WISCONSIN REALTORS® ASSOCIATION

LEGAL UPDATE

A MONTHLY GUIDE TO WISCONSIN REAL ESTATE LAW & POLICY

MARCH 2022, 22.03

2022 Changes to the WB-40, WB-42, WB-44 and WB-45

The WB-40 Amendment to Offer to Purchase, WB-41 Notice Relating to Offer to Purchase, WB-44 Counter-offer and WB-45 Cancellation Agreement and Mutual Release are some of the most used forms in a real estate transaction. These forms also have not been updated since 2015. Accordingly, these forms received a review by the Department of Safety and Professional Services (DSPS) Real Estate Contractual Forms Advisory Council and were approved by the Real Estate Examining Board (REEB).

Some of the forms did not receive a substantive update and thus may not look any different. However, because the forms were reviewed and approved by the REEB, real estate practitioners still need to pay attention to the mandatory use date.

All four forms have the same use dates:

- Optional use date: May 1, 2022
- Mandatory use date: July 1, 2022

As of July 1, 2022, the revised forms must be used.

Rather than providing a deep review of what each form does, this *Legal Update* will provide a summary of the changes made to each one of the forms, followed by a series of practice tips for use.

WB-40 Amendment to Offer to Purchase

The WB-40 is to be used to change terms ***after the offer has been accepted***.

The WB-40 did not receive substantial changes as part of the 2022 revisions process. Therefore, the form usage is the same as previous versions.

2022 Changes

- Optional use date of May 1, 2022, and mandatory use date of July 1, 2022
- The rejection lines now on lines 49 and 50 are not broken into two separate areas, but instead are now one “party initials and date.”

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REALTOR® Practice Tip

When a party wants to change the terms of an accepted offer to purchase, the party would propose an amendment to the other party. If the party accepts the proposed amendment, then the contract is changed based upon the language of the amendment. If, for some reason, the party does not accept the proposed amendment, the offer stands as is with the existing terms.

REALTOR® Practice Tip

Licensees representing or working with the parties do not sign amendments. Amendments to an offer are signed by the parties and not the licensees preparing the amendments. The licensee who drafts the amendment for a party completes line 39 of the amendment. The licensee presenting the amendment completes line 41. On these lines, the licensee and firm are identified but the identification of the licensee is not a signature as the licensee is not a party to the offer to purchase.

REALTOR® Practice Tip

An amendment is a proposed change to a contract provision, and it requires the other party's consent to be effective.

WB-41 Notice Relating to Offer to Purchase

The WB-41 is used when one party needs to notify another about a contract provision where the other party's agreement is not necessary.

The WB-41 did not receive changes as part of the 2022 revisions process other than the updated use dates. Therefore, the form usage is the same as previous versions.

2022 Changes

- Optional use date of May 1, 2022, and mandatory use date of July 1, 2022.
- No other changes.

REALTOR® Practice Tip

A notice originates with one party and is a statement about a contract provision or the status of a particular contingency such as notifying a seller that the buyer is waiving the Closing of the Buyer's Property Contingency or is delivering a loan commitment. The notice does not require the consent of both parties. It does not change the contract terms but rather is a unilateral action by one party.

REALTOR® Practice Tip

A notice is used to notify another party about some contract provision where the other party does not need to agree. For example, a buyer whose offer included an inspection contingency would use a notice to deliver a notice of defects in response to a home inspection report that revealed defects.

WB-44 Counter-offer

A WB-44 Counter-offer is used in negotiations ***before an offer is accepted***.

In 2022, the WB-44 did not receive substantial changes other than the use dates and updates made to the signature lines. Therefore, the form usage is the same as previous versions.

2022 Changes

- Optional use date of May 1, 2022, and mandatory use date of July 1, 2022
- Lines 38-43 in the 2022 form, the lines now read Buyer' Signature and Seller's Signature rather than Signature of Party Making Counter-offer and Signature of Party Accepting Counter-offer.

