

# ***Correspondence Course***

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## **Watch What You Say**

3 clockhour real estate course

by

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*A Washington State Approved Real Estate School under R.C.W. 18.85.*

# Watch What You Say

## Introduction

This course covers issues regarding misrepresentation in real estate transactions. In addition, there are times that an agent must disclose and times when disclosure could violate laws as in the case of fair housing.

It is necessary to "Watch What You Say" as a real estate agent when working with clients and customers. Natalie is not an attorney. Just learn to spot times where you should be careful.

## Course Objectives

At the end of this course, participants will be able to:

- Illustrate examples of fraud, negligent misrepresentation, negligence, and innocent misrepresentation
- List and describe the steps to limit misrepresentation liability
- Describe the advantages of seller disclosure

# 1. Misrepresentation

Approximately 2/3rds of all claims brought against real estate brokers are filed by dissatisfied purchasers involving allegations of misrepresentation, negligence or fraud. With increasing frequency purchasers bring claims against agents and firms when they discover defects after closing. Because of this, agents need to be extremely careful about the extent and accuracy of the information provided to purchasers. Misrepresentation liability is imposed by state law and arises out of both statutory law as well as common case law arising from lawsuits. In other words, there are state laws including the Real Estate License Law RCW 18.85 and The Law of Agency RCW 18.86 that both include provisions for misrepresentation liability. In addition, there are precedent setting lawsuits that have identified liability for agents.

The condition of the property directly affects the value. The principles of value need to be weighed along with the condition and the amenities of the property. Withholding information because the agent doesn't think it would affect the buyers decision or because the agent does not want to put the transaction in jeopardy could have disastrous results in the future.

Ignorance will never save you in court! This is a very important message! Some agents just don't want to have any knowledge. You will be held up to the standards of other agents. Expert witnesses will be hired to testify what is the standard. One manager told an agent to put the information on a problem from an inspection in the file, but "do not read it." He thought the agent could then say that she didn't know about the problem.

Agents have been heard to say and really believe that if they are found in the wrong that their errors and omissions insurance or their corporate attorney will "get them off." That is not the case in most situations. Agents have an incredible amount of liability. To assume that a party that feels a loss will not come after an agent is like assuming that a shark won't go after a vegetarian.

Most of the time attorneys will go after the real estate agent and company for negligent misrepresentation. And in most cases the agent will be covered by errors and omissions insurance with a deductible. But, not all misrepresentation damages would be covered by errors and omissions insurance. For, example, actual fraud would not be insurable! If you intentionally misrepresent a problem that could be considered "actual fraud" you would not be covered.

## 2. Possible remedies for damaged party

A buyer or seller might think that a real estate licensee has misrepresented something in a transaction. If they believe there has been damages they can hire an attorney and file a lawsuit. Typically, a seller would have to prove damages when in a lawsuit for misrepresentation. There are statutes of limitations on lawsuits.

In addition to filing a lawsuit, a consumer can file a complaint with the Association of REALTORS, the multiple listing association, and/or the Department of Licensing. If an agent is found to have misrepresented a material fact, the agent could be liable for:

- Actual Damages which include the costs to fix the problem
- Punitive Damages... this includes the word "punish"
- Rescission... The cost to take the consumer back to the starting line
- License suspension or revocation by the Department of Licensing
- Fines from the Department of Licensing.
- Disciplinary action by the Association of REALTORS
- Attorney fees, courts costs, lost of business.
- And maybe worst of all.. the loss of time, stress and self esteem.

The assumption has been that if the seller is negligent in disclosure, that the buyer could sue the seller for damages. In light of the 2006 Washington State Supreme Court decision, this assumption changes and the Purchase and Sale agreement has the buyer and seller agree whether or not they have recourse.

## 3. Washington State License Law

Washington State License Law RCW 18.85 states that disciplinary actions can be taken against a licensee if they violate the following:

"making , printing, publishing, distributing or causing, authorizing, or knowingly permitting the making, printing, publication or distribution of false statements, descriptions or promises of such character as to reasonable induce any person to act thereon, if the statements, descriptions or promises purport to be made or to be performed by either the licensee or his or her principal and the licensee then knew of, or by the exercise of reasonable care and inquiry could have known, of the falsity of the statement, descriptions or promises."

"Knowingly committing, or being a party to any material fraud, misrepresentation, concealment, conspiracy, collusion, trick scheme or device whereby any other person lawfully relies upon the word, representation or conduct of the licensee."

"Any conduct in a real estate transaction which demonstrates bad faith, dishonesty, untrustworthiness or in competency."

