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Legal Update

A WRA Publication Exclusively for the Designated REALTOR®

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Electronic Commerce and E-Mail Delivery

While electronic transactions are becoming more commonplace, these electronic contractual arrangements have raised complex legal issues unprecedented in the law. Courts must now deal with agreements created on Web sites, via CD-ROMS and in e-mails. This means that the existing legal doctrines must be evaluated and applied to address these new means of entering into a contract through modern technology.

Contracting in cyberspace is the new game in town, but not everyone is entirely clear about all of the rules. Every day thousands of people enter into legally binding relationships on the Internet without knowing and/or understanding all of the rules. Electronic commerce was originally introduced as a topic in the September 2004 *Legal Update*, "Electronic Commerce Law," online at www.wra.org/LU0409, and in the E-Commerce REALTOR® Resource page at www.wra.org/e-commerce.

That discussion is continued in this *Legal Update*, which attempts to further analyze practical application of electronic commerce and technologies in daily real estate practice. This *Legal Update* introduces and evaluates these e-commerce laws with respect to the ability of REALTORS® to use e-commerce in their real estate transactions. An overview of the concepts and definitions under the Wisconsin E-Commerce law is followed by a discussion of the federal E-Sign requirements for obtaining electronic consumer consent to the use of electronic signatures and documents in consumer transactions. Further discussion of the E-Commerce requirements concludes

with a detailed, step-by-step description of the process for incorporating the parties' consent to the use of electronic delivery and electronic signatures into Wisconsin real estate contracts. Sample contract language for obtaining consent to electronic signatures and documents under E-Sign and for incorporating electronic delivery and electric signatures into real estate contracts is provided and explained.

Wisconsin E-Commerce

Wisconsin's electronic commerce law provides a framework for the use of electronic records and electronic signatures in real estate and other transactions. The state's E-Commerce law in Wis. Stat. §§ 137.11-137.26 (www.legis.state.wi.us/statutes/Stat0137.pdf) allows electronic documents to replace paper documents if certain requirements are met, and gives direction to businesses that have been uncertain in the past how traditional contract laws and government regulations would be applied in electronic transactions.

Uniform Electronic Transactions Act

In 1999, the National Conference of Commissioners on Uniform State Laws approved the Uniform Electronic Transactions Act (UETA) and recommended it for enactment in all states. UETA establishes a legal framework that removes the barriers to electronic commerce and facilitates, validates and effectuates electronic records and signatures and certain electronic transactions. Wisconsin's E-Commerce law, passed in 2004 is based on UETA, which has now been adopted in 48 states.

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Chapter 137 of the Wisconsin Statutes enacts UETA in Wisconsin with minor, non-substantive changes necessary to incorporate UETA into existing statutes. UETA generally provides that, upon mutual agreement of the parties, electronic records and electronic signatures will have the same legal effect and enforceability as written records.

The Wisconsin law applies only to transactions between parties who have agreed to conduct transactions by electronic means. The determination of whether the parties have agreed to conduct a transaction by electronic means is to be determined from the context and surrounding circumstances, including the parties' conduct. If the parties have agreed to

carry out a transaction by electronic means and a law requires a person to provide additional information in writing to another person, a party may satisfy this requirement if the information is provided in an electronic record capable of retention by the recipient at the time of receipt.

The Wisconsin E-Commerce law establishes the following principles:

- A document or signature may not be denied legal effect or enforceability solely because it is in electronic form.
- A contract may not be denied legal effect or enforceability solely because an electronic document was used.
- If a law requires a document to be in writing, an electronic document

E-Commerce Definitions

Consumer: An individual who obtains, in a transaction, real estate that is used primarily for personal, family or household purposes.

Electronic Records: Records that are created, generated, sent, communicated, received or stored by electronic means. These records or documents may or may not also exist in writing. "Electronic records" will be referred to in this *Update* as electronic documents. Any contract, amendment, notice or document that is transmitted by e-mail becomes an electronic record or electronic document. Think of the documents saved on your computer or sent or received as an attachment to e-mail – these are electronic documents.

Electronic Signature: An electronic sound, symbol, or process attached to or logically associated with a document and executed or adopted by a person with the intent to sign the document. Just like you can legally "sign" a printed document by making your mark, whether that be your cursive signature in ink or an "X," so you can "sign" an electronic document by making your mark, whether that be a high-tech encrypted or

digital signature or your name typed in the signature line or space on an e-mail or document on the computer. These are all electronic signatures. If you sign a paper document in ink and then scan the document and save it on your computer, the scanned and digitized image of the cursive signature on the electronic document is also an electronic signature.

Non-Consumer Transaction: A commercial, business, vacant land or other transaction in which neither party is a consumer.

Record: Information that is inscribed on a tangible medium or is stored in an electronic or other medium and is retrievable in a perceivable form. In plain language, a record is a contract, notice, disclosure or other document. A "record" will be referred to in this *Update* as a document.

Transaction: An action or set of actions occurring between two or more persons relating to the conduct of business or commercial or governmental affairs. The definition of a transaction is broad enough to cover all aspects of a real estate transaction for the sale, lease, exchange or other disposition of real estate.

satisfies that requirement.

