



WRA Legal News Weekly

April 5, 2021

Top News:

- April Is Fair Housing Month
- NAR Launches New Fair Housing Resources for Members
- Increase Diversity with Partnership for Success

Legal Hottips:

- Buyer "love" letters
- Short-term rental
- Buyer concessions
- Drafting seller financing
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Top News

April Is Fair Housing Month

Every April, REALTORS® commemorate the passage of the Fair Housing Act of 1968 with events and education that shine a light on housing discrimination and segregation, and a recommitment to expanding equal access to housing. As real estate professionals, we reaffirm our commitment to breaking down biases, holding ourselves accountable and upholding the letter of the law.

- ◆ Review the NAR Fair Housing Month Toolkit for fair housing activities and social media graphics you can use to celebrate at <https://realtorparty.realtor/community-outreach/fair-housing/fair-housing-month>.
- ◆ Print the NAR fair housing poster at <https://realtorparty.realtor/community-outreach/fair-housing/fair-housing-month#poster>.
- ◆ See the new WRA Racism and Steering Resource page at www.wra.org/RacismSteering and learn about the discrimination issues confronting real estate professionals.

NAR Launches New Fair Housing Resources for Members

In honor of Fair Housing Month, the National Association of REALTORS® (NAR) is launching several resources to help members promote their fair housing commitment, as well as educational resources to keep REALTORS® informed about the latest issues surrounding fair housing topics.

On April 8, NAR's Advocacy Policy Forum Series will feature a webinar, "Tipping the SCALE: How Alternative Data Promote or Impede Fair Lending Goals." During the one-hour event (1 p.m.-2 p.m. Eastern Standard Time), NAR will unveil independent research about alternative credit scoring models and minority homeownership. [Register for the April 8 webinar](#).

On April 15, in partnership with the Memorial Foundation Inc., builders of the Martin Luther King Jr. Memorial on the National Mall in Washington, D.C., NAR is sponsoring a special event, "The Past, Present, and Future of Fair Housing." Soledad O'Brien, an award-winning documentarian, journalist, speaker, author and philanthropist, will host the event. Secretary of the U.S. Department of Housing and Urban Development Marcia Fudge is the headline speaker. Watch "The Past, Present, and Future of Fair Housing" live on April 15, 2 p.m. Eastern Standard Time, on [NAR's Facebook page](#).

Increase Diversity with Partnership for Success

The WRA Partnership for Success Program is designed to promote diversity within the REALTOR® membership and enhance the probability of long-term success for new minority agents. The program offers the successful minority candidate the opportunity to have one year of REALTOR® dues and six months of MLS fees covered, and to attend real estate practice courses and networking events. Some Program benefits are “paid forward” via cash reimbursements or community service hours within three years. Potential applicants and their sponsoring brokers can find more information, obtain the application forms and watch the videos at www.wra.org/Partnership.

The Partnership for Success gives firms a way to recruit new agents and promote diversity based on race, color or national origin. Learn from Sean Lewis, the director of talent acquisition for EXIT Elite Realty, how the Partnership for Success can help you help a new agent by mentoring the agent and reducing barriers to entry such as dues and MLS fees. See Episode 23 of the Thursday Takeaways videos discussing the Program at www.wra.org/Education/Thursday_Takeaways/Thursday_Takeaways_-Partnership_for_Success.

Found a good candidate for the WRA's Partnership for Success program? In Episode 24, Sean Lewis explores the application process and how to assist a new agent through the process successfully. Visit www.wra.org/ThursdayTakeaways/Episode24.

And be sure to stay up to date on fair housing-related information by visiting the WRA Cultural Diversity in Housing Program Facebook page at www.facebook.com/CulturalDiversityInHousing.

Hotline

Agency – Miscellaneous Agency; Fair Housing – Miscellaneous

QUESTION:

Can a seller instruct the listing firm (in writing on the listing contract) that “buyer love letters” are not to be presented/provided? In the NAR article (www.nar.realtor/fair-housing-corner/love-letters-or-liability-letters), it appears to be insinuated that the seller can instruct that, as long as the property is listed in the MLS, that letters are not to be included in the offer:

Before the next time you are faced with a buyer love letter, consider these best practices to protect yourselves and your clients from fair housing liability:

- Inform your clients that you will not deliver buyer love letters, and advise others that no buyer love letters will be accepted as part of the MLS listing.

