Jay Reifert

From: "Jay Reifert" <true-agents@true-agent.com>
To: <celia.jackson@drl.state.wi.us>
Cc: <sandra.rowe@drl.state.wi.us>; <larry.martin@drl.state.wi.us>; "Black, William" <William.Black@drl.state.wi.us>; "Gary Goyke" <gnregoyke@mailbag.com>; "Gary R. Goyke" <gary@wcblind.org>
Sent: Tuesday, August 23, 2005 8:12 PM
Subject: Consolidated REAL-Reform Criticisms of the WRA's LRB-1387/3 Agency Law Draft

[Please note that the REAL-Reform criticisms of LRB-1387/3 are NOT ranked in order of importance. The numbers are for future reference purposes, only. This document can be printed out for easier reading and distribution to other interested parties.]

Dear Secretary Jackson & Staff,

Here is the consolidated version of the individual messages I have sent to you, on behalf of REAL-Reform, over the past couple of days.

If you have any questions, please do not hesitate to contact me...

Just so there's no confusion...none of my criticisms or suggestions are meant to imply that REAL-Reform, or myself, endorse any aspect of what the Wisconsin Realtors Association is creating.

I'm just trying to help the Department see the multitude of flaws and problems that are endemic within the WRA proposal.

REAL-Reform, as mentioned, is having a draft prepared that will be completely pro-consumer. It only makes sense that, in the interim, shining light on the flaws in the WRA's proposal may be an effective use of time.

However, any aspects of the WRA proposal that do turn out to be worthwhile, could easily be folded into what REAL-Reform presents in the upcoming weeks.

REAL-Reform Criticism #1 of WRA's LRB-1387/3 Draft --Multiple Representation

No matter what version of legislation ultimately gets enacted, I think you would agree that words do have meaning...and that ambiguity, in the minds of consumers and clients, should be avoided.

With that in mind, "Multiple Representation" , MR, should be replaced in existing statute and in any drafts, with the term "Dual Agency".

There is no "representation" in a MR situation. When MR occurs, neutrality is mandated by both current statute and by the common law of agency. In MR, the interests of either party cannot be placed above the interests of the other

party.

Also, as such, Dual Agency should be defined, in statute.

REAL-Reform Criticism #2 of WRA's LRB-1387/3 Draft -- 452.01(5m)
Negotiate

Once again, regardless of what version of legislation gets passed, there is a substantive error in 452.01(5m) which should be corrected.

452.01(5m) keeps in statute the idea that negotiation means acting as an intermediary. Intermediaries do not take sides. Agents, however, represent the best interests of their clients. That requires taking sides...giving advice to the client and advocating their position to other parties.

If the WRA succeeds in what they are attempting, but does not change 452.01(5m), there will be an ambiguity in the law, whenever representation is intended.

In my opinion, it should say something like the following:

452.01(5m) "Negotiate" means to act either as an agent for one, or more, party to a transaction or as an intermediary between parties to a transaction, including doing any of the following. ---------end suggestion

Of course, that would likely necessitate defining "Agent", which--by the way--refers both to the firm and the individual licensees. Technically, the broker of the firm would be considered the Agent, with the associates of the firm being subagents of the client...but, that could be confusing, as subagency is usually used, also correctly, to describe licensees from other firms who represent the clients of the firm with the agency agreement. So, we have two different kinds of subagents, in reality.

I apologize if that's confusing, but I'm sure Bill Black, who also is receiving these messages, could explain it better.

REAL-Reform Criticism #3 of WRA's LRB-1387/3 Draft
452.01(5m)(a) Prelude to Non-Disclosure

In the grand scheme of what the Realtors want, this is the prelude to one of the worst. What they want everyone to believe, is that it is no big deal to wait until the point of drafting an offer to declare whom you will represent.

The main problem with this line of thought, is that nearly every substantive detail that can be learned about a party, and therefore damage that party's negotiating position, will be learned far, far in advance of the drafting of an offer.

In fact, the gathering of information that will assist licensees in manipulating a deal, later, occurs from the first point of contact, and begins growing from there.

If that information is being gathered by a licensee who will, ultimately, be working against that party or who may, at best, be legally neutral in a transaction, the party from whom the information is being drawn deserves to know, as early as possible, whom that licensee will represent.

Now, the Realtors like to say, "But we've been keeping non-client confidences for YEARS." Don't you believe it! When it comes to substantive issues that would negatively impact on buyer and/or seller interests, the Realtors have been brazenly violating customer confidences, in spite of the Wisconsin law that mandates that all parties are to receive confidentiality from all licensees.