- If a law requires a signature, an electronic signature satisfies that requirement.

Wisconsin E-Commerce law does not require the use of electronic documents or electronic signatures. It is important to understand that the law is not a digital signature law; it is technology neutral. The law applies only when the parties have agreed to conduct their transaction by electronic means. This agreement is determined from the context, the surrounding circumstances and the parties' conduct.

 **REALTOR® Practice Tips:** All of these general electronic commerce principles apply in Wisconsin real estate transactions, but REALTORS® must keep in mind that additional requirements come into play whenever one or more parties to the transaction is a consumer.

Contracts & Notices that Cannot be Electronic

Some types of transactions are excluded from the E-Commerce law, such as wills and certain trusts and many Uniform Commercial Code transactions. Wis. Stat. § 137.12 also provides that certain records, documents and notices are exempt from coverage and thus may not be provided on an electronic basis. They must instead be provided in writing. Specifically, E-Commerce law does not apply to:

- a. Records governed by any law relating to adoption, divorce or other matters of family law;
- b. Notices provided by a court;
- c. Court orders; or
- d. Official court documents, including briefs, pleadings and other writings required to be executed in connection with court proceedings.

All of these documents must be in writing. In addition, E-Commerce law

does not apply to notices provided and governed by existing law with regard to:

- a. The cancellation or termination of utility services, including water, heat and power service;
- b. Default, acceleration, repossession, foreclosure, or eviction, or the right to cure under a credit agreement secured by or a rental agreement for a primary residence of an individual;
- c. The cancellation or termination of health insurance or benefits or life insurance benefits, including annuities;
- d. Recall or material failure of a product that risks endangering health or safety; or
- e. A law requiring a document to accompany any transportation or handling of hazardous materials, pesticides or other toxic or dangerous materials.

Consent by Action

In many situations, Wisconsin law only requires brokers and parties to consent to do business electronically by their actions. The law simply states that, "Whether the parties agree to conduct a transaction by electronic means is determined from the context and surrounding circumstances, including the parties' conduct." Therefore, an individual contacting a broker by e-mail or asking for property information from a broker's Web site is signifying by his or her actions an agreement to work with the broker electronically. REALTORS® can safely rely on the person's conduct to approve electronic communications of this sort. If the person's actions indicate approval of electronic communication, Wisconsin E-Commerce law allows brokers to continue to distribute property information and other advertising electronically and communicate electronically on Internet sites and by e-mail without any formal consent process.

This works because there is no law that requires that individuals receive property information in writing.

 **REALTOR® Practice Tips:** REALTORS® may forward property information to consumers and non-consumers without any special consent other than their actions, subject to the CAN-SPAM law. The federal CAN-SPAM Act applies to all commercial e-mails: "any electronic mail message the primary purpose of which is the commercial advertisement or promotion of a commercial product or service." The CAN-SPAM is discussed on Pages 12-16 of the August 2005 *Legal Update*, "Federal laws Impacting REALTOR® Practice," online at www.wra.org/0508.

Party Consent for Real Estate Transaction Documents

In non-consumer transactions in which the broker is willing to use electronic documents and the party working with the broker consents to use electronic documents, that party may receive electronic copies of documents from the broker, sign them electronically and return them electronically to the broker. When both parties consent to use electronic documents, they will be able to receive, sign and deliver transaction documents, such as e-mail offers, counter-offers and other documents, electronically.

WRA Addendum D

REALTORS® working in non-consumer transactions – commercial, business or vacant land transactions in which neither party is a consumer – may wish to indicate in their contracts that they will use e-mail as a method of delivery of notices and documents. This may be indicated in Additional Provisions or using the WRA's Addendum D – Electronic Document Delivery, a copy of which appears at the end of this *Update*. Another copy of the form is also available on the

E-Commerce REALTOR® Resource page at www.wra.org/e-commerce, and will soon be available in ZipForm. Addendum D may be used as an attachment for offers to purchase, listing contracts, buyer agency agreements, exchange agreements, option agreements and any other contracts in which electronic commerce and e-mail delivery is desired. If the form is used with a listing contract, the seller and the listing broker would complete the form; if the form is used in an offer, both parties and brokers would complete Addendum D.

Addendum D contains a paragraph with regard to consumer transactions and provides a check-box for indicating that a party has given electronic consent, but these features do not apply to parties who are not consumers, that is, an individual who purchases or obtains property that is used primarily for personal, family or household purposes.

 **REALTOR® Practice Tips:** Addendum D may be used in cases where the consent to the use of electronic documents, electronic signatures and e-mail delivery is based on the parties' actions and conduct only when neither party is a consumer. If a party is a consumer, then an additional step must be taken before Addendum D, authorizing e-commerce in a real estate transaction, may be executed by a consumer.

Electronic Signatures in Global and National Commerce Act

Congress enacted the Electronic Signatures in Global and National Commerce Act (E-Sign) effective October 1, 2000. E-Sign was designed to foster the expansion of electronic commerce, encourage uniform regulation of electronic transactions, maintain the

effectiveness of consumer protection laws, and provide legal certainty for companies using electronic contracts and procedures in business.