Is there anything else licensees should know about this?

ANSWER:

If a seller does not want to consider a buyer's letters as part of the seller's evaluation of offers, there are two different scenarios to consider.

Offers accompanied by a buyer's letter

In this scenario, a buyer submits an offer and along with it includes a letter from the buyer to the seller. The seller could instruct the listing agent to present the offer but not to present the buyer's letter. The seller could instruct the listing agent in the listing contract not to present any buyer letters that accompanied an offer. Ideally, the fact that the seller will not review buyer letters would be identified as non-confidential information at lines 149-150 of the WB-1 Residential Listing Contract – Exclusive Right to Sell. Once this information is identified as non-confidential, the listing agent may inform other agents that the seller will not review buyer letters, such as in the MLS.

Offers that incorporate a buyer's letter

In this scenario, the buyer incorporated the buyer's letter into the offer. Often this is achieved by identifying the letter as an addendum to the offer on line 573 of the WB-11 Residential Offer to Purchase in the same way a buyer would incorporate an Addendum S for lead-based paint disclosure in the buyer's offer. If the buyer incorporates the buyer's letter into the offer in this way, the agent cannot simply "remove" the letter because it is a part of the offer at this point. If a seller will not consider any offers that have incorporated a buyer's letter, the seller may instruct the listing firm in the listing contract not to present any offers that incorporate a buyer's letter. Ideally, the fact that the seller will not review any offers that incorporate a buyer's letter would be identified as non-confidential information in the listing contract so the listing agent could inform other agents of the seller's instructions, such as in the MLS. The seller could use the listing contract to both instruct the listing agent not to present any buyer letter that accompanies an offer and not to present any offer that incorporates a buyer's letter.

Wis. Admin. Code § REEB 24.13(1): "Refusal prohibited. Licensees shall not refuse to draft or submit any written proposal unless the terms of the written proposal would be contrary to specific instructions of the other party."

Wis. Admin. Code § REEB 24.02(19): "Written proposal" means any written document provided by one party to another during the course of a transaction, including but not limited to notices, offers, counteroffers, options, exchanges, rental agreements, and amendments.

READ MORE ABOUT IT:

See the September 2020 *Legal Update*, "Multiple Offers and Love Letters," at www.wra.org/LU2009 and pages 8-9 of the September 2017 *Legal Update*, "Fair Housing Advancements," at www.wra.org/LU1709.

Landlord/Tenants – Miscellaneous; Offer to Purchase – Rental Property

QUESTION:

The broker has a condominium listing that currently is being used for Airbnb overnight rentals in Wisconsin Dells. This is the broker's first property listing that is rented through Airbnb. The broker does not believe the future rental listings can be transferred to the buyer and read the seller has to contact Airbnb to notify them the property is actively listed for sale. Does the WRA currently have any procedures or forms that are used in this type of situation?

ANSWER:

The topic of short-term rental services is multidimensional and unique to the services used. The WRA does not have forms or protocols regarding sales of such properties. The seller would be wise to work with his attorney to sort out what regulations apply after looking at Airbnb rules, the condominium rental rules, landlord tenant law and the laws and ordinances applicable to short-term rentals.

It appears the licensee and seller are taking the initial steps to first review the terms and conditions of the rental service used, for example www.airbnb.com. The seller should begin by reviewing those policies and may need to consult with Airbnb about the conditions relating to the sale of the property.

Simultaneously, the seller should review the condominium rules and regulations regarding rental of units within the association. The seller may wish to have his or her attorney assist in these reviews.

Generally, for rented property, Wis. Stat. § 704.09 states a buyer takes title subject to tenant rights. The sale of a property does not terminate a lease or rental agreement. When a buyer writes an offer on a currently rented property, the buyer purchases the property subject to the lease or rental agreement terms. Wis. Stat. § 704.09 requires that a buyer or other transferee take ownership of the property subject to the tenant's rights. The new owner will "step into the seller's shoes" and must honor the current tenant's rights.