If a consumer wants to file a complaint against an agent the form is available from the Department of Licensing website. They send the form along with documentation and a description of the problem. The Department of licensing then reviews the information to see if there is a possible violation of license or agency law. About half of the complaints are not violations of the law under their jurisdiction. The Department of Licensing will notify the agent and ask for more information.

## **Washington State Law of Agency**

According to the Law of Agency RCW 18.86 real estate agents must: "Disclose all existing material facts known by the licensee and not apparent or readily ascertainable to a party: provided that this subsection shall not be construed to imply any duty to investigate matters that the licensee has not agreed to investigate."

In one of the most recent cases, an agent had her real estate license suspended due to misrepresentation. The agent failed to disclose the flooding that had occurred in the past on the property. The seller did not disclose it to the purchaser also, but the agent had previous knowledge of the problem and had disclosed it to a buyer of a neighboring property.

In another case, a real estate agent provided the buyer with a false pest inspection report.

As in violations of License law, complaints against an agent regarding the Law of Agency are to be submitted in writing. They are then checked to see if there is an actual violation of the law.

The Department of Licensing only has jurisdiction over a few sections of the Law of Agency.

## 4. What is a Material Fact?

A material fact that must be disclosed according to common law includes information that would affect;

- How much a buyer would pay for the property, or
- The buyer's decision to buy the property.

The definition from the Law of Agency says that a material fact is

- Information that substantially adversely affects the value of a property,
- Information that affects the party's ability to perform,
- Information that operates to materially impair or defeat the purpose of the transaction.

So then, what needs to be disclosed? **Anything** that would affect a buyer's decision to buy or how much the buyer would pay...needs to be disclosed... If not, the buyer may find a way to make the agent liable and file a complaint or sue.

## 5. Types of Misrepresentation

Fraud

A false representation of a known fact.

Saying nothing about a known defect.

When you know that there is a problem and intentionally mislead a client.

Negligent Misrepresentation

Lack of care in accurately conveying information to the purchaser.

Failure to confirm, when necessary, the accuracy of information given to the purchaser.

Negligence

Failure to use reasonable care in discovering and disclosing defects

Innocent misrepresentation

When the agent is unaware or could not have known about a defect. Agents are not liable for defects that they had no knowledge of. But, an attorney will try to prove that the agent had knowledge or "should have known."

## 6. Examples of Misrepresentation

Consider the following examples

The seller says the fence is the property line. It is what he was told when he bought the land. The plat map does not appear to match the fence line.

The seller tells the agent the property is hooked to the sewer. But, the property is out in the country.

There is no pest problem evident at the house. But, the agent has a pest inspection report full of problems from the last sale that failed.

The kitchen sink drain is not hooked up to the septic tank and just drains into the yard.

The house is free from mold and water intrusion when in fact it has major water problems in the winter.

The agent told the buyer that it is a "safe" neighborhood when in fact there is a registered sex offender living next door.

The agent told the buyers that the shed and the woodpile are included in the sale when in fact; the shed was off the foundation.

The seller told the buyer that the agent said the tree in the backyard is on the property line and the buyer can cut it down, when in fact it belongs to the neighbors and there are city codes and permits required to take down a tree.

The buyer said that the agent confirmed that the view will stay unobstructed, when in fact that "greenbelt" is actually going to be a 6 story condominium.

The agent did not deposit the earnest money and did not tell the parties.

The agent told the sellers that they would have no deficiency judgement if they sell on a short sale.

The agent told the homeowners that the best option is to go into foreclosure.

## 7. Negative Stigmas

One of the hottest issues in the real estate industry is a negative stigma that may affect property.

A negative stigma can include:

- A property psychologically impacted
- An event that occurred or suspected to have occurred on the property
- A stigma that does not affect the physical condition or title to the property.

Examples of negative stigmas.

A neighbors kid commits suicide in the backyard.

A ghost has appeared to the brother in the dining room.

The house has been burglarized every month on the 15<sup>th</sup> of the month.

A group of sun worshippers arrives in the yard each solstice.

There is a sex offender next door.

There was a gang shooting in the neighborhood.

A meth lab is not a negative stigma because it affects the physical condition of the property. It must be disclosed.

**The Washington State Law of Agency states that:**

"The fact or the suspicion that the property or any neighboring property is or was the site of a murder, suicide or other death, rape or other sex crime, assault or other violent crime, robbery or burglary, illegal drug activity, or other act, occurrence or use not adversely affect the physical condition of, or the title to the property is not a material fact."

This is the AGENCY law. This has not been tested in the courts!

If an agent is aware of a negative stigma, that agent should disclose the information as it would affect the buyers decision to buy or how much to pay. If the seller does not want the information disclosed... contact the broker. Make the decision whether or not to take the listing.