One need look no farther than the widespread industry practice of requesting showing feedback that damages any serious buyer's negotiating power. (More on that in the next email.)

All of this is why it remains crucial that conversations about who represents whom still occur at the first meaningful point of contact, which is absolutely:

1) Before any information is shared which can be used against that party, and

2) In the case of a buyer, before that buyer considers, or enters into discussions about any homes with a licensee, because of the anti-buyer Realtor concept known as Procuring Cause.

Here are three, plain language, articles about Procuring Cause that will help you understand why licensees cannot be allowed to hold off on declaring their status, up front. (One of them even involved a high-ranking friend of Condoleeza Rice.)

http://www.ired.com/news/2001/0102/procuringcause.htm

http://www.ired.com/news/2000/0008/moneysecret.htm

http://www.ired.com/news/2000/0008/pcmyths.htm

In fact, REAL-Reform's competing legislation is actually going to statutorily require the written disclosure of Procuring Cause, as it can remove a buyer's ability to receive representation in a real estate transaction, completely without their knowledge and/or consent.

Allowing 452.01(5m)(a) to keep the language, near the middle of the paragraph, that begins, "In this paragraph...," and ends in, "...participating communications between parties.," would be a big mistake, as it removes legal protections against procuring cause that currently create a loophole in the Realtor Procuring Cause system that can break the chain of Procuring Cause. (The Procuring Cause concept that is known as "estrangement".)

Disclosure must remain the rule of the day...and, in fact, be broadened to include more disclosures and penalties for non-disclosure. Penalties, including monetary ones, which could be used to hire more DRL agents to monitor non-compliance issues, among other things.

Organized real estate has thumbed it's nose at disclosure for far too long, now.

Bill Malkasian's View of the Department of Regulation and Licensing

Although I said this message would be about the issue of licensee failure to maintain confidentiality of non-clients, as mandated by Wisconsin law, I wanted to make sure this message was presented, first.

What you are about to hear, is Bill Malkasian, holding forth in a nationwide forum about who runs the real estate scene in Wisconsin, and how little the DRL has to do with that task.

While I agree that he is correct, please do not take it as an indictment of yourselves. You did not create this mess...you inherited it! REAL-Reform, though,is certainly interested in seeing that Mr. Malkasian can no longer make his claims and is doing all it can to return effective oversight, of pro-consumer law, to the DRL.

Here, is what Mr. Malkasian had to say, with regards to the DRL:

One format is .MP3, the other is .WAV .

http://www.real-reform.org/unchecked_power_2.mp3

http://www.real-reform.org/unchecked_power_2.wav

And the written transcript of that audio file:

http://www.real-reform.org/unchecked_power_2.pdf

and, then, the one you have already heard, in case you'd like a reminder on who Mr. Malkasian represents and how they deal with dissent.

http://www.real-reform.org/unchecked_power_1_.mp3

http://www.real-reform.org/unchecked_power_1.wav

Here's the written transcript of the other audio file:

http://www.real-reform.org/unchecked_power_1.pdf

Allowing the WRA to continue its stranglehold on real estate laws and how licensees--and consumers, via disclosures--will be educated, only allows their deceptiveness to grow to ever more murky depths.

Confidentiality from Licensees? Don't Count on It!

Rick Staff, chief legal counsel of the WRA, loves to tell how he hasn't heard one complaint, or seen any evidence that licensees in Wisconsin are violating customer confidentiality.

In fact, that's exactly what he said at Realtor and Government day, back in May of this year. What's more, it was when I loudly said, "Wrong!" to that statement, two times in a row, that I was told by security at that packed meeting that I was going to have to leave the premises, or be hauled off in handcuffs. (Nice people, those Realtor leaders.)

Well, Mr. Staff doesn't spend much time looking for violations of customer confidentiality, that's for sure.

Every day, thousands of times a day, across the State of Wisconsin, listing agents call licensees who have shown the homes of their sellers, requesting showing feedback.

Now, as one who only represents buyers, my duty of loyalty to my clients eliminates my ability to give feedback, as it could harm the negotiating position of present, or future, clients.

Yet, even if I did not have a duty of loyalty--and the common law of agency mandated duty of maintaining my client's confidentiality--Wisconsin has a statute which declares that ALL licensees owe ALL parties confidentiality on anything that a reasonable person would want to have held as confidential.

Wouldn't it be reasonable to presume that a buyer would not want a seller to know that they're interested and may be bringing an offer? I mean, does my client want the seller's agent to have time to call around to all other licensees who have seen the home and say, "Hey, we hear there's an offer coming, if you're going to do anything, you might want to get on it!"?