However, depending on the length of rentals, the Wisconsin landlord tenant rules and residential rental practices rules may not apply. If the rentals are short-term, they may be exempt from the Wis. Admin. Code chapter ATCP 134 rules if the property is “a dwelling unit, such as a dwelling unit in a hotel, motel or boarding house, that is being rented only by tourist or transient occupants.” “Tourist or transient occupants” means tourists or other persons who occupy a dwelling unit for less than 60 days while traveling away from their permanent place of residence.

READ MORE ABOUT IT:

See chapter ATCP 134 at https://docs.legis.wisconsin.gov/code/admin_code/atcp/090/134.pdf. With regard to short-term rentals, see “Right to Rent: Five things REALTORS® need to know about Wisconsin’s new short-term rental law,” in the November 2017 *Wisconsin Real Estate Magazine* at www.wra.org/WREM/Nov17/RightToRent and Wis. Stat. § 66.1014 at <https://docs.legis.wisconsin.gov/statutes/statutes/66/x/1014>. The Department of Agriculture and Consumer Protection has an informative brochure regarding short-term rentals at <https://datcp.wi.gov/Documents/ShortTermRentalGuidance.pdf>.

REALTOR® Issues – MLS Questions

QUESTION:

In the local MLS forms, there is a space when a sale closes for Seller Concessions made to buyer in order to close the sale. There is currently no place provided to enter Buyer Concessions, which is a relatively new practice in the area where buyers are offering credits for taxes or paying part of the seller’s broker commission fees and so on to enable them to obtain the winning bid. It is believed this is vital information not only for doing comps but also for appraisers to see credits that may only show up on a closing sheet but are still vital to obtaining the sale. What are the advantages or disadvantages of having this information provided? Are there any legal issues with revealing these details? Can the MLS add this to their forms or are there legal concerns?

ANSWER:

Buyers may choose to offer seller concessions such as tax credits or paying a portion of the listing firm’s commission owed by the seller for a successful sale. A buyer should check with the buyer’s lender regarding how any concessions offered to the seller may affect a buyer’s financing. A lender may see a buyer offering to pay a portion of the listing firm’s commission and may wonder why that money is not instead being added to the buyer’s down payment. The analysis from the lender will likely be influenced by the buyer’s loan to value ratio.

Buyers have been offering seller concessions to address problems with properties not appraising at the purchase price or higher. When a property appraises lower than the purchase price, a seller may be willing to reduce the purchase price if the buyer is going to be making a cash payment to the seller or paying a portion of the listing firm’s commission on behalf of the seller.

A seller should consult with the seller’s tax adviser regarding buyer concessions to the seller and whether that may have implications for the seller’s transfer tax obligations. The transfer tax is calculated based on the value of the property transferred.

Each MLS will have to determine, in conjunction with their legal counsel if needed, how a buyer’s concession to a seller influences data collected by the MLS such as the purchase price of a property.

Offer to Purchase – Seller Financing

QUESTION:

The licensee has a listing on a property. The buyer is going to pay cash for it and the remaining balance is \$50,000 and the seller is going to be financing that for them. It is going to be at 1% for 36 months. The agent is not sure how to write that in the counter-offer. Can that be done without a mortgage loan broker or originator and what language may be used?

ANSWER:

The SAFE Act of 2008 limited who could negotiate and draft financing documents to those registered as a mortgage loan originator. However, that has been revised and clarified and, as of 2014, Wis. Stat. § 224.725(1m) lists different individuals who are not required to be licensed as a mortgage loan originator .

Specifically, under the new law, a mortgage loan originator license will no longer be required in transactions involving seller financing for (a) sellers who provide seller financing on no more than five residential transactions per year, and (b) real estate licensees who use state-approved forms in affected transactions involving financing contingencies. In other words, a REALTOR® involved in qualifying seller-financed transactions will be required to obtain a mortgage loan originator license only if the REALTOR® is acting outside the scope of his or her real estate license, such as acting as a mortgage broker, or using forms that are not approved by the Wisconsin Real Estate Examining Board (REEB).

The Wis. Stat. § 224.71(13) definition of real estate brokerage activity now includes:

any activity that involves offering or providing to the public real estate brokerage services involving residential real property in this state, including all of the following: ... (c) Negotiating, on behalf of any party, any portion of a contract relating to the sale, purchase, lease, rental, or exchange of real property, other than in connection with providing financing for the transaction. For purposes of this paragraph, providing financing for the transaction does not include use by a licensee under s. 452.03 of forms approved under s. REEB 16.03, Wis. Adm. Code.