The Code of Ethics for the Association of REALTORS was originally based on the "golden rule." Would YOU, your family or friends want the information disclosed before you made the decision to buy?

Buyers have sued agents for things like a barking dog, a ghost, a sex offender. Disclose Disclose Disclose.

**Questions regarding negative stigmas**

*Should agents tell sellers that they don't have to disclose negative stigmas?*

No. Because the sellers must disclose anything that would affect a buyers decision. If the sellers choose not to disclose, the agent must refer the issue directly to the broker.

*Is the seller obligated to disclose this kind of information even though it is not on the property information disclosure form?*

If a seller chooses not to disclose, then the agent needs to refer to the broker. The Law of Agency does NOT say that a buyer Cannot sue the seller for lack of disclosure. Buyers have sued for everything from the barking dog, the sex offender and ghosts.

*Is there a difference if the agent represents the buyer or the seller? If the agent represents the buyer, encourage the buyer to do a neighborhood review and get to know information that would affect their decision to buy.*

*Is it "fair" for sellers to be impacted by negative stigmas?*

No. It is not always fair. But, agents are not there to make it fair by not disclosing.

## 8. Washington State Property Information Disclosure Law

Since 1994, Washington State has The Property Information Disclosure Law RCW 64.04 that requires a seller of residential real estate to provide a buyer with a disclosure statement as designed by law prior to the closing of the transaction whether or not the sale occurred with a real estate broker or without a broker. It is to be used in transfers of residential real property including multifamily up to 4 unity, new construction, condominiums not subject to a public offering statement and certain timeshares.

There are exclusions including banks, foreclosures, estate, etc.

The seller is to provide the statement even if selling without an agent. If the seller does not provide the statement, the buyer can walk anytime before closing.

The seller must disclose defects even if they are not listed on the form.

The seller must disclose defects even if the seller does not provide the form or claims to sell it "as is" according to common law.

The law applies to all sellers, even those not listed with an agent.

The Law is the form. If you read the actual law, it is a form with the questions.

The agent is not to fill out the form. It is a separate law between sellers and buyers. If the agent fills out the form or helps in the preparation, then the agent could be found liable for errors.

The Disclosure Law has been amended regarding the required disclosure of environmental issues in the environmental section of the Property Information Disclosure law. If the buyer waives the form, the environmental section must still be provided.

In addition, a vacant land disclosure is required for property that is ZONED for residential use.

The attorneys refer to the form as the "Lawsuit."

## Economic Loss Decision

In March 2007, the Washington State Supreme Court decided in the *Alejandro v. Bull* case that buyers will no longer have a claim for negligent misrepresentation in property condition disputes after closing. The "economic loss rule" was applied in the context of a real estate transaction. It provides that when two parties enter into a contract (Purchase and Sale Agreement) and economic losses occur (not physical harm or personal injury), recovery is confined to the contract. In the Purchase and Sale Agreement, contract remedies do not exist and there are no specific warranties. So, even if the buyer could prove the seller had negligently misrepresented the condition of the property they couldn't be compensated.

The newest purchase and Sale agreement form on Section 9 gives the buyer and seller the opportunity to agree whether there is recourse. They negotiate who will bear the risk of the loss.

"9. Disclosures in Form 17: Buyer will \_\_\_ will not \_\_\_ have a remedy for seller's negligent errors, inaccuracies, or omissions in form 17. "

This can make or break a contract or cause a seller to choose, for example, an offer whereby the buyer checks "will not." So the question is what box should be checked. It is important to consult with the broker of your office.

Since proving fraud can be difficult buyers that find a problem not disclosed by the seller will find an attorney to find a remedy. The target could be real estate agents and their Errors and Omissions policies.

Real estate agents have duties under Real Estate Law of Agency RCW 18.86 that cannot be WAIVED. They include to:

"Exercise Reasonable Care and Skill"

"Deal honestly and in good faith."

"Disclose all existing material facts known by the licensee and not apparent or readily ascertainable to a party: provided that this subsection shall not be construed to imply any duty to investigate matters that the licensee has not agreed to investigate."

In addition, a real estate agent is to advise the client to seek expert advice on matters relating to the transaction that are beyond the agent's expertise.

It is most important for real estate agents to disclose any defect they have knowledge of and to suggest expert advice including inspections.

## 9. Fair Housing

There are times when "disclosure" is against the laws. The Fair housing and anti discrimination laws do not protect "minorities." They protect people that are discriminated because of certain reasons or "protected classes." There are Federal, State and Local Fair Housing and Anti Discrimination Laws.

The Federal Fair Housing Act is a federal law. According to the law you are not to discriminate based on a protected class.

