



WISCONSIN LEGISLATIVE COUNCIL ACT MEMO

2005 Wisconsin Act 87
[2005 Assembly Bill 783]

Real Estate Practice

2005 Wisconsin Act 87 makes several changes to current law regarding real estate practice.

Brokers' Duties to Parties and Clients

Under current law, a broker providing brokerage services owes certain duties to all parties to a transaction, including the duties to: (1) provide brokerage services to all parties honestly, fairly, and in good faith; (2) when negotiating on behalf of a party, present contract proposals in an objective and unbiased manner and disclose the advantages and disadvantages of the proposals; and (3) account for all property coming into the broker's possession within a reasonable time after receiving it.

The Act repeals a broker's duty to provide brokerage services in good faith and replaces a broker's duty to account for property within a reasonable time with a duty to safeguard property held by the broker according to rules promulgated by the Department of Regulation and Licensing under authority granted by current law.

Under current law, a broker owes to the broker's client all the duties owed to a party, and additional duties to: (1) loyally represent the client's interests by placing the client's interests ahead of the interests of any other party; (2) disclose to the client all material information known to the broker and not known to the client or discoverable through reasonably vigilant observation, unless the information is confidential; and (3) fulfill any legal obligation required by the agency agreement and any legal order by the client that is within the scope of the agency agreement.

This Act modifies the duty to loyally represent the client's interests. Under the Act, a broker satisfies this duty by doing the following: (1) placing the client's interests ahead of the broker's interests; and (2) placing the client's interests ahead of the interests of nonclients in the transaction by not disclosing information and advice to nonclients if disclosure is contrary to the client's interests. The Act also creates a duty to provide, upon the client's request, information and advice on matters that are

This memo provides a brief description of the Act. For more detailed information, consult the text of the law and related legislative documents at the Legislature's Web site at: <http://www.legis.state.wi.us/>.

material to a transaction and a duty to negotiate on behalf of a client. Under the Act, a client may waive the broker's duty to negotiate, but only in writing.

Brokerage Services

Under current law, a person may not engage in brokerage services unless the person is a licensed broker. Currently, brokerage services include promoting certain transactions in real estate or business opportunities. This Act specifies that brokerage services include promoting certain transactions in real estate, time shares, or businesses or their goodwill, inventory, or fixtures, whether or not the business includes real property.

Under current law, a broker may not provide brokerage services to a party to a transaction without an agency agreement that authorizes the broker to provide the services. The agency agreement must contain a statement of the terms and conditions of the brokerage services that the broker will provide. Also under current law, a broker may not provide brokerage services to a party or a client unless the broker has provided the party or client with a disclosure form that: (1) identifies the broker's clients in the transaction; (2) states the broker's duties to the broker's clients; (3) states the broker's duties to a party; and (4) contains a statement, the text of which is prescribed by current law, describing the broker's duties to disclose certain known defects affecting a property and to maintain the confidentiality of certain other information.

Under the Act, a broker may provide brokerage services to any person in a transaction, whether or not the broker has entered into an agency agreement with a party to the transaction or has been engaged to provide brokerage services in the transaction as a subagent. However, a broker may not negotiate on behalf of a person who is not the broker's client unless another party to the transaction is the broker's client or is a client of another broker who has engaged the broker to provide brokerage services in the transaction as a subagent. In addition, the broker must provide to the party a disclosure form stating the broker's duties to a person receiving brokerage services from the broker. The Act deletes the requirements that the disclosure form identify the broker's client in the transaction and state the broker's duties to the broker's client. Under the Act, the disclosure form summarizes the broker's duties to parties and the broker's disclosure and confidentiality duties.

The Act creates a separate disclosure form for a broker's client. Under the Act, a broker is required to provide the form to a client not later than the time the broker enters into an agency agreement with the client. The client disclosure form summarizes the broker's duties to clients, the broker's disclosure and confidentiality duties, and the broker's duties if the client is involved in a transaction in which another party is also the broker's client. The client disclosure form also contains a space for the client to indicate whether the client consents to certain multiple representation relationships.

Under the Act, if a broker is providing services to a person in a transaction in which no party is the broker's client or a client of another broker who has engaged the broker as a subagent, the broker may not provide to any party advice or opinions relating to the transaction if doing so is contrary to the interests of the person or another person receiving services from the broker.

The Act also modifies the current definition of "negotiate." The Act specifies that providing advice or opinions that are material to a person's transaction or showing real estate to a party does not, in and of itself, constitute negotiation.

Subagency

This Act defines a subagent as a broker who is engaged by a principal broker to provide brokerage services in a transaction but who is not the principal broker's employee. A broker may not engage another broker to provide brokerage services to the broker's client as a subagent unless the agency agreement between the broker and the client authorizes the broker to engage a subagent.

Under the Act, a broker who has been engaged to provide brokerage services in a transaction as a subagent owes all parties the duties owed by a broker who is not a subagent. Additionally, in a transaction in which a subagent has been engaged by a principal broker, a subagent may not place the subagent's interests ahead of the interests of the principal broker's client in the transaction, or provide advice or opinions to parties in the transaction if doing so is contrary to the interests of the principal broker's client. A broker who has been engaged by another broker as a subagent does not owe the principal broker's client the additional duties that a broker owes to the broker's own client.

Multiple Representation Relationships and Designated Agency

Currently, a broker may not provide brokerage services to more than one client in a transaction, referred to as "multiple representation relationships," unless the broker has entered into an agency agreement with, and made certain written disclosures to, each client, and each client has given written consent. Under current law, a broker who represents more than one client in a transaction may not place the interests of any client ahead of the interests of another client in the transaction.

Under the Act, if a broker's client does not give written consent to multiple representation relationships or if the client withdraws such consent, neither the broker nor the broker's employees may place the interests of any client ahead of the interests of any other in negotiations. A client may withdraw consent to multiple representation relationships at any time by written notice to the broker.

Also under the Act, if a client consents to multiple representation relationships, the client may also consent to receiving negotiation services from an employee of the broker who is not providing negotiation services to another client of the broker in the transaction.

This is referred to as "designated agency." In a designated agency relationship, the broker's employee may provide to the client on whose behalf the employee is negotiating information, opinions, and advice to assist the client in the negotiations, whether or not the information, opinions, and advice place the interests of one of the broker's clients ahead of the interests of another client of the broker.

If a client consents to multiple representation relationships but not to designated agency, the broker and the broker's employees may not place the interests of any client ahead of the interests of any other in negotiations.

Broker Liability

Current law provides that duties imposed on brokers by statutes or by rules supersede fiduciary duties the broker has to a party based on common law principles of agency, to the extent that common law is inconsistent with the statutes or rules.

Under the Act, a broker's duties under the statutes or rules supersede any inconsistent common law duties or obligations, not just fiduciary duties based on agency principles.

Under current law, a broker must supervise, and is responsible for, the acts of any broker, salesperson, or time-share salesperson employed by the broker. Under the Act, a broker is responsible for brokerage services provided on behalf of the broker by a broker, salesperson, or time-share salesperson employed by the broker.

Effective Date: The Act takes effect on July 1, 2006.

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