I mean, the seller's agent does have a duty to loyally advance the seller's best interests, right? I would argue that the failure to attempt to create competing offers for the seller is a breach of fiduciary duty, quite frankly.

How about price? In what way does my client benefit from my telling the other side what we think of the price? What am I doing to my client's negotiating power, if I tell seller agents what my clients think, or what I think? Wouldn't a reasonable non-client consumer also want that held confidential?

Condition? Maybe we want--as I usually do--to use condition issues as an element of negotiations. How is it any different for a reasonable non-client party?

Giving meaningful feedback is, for buyer agents, a violation of fiduciary duties...and for all other licensees, a violation of the statutory confidentiality duty under 452.133(1)(d).

Now, hear with your own ears, the requests--which, again, are repeated thousands of times a day across Wisconsin, for viewing feedback.

Interestingly, these run the gamut from polite--but still unethical requests...to hostile demands, including threat of boycott and/or implications of blacklisting. I've put the more offensive audio clips toward the top of this list...

In fact the one I find, personally, most offensive, is the one from Julie Bollig...who, reiterates my concerns to her, and then still presses for me to violate my fiduciary and state-mandated duties.

http://www.real-reform.org/jbollig.wav

http://www.real-reform.org/keith_sorenson2.wav

http://www.real-reform.org/mstanley2.wav

http://www.real-reform.org/sabol.wav

http://www.real-reform.org/michele_rolfe.wav

http://www.real-reform.org/sheila_power.wav

http://www.real-reform.org/mietzel.wav

http://www.real-reform.org/sue_roessel.wav

http://www.real-reform.org/laurie_homan.wav

http://www.real-reform.org/bob_tidwell.wav

http://www.real-reform.org/alice_copper.wav

http://www.real-reform.org/charlene_bennett.wav

And here is a link which is representative of email requests I occasionally receive from area Realtors...also asking me for inappropriate feedback:

http://www.real-reform.org/email_feedback_form.pdf

Does this inspire confidence in licensee ability to keep consumer confidences? If they can't even understand the notion that they are damaging buyers today...how can it be expected that, when the law allows them to avoid declaring whom they represent, up front, that they will do any better?

In fact, I see it as only opening even more opportunities for abuse.

REAL-Reform, in it's bill draft, will be seeking language that addresses the feedback issue, with--again--substantive penalties for violating consumer confidence...to the degree that non-client confidentiality remains.

I say to the degree it remains, because confidentiality without loyalty is meaningless. If you have the duty to loyally represent a seller's best interests, yet have to keep a buyer's confidences, you still have to advise your seller in the most beneficial way--even if you can't tell her why--making that buyer confidentiality a hollow promise, or if the information is not used...the seller promise of loyalty is hollow.

Again, the ambiguities create opportunities for deception and mischief.

Instead, buyers working with seller representatives need to go back to maintaining their own confidences and getting disclosures from the seller reps with whom they work, in advance of sharing sensitive information, that anything they say can, and will, be used against them in negotiations.

It may sound harsh, but anything less leaves those buyers

at the mercy of a system that encourages taking advantage of them. A system created by Rick Staff and the WRA back in the early 1990's. If those buyers want representation, then buyer agency is their answer.

You may think this is a new issue...but, it's not. I have actually raised this, already, as a DRL complaint which is currently working it's way through the system. It's identified as complaint 04-REB-214, if you want to review the details.

Other information about that complaint can be found here:

http://www.true-agent.com/feedback_complaint.pdf

REAL-Reform Criticism #4 of WRA's LRB-1387/3 Draft
452.01(7r) Subagency Changes

This particular part of their bill draft is the WRA's intended magic bullet for dealing with limited service practitioners.

If subagency and their appurtenant fiduciary duties do not extend to sellers, then licensees, under the draft, will only owe a degree of loyalty to the listing brokerage--but only the same level of duties, as I understand it, that are owed to the seller by that listing brokerage--will, under the draft, be free to hold sellers hostage for higher fees, if those sellers want to deal with the buyers with whom those, formerly, seller loyal licensees are working.

Under current law, and under the common law of agency, the licensees who accept subagency also owe fiduciary duties directly to the seller. As such, they would not be in a position of trying to get the seller to pay them more money, as that would be a breach of two fiduciary duties...loyalty and possibly obedience.

The implication of this tactic is clear to me. If there is no constraint to keep the subagent from asking the seller for more money, they will. And if the seller is held hostage and has to pay more money to conclude that transaction...and here's the key...then why do they need/want the services of the limited service broker?

If they have to pay anyway, why have one more broker with whom to deal?