The protected classes are:

Race

Color

Religion

Sex

National Origin

Familial Status

Handicap/ disability

In Washington State there is the Law against Discrimination. The protected classes also include Sexual Orientation.

In local jurisdictions including Seattle the protected classes include Marital Status, Political Ideology and Section 8.

In other Jurisdictions across the country the protected classes can include military Discharge, Source of Income and matriculation, and Personal Appearance.

If a client asks a real estate agent something regarding the background of another, if it falls under a protected class the real estate agent is bound by federal, state and local laws to not discriminate. That may mean that it is illegal to disclose information that could be discriminatory.

Do the buyers have children?

What is the race of your clients?

Will the family go to the church next door?

Is the buyer gay?

If the buyer chooses to live within a mile of a certain church or cultural center, that is the buyers choice. You can accommodate their choice but you cannot steer them to a certain neighborhood. You cannot tell them where others from their same religion or country live.

**Watch What you Say .....**

# **Additional Reading and Case Studies**

## **Lawsuits on misrepresentation**

### **A. Seller Misrepresented condition of Septic**

The seller notices soggy ground a year before listing her house. The septic tank was pumped by one inspector and a pipe repaired by a second inspector. She applied for a connection to the city sewer but abandoned the idea when she learned there was a \$5000 hook up fee. The seller lists the property and on the Property Information Disclosure Form 17 the seller indicates that the house had a septic tank system that was last pumped and inspected in the fall of 2000, a broken line between house and septic tank had been replaced and that there were no defects in the operation of the septic system.

The buyer and seller entered in a purchase and sale agreement for the sale of a house. The seller promised to have the septic tank pumped prior to closing. The buyer has an inspection of the property that indicated that the septic system appeared to function properly. After closing the buyers heard water gurgling and noticed a foul odor inside and outside the house which came from the soggy ground around the septic tank. They hired the same septic company that had worked on the system for the seller and were told that he could pump the tank but could not fix the problem because the drain fields were not working. He also told them that he informed the seller that the drain field was not working. They were told that they should connect to the city sewer. The buyer hired another company to connect to the city sewer and that company discovered that the septic system was malfunctioning thus allowing sludge from the septic tank to enter the drain field and plug it.

The buyer then sued the seller and asks for \$30,000 in damages.

*Do you think the seller misrepresented the condition of the sewer?*

*Do you think there was fraud or negligent misrepresentation?*

*Do you think the buyers were compensated for the damages by the court?*

### **B. Septic or Sewer? The seller erred and the buyer sued.**

As a result of the property settlement in a divorce, Susan received a house that was a rental managed by her ex husband. She moved into the house for a year prior to selling. Susan called her favorite real estate agent who listed the property for sale. Susan did not know much about the property. She struggled to fill out the property information disclosure form and checked that the property was on sewer. She did not really know the difference between septic and sewer. Her agent is familiar with the area. After closing the buyers discovered that the property was not hooked up to sewer and filed a claim in small claims court against Susan and her real estate agent. Agent Joe assured her that all would be fine in court. She just trusted him that since she didn't know if it was septic or sewer she would be ok.

*What do you think the judge decided in court?*

*What if the seller does not know if there is septic or sewer?*

*Can the judge suspend or revoke the license of a real estate agent?*

### **C. Inspection finds past leaks, but buyer sues for basement leaking**

Burgess bought a home from the Millers. The Millers indicated no seepage on the disclosure statement they gave Burgess because, they asserted, there was none during the years they resided there. They did acknowledge a pre-existing stain on the wall. After receiving the disclosure statement from the Millers, Burgess had her own inspection performed. Burgess hired an inspector that reported evidence of water seepage in the basement and recommended that water be directed away from the exterior of the house at that spot. Before closing, Burgess asked the Millers to explain the disclosure statement they had given her. They provided an addendum in which they asserted there had been no water seepage during their tenure and in which they speculated that the past seepage may have been due to an improperly maintained downspout. Relying on this Burgess closed. A few months later, the basement leaked during a major rainstorm and Burgess sued.

*Since the inspector found the evidence of leaks and the Millers disclosed what they knew about the leaks, are the Millers liable for the damage due to leaking after closing?*

### **D. Disclose sex offender in neighborhood?**

The Glazers purchased a home owned by the LoPrestes. The home was located across the street from the home of a convicted sex offender. The Glazers alleged that the LoPrestes and their real estate agents fraudulently represented that the house was a good place to raise children and fraudulently concealed the fact that a sex offender lived in the neighborhood.

Did the defendants, LoPrestes and their agents, have a duty to disclose to the Glazers that a sex offender lived across the street from the home they were buying?