E-Sign promotes the use of electronic contract formation, signatures and record keeping by establishing a legal equivalency between contracts written on paper and contracts in electronic form, pen and ink signatures and electronic signatures, and other legally required written documents and the same information in electronic form. If there is no writing required by another law, then E-Sign does not apply.

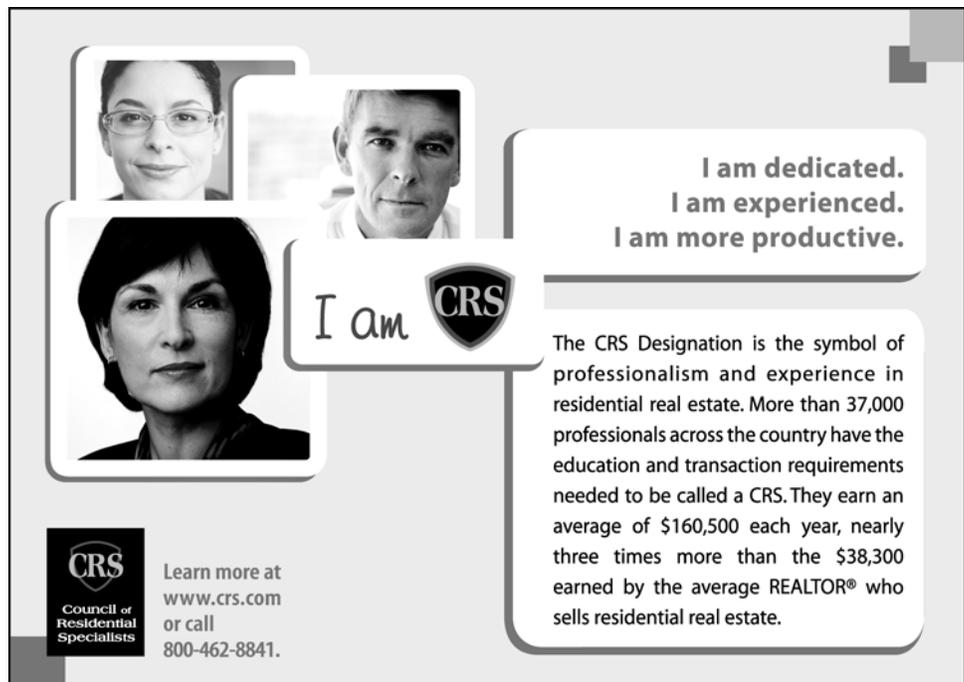
If all parties to a contract choose to use electronic signatures and records, E-Sign generally grants recognition to those methods. E-Sign confirms that no contract, signature or record will be denied legal effect simply because it is in electronic form.

However, E-Sign also pays homage to those federal, state and local laws that require that consumers receive information, notices and disclosures in writing. To the extent that these laws require paper, E-Sign supersedes them, allowing an electronic form

only if all parties agree electronically and only if the E-Sign special requirements for electronic notices and disclosures in consumer transactions have been met. E-Sign seeks to ensure that existing consumer protections based on paper disclosures to consumers are not undermined by the use of electronic records and disclosures in cases where the consumers do not have the capability to receive such disclosures or may not fully be aware of the consequences of agreeing to receive documents electronically.

Relationship Between Federal E-Sign and Wisconsin E-Commerce Laws

E-Sign supersedes state laws that are inconsistent with its provisions, with some exceptions. One of the exceptions permits a state to override the effect of the primary electronic commerce provisions of the federal law by enacting a law that constitutes an enactment of UETA. Because Wis. Stat. Chapter 137 makes no significant changes to the substance of UETA, Wisconsin's E-Commerce law supersedes and supplants the primary electronic commerce provisions of



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E-Sign in this state. There is one category of transactions, however, to which the federal law still applies – transactions involving consumers.

Although the drafters of Wis. Stat. Chapter 137 intended to adopt UETA, and thus have state law supersede the federal E-Sign, they also intended to preserve the consumer protections that are contained in the federal E-Sign law. While Wisconsin E-Commerce law governs electronic documents, signatures, records and transactions in Wisconsin, Wis. Stat. § 137.12(2p) indicates that the consumer protection features of E-Sign will govern Wisconsin transactions. Thus, parties in Wisconsin must comply with the E-Sign consumer requirements (contained in 15 U.S.C. § 7001(c)) even though the rest of E-Sign is preempted in Wisconsin.

E-Sign Consumer Requirements

Federal E-Sign law provides, with respect to consumers, that whenever a statute, regulation or other rule of law requires that information relating to a transaction be provided in writing, electronic documents may be used only if certain disclosures are first provided to the consumer and the consumer consents electronically to the use of electronic documents and signatures. Wisconsin E-Commerce law does not override this federal requirement.

E-Sign and its consumer requirements apply to “any transaction in or affecting interstate or foreign Commerce.” The vast majority of real estate transactions affect interstate commerce, so for the purposes of this *Legal Update*, it is assumed that Wisconsin consumer real estate transactions are subject to E-Sign and its consent rules.