Don't believe that? Then ask yourself...what other reason do the Realtors have for not wanting subagency to flow all the way to the seller?

The fiduciary chain needs to continue running all the way to the seller. To do otherwise will leave the sellers open to legal extortion from those who previously owed them loyalty and obedience.

If the concern of the subagents is getting more money, then they should either abandon subagency and learn how to be proper buyer agents--where they do have control over their fee income--or they should simply accept what the seller employer has offered to them.

If the Realtors succeed in making this change, they will be backdooring their desire of controlling limited service brokerage.

Want to see how greedy these big companies are? Do a little "mystery shopping". Send a couple posing as buyers to Shorewest Realtors in the Milwaukee area. Have them insist on buyer agency, but also get information about what it's going to cost for a non-listed property or for a for sale by owner, under that buyer agency.

Last I knew, Shorewest was requiring that it's licensees charge six percent in that kind of scenario. A much more statistically normal fee for that kind of transaction would be three to four percent.

For instance, on for sale by owners, my fee is the same as it is for properties that are on the multiple listing service...three percent.

The work load simply does not go up enough for me to justify the increased transaction cost to my client.

Subagency, and fiduciary duties, must continue to flow from the subagents to the seller, or big broker greed and manipulation will destroy limited service offerings, costing buyers and sellers a lot of money in the process.

REAL-Reform Criticism #5 of WRA's LRB-1387/3 Draft
452.133(1)(e) Provision of Market Information

This message deals with a change that has not been made...but, needs to be made.

452.133(1)(e) requires all licensees to provide, to all parties, including non-client parties, "...accurate information about market conditions that affect a transaction, to any party...".

This is fine for an intermediary to do. However, as an agent for the buyer, it is not right for a licensee to be forced to provide information that could adversely affect the best interests of his/her buyer to a non-client seller. It violates the duty of loyalty to the buyer client.

If a non-client party wants such information from a licensee who is representing the best interests of an opposing party, it is incumbent on that party to seek that information from someone other than the licensee who has loyalty duties to the other party.

As such, this duty should be removed from 452.133 and, if kept, placed under 452.01(5m) as part of various negotiation duties, with one set of expectations for intermediaries serving non-client parties and another for licensees who are serving a non-client party, but representing the best interests of a client.

If this change isn't made, it also leaves the State open to being sued for violation of Article 1, Section 10 of the US Constitution, for passing a law that interferes with the obligation of contracts. Wisconsin cannot keep a licensee from

contracting to protect a client's best interests, yet this law would interfere in that contract, by making licensees do that which is counter to the best interests of their clients.

REAL-Reform Criticism #5a of WRA's LRB-1387/3 Draft
452.133(1)(e) Alterations to Provision of Market Information

I see now that the WRA has made some changes to 452.133(1)(e), however they still do not address the fact that an agent for a party who is a client should not be providing information which is contrary to the best interests of that client to non-client parties, as it breaches the duty of loyalty.

While I still believe this should be moved under the part of the statute that has to do with negotiations, 452.01(5m), I think either version could be handled by the addition of the following language to the end of the sentence, "...prohibited by law.," by saying, "...prohibited by law, such as--but not limited to--when a client's best interests would be harmed by the provision of this information to a non-client person."

A Word About Waivers and Non-Client Parties

While I expect to raise this issue again, here is some early information on why merely offering to allow non-client parties the right to waive something is not sufficient. In one case the waiver must be automatic.

Certainly, I can understand that those who provide limited services may have no problem with such language, as long as most duties are waivable.

The issue comes into play, though, when a licensee is serving as the agent of one person...and the fact that a non-client party in the transaction may choose not to allow the waiver, thus destroying the client's right to continued full representation.

Any reasonably savvy non-client would realize that s/he could neutralize the representation that was due the client, by simply refusing to sign the waiver.

There must be a statement in the law that covers this possibility, making it unnecessary for a firm which is only representing one party to seek permission of a non-client party to waive duties. Such duties must be automatically waived, as they could otherwise compromise the loyalty duties owed to clients.

Failure to make this allowance also leaves the State open to being sued under Article 1, Section 10 of the US Constitution on grounds that this would be the passage of a law that impairs the obligation of contracts.

REAL-Reform Criticism #6 of WRA's LRB-1387/3 Draft
452.135(1) Midelfarb the Grobang et Turfino

If you understood the last half of my subject line, then you probably will have no problem understanding what Rick Staff has created under 452.135(1) as it is nonsense, too.