REALTOR® Practice Tip

A counter-offer can be understood as a new offer that is being issued by a party who has previously received an unacceptable offer. The legal effect of writing and delivering a counter-offer is the same as the rejection of the previous offer and the presentation of a new offer to the party who had submitted the previous offer. By using the counter-offer form, only the terms that vary from the original offer are written out, and all the other terms from the original offer remain the same because they are incorporated by reference.

REALTOR® Practice Tip

Each counter-offer stands on its own merits, unless terms and conditions of a previous counter-offer are incorporated by reference or repeated or copied from a prior counter.

REALTOR® Practice Tip

There are several ways to incorporate terms of a previous counter-offer into a subsequent counter-offer. A subsequent counter-offer may incorporate by reference desired provisions or information from a previous counter-offer by identifying the previous counter-offer and referring to the line numbers, by writing out each desired provision or by incorporating the entire previous counter-offer.

REALTOR® Practice Tip

A party can use a counter-offer to revive negotiations even after a party has rejected a previous offer or counter-offer. If, for example, a seller rejected a buyer's offer and the buyer wanted to continue negotiations, the buyer could at that time counter the buyer's own offer to propose new terms to the seller. Because most dates and deadlines run from acceptance, few of those should need to be updated, but the agent drafting the counter-offer should review the closing date to see if that needs to be modified due to the time taken up with negotiations.

REALTOR® Practice Tip

A party who has made an offer (or counter-offer) is, in all but relatively few situations, able to withdraw the offer any time prior to its binding acceptance. The law requires the party withdrawing the offer to notify the person in receipt of the offer that the offer is withdrawn. If the notice of withdrawal arrives before a binding acceptance (per the terms of the contract) the offer becomes null and void. Any attempt at acceptance of the offer thereafter (even if prior to the stated time limit for acceptance) will have no legal effect.



REALTOR® Practice Tip

Notice of withdrawal does not technically have to be in writing. It may be wise to first telephone the buyer's agent to tell him or her the counter is withdrawn and immediately follow up with written confirmation transmitted via email, fax, mail, etc. Sending the confirmation using multiple means provides good back up.

REALTOR® Practice Tip

Ideally the party attempting to withdraw the offer or counter-offer would want to make certain that proof is available that the counter had not already been accepted and delivered at the point when the verbal withdrawal message was given, but that is not always possible. If it can be verified (and hopefully documented) that the counter had not been accepted and/or delivered, then notice of withdrawal is less likely to be challenged.

REALTOR® Practice Tip

For more resources about the use of amendments and notices in the Inspection Contingency, visit www.wra.org/Resources/Transactional/Home_Inspections_Resources.

WB-45 Cancellation Agreement and Mutual Release

The WB-45 Cancellation Agreement and Mutual Release (CAMR) is utilized when an agreement is being cancelled and the parties are releasing each other from the contractual obligations.

In 2022, the WB-45 received the most changes of all four forms, including verbiage updates and improved clarity about earnest money. However, even with these changes, the form usage is substantially similar to previous versions.

2022 Changes

- Optional use date of May 1, 2022, and mandatory use date of July 1, 2022.
- The title now writes out “and” rather than using “&.”
- The form no longer uses "broker" but more accurately uses Firms and their licensees.
- The form more clearly provides it can be executed to direct the Firm or third party holding the earnest money or other funds.
- Lines 6-8 now read “The Parties hereby release the ‘Firms and their licensees’ from any and all liability for disbursing trust funds as directed and hereby authorize and direct the firm or third party holding the earnest money or other trust funds to disburse the trust funds held on behalf of the Parties as follows…"
- Lines 10 and 12 now note that including the address is optional for the disbursement since it is possible the disbursement will not be mailed but rather may be hand delivered or wire transferred depending on the circumstances.

REALTOR® Practice Tip

Even though it is only one page, this form packs a big punch of power. Without a CAMR, it is not clear whether both parties agree that the offer is null and void.

REALTOR® Practice Tip

The CAMR is not just for offers to purchase. The CAMR can be used for any type of contract, such as a lease, option or listing contract.