*Have you ever sold a house in the neighborhood of a sex offender? How do you know? What does the Property Information Disclosure statement say regarding this?*

### **E. Buyer doesn't get inspection but finds defects after closing**

Clark hired McDonald, a real estate agent, to help her purchase a home. McDonald informed her of a house listed with Caldwell with another real estate office under the same franchise. Clark walked through the house that same day. The next day Clark met McDonald and Caldwell at the house and they walked through it again. At that time, Caldwell, the listing agent, told Clark that the home was a good buy, was in good condition, the owners were really good at handy work and good at fixing things and that she was friends with the owners who were really nice, honest people. Clark was unable to adequately inspect the house, as it was full of boxes and furniture. Right after this visit, Clark made an offer on the home, which was accepted. Closing was scheduled for a couple of weeks later. Clark received a copy of the owners' disclosure statement, which revealed no defects or problems. Before closing, Clark again walked through the house. This time she noticed some water damage and that the owners were painting several rooms. Clark did not hire a home inspector, although there was an inspection clause in the contract. After closing and moving into the house, Clark noticed foul odors and rotten and bowed wood in the attic. She then hired a home inspector who discovered several defects with the home, most of which had been there for well over a year. The new painting was done to cover old water spots and deck boards had been, turned over to conceal rot. It would cost several thousand dollars to repair the property. Clark sued the owners, the agents and the real estate company.

*Was the real estate listing agent, Caldwell, liable for the representations made about the owners? What did Caldwell say about the owners? What did Caldwell say about the property? Did Caldwell relay false information?*

## **F. Previous flooding was not completely fixed and not disclosed**

The Stocks knew that their property had drainage problems. Several times, a storm drain on a neighbor's property had become blocked and caused water to flow onto their property. In response, the county had cleared the storm drain each time. When the Stocks filled out the Seller Property Information Disclosure Form RCW 64.06, they originally answered "yes" to the question whether the property had standing water or drainage problems. They claimed that Edwards, their listing agent, told them to answer "no," advising that they were not required to disclose a past problem which had been corrected by the action of the county in unblocking the drain. The sellers answered "no" but asked Edwards to disclose the prior instances of flooding to the prospective buyers anyway and tell them that "if the drain in the neighbor's yard plugged up to call the county."

The listing agent, Edwards, had personal knowledge of the flooding in the neighborhood and had disclosed it to buyers of a neighboring property.

Svendsen purchased the property and the first winter following closing, the drain became clogged and water caused substantial damage to the property. Svendsen sued the seller and the listing agent, Edwards on claims of fraudulent concealment, negligent misrepresentation and violation of the Washington Consumer Protection Act (CPA).

*Were the sellers, the Stocks, the real estate agent, Edwards, and the real estate company liable for the damages since the problem had been corrected in the past?*

*Was the agent liable since she knew of the flooding even though the Stocks did not disclose the flooding on the Disclosure Form?*

## **G. How much disclosure is enough?**

Paula Keefhaver purchased a 25 yr old house from the Weeses. Before signing the contract, Paula spent a half hour in the home with her real estate agent. Then she returned to the agent's office to review the disclosure statement provided by the Weeses. The disclosure statement asked "the roof leaking during ownership?" to which the Weeses responded, "Yes, with an explanation that the roof had been replaced in 1991. To the question "Repairs during your ownership?" The Weeses said "No." The disclosure statement next asked, "Any drainage or flood problems on the property or adjacent properties?" The Weeses marked the question, "yes," and explained that they planned to bring in fill dirt to redirect water away from the foundation. The disclosure finally asked, "Any water leakage or dampness in the house crawl space or basement?" Again the Weeses said, "yes" and again referred to the fill dirt being brought in to redirect the drainage.

Paula Keefhaver then signed an inspection waiver. She proceeded with the purchase of the \$71,900 house. About a month after moving in, a heavy rainstorm revealed there were both leaks in the roof and a water problem in the basement. Also about the same time, Paula said she leaned a chair against the back deck and "the whole thing caved in." Paula sued claiming the Weeses did not make an accurate disclosure of the property's condition and that she had relied on that disclosure statement in making her decision to purchase.

Since the Weeses did disclose the water problems, are they liable for the problems after closing?