Consumer Transactions

E-Sign’s consent requirement only applies when a consumer will be using and receiving electronic documents in place of the written docu-

ments otherwise required by law. A consumer is defined by E-Sign as “an individual who obtains, through a transaction, products or services which are used primarily for personal, family, or household purposes, and also means the legal representative of such an individual.” It might appear that consumers buying or selling real estate are not receiving a product. However, the definition of a transaction under E-Sign clearly includes real estate transactions in which there is a “sale, lease, exchange, or other disposition of any interest in real property.” In addition, consumers who are parties to a brokered real estate transaction are receiving services.

E-Sign’s consent requirements apply to most transactions in which individuals are buying or selling residential properties because they will be using the property or the proceeds for personal, family or household purposes.

However, not all parties in real estate transactions are consumers. Transactions that are strictly commercial or involving two businesses as parties are not consumer transactions and are not subject to the E-Sign consent requirements. For example, a developer buying a house to tear it down and to use the land for a large condo development is not a consumer, so E-Sign compliance is not required.

It may be less obvious in other transactions whether they are for personal, family or household purposes, or for business or commercial purposes. When transactions do not neatly fall into one category, prudent practice will dictate treating them as consumer transactions and complying with the consumer consent requirements.

For example, when a “mom and pop” landlord sells a duplex or a young entrepreneur buys a small commercial property to rehab without knowing what she will do with the property, it is not necessarily clear if this is a consumer transaction. Note that the

standard is that the person obtained products (real estate) or services (brokerage services) used primarily for personal, family or household purposes. It is the “personal, family or household” nature of the transaction that triggers the consumer consent requirement, not necessarily the type of real estate involved. In both of these examples the brokerage services provided to the party arguably are used for personal purposes. Prudent brokers may choose to incorporate E-Sign consents into all real estate transactions unless they are clearly not providing products or services that are used primarily for personal, family or household purposes.

Documents Required to Be in Writing

What documents must be provided in writing in a consumer real estate transaction?

The E-Sign consent requirement generally applies to any information, including real estate transaction disclosures, signatures, contracts and other documents, that is required to be in writing for consumers under applicable law. Obviously agency disclosures, offers, listings, buyer agency agreements, amendments and addenda with respect to these documents, Chapter 709 real estate condition reports, lead-based paint disclosures and many other real estate transaction documents must be in writing under current law. Once a listing, buyer agency agreement or offer has been entered into, these documents themselves require that notices and documents be delivered in specific ways. Arguably, if those documents are to be delivered by e-mail in electronic format, they too will be subject to first having the Consent form from the consumer since they are part of the implementation of documents required to be in writing. Therefore, subject to certain exceptions, if a Wisconsin real estate licensee wishes to replace written real estate documents with electronic real estate docu-

ments, the required federal disclosures must be made, and the consumers in the transaction must consent electronically as required under E-Sign.

What documents are not required to be in writing under the laws applicable to consumers?

Spec sheets and property information delivered to a consumer before any agency relationship is entered into may be exchanged based upon the general electronic commerce principles.

E-Sign Disclosure and Electronic Consent Requirements

The theory behind E-Sign is that consumers are agreeing to use electronic documents in the types of transactions in which the law otherwise requires written documents for the protection of consumers. The E-Sign consent process strives to assure consumers that they will enjoy similar protections when using electronic documents instead of written documents.

1. The E-Sign disclosure and consent requirement is unique in that consumers *must consent electronically – written consent is not sufficient.*

E-Sign Consumer Requirements

E-Sign dictates that, if a consumer or broker wishes to use electronic documents in the place of the written documents otherwise required by law, the obligation to use written documents will be satisfied when using electronic documents only if the following disclosure and consent requirements are first met:

1. **Disclosures.** The consumer is provided with a clear and conspicuous statement containing the following information:
 - The consumer's right to have the documents provided on paper.
 - The consumer's right to withdraw his or her consent to the use of electronic documents and any applicable fees or other con-

sequences that may result upon a consumer's withdrawal of consent (for example, a possible termination of the parties' relationship).

- Whether the consumer's consent applies only to a particular document or to broader categories of documents that may be provided during the course of the transaction.
 - How the consumer may obtain a paper copy of an electronic document, and whether any fee will be charged for the copy.
 - The procedures the consumer must use to update the consumer's contact information.
 - The procedures the consumer must use to withdraw consent.
 - A statement of the hardware and software requirements needed to open and save the electronic documents.
2. **Hardware or Software Changes.** If the hardware or software requirements change, the new requirements must be given to the consumer who must approve them.
 3. **Electronic Consent.** The consumer has affirmatively consented to the use of electronic documents. This consent must be given electronically, in a way that shows that the consumer can access, open and save electronic documents in the format that will be used in the transaction.

WRA E-Sign Consent Form

The WRA has developed a sample form that REALTORS® may use when they and their clients and customers want to use electronic documents, signatures and e-mail delivery in their transactions. A copy of the Consent for Use of Electronic Documents and Signatures in Consumer Real Estate Transactions form (Consent form) appears at the end of this *Update*. This sample consent form was designed so that WRA members may attach it or incorporate it into their e-mails.

A copy that can be attached to or incorporated into e-mails appears in both PDF and Word format on the E-Commerce REALTOR® Resource page at www.wra.org/e-commerce.