This exemption means that brokers will not be required to register as mortgage loan originators if they negotiate offers that include the provision of financing, as long as they use the forms approved per Wis. Admin. Code § REEB 16.03. That rule approves the use of the WB forms approved by the REEB, the State Bar forms (deeds, mortgages (SB form 21), mortgage notes (SB form 16), truth-in-lending disclosures, land contracts, release of mortgage, satisfaction of mortgage, assignment of mortgage and assignment of land contract), the Uniform Commercial Code (UCC) forms, out-of-state forms for out-of-state real estate and businesses, forms prepared by government agencies such as FHA or VA, and property management agreements drafted by a party or the broker's attorney. Salespersons cannot draft the State Bar forms or the UCC forms.

For suggested language for the seller financing see the *Wisconsin Real Estate Clause Manual*. This manual can be purchased electronically for use in zipForm so clauses can easily be added to contracts. The *Wisconsin Real Estate Clauses* 2019 Edition is available for purchase in zipForm (www.wra.org/zipform) or hard copy from the WRA (www.wra.org/pub280).

READ MORE ABOUT IT:

See pages 4-6 of the March 2014 *Legal Update*, "Legislative Update 2014," at www.wra.org/LU1403 and "SAFE At Last: New law removes mortgage loan originator licensing requirements for sellers and REALTORS®," in the May 2014 *Wisconsin Real Estate Magazine* at www.wra.org/WREM/May14/Safe.

Offer to Purchase – Closing Issues

QUESTION:

The seller is working with an out-of-state cash buyer and their preferred out-of-state title company and are scheduled to close Monday. The title company says that it will be a dry closing. This is the first the listing agent has heard about dry closings. His understanding is that everything is done, including signing papers and handing over keys, and then the funds will be disbursed at a later date. Is this type of closing legal/normal? Is there some type of protection the seller gets that guarantees the funds? What would happen if the funds do not go through?

ANSWER:

Wisconsin is a table closing state as opposed to an escrow closing or dry closing state. The transaction is not closed until the funds are paid by the buyer and the deed is provided by the seller.

Per the offer the buyer agrees to provide funds at closing. See line 66 of the WB-11 Residential Offer to Purchase, which states, "THE BALANCE OF PURCHASE PRICE will be paid in cash or equivalent at closing unless otherwise agreed in writing."

Likewise, per the offer, the seller agrees to provide title at closing. See lines 383-392, a portion of which states, "CONVEYANCE OF TITLE: Upon payment of the purchase price, Seller shall convey the Property by warranty deed (trustee's deed if Seller is a trust, personal representative's deed if Seller is an estate or other conveyance as provided herein), free and clear of all liens and encumbrances, except:...."

Wisconsin's good funds law may also be considered. Wis. Stat. § 708.10(2) prohibits a lender from requiring a borrower to complete a loan settlement unless the lender unconditionally delivers qualified loan funds to the settlement agent before or immediately upon completion of the loan settlement. In other words, if the buyers sign a note and mortgage, the lender must have the funds available for disbursement at the time of closing.

READ MORE ABOUT IT:

For further discussion, see "Are No Funds Considered Good Funds?" in the October 2006 *Wisconsin Real Estate Magazine* at www.wra.org/WREM/Oct06/Funds.

This WRA Legal Hotline document is provided by the WRA's Legal Affairs Department. The WRA Legal Hotline is an educational resource intended to keep the WRA abreast of legal developments affecting real estate practice in Wisconsin. The content included here should be considered a general statement of applicable legal principles. Given this format, it is impossible to fully address all potential legal issues that might apply in any particular situation. A determination of any individual's legal rights in a transaction can only be obtained after complete analysis of the law and its applicability to the particular fact situation. Therefore the answers to the questions above do not constitute legal advice and should not be relied upon as legal advice in litigation, arbitration or ethics matters. Neither these answers nor the communication with the attorneys associated with the Legal Hotline is intended to create an attorney-client relationship, and no information communicated to or by the attorneys associated with the Legal Hotline will be protected by attorney-client privilege or the work product doctrine. Private counsel should be consulted if legal advice is needed or if the member or a party is involved in litigation, arbitration or ethics matters.

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