## What happened in court?

**A.** This is a very important case that the Washington State Supreme Court decided in *Alejandro v. Bull* in March 2007. For the first time in the state the court applied the Economic Loss rule in the context of a real estate transaction. The purpose of the economic loss rule is to bar recovery for alleged breach of tort duties where a contractual relationship exists and the losses are economic losses. Tort law is not intended to compensate parties for losses suffered as a result of a breach of duties assumed only by agreements. The Economic Loss Rule maintains the fundamental differences between contract and tort law. The contract can allow the parties to allocate risk by agreement. The failed septic was purely economic loss and since the parties relationship is governed by contract, they should have allocated the risk of loss **IN THE CONTRACT** through warranties, insurance, or pricing. So even if they were able to prove that the seller had negligently misrepresented the condition of the septic, there were no warranties on the contract should that be the case. Unless the buyer has an express or implied warranty regarding a property condition, they will have no recourse against the seller unless they can prove fraud. So now the parties must negotiate who will bear the risk of loss and the provision is Section 9 on the new Purchase and Sale Agreement.

As a result there may be more claims against real estate agents should the buyer find that the seller was negligent in disclosing defects. Real estate agents must disclose any information that they know about defects and make sure to advise the buyer to see advice on matters beyond the agent's expertise.

**B.** Susan believed that her agent would help her out in court. He arrived with his broker and said that he was unaware that the property was not on the sewer. Susan testified that she got the house in a divorce and had no idea about the septic vs. sewer. But, a judgment was found in favor of the new buyers against Susan in the amount of \$4,000. In this case the real estate agent and broker were not found liable. A judge in small claims court does not have the power to suspend or revoke a real estate license. If a licensee is found guilty of a crime in a court, that verdict could affect their license.  
Redmond WA Small Claims Court (2002)

Learn from this case that there are times that the seller does not know the pertinent information about the property. In this situation, the seller assumed that the agent knew about the property and used his help to fill out the property information form. The agent claimed no responsibility. But, had the seller claimed that the agent helped with the form, the entire ruling could have gone the other way. Sellers do have a tendency to rely on the expertise of the agent.

**C.** The court directed the verdict in favor of the Millers and Burgess appealed. The court held that the Millers did not make a misrepresentation on the disclosure statement because (1) they disclosed the condition of the basement to the best of their knowledge and belief in the statement and its addendum and (2) Burgess failed to prove that the Millers knowingly made a false representation.  
*Burgess v. Miller*, 621 N.W. 2d 828 Court of Appeals of Nebraska

This situation is very typical. Buyers move into a house and discover a water leak. There was no mention of an agent in this summary. In this situation as in all others, the seller is better off

disclosing a water leak. When to disclose? Immediately. Any known defects should be disclosed. Even if the water leak is fixed, it could have done damage so disclosure of the leak and the fix is usually in the seller's best interest.

Learn from this lawsuit the importance of disclosure.

**D.** The Supreme Court of New York held that New York law imposes no duty on either the seller or agent to disclose any information concerning the premises unless there is a confidential or fiduciary relationship between the parties or some conduct on the part of the seller which constitutes active concealment. There was no allegation that the parties were in any confidential or fiduciary relationship. There was no evidence that the Glazers made any effort to discover the character of the neighborhood or that the agents or sellers thwarted their efforts to do so. The alleged misrepresentations were no more than expressions of opinion. Finally, the court noted that the information was not peculiarly within the knowledge of the seller or unlikely to be discovered by a prudent purchaser. Summary judgment for the seller and agents was upheld. *Glazer v LoPreste* 717 N.Y.S 2d 256 (2000) Supreme Court of New York, Appellate Division.

In Washington State the Law of Agency in the definition of Material Fact says that certain facts are not considered material. "The fact or suspicion that the property or any neighboring property is or was the site of a murder, suicide or other death, rape or other sex crime, assault or other violent crime, robbery or burglary, illegal drug activity, gang-related activity, political or religious activity, or other act, occurrence or use not adversely affecting the physical condition of or title to the property is not a material fact."

This clause has not been tested in the Washington Courts. If the seller and/or agent has knowledge of a fact that would affect the buyers decision to purchase the property, that information should be disclosed. Agents should encourage all buyers to do some research before purchasing a property. Registered sex offenders live in neighborhoods throughout the state... event the "best" neighborhoods. If there is any question, then it must be referred to the Broker or corporate attorney.

**E.** Clark sued the owners, agents and the real estate company and won damages against all defendants. But, on appeal, The court held that neither the real estate company nor Caldwell made any written misrepresentations to Clark. Clark contended in the appeal, that Caldwell knew about the defects and concealed them and that she fraudulently made false representations about the condition of the home to induce Clark to buy it. The agents and the company asserted that the elements of fraud were not present in the case since no false representation were made and that Clark was not justified in relying on Caldwell's representation made during the visit to the home. The disclose statement was made by the seller and merely relaying the form without actual knowledge of its falsity was insufficient to form the basis of a fraud claim against the agent. The oral statements made by Caldwell, the listing agent, were puffing or mere statements of opinion. Clark affirmed the contract and sued for damages, rather than rescission, thus she is bound by the terms of the contract. Finally there was no evidence that Caldwell had any knowledge of the concealed defects just because she was a friend of the seller and was their listing agent.