The only thing which is clear, from what Staff has written, is that making disclosures of a licensee's agency status is not necessary until the drafting of an offer begins...as negotiation, under the law, can be forestalled that long, with the language that they've included under 452.01(5m)(a).

Oh, it may occur prior to that time, but, just as outlined in REAL-Reform's Criticism #3, Prelude to Non Disclosure, this reinforces the WRA's notion no harm comes from the failure of a licensee to choose sides, up front, and make proper disclosures at the first meaningful point of contact.

Again, all kinds of harm comes from the violation of the duty of customer confidentiality, today...and only more can come if licensees are allowed to avoid disclosure of the various agency options at the first meaningful point of contact.

452.135(1) is among the worst of the worst things being proposed by the WRA.

REAL-Reform Criticism #7 of WRA's LRB-1387/3 Draft
452.133(1)(d) Revisiting Confidentiality

Once again, for the record, I would like to state that the requirement that all parties should receive confidentiality from all licensees was a flawed idea when introduced...and remains a flawed idea today.

At most, it conveys a false sense of security.

When, for instance, a buyer is sharing confidential information with the licensee of a firm who is representing the opposing party, there are loyalty obligations to the opposing party. (The client of the firm.)

Even though the licensee cannot share the confidential information from the non-client with their client, they are still obligated to use that information to the advantage of their client, due to the obligation of loyalty to the client, when crafting the advice they give their clients.

In situations where licensees are serving as an intermediary or a dual agent, then confidentiality would be appropriate, as there is no loyalty due either party in the transaction.

When there are undivided loyalty issues, non-client parties need to understand that they should NOT be providing any information that they do not want used against them, as the licensee who represents only the other party has an obligation to loyally and obediently use that information in the best interests of the client.

Again, in this frequently occurring scenario, the non-client party gets nothing more than a sense of false security...or if the information is not used against them, the client is having his/her loyalty breached.

Either way, it is an ambiguity...and it could also result in the filing of a lawsuit, under Article 1, Section 10 of the US Constitution, on grounds that its existence creates a law passed by a State that impairs the obligation of contracts.

REAL-Reform Criticism #8 of WRA's LRB-1387/3 Draft
Concepts of Fantasy and Confusion

Here begins the mother of all deceptions. The idea that a firm will suspend its self interest and avoid incentivizing their associates with undisclosed conflicts of interest, when having the ability to exercise influence and control over two parties in the same transaction is laughable.

You have already heard Shawna Alt, the person who is on the WRA's pre-licensing course, holding forth on how the double dip--the firm and/or licensee getting paid the buyer side fee and the seller side fee in the same transaction--is a good thing, and her mention that many firms will offer a higher compensation split to their associates for in-house transactions, something that the buyers they are representing simply do not know.

Allowing one firm to put forth pretend agents for each side of the transaction when those licensees only get paid if the deal closes, is a sure way to add even more conflicts and double dealing to the mix.

At least under the common law of agency the licensee and firm can be hung out to dry, if these non-disclosures are not made. All it would take would be for enterprising attorneys to sniff out these breaches of loyalty and severe monetary costs would accrue to the licensee and firm, upon proving the easily trackable--via subpoena of compensation records and mls data--details. In fact, recission of the offer to purchase would be one potential result.

If Designated Agency occurs, the breaches will be legalized, as the common law of agency is being thrown out the door. Deception will be legalized, as motive and opportunity arrive to "do the deal" with other associates from within the firm.

What's more, this is where the antitrust issues begin to materialize. The broker of the firm has the right to dictate what these licensees, who will now be competitors of one another, will charge clients of the firm.

That is fine when they not competing against one another, however, under this concept, they are now clearly competitors of one another. As such, just as it would be a violation of antitrust laws if truly independent brokers were to get together and agree to charge the same rates, this should become a per se violation of antitrust laws, on price-fixing grounds.

It seems to me to be a bad idea to endorse a law that will result in lawsuits that run counter to other laws. I see federal preemption as a very real probability, once the cases are brought.

452.133(3)(1) and (2) are bad public policy for the aforestated reasons.

HOWEVER, as the possibility does exist that the Realtor lobby may get this anti-consumer, anti-small broker legislation passed, let's look at the key issue to these situations.

Once again, it is Procuring Cause. While I note that the Realtors are being good enough to allow a client to "opt out" of a Designated Agency relationship at any time...this does the client no good if they cannot obtain representation from an outside source, at no additional cost to them.

The nasty thing is, the Realtors know, and are banking, on this. Sure...we'll give our clients the ability to transition to something else, but we're still going to get paid as if we gave them that for which they originally signed up, thanks to Procuring Cause and mandatory Realtor arbitration.