When should a broker use the E-Sign consent form? If a broker anticipates using an electronic agency disclosure form or electronic contracts, the broker will want to have the consumers in the transaction consent to the substitution of electronic forms for written forms in advance. The consumer must give his or her consent via e-mail, on a Web site or in some other manner whereby the consumer electronically accepts the broker's disclosures and approves the use of electronic documents. With a consent form on a broker's Web site, the consumer may signify his or her consent using a "click-through" agreement. By incorporating the WRA's Consent form into broker Internet sites or attaching it to e-mails, brokers and consumers will be able to fully enjoy the benefits of electronic commerce.

The Consent form will work adequately for brokers sending parties forms in PDF or Word format. Many brokers use ZipForm documents. Because electronic versions of ZipForm documents can be sent to consumers in either a ZipForm or PDF format, the Consent form assumes the use of the far more common PDF format as well as the Word format. The Consent form is provided in formats that can be read by essentially all computers with a modern operating system (Windows 98 or higher, Mac Os 8.1 or higher). Because the law requires consumers to acknowledge that they can open and save the electronic documents the parties will use in the transaction, if a broker uses file formats other than PDF or Word files, the Consent form would need to be adapted so that a consumer's consent indicates that the consumer can open and save these other types of electronic document formats.

How Wisconsin REALTORS® Want to Use Electronic Documents

The main frustration of most REALTORS® is that they want a simple way to authorize the use of e-mail delivery in transactions so that they can deliver offers and other documents via e-mail. What isn't always realized is that, by definition, e-mailing means the documents being sent by e-mail are electronic documents – they are not printed or written on paper; they are digitalized, electronic documents on the computer.

Some licensees and consumers indicate their desire to use PDF documents that are e-mailed, printed out, signed in ink, scanned in, and e-mailed back. That requires the party to have the capability to scan a paper document and create an electronic document to return to the broker via e-mail. If that is done for the sole purpose of a broker obtaining the party's signature on a document, the legal requirements are being met, and so an electronic Consent form would appear to have been required. Although any person who signs a document is to promptly receive a complete and exact copy of the signed document, the party has a paper copy with his or her original signature. The party also has an electronic copy on his or her computer that was created to e-mail back to the broker. It is an electronic document that has an electronic signature on it.

If the document is then ultimately delivered to another consumer in PDF format, that consumer is receiving a document electronically and must have given electronic E-Sign consent first. For example, the electronic document e-mailed to the other party is a fully executed amendment to the offer to purchase and the e-mail is the formal delivery to that party. There is no guarantee that the party will print that amendment, and he or she may simply save it on the computer. The electronic amendment to the offer has been delivered by e-mail to a party to create a binding acceptance of that amendment. This illustrates the use of electronic documents with a consumer and illustrates why the Consent form and Addendum D should both be used with consumers.

REALTOR® Practice Tips:

When REALTORS® work with consumers, prudent brokers will obtain the consumer's electronic consent to the use of electronic documents (Consent form) and execute Addendum D at the outset so that e-mail may be used freely with that party, rather than attempting to analyze the circumstances of each electronic document forwarded to the party to determine whether it must first meet the E-Sign consumer protection requirements.

The other point not widely recognized is that in this scenario, even though the consumer signed on a paper copy, once the document is scanned back into electronic format, that signature has taken the form of an electronic signature.

What is an Electronic Signature?

Wisconsin's E-Commerce law provides that an electronic document or signature is attributed to a person if it was created by the person. Whether a person created a document or a signature may be shown in any manner. An electronic signature is much like a paper signature – any mark intended to be a person's signature in the paper world is the person's signature as provided in Wis. Stat. § 706.01(10) and § 990.01(38). The E-Commerce law defines an electronic signature as, "an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record." A technologically savvy consumer may have a secure digital signature that the consumer would attach to a document, but most consumers have not adopted this level of technology. They will typically make their electronic mark on electronic documents by typing their name on the appropriate line. If the consumer receives a PDF document, prints it out, signs the paper document in ink, and then scans the document and saves it on the computer or e-mails it to someone, the scanned and digitized image of the cursive signature on the electronic document is also an electronic signature.

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PDF Consent

If a consumer wishes to be able to receive electronic documents and use electronic signatures and e-mail deliveries and the consumer has access to a scanner, the broker may wish to use the Consent form in PDF format to obtain the consumer's consent to the use of electronic commerce. The Consent form appears in PDF format on the E-Commerce REALTOR® Resource page at www.wra.org/e-commerce, and will soon be available on ZipForm (a sample copy appears at the end of this *Update*).

The following steps need to be taken to use the PDF Consent form:

1. The broker inserts the broker's name, address and e-mail address at the end of the form. The broker may print out the PDF form, write in the information, and then scan the document so that the broker has a PDF copy of the Consent form with the broker's information. Alternatively, the broker may wish to take the Consent form that is in Word format, type in the broker's information, save it, and then convert it to PDF format if the broker has that capability on his or her computer.
2. The broker attaches the PDF format of the Consent form to an e-mail and transmits it to the consumer.
3. The consumer receives the e-mail and opens the PDF Consent form.
4. The consumer reads the Consent form, prints it, signs the paper copy, and fills in the consumer's e-mail address.
5. The consumer scans the Consent form, attaches it to an e-mail, and transmits it to the broker.