*ReMax North Atlanta v. Clark*, 537 S.E.2d 138 (2000) Court of Appeals of Georgia

Learn from this lawsuit, that buyers need to hire inspectors prior to closing. Agents need to be careful about statements made about their clients and the property. In this situation, the buyer relied upon the statements about the seller's honesty.

**F.** The trial court granted judgment for the plaintiff. The Defendants appealed. The Court of Appeals affirmed the judgment for fraudulent concealment but reversed an additional award to the plaintiff for damages and attorney fees determining that it did not fall under the Consumer Protection Act. The CPA contains an exemption from liability under the Act for “ the practices covered by” the Seller Information Disclosure Form Statute RCW 64.06. The question was whether the seller’s disclosure exempts a real estate agent from liability for fraudulently concealing matters that are to disclosed in the sellers disclosure statement. Svendsen appealed to the Supreme Court of Washington.

The court of Appeals determined that the seller disclosure state precludes an action against a real estate agent where the claim for fraudulent concealment arises directly from the agent’s conduct in completing the disclosure statement. However, where the claim for fraudulent concealment (here the agent’s independent knowledge of the drainage problem) was separate and apart from the disclosure statement, an independent cause of action could be maintained against the seller’s agent under the CPA. The Court of Appeals was reversed ad the judgment of the trial court for additional damages under the CPA was reinstated. Edwards was convicted of fraud.

Svendsen v. Stock 23 P.3d 455 (2001) Supreme Court of Washington

A hearing at the Department of License revoked her license for a period of 1 year with 6 months stayed.

Learn from this lawsuit that if a defect has been fixed, disclose the defect and the fix. Also, do not ever consult the seller on how to fill out the property information form.

If you, as an agent, have personal knowledge of a previous defect that would affect the buyers decision to buy or how much they would pay, then discuss that with your seller, your broker or the corporate attorney.

**G.** The Weeses argued that the disclosures were full and ample as far as they knew, and pointed out that Keefhaver was free to order a home inspection of the property and waived that right. The Weeses also argued that while they did their best to fill out the disclosure form they could not be held liable for issues they contended they were unaware of.

The first court found for the Weeses. But, the appeals court, however did not accept the Weeses’ arguments. It reversed the lower court decision and sent the case back to trial. In reversing the lower court, the appeals judges said that Paula Keefhaver was led to believe she could relay on disclosure statement. She testified she would not have purchased the home had she known of problems with the roof, basement and deck. It was the disclosure statement, however, that convinced her the house did not need a formal inspection. The appeals court sent the case back to the lower court for a new trial.

Keefhaver vs. Weese, Missouri Court of Appeals, 2001 WE59446, Real Estate Intelligence Report Nov 2001

Learn from this lawsuit to encourage all buyers to get a formal home inspection. The buyer relied on the information on the disclosure statement and chose not to get an inspection. It is important for buyers to get inspections... often in a hot market agents encourage buyers to waive that right. But, it can come back to bite the agent because when there is a problem, the buyers or their attorney will try to pin it on the agent! Remember how many items come up in inspections that the sellers were unaware of!

## **Please Note:**

Natalie Danielson is not an attorney. These are examples of lawsuits that we can all learn from. Learn from these lawsuits:

1. Anyone can file a lawsuit even if it appears that there is not case.
2. That water is the worst enemy.... Attorneys can be your next biggest problem!
3. That the cases can go either way depending on the attorneys and judge.
4. That court costs money.

Next year we'll have cases and examples about short sale and mortgage fraud. Don't give clients financial or legal advice!

That it is important to disclose, disclose, disclose!

## Watch What You Say Quiz

1. T / F About 2/3 of all claims against brokers are misrepresentation.
2. T / F State laws regarding disclosure include License Law and Agency Law
3. T / F Only federal laws that define what a seller must disclose.
4. T / F Condition of the property does not affect the value.
5. T / F Common law arises out of legal decisions from lawsuits.
6. T / F The best way to avoid claims is to say nothing.
7. T / F Ignorance will never save an agent in court.
8. T / F It is not always the questions that you are unsure of the answers, but the questions that you fail to ask.
9. T / F Disclose anything that affects a buyers decision to buy.
10. T / F It doesn't matter what an agent says as long as the company has errors and omissions insurance.
11. T / F To assume a buyer that feels damaged will not come after an agent is like assuming that a shark won't go after a vegetarian.
12. T / F There are statutes of limitations which limit how long the party has to file a lawsuit.
13. T / F A consumer can file a complaint at the Dept of Licensing.
14. T / F Only a seller can be liable for actual damages.
15. T / F Punitive damages are to "punish" the agent or broker.
16. T / I An agent can be sued for fraud, negligent misrepresentation and negligence.
17. T / F Negligent misrepresentation includes the lack of care in accurately conveying information to the purchaser.
18. T / F An agents E & O insurance will ALWAYS cover fraud.
19. T / F A false representation of a material fact is negligence.
20. T / F If an agent had no way to know about the defect, it could be difficult to show in court that he should be liable.

