed broker entities, but here the choice was to refer to the Firm and the agents of the Firm. We may need to add a definition of “Firm” to make it clear that this includes agents of the Firm acting on behalf of the Firm or something similar – this may need to be decided after working through the form a bit and adjusting to the terminology is selected.
- ◆ **First caption (Line 1):** The paragraph heading was simplified: ~~BROKER-THE SOLE AUTHORITY TO ACT FOR BUYER AS A BUYER’S AGENT~~. WRA Forms Committee found this to be acceptable.
⇒ **Is this acceptable or are there additional changes?**
- ◆ **Note (Lines 6-9):** The format was modified but the language is that from the present WB-36 (except for terminology). This language emphasizes to the buyer that he or she is under contract to pay the buyer’s broker’s fee. If the fee cannot be collected from the owner or the owner’s agent, the buyer is obligated to pull out his or her checkbook. The buyer’s ability to work with others comes with a price: the

buyer may have to pay a higher purchase price or additional broker compensation if the buyer works with an agent of the seller. WRA Forms Committee found this to be acceptable.

◆

⇒ **Is this acceptable or are there additional changes?**

◆ **Purchase Price Range (Line 10):** This item is necessary to meet the requirements of Wis. Stat. § 240.10(1) for an enforceable real estate contract that supports actions for the payment of fees or commissions: “Every contract to pay a commission to a real estate agent or broker or to any other person for selling or buying real estate shall be void unless such contract or note or memorandum thereof **describes that real estate; expresses the price for which the same may be sold or purchased,** the commission to be paid and the period during which the agent or broker shall procure a buyer or seller; is in writing; and is subscribed by the person agreeing to pay such commission, **except that a contract to pay a commission to a person for locating a type of property need not describe the property.**” WRA Forms Committee found this to be acceptable.

⇒ **Is this acceptable or are there additional changes?**

◆ **Excluded Properties (Lines 11-27):** In the current form this section attempts to perform numerous function all in one relatively small section. The language begins in a manner similar to the listing contract language where a seller excludes certain buyers from the listing, up until a certain date. These may be properties seen by the buyer already with another buyer’s broker (protected property), properties seen with listing or subagents (to avoid procuring cause disputes), or properties under contract with an option or offer.

It also describes the type of properties the buyer’s agent is authorized to look for -- by describing those types or specific properties the buyer’s agent is not authorized to search for or negotiate for. Note above that § 240.10(1) requires that the **type of property** the buyer’s agent is trying to locate needs to be indicated (unless there is a specific property identified) if the buyer’s agent wants to have an enforceable contract for commission or fees.

Many brokers seem to find the current structure with its backwards logic workable. One way they work with it is to exclude few properties or none at all and then have a conversation to identify what the buyer is looking for.

The drafts attempts to separate out the different components and provide more prompts and detail to see if it seems clearer and more easy to understand (or not) – starting place for discussion. The WRA Forms Committee was somewhat in favor and will look at it again.

⇒ **Is this acceptable or are there additional changes?**

*****AS FAR AS THE WRA FORMS COMMITTEE WENT*****

◆ **Compensation (Lines 28-45):** In the draft formatting and terminology is modified slightly. Lines 43-44 were modified to make it clear that the buyer owes the compensation unless paid by the owner or another broker. A note regarding the need to have consent in the offer or other contract under Wis. Admin. Code § REEB 24.05(1) for the buyer’s broker to receive compensation from the owner/seller was added at line 45. A friendly reminder that you may or may not like – just an idea.

⇒ **Is this acceptable or are there additional changes?**

◆ **Delivery (Lines 46-68):** Added in the Delivery of Documents and Written Notices from the WB-1 draft with terminology modifications. Deleted the Delivery definition from Definitions section.

◆ **Firm's Duties (Lines 69-76)**: Do we want or need the long description of what negotiate means? The language used is from the statutes, which is well and good, but the Disclosure to Clients section covers much of this and lists the Firm's duties. Not sure if this is needed with lines 1-5 and the Disclosure to client section listing all the duties the Firm owes to the client, but it does no harm per se.

⇒ **Is this acceptable or are there additional changes?**

◆ **Earnest Money (Lines 77-83)**: The terminology was changed and the provision was made to mirror the Earnest Money provision in the WB-6 business listing contract so that disbursement may be authorized in accordance with the law, especially Wis. Admin. Code § REEB 18.09(1) and not limited to a disbursement agreement.

⇒ **Is this acceptable or are there additional changes?**

◆ **Non Discrimination (Lines 84-87)**: This was made to read the same as the provision in the WB-1 with regard to expanding the bases for disbursement authorizations to match Wis. Admin. Code § REEB 18.09(1).

⇒ **Is this acceptable or are there additional changes?**

◆ **Disclosure to Clients (Lines 88-162)**:

There will be statutory changes coming to this language to make it more user friendly and understandable for the property owners. This section now shows in tracking the changes expected to be proposed. It is the same as the same section in the WB-1 draft.

This is a start – more discussion to come next time.

New Construction Issue: there is an issue in those situations when the buyer purchases a vacant lot and enters into a building/construction contract with a builder with the contract attached to the vacant land offer. Should the broker be paid based on the lot price or the total package price? Brokers have no authority to negotiate a construction contract which raises the question of why they should be paid based on a price that includes the construction price. Brokers can enter into a referral agreement with a builder and receive a referral fee outside of the WB-36, but some brokers assert they should be paid a success fee based upon the total price. One observation: when the contract is attached should be only as an attachment but not included in the total price for compensation? Any way to address this issue in the WB-36?

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