REALTOR® Practice Tip

If a CAMR is used to cancel a listing contract or buyer agency agreement, the firm will be forfeiting their protected buyer or protected properties, respectively, because the CAMR both cancels and releases the parties from continued and future obligations of the contract. An agent should consult their broker before using a CAMR to cancel an agency agreement.

REALTOR® Practice Tip

Buyers and sellers often have different interpretations of contract terms such as the definition of defects, the status of an offer, and the parties’ rights and obligations under the offer. Though the seller may believe the offer is null and void, a buyer may disagree and try to claim the seller breached the contract in some way, notice was not delivered correctly or some other legal claim related to the contract. Without a CAMR, there are lingering questions as to the parties’ rights and obligations under the offer. With a CAMR, it is clear that both parties agree the deal is over, both parties are agreeing that there are no more rights and obligations related to the offer and they are releasing each other from the deal.



REALTOR® Practice Tip

A CAMR is not a legal requirement for terminating an offer and, in some cases, may intentionally not be used in order to protect a party's legal rights under a failed transaction (for instance, to reserve the right to sue for damages). The parties should be in contact with their attorneys in such instances.

REALTOR® Practice Tip

The CAMR can serve as a written disbursement agreement to permit the listing firm to disburse earnest money if signed by both parties. Without a disbursement agreement, the earnest money remains in the listing firm's trust account unless or until the listing firm or the parties pursue a disbursement option permitted by Wis. Admin. Code § REEB 18.09.

REALTOR® Practice Tip

A CAMR is prudent practice for licensees because it provides a way for the parties to have certainty that a contract is over with, rather than the parties expecting the agents to tell them whether the transaction is over and done, which requires a legal opinion. That is why an attorney's opinion is often stated as the alternative to having the CAMR signed by the parties.

REALTOR® Practice Tip

If a seller sells the property to a second buyer when the first offer is still potentially binding, the seller could end up with two valid primary sales contracts with two different buyers, which could result in either one or both of the buyers suing the seller to enforce the contracts. This is why a seller should be strongly encouraged to seek legal counsel before accepting a second offer as primary when the first offer has not been ended by way of a CAMR.

Resources

- September 2015 *Legal Update*, "One Page Form Revisions," at www.wra.org/LU1509 for further discussion of the four one-page forms.
- March 2000 *Legal Update*, "Cancellation Agreement and Mutual Release; and Bill of Sale," at www.wra.org/LU0003 for further discussion of CAMR usage.
- January 2005 *Legal Update*, "Contract Review," at www.wra.org/LU0501 for discussion of the proper use of amendments.
- February 2013 *Legal Update*, "Contract Law Drafting Pointers," at www.wra.org/LU1302 for further information about counter-offers on pages 14-16.
- November 2001 *Legal Update*, "Best of the Legal Hotline – Offer to Purchase Issues," at www.wra.org/LU0111 on pages 6-7.

"Cheat sheet" for one-page forms

- **WB-25 Bill of Sale:** Use when personal property is negotiated as part of the sale of the real property.
- **WB-40 Amendment to Offer to Purchase:** Use to change terms after the offer has been accepted.
- **WB-41 Notice Relating to Offer to Purchase:** Use to provide notice to the other party in the transaction.
- **WB-42 Amendment to Listing Contract:** Use to change the terms of the listing contract after the listing contract has been accepted.
- **WB-44 Counter-offer:** Use for negotiations when the offer has not yet been accepted.
- **WB-45 Cancellation Agreement and Mutual Release:** Use when an agreement is being cancelled and the parties are releasing each other from the contractual obligations.
- **WB-46 Multiple-Counter Proposal:** Use when the seller wishes to negotiate with two or more buyers by proposing potential offer to purchase terms.
- **WB-47 Amendment to Buyer Agency/Tenant Representation Agreement:** Use to change the terms of the buyer agency/tenant representation agreement after the buyer agency/tenant representation agreement has been accepted.

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