### Property Information Disclosure Form

16. T / F A For sale by owner has to provide the form to buyers.
17. T / F The seller is obligated to provide the form to buyers.
18. T / I Only listed sellers have to provide the form.
19. T / F Some sellers are exempt from filling out the form.
20. T / F If an agent fills out the form, the agent could be liable for the information on the form.
21. T / F The seller has to change the form if a defect is discovered after the form has been completed.

22. T / F The buyer can waive the form.
23. T / F The seller must fill out the environmental section of the form if there is something that must be disclosed.
24. T / F The seller must provide the buyer with the Environmental section of the form if there is information to disclose even if the buyer wants to waive their right to get the form.
25. T / F A vacant land disclosure is ONLY required if there is a house on the property. (read this carefully and check your answer in the booklet!)
26. T / F If the property is zoned for residential but has a small commercial office, then the seller must provide a vacant land disclosure.
27. T / F The attorneys call the property disclosure form the "lawsuit."
28. T / F If there is a negative stigma that the seller does not want to disclose, go to the broker for advice.
29. T / F There is information that an agent cannot disclose due to Federal Laws.
30. T / F The Seller can request information about the marital status and race of the buyer.
31. T / F The agent can tell the seller the sexual orientation of the buyers to the seller legally in Washington State.
32. T / F The Fair Housing Laws protect only minorities.
33. T / F It is important to disclose material defects.
34. T / F Did you read and understand the facts in the Alejandre case?
35. T / F Do you know what Section 9 is on the purchase and sale agreement?
36. T / F You can claim you do not know about a problem if didn't look at the disclosure form or inspection that is in the transaction file.
37. T / F A real estate agent is the best source of financial information for a client who is considering a short sale.
38. T / F A real estate agent can show a buyer homes in a 1 mile radius of the clients church if the client specifies that neighborhood.
39. T / F Did you sign and Date the Evaluation Form?
40. T / F Did you read the material and take the quiz?

**an answer sheet follows on the next page**

**PROFESSIONAL Direction, 13148 Holmes Pt Dr NE, Kirkland WA 98034**  
www.clockhours.com Email: [clockhours@gmail.com](mailto:clockhours@gmail.com)



## Watch What You Say

You must attach the Evaluation to this Answer Sheet to receive clockhours.

1		21	
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I attest that I have read the materials and have answered the questions.

**Print Name** \_\_\_\_\_ **Company** \_\_\_\_\_ **Signature** \_\_\_\_\_

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 www.clockhours.com  
 Email: [clockhours@gmail.com](mailto:clockhours@gmail.com)



## Watch What You Say Mandatory Evaluation

- Did you read the material in the booklet on this date?** YES / NO  
 Did you complete the quiz for the course? YES / NO  
 Did you enclose tuition for \$30? (or use pay pal on the front of the site) YES / NO  
 Did you fill out and sign this form? YES / NO  
 Did you attach the 40 question quiz? YES / NO  
 Why did you choose to take this course? Topic? Time? Cost? Ease? Other?

A “clock hour” according to the state is 50 minutes.. So this 3 hour class should take in the area of 2.5 hours. How long did it take you to complete the course? \_\_\_\_\_

Comments?

	No			Yes	
Will the material you learned improve your performance?	1	2	3	4	5
Were the course materials easy to follow?	1	2	3	4	5
Were the course materials relevant to your profession?	1	2	3	4	5
Were your objectives met by attending the class?	1	2	3	4	5

Was the course material interesting?

What are 3 things that you learned from the course?

- 1.
- 2.
- 3.

Would you take another correspondence course from Professional Direction? Yes/ No

Why? \_\_\_\_\_

Print Name \_\_\_\_\_ Signature \_\_\_\_\_

Company \_\_\_\_\_ Address \_\_\_\_\_

City \_\_\_\_\_ WA Zip \_\_\_\_\_ phone \_\_\_\_\_

Email \_\_\_\_\_

Date Completed \_\_\_\_\_ Renewal Date \_\_\_\_\_

Thanks for taking this class! Scan and email or just mail by US mail to the address below.  
Natalie Danielson



13148 Holmes Pt Dr NE, Kirkland, WA 98034

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