Unless there is language installed in the statute that prohibits companies from asserting procuring cause against a buyer agent that would take over in one of these failed Designated Agency situations...there is great harm done, basically at the eleventh hour, to any client who had previously consented--without understanding what was really at stake--to the Designated Agency relatioship.

Again, the key to Procuring Cause is that the original Designated Agent maintains the right to file a grievance against the second Realtor...potentially stripping the second Realtor of compensation, yet leaving that second Realtor with all of the liability that comes out of the negotiations phase, the most liability-laden aspect. In short, as long as Procuring Cause can be asserted in this scenario, no buyer agent will step in to work for free, thus denying the buyer the ability to get representation unfettered by the Designated Agency companies conflicts of interest.

The client's ability to bail from a Designated Agency situation is worthless as long as Procuring Cause remains in the equation...and this is true whether one is talking about 452.133(3)(1) or (2).

The fact is, a client should not be shanghai'd into remaining in either relationship, as there is rarely adequate disclosure of the real, let alone potential, conflicts of interest that come into play in these situations and, upon learning that they are not being well served, these former clients need a way to regain the services they have lost via Designated Agency, at no additional cost to them.

If buyers and sellers want true representation of their best interests, procuring cause cannot remain in place.

Also, the references to "Multiple Representation" need to be changed, of course, to accurately reflect the nature of the services.

452.133(3)(1) should be: "Firm-Level Dual Designated Agency" and (2) should be: "Licensee-Level Dual Agency". These terms should help to minimize confusion.

This is, arguably, the biggest, most nasty fraud that the Realtors are trying to perpetrate.

REAL-Reform Criticism #9 of WRA's LRB-1387/3 Draft
452.133(45) and (6), etc. -- Subagency Revisited

I'm not sure I even understand how 452.133(45) and (6) are numbered. I am positive that I don't understand the mangling of the English language found thereunder.

There is so much cross-referencing and mental gymnastics required to understand how subagency interacts across all of the different relationship spectrums, that I don't think I can even comment on what Rick Staff is trying to say.

I will say, though, this is what happens when one man tries to replace a concept that is built on common sense, and hundreds of years of precedent--the common law of agency--with the imaginations of his own mind and the desires of those who pull his strings, the big brokers of the WRA.

Interestingly, the common law of agency also allows for every service that the Realtors are seeking. The difference is, though, the abuse of clients under the common law can be very effectively punished...whereas the abuse of clients under Realtor fantasy laws leave the clients nowhere to turn for justice.

As for limited service, a licensee can simply refuse, contractually, to take on agency-level duties, thus never coming under the auspices of the common law in the first place. (Unless that licensee then began acting like an agent, a clear no/no if you're supposed to be neutral.)

Back to subagency...

As mentioned in REAL-Reform Criticism #4, Subagency Changes, it is crucial that subagency continues to extend all the way to the seller...to keep subagents from demanding higher fees from sellers...a practice which would make it so the appeal of limited service providers will be eliminated.

Again, if the discounts cannot remain...why even bother starting with a discount broker? Just go full, or fuller, service/price. It's sneaky protectionism, pure and simple.

If that's not so, then certainly the Realtors would agree that language could be installed, prohibiting subagents from requesting additional compensation from clients of other brokers...

These comments apply to anything relative to subagency, as I'm not sure that I've picked up all the statute numbers that speak to the practice.

REAL-Reform Criticism #10 of WRA's LRB-1387/3 Draft
Waiver of Duties & Various Disclosure Formats

On the issue of waiver of duties, I would like to reassert the objection that, beyond mere waivers, a firm that is only representing one party in a transaction MUST be statutorily released from providing any of the negotiation

duties, plus the duty regarding the provision of market information, when involved with non-client parties.

To do otherwise imposes the risk that the non-client party may not waive, thus robbing the client of the agency-level duties and services for which they are paying.

As for the variety of disclosure forms beginning at 452.135(2) and running very nearly to the end of the LRB draft, the disclosures are flawed to the degree that they contain any of the items to which REAL-Reform has objected in the other nine criticism pieces...and in our other supporting documentation.

Rather than rehash those issues, here, I would simply point back to those messages.

REAL-Reform Criticism #11 of WRA's LRB-1387/3 Draft
452.139(1) Complete Death of Common Law Protections

Indeed, this alteration is the height of arrogance and, I'm sorry to say--self-delusion--on the part of the Realtors.

If they succeed in eliminating the common law, as it pertains to real estate, period...then what body of law will be used to adjudicate any grievances that Wisconsin citizens may have?

