The Dangerous Dozen

Twelve Most Common Errors when Writing Purchase and Sale Agreements

by

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

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Clockhours by Mail

1. You will be provided with a booklet of with the class material. It is only for use as clockhours under Professional Direction. Any other use by permission only.

2. The course has been divided up into one hour sessions. In Washington State a "clock hour" is 50 minutes. There are questions about each session. They can be answered while reading the material, at the end of the session, or at the end.

3. ***Answer*** the questions on the quiz answer sheet.

4. If you have any questions regarding the material or the questions, don't hesitate to call or email Natalie Danielson.

5. ***Mail*** Answer Sheet and Evaluation to Professional Direction.

6. The certificate will be mailed within 10 days of receipt of course materials and handout.

Disclaimer.. the course materials and questions are not to be used for legal advice. Information can change over time. Real estate transactions are handled different ways in different regions in the State of Washington. If you have any comments or concerns about the material contact Professional Direction.

Thanks!

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Curriculum

Session Hours	Major Topics	Equipment/ Materials	Assignment
1 .5 hrs	Introduction Overview of the Dozen Mistakes commonly made on Purchase and Sale Agreements.	Handbook	Read Handbook* Take Notes
2 1 hour	1. Proper Legal Description 2. Earnest Money Deposits 3. Offers, Counteroffers and Mutual Acceptance	Handbook	Read Handbook Take Notes
3 1 hour	4. Consistent dates 5. Notices 6. Possession	Handbook	Read Handbook Take Notes
4 1 hour	7. Property Information Disclosure 8. Inspection Clause 9. Personal Property	Handbook	Read Handbook Take Notes
5 1 hour	10. CCR's and Land Use Issues 11. Closing and Extensions 12. Form 34, the Blank Addendum	Handbook	Read Handbook Take Notes
6 .5 hours	Conclusion Review and answer questions	Handbook	Read Handbook Take quiz

Dangerous Dozen

The twelve most common errors when writing Purchase and Sale Agreements

This 5 clock hour course is designed to give real estate agents an overview of the common errors made when writing and negotiating purchase and sale agreements.

When real estate agents prepare the documents relating to a purchase and sale agreement on residential homes, multi family, vacant land or condominiums they often make errors that do not reflect the intent of the parties and can render the agreement unenforceable. It is important to be aware of these common errors that are repeated.

A licensee is not authorized to practice law in Washington State unless he or she is also an attorney. One function of an attorney includes preparing legal documents A licensee may fill in the blanks on pre-printed forms prepared by an attorney.

The ***Statute of Frauds*** is a Washington State Law that requires certain real estate contracts to be in writing and signed by all parties. This apples to any agreement that is not to be performed within one year form the time it is made. It applies to any agreement for the payment of commission to a licensee.

Course Objectives

As a result of taking this class the agent shall be able to:

- Understand that the Statute of Frauds requires real estate contracts to be in writing.
- Know that a legal description is required and how to obtain the correct legal.
- Know the requirements regarding earnest money deposits.
- Identify the notices necessary on typical agreements.
- Know the possession dates and liabilities tied to early or late possession.
- Recognize how CCR's and land use issues can affect use of property.
- Know it is important for the seller to fill out the Property Information disclosure form.
- Recognize inspection issues.
- Identify items that may be personal property.
- Explain the importance of reviewing the CCR's because of the restrictions they might have that may affect the buyer's decision to purchase.
- Know when closing occurs.
- Know the hazards of completing a blank addendum.

1. Legal Description

For the past 50 years a legal description has been a requirement in order for a purchase and sale agreement to be enforceable according to the statute of frauds in Washington State. A proper legal description is one, which is definite to locate a property without recourse to oral testimony.

Real estate agents have defined the property in a variety of ways with the belief that there would be no discrepancy as to which property was a part of the contract. Other descriptions have included:

- Street address This is assigned by the post office and the fire department. It does not describe the real property. One property can have more than one address.
- Tax ID number This is a number the county assessors office uses to bill for property taxes. It is not a legal description. One parcel can have two tax numbers.
- Lot number The lot number is a number that could be part of the legal description. But, it could be a number assigned by the builder, for example, on the marketing flyers and not the actual legal lot number. It must include the remainder of the legal description.

Why can't these property descriptions replace a proper legal description?

Where do these property descriptions originate?

What other information is necessary when using the lot and block number?

Finding a Legal Description

The legal description for a property for sale in Washington is available from a number of sources. The following are some examples of where to obtain the legal description for a property.

- The last deed available from customer service at a title company office.
- The property profile available 24 hours a day on the Internet from a number of the title companies.
- The title insurance policy available from the