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CLEARINGHOUSE RULE 94–174

Comments

[NOTE: All citations to "Manual" in the comments below are to the Administrative Rules Procedures Manual, prepared by the Revisor of Statutes Bureau and the Legislative Council Staff, dated October 1994.]

1. Statutory Authority

a. It appears that the definition of "brokerage service," set forth in s. RL 24.02 (3), is different than the definition of that term provided in s. 452.01 (3e), Stats., as created by 1993 Wisconsin Act 127. This discrepancy should be corrected.

b. It appears that in the definition of the term "material adverse fact," in s. RL 24.02 (12), the phrase "decision to enter into a contract or agreement concerning a" was inadvertently deleted. [See s. 452.01 (5g), Stats., as created by 1993 Wisconsin Act 127.]

c. Section RL 24.025 (1) states that licensees owe the duties under s. 452.133 (1) to their clients and customers. This statement conflicts with s. 452.133 (1) (intro.), Stats., which states that licensees owe those duties to all parties to a transaction, rather than only to a licensee's clients and customers. This discrepancy is significant because the definition of "customer," provided in s. 452.01 (3s), Stats., does not include any parties to a transaction who are not provided brokerage services by a broker.

2. Form, Style and Placement in Administrative Code

a. The correct way to express a mandatory or absolute duty or directive is through the use of the word "shall." The word "may" is used to denote an optional or permissive privilege, right or grant of discretionary authority. Several sections of the rule should be rewritten to conform with this drafting style. Specifically, in s. RL 24.025 (1), the phrase "Licensees owe their clients and customers the duties..." should be changed to "Licensees shall

perform the duties in...." In s. RL 24.05 (2), in the last sentence, the phrase "it shall be competent practice for the licensee to" should be changed to "a licensee may." In the last sentence of s. RL 24.07 (1) (c), "shall" should replace "must." In addition, the first sentence in s. RL 24.07 (8) (b) 2 would be clearer if it were rewritten as follows:

> No listing broker or listing broker's salesperson may permit other brokers to act as subagents in the sale of a property or business opportunity unless the listing broker or salesperson has received the seller's authorization.

b. The second sentence in s. RL 24.025 (2) is confusing and should be rewritten. Also, is a definition needed for the term "subagency"?

c. It appears that the information provided in the second sentence of the Note following s. RL 24.025 is not useful and, in fact, is confusing because it lists information which may or may not be considered confidential depending upon each individual circumstance. Because the statute refers to information that a licensee knows a "reasonable party would want to be kept confidential," and the Note describes some information that a reasonable party might want to be kept confidential, the information is superfluous and confusing.

d. Introductory material should end in a colon and lead into the subunits that follow. [See s. 1.03 (8), Manual.] This is done correctly in current s. RL 24.07 (1) (intro.), but not in proposed s. RL 24.07 (1) (intro.). This (intro.) should either be redrafted or be renumbered to be par. (a).

e. In the first sentence in s. RL 24.07 (2), it appears that the terms "licensee" and "broker" are used interchangeably. For purposes of clarity, only one of these terms should be used.

f. It appears that s. RL 24.07 (6) is incorrectly numbered in SECTION 16 and should be numbered s. RL 24.07 (5). Also, it is not clear why s. RL 24.07 (5) is being repealed and recreated since no changes appear to have been made in the text of the rule.

g. The treatment clause in SECTION 18 should state that s. RL 24.07 (7) is repealed. A new s. RL 24.07 (8) should be created in a separate SECTION.

h. It appears that the information contained in the first sentence of the Note following s. RL 24.07 (8) is substantive in nature and should be placed in the text of the rule.

4. Adequacy of References to Related Statutes, Rules and Forms

a. In the analysis of the rule, it should be made clear that certain statutory sections referred to were "created by 1993 Wisconsin Act 127," since those sections do not yet appear in the bound volumes of the Wisconsin statutes.

b. A cross-reference should be added to s. RL 24.02 (14) to identify the "written report" referred to in the last sentence.

5. Clarity, Grammar, Punctuation and Use of Plain Language

a. Section RL 24.02 (15) would be clearer if reorganized to read as follows:

> "Secured lender" means an individual or organization originating a loan in a real estate or business opportunity transaction secured by real estate or by the assets of a business or a business opportunity.

b. Section RL 24.05 (3) states that an exception to that rule is set forth in s. 452.19, Stats. It is not clear that that statutory section actually sets forth an exception to the requirement to disclose the information required in the rule. Rather, s. 452.19, Stats., appears to set forth an additional requirement that anyone receiving compensation for a referral must be properly licensed.

c. It appears that in s. RL 24.07 (7) [which apparently has been renumbered sub. (8)], the phrase "transaction is" in the second sentence should be changed to "services are."