Now, granted...the Realtors are very nearly removing all liability from themselves by the creation of this nightmare of a law in the first place, but, to the degree that the law itself does not remove every last vestige of consumer protection, where will a judge turn to consult precedent when lawsuits arise?

This clause negates common law protections, period. A sad, and very dangerous, idea.

Additional REAL-Reform Concern -- Regarding LRB-1387/FOUR
452.01(2)(am) Redefining Broker

In addition to all previous objections, REAL-Reform objects to the WRA's attempt to redefine "Broker" to include the language, "and based on criteria provided by the person...," as it could potentially be construed to mean that advertising or activities that are currently non-brokerage services offered by for sale by owner service providers could come under regulation by the DRL, something not currently required...and something that would--by necessity to provide additional duties--put those service providers out of business, by necessitating that they charge higher fees to cover their newly created liabilities.

The Wisconsin Realtors Association does not suggest changes to statute frivolously. Unfortunately, while not frivolous, the changes they foster are almost always intended to restrain trade, or protect what they consider to be their turf.

Either way, just as the Agency "Reform" Act of 1994 was anti-consumer and anti-small broker...and the WRA's attempt to bring Designated Agency to Wisconsin in 2002 was anti-consumer

and anti-small broker, so too, is this particular change--as is every other aspect of their current proposed legislation--anti-consumer, anti-small broker and, with this particular clause, anti-fsbo service provider, too.

REAL-Reform Summation of WRA's LRB-1387/3 and 4
It's About Protectionism and Profits, Not Consumerism

The WRA attorneys and lobbyists are masters of deception. In 1994, they succeeded in creating legislation that robbed each and every Wisconsin home buyer and seller of the right to representation in a real estate transaction.

The sad part is, the theft was planned, as it was supposed to eliminate the threat and influence of the concept of true, fiduciary buyer agency.

Why would the WRA care about that? Because the big brokers who control the WRA realized that as consumers began to demand true buyer agency services...revenue from the in-house transaction would radically decline.

This is still their concern, today.

Their proposed agency reforms are still about the in-house transaction, with the added desire, this time, of removing the appeal of limited service brokerage.

While they would like you to believe that this is about consumerism and consumer choice, I challenge anyone to point out any aspect of this that does not benefit the large brokerage constituencies that control the WRA...at the expense of the clients that pay their fees.

When it comes to agency level services, the common law of agency is the gold standard...the only tried and true method of delivering services that are in the best interests of the clients who retain agents.

If firms want to practice "Designated Agency" the common law allows for that. The difference is that if they don't keep their promises, the liability continues to accrue to them, unlike the result under the WRA proposal...which is to tranfer that liability to the client.

And, for those who do not wish to practice as common law agents, but would instead prefer to offer limited services, they simply need to contractually limit the services they provide...and then avoid acting as if they are representing anyone.

All of this is a matter of proper education of licensees. In the late 1980's that education had begun, but the NAR and State Associations brought that education to a screeching halt, as soon as the big brokers recognized the damage that adherence to the common law of agency would bring to their in-house transactions.

Once the law is returned to the common law of agency, there is nothing to stop the DRL from using old source materials about the common law of agency to begin teaching, again, that which was abandoned--due to protectionism--nearly

twenty years ago.

The choice is clear, Realtor protectionism and restraint of lawful trade...or consumerism and protection of client rights.

The WRA favors and promotes the former...REAL-Reform favors and promotes the latter.

Soon, we hope to have our bill draft out so that you can view for yourself how different the two approaches really are.

Thank you, again, for your time...and please feel free to contact me with any questions you may have.

Sincerely Yours,

Jay Reifert, Organizer/Director of Operations
REAL-Reform (Real Estate Agency Law-Reform)

http://www.real-reform.org

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http://www.true-agent.com or http://www.buy-madison-real-estate.com
or mailto:true-agents@true-agent.com

Jay Reifert

From: "Jay Reifert" <true-agents@true-agent.com>
To: <celia.jackson@drl.state.wi.us>
Cc: <sandra.rowe@drl.state.wi.us>; <larry.martin@drl.state.wi.us>; "Black, William" <William.Black@drl.state.wi.us>; "Gary Goyke" <gnregoyke@mailbag.com>; "Gary R. Goyke" <gary@wcblind.org>
Sent: Wednesday, August 24, 2005 12:37 AM
Subject: Review and Reconciliation -- REAL-Reform Criticism of LRB 1387/4 <-------Note: 4th Draft

Dear Secretary Jackson & Staff,

This brief message is so that you will know that I've also reviewed the latest version of the WRA's proposed Bill, LRB 1387/4.