The consumer has thereby consented electronically to the use of electronic documents in PDF format, electronic signatures and e-mail delivery. The consumer represents that he or she can open and save PDF documents when the party opens, completes and returns the Consent form. That party

may receive electronic documents in PDF format and use electronic signatures thereafter in the transaction.

Brokers with computers with more advanced Adobe software may be able to streamline this process to eliminate the need for the consumer to print out, sign and scan the Consent form. Adobe software is available whereby the PDF may be opened and altered with the use of a password. This would allow a consumer receiving a PDF Consent form to use the password, type in the consumer's name as his or her signature, type in his or her e-mail address, and return the document to the broker. The drawback to this process is that the consumer would have the ability to alter the form, not just complete the signature.

Other Adobe software allows the user to create an open field that may be altered at specified points in the PDF document. Open fields could be placed in the spots where the consumer is to insert a signature (typed name on the electronic PDF) or other information such as the e-mail address. This process would be ideal because the consumer could electronically sign and complete the PDF Consent form and return it to the broker without having to print, sign in ink, and scan the Consent form before returning it by e-mail.

Word Consent

Easier, but perhaps less favored, is to e-mail a Word document to a party and have the party type in the party's name to sign it and then e-mail it back to the broker. If a consumer wishes to be able to receive electronic documents and use electronic signatures and e-mail deliveries, and the consumer can be convinced to simply type his or her name as his or her electronic signature, the broker may use the Consent form in Word format on the E-Commerce REALTOR® Resource page at www.wra.org/e-commerce (sample copy of the Consent form

appears at the end of this *Update*). The Word Consent form may be used as an attachment to an e-mail or can be copied and pasted directly into the body of an e-mail. The following steps would need to be taken:

1. The broker types in the broker's name, address and e-mail address at the end of the Consent form (Word format) and saves the form.
2. The broker attaches the Word format of the Consent form to an e-mail and transmits it to the consumer. As an alternative, the Consent form may be copied into the body of an e-mail and sent to the consumer.
3. The consumer receives the e-mail and opens the Consent form if it was sent as an attachment.
4. The consumer reads the Consent form, signs it by typing in the consumer's name, and types in the consumer's e-mail address.
5. The consumer saves the Consent form, attaches it to an e-mail and transmits it to the broker.
6. If the Consent form was in the body of the e-mail, the consumer may click on reply, type in his or her name and e-mail address in the Consent form in the body of the received e-mail, and transmit it back to the broker.
NOTE: The consumer must click on Reply before typing in information or this does not work.

In the Word version of the Consent form, the consumer is representing that he or she can open and save documents in both Word and PDF format. The Word format of the Consent form has an embedded Word file as well as an embedded PDF file that the consumer is representing he or she can both open and save. Therefore, just because the Consent form is in Word format does not mean that the parties are going to use Word documents. The party is still consenting to use documents in PDF format even though the consent form is not

a PDF document. That party may receive electronic documents in PDF or Word format and use electronic signatures thereafter in the transaction.

E-Mail Delivery in Transactions

The end game for many brokers is to be able to use e-mail delivery in offers, listing contracts, buyer agency agreements, etc., for the delivery of documents and notices. The Department of Regulation and Licensing-approved offers, listings and other forms define delivery exclusively in terms of mail, commercial mail, fax and personal delivery. In order to permit use of e-mail delivery (before the next version of DRL forms are drafted), it will be necessary to amend transaction documents to authorize sending an electronic document to a specified e-mail address as an acceptable method of delivery.

The WRA Addendum D provides the approval to electronically deliver documents to a specified e-mail address. The form would be used as an addendum to the offer to purchase, listing contract or other document that must be revised to allow for delivery by e-mail. The form includes a check-off box to confirm that the party has already given electronic consent to the use of electronic documents, electronic signatures and e-mail delivery.

 **KEY POINT:** In other words, authorizing e-mail delivery in a consumer transaction is a two-step process.

1. The parties who are consumers must electronically give their consent to the use of electronic means using the Consent form. This step is not required for parties who are not consumers.
2. Addendum D is attached and/or incorporated by reference to the offer, listing, etc., to authorize e-mail delivery of transaction documents, notices and forms.

Using the Consent Form When Listing a Property

When a REALTOR® is listing a property, use of the Consent form and Addendum D can be added with a couple of easy steps in the listing process. This will be advantageous because then the listing broker and the seller can freely use e-mail between themselves to deliver lists of protected buyers, amendments changing list price, termination notices and any other notices and documents. In addition, if the buyer in the transaction also provides electronic consent using the Consent form, all documents and notices in that transaction can be delivered by e-mail.

The easiest way to get the electronic consent step accomplished is to e-mail a Word Consent form to a party. First the broker opens the document, types in the broker's information and saves it. Then the broker attaches it to an e-mail to the seller. The broker can then have the seller open the Word document, type in the seller's name(s) and e-mail address on the Consent form, save it, and then e-mail the Consent form back to the broker. Just because the Consent form is a Word document does not mean the consumer is consenting to the use of just Word documents. The WRA Consent form (in Word format) is set up so that the consumer is consenting to the use of both Word and PDF documents. This can be altered if the broker is going to use a different format.

Another easy way to use the Word version of the Consent form is for the broker to take the document, fill in the broker information, and save it. The broker can then copy the contents of the Word Consent form into an e-mail and send it to the seller. The seller can simply click on reply, type in the seller's name and e-mail address on the form, and send the e-mail back to the broker. It is crucial that the seller click on Reply *before* typing in the name and e-mail address or this will not work.

Once this is done, the broker can add Addendum D to the listing contract and may thereafter use e-mail with that seller.

If the broker prefers to work with a PDF Consent form, the steps are the same except that the broker and the seller will need to print the Consent form, complete the needed information, and then scan the Consent form so that it may be e-mailed as a PDF attachment. See the PDF Consent section on Page 7 for details of the process.

Using the Consent Form with a Buyer Agency Agreement

The process is the same as described above for a listing. Once the Consent form has been completed by the broker, forwarded to the buyer, completed by the buyer, and e-mailed back to the broker, Addendum D may be used as an attachment to the buyer agency agreement.

Using the Consent Form with a Buyer Under Sub-Agency

When working with a buyer under sub-agency, the broker may want to have the buyer consent to the use of electronic documents at the time that the Broker Disclosure to Customers is given. In fact, if the Consent form process has been completed, the Broker Disclosure to Customers may be given via e-mail. Once again the process is the same as described above for obtaining the electronic consent of a seller, except that Addendum D is not used initially because there is no agency agreement to which to attach it.

Addendum D would come into the picture once there was an offer to purchase or some other real estate contract being negotiated.

Using the Consent Form with the Offer or Other Transaction Contract

A buyer who has consented to electronic documents by completing a Consent form and returning it

to the broker may wish to include Addendum D as an attachment to the offer to purchase. That would mean that the buyer is proposing the use of electronic documents and e-mail delivery in the transaction. If the seller also completes the Consent form process, then the seller may complete the seller's portion of Addendum D, and the parties will be able to use e-mail delivery of documents and notices throughout the transaction.

Note that neither party should complete their section of Addendum D unless that party has first given consent electronically using the Consent form. Addendum D also contains lines for the brokers working with the parties to initial and provide their e-mail addresses. A fully executed Addendum D will be initialed by both parties and by the brokers, and will include the e-mail addresses to be used, appearing together in one place.

Time and Location of Electronic Sending and Receipt

Under Wisconsin E-Commerce law, an electronic document is sent per Wis. Stat. § 137.23(1) when the electronic document:

- a. Is addressed or otherwise properly directed to an information processing system that the intended recipient has designated or uses for the purpose of receiving electronic documents or information of the type sent and from which the recipient is able to retrieve the electronic document;
- b. Is in a form capable of being processed by that information processing system; and
- c. Enters an information processing system outside of the control of the sender or enters a region of the information processing system used or designated by the recipient that is under the recipient's control.

An electronic document is received per Wis. Stat. § 137.23(2) when:

- a. It enters a system that the recipient has designated and from which the recipient is able to retrieve the electronic document, and
- b. The document is in a form capable of being processed by that system.

Thus, an electronic document may be received even if the party is not aware of its receipt.

The existing law says that an offer to contract is effective when received by the offeree and the acceptance is effective once sent under the "mailbox" rule – the rule that is implicit in the DRL real estate contracts. This doctrine is based in old English common law, reasoning that while determining when acceptance was *received* can cause delays, determining when the acceptance was *sent or delivered* is faster and often more reliable. Once the acceptance is placed in transit via reasonable means, the offeror cannot withdraw the offer; withdrawal of the offer must be received by the offeree before the offer is accepted. At the moment of dispatch or delivery, the party has lost control and manifested his or her intent to contract. Acceptance shows the mutual agreement as soon as the acceptance is put out of the offeree's possession without regard to whether it ever reaches the offeror.

Because some standard contract rules do not translate nicely to the e-commerce world, the Wisconsin E-Commerce law includes some clarifications on issues such as when a document is considered to be *sent* or *received*. "Sending" is not a key term in typical Wisconsin real estate transactions that focus on delivery instead of sending as a key standard. Sending and delivery, however, may often refer to the same action. In addition, receipt is a term used in conjunction with the bump notice provisions and the financing contingency, so it is important to know when an electronic notice is considered to be received.

Other Electronic Commerce Options

Those interested in extensive e-commerce options can take advantage of the e-commerce opportunities available if one:

- Obtains electronic consent from the consumer, as described in the *Wisconsin Real Estate Magazine* article, online at news.wra.org/story.asp?a=80;
- Takes advantage of the opportunity to engage in a completely electronic transaction using the ZipForms electronic signatures, as described in the article, online at news.wra.org/story.asp?a=704; or
- Other similar services available commercially from other providers.

Conclusion

E-mail delivery of electronic documents and use of electronic signatures can be accomplished in Wisconsin consumer real estate transactions if brokers simply use the Consent form. The Consent form needs to be sent to the consumer who must sign and complete the form before e-mailing it back to the broker. Once this step has been completed, brokers can modify listings, offers, etc., to provide for e-mail delivery, secure in the knowledge that they are in total compliance with both Wisconsin and federal law.

ADDENDUM D – ELECTRONIC DOCUMENT DELIVERY

This Addendum pertains to the (Offer to Purchase) (Listing Contract) [Buyer Agency Agreement] [Other (specify): _____] the (“Form”) [STRIKE AND COMPLETE AS APPLICABLE] dated _____, for a transaction relative to the following Property: _____

___ [leave blank for a buyer agency agreement unless a specific property has been identified].

■ **E-MAIL DELIVERY:** The undersigned parties agree that the delivery standards and definitions set forth in the Form are supplemented to add delivery of documents or written notices relating to the Form by e-mail. E-mail delivery of documents and written notices is effective upon the electronic transmission of the document or notice to the e-mail address specified below for the party.

If this is a consumer transaction whereby the property being purchased is used primarily for personal, family or household purposes, each consumer (buyer, seller, etc.) has consented electronically to the use of electronic documents, e-mail delivery, and electronic signatures in the transaction, as required by federal law.

Seller’s Initials: _____ Electronic Consent Given: Yes

Seller’s e-mail address for delivery of electronic documents: _____

Buyer’s Initials: _____ Electronic Consent Given: Yes

Buyer’s e-mail address for delivery of electronic documents: _____

Listing Broker’s Initials: _____

Listing Broker’s e-mail address for delivery of electronic documents:

Cooperating Broker’s Initials: _____

Cooperating Broker’s e-mail address for delivery of electronic documents:

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No representation is made as to the legal validity of any provision or the adequacy of any provision in any specific transaction.

CONSENT FOR USE OF ELECTRONIC DOCUMENTS AND SIGNATURES IN CONSUMER REAL ESTATE TRANSACTIONS

If you want the option of sending and receiving real estate transaction documents by e-mail, federal law requires certain safeguards to ensure that consumers like you have the capability to receive such disclosures and are fully aware of the consequences of agreeing to receive documents electronically. Federal law requires your consent to use e-mail and electronic versions of information, disclosures, contracts and other documents and records (“electronic documents”) that would otherwise be legally effective only if provided to you in a printed/written paper document.

Understanding Electronic “Lingo:” “Electronic documents” include the documents you may save on your computer or attach to e-mail. They can typically be printed out, but exist independently in an electronic form on your computer.

“Electronic signatures” are sometimes hard to conceptualize. An “electronic signature” includes any mark, symbol, sound or process that is written, stamped, engraved, attached to or logically associated with an electronic document and executed by a person with the intent to sign. Just like you can legally “sign” a printed document by making your mark, whether that be your cursive signature in ink or an “X,” so you can “sign” a electronic document by making your mark, whether that be a high-tech encrypted or digital signature or just typing your name in the signature line or space on an e-mail or document on the computer – these are all electronic signatures. If you sign a paper document in ink and then scan the document and save it on your computer, the image of the cursive signature on the stored electronic document on you computer is also an electronic signature.

1. Right to Receive Paper Document: You have the right to have any document provided in paper form. If you want a paper copy of any document sent to you by e-mail, send your request to the broker at the mail or e-mail address provided below. Paper copies will be provided at no charge.

2. Right to Withdraw Consent. You have the right to withdraw your consent to receive electronic documents by e-mail by contacting the broker by mail or e-mail at the address provided below. The legal validity and enforceability of the electronic documents, signatures and deliveries used prior to withdrawal of consent will not be affected.

3. Changes to Your E-Mail Address. You should keep the broker informed of any change in your electronic or e-mailing address. Please contact the broker as promptly as possible by mail or e-mail at the address provided below regarding any such changes.

4. Minimum Hardware and Software Requirements. The following hardware and software are required to access (open and read) and retain (save) the electronic documents:

- ◆ Operating Systems: Windows 98, Windows 2000, Windows XP or Windows Vista; or Macintosh OS 8.1 or higher.
- ◆ Browsers: Internet Explorer 5.01 or above or equivalent
- ◆ Needed Software/Electronic Document Formats: Adobe Acrobat Reader or equivalent for PDF files; Word program for Word files



Word File.doc (28 KB)



WREM_May2007_tips.pdf (682 KB)...

- ◆ Sample Files (make sure you can open and save): Word

PDF

5. Your Ability to Access Disclosures. By completing and e-mailing this consent to the broker, you acknowledge that you can access and retain the electronic documents in Sample Files above.

6. Consent to Electronic Signatures and Documents: By completing and e-mailing this consent form to the broker at the e-mail address specified below you are providing electronic consent to the use of electronic documents and signatures in your real estate transaction. Specifically, you are acknowledging receipt of this form and consenting to the use of electronic documents, e-mail delivery of documents, and electronic signatures in any real estate transactions involving you, the broker identified below and other parties. If you prefer instead to limit this consent to the transaction relative to a specific property, provide the property address or description below.

Specific Property:

CONTACT INFORMATION:

Broker Name:

Agent's Name (optional):

Address:

E-mail Address:

Party Signature (sign or type in name):

E-mail Address:

Coverage That's Right For You

Get an E&O Quote
in Minutes!

*And Buy Instant
Errors & Omissions
Coverage Online Today!*



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