Other than accounting for a few numbering discrepancies, REAL-Reform's objections remain the same as they were in the "Consolidated REAL-Reform Criticisms of the WRA's LRB-1387/3 Agency Law Draft" which was sent to you earlier this evening.

The numbering changes from one draft to the next are as follows:

In the fourth draft, LRB-1387/4, 452.133(2m)(a) and (b) correspond to what was identified as 452.133(3)(1) and (2) in LRB-1387/3. The "REAL-Reform Criticism #8 of WRA's LRB-1387/3 Draft, Concepts of Fantasy and Confusion" address these concepts and remains unchanged.

Also, in the fourth draft, LRB-1387/4, 452.133(4) and (5) correspond to what was identified as 452.133(45) and (6) in LRB-1387/3. The "REAL-Reform Criticism #9 of WRA's LRB-1387/3 Draft 452.133(45) and (6), etc. -- Subagency Revisited" address these concepts and remains unchanged.

Lastly, in the fourth draft, LRB-1387/4, 452.133(6) is numbered the same as it was in the third draft, however I do note that I didn't identify that concept by its section number and paragraph in the criticism that was titled, "REAL-Reform Criticism #10 of WRA's LRB-1387/3 Draft, Waiver of Duties & Various Disclosure Formats."

REAL-Reform's criticism of 452.133(6), as with all other aspects of the WRA's LRB-1387/4 remains unchanged. We find the legislation to be anti-consumer, anti-small broker and anti-for sale by owner, fsbo, advertiser, too.

REAL-Reform remains opposed to LRB-1387/4 and all previous versions. Thank you for your continued interest in our commentary on the WRA's bill drafts.

Sincerely Yours,

Jay Reifert, Organizer/Director of Operations
REAL-Reform (Real Estate Agency Law-Reform)

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Jay Reifert

From: "Jay Reifert" <true-agents@true-agent.com>
To: <celia.jackson@drl.state.wi.us>
Cc: <sandra.rowe@drl.state.wi.us>; <larry.martin@drl.state.wi.us>; "Black, William" <William.Black@drl.state.wi.us>; "Gary Goyke" <gnregoyke@mailbag.com>; "Gary R. Goyke" <gary@wcblind.org>
Sent: Thursday, August 25, 2005 9:03 AM
Subject: Crucial Point About Procuring Cause -- REAL-Reform Criticism of LRB 1387/4 -- 452.133(2m)(a) and (b)

Dear Secretary Jackson & Staff,

With regards to 452.133(2m)(a) and (b) of the fourth draft of LRB-1387, I would like to draw extraordinary attention to the fact that consumers who initially consent to either relationship described, do not have any way of escaping the impact of procuring cause.

It is crucial...absolutely crucial, that consumers understand the inherent conflicts of interest of the relationships above, and that they have a way to extricate themselves, without losing--due to undisclosed procuring cause--the ability to seek a buyer's agent who will be completely true to them, later on in a transaction.

So, we need disclosure of the hazards of the relationship, and meaningful disclosure of the existence of procuring cause and the fact that it will preclude a buyer from jumping to another firm for representation, whether as a result of the relationships set forth above, or as a result of seeing a property without any kind of buyer agency agreement. (Yes, procuring cause applies to situations where the licensee with whom the buyer is working is the agent for the seller, too. In fact, that's where procuring cause started.)

Once again, here are the earlier provided procuring cause links:

http://www.ired.com/news/2001/0102/procuringcause.htm

http://www.ired.com/news/2000/0008/moneysecret.htm

http://www.ired.com/news/2000/0008/pcmyths.htm

Sincerely Yours,

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Sent: Thursday, August 25, 2005 9:13 AM
Subject: State Bar Board of Governors to Oppose LRB-1387

Dear Secretary Jackson & Staff,

Allow me to be the first to share with you what I perceive as some excellent news! The State Bar Board of Governors is opposing LRB-1387, according to the following article from their website.

http://www.real-reform.org/state_bar_opposition.pdf

While I don't necessarily agree with every premise they have stated, I do feel that any entity which can help stop the Realtors from getting their anti-consumer, anti-small broker, Realtor protectionist legislation passed, is an ally to the consumer/citizens of Wisconsin.

Sincerely Yours,

Jay Reifert, Organizer/Director of Operations
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Clarification:

Actually, to be accurate, the State Bar has not yet come out against the WRA proposal, as they have not likely seen it, yet.

However, what they reference in their opposition, is the recommendations of the Wisconsin Realtors Association's License Law Task Force Report--which was provided to them by me--and which mirrors the substance of the WRA Bill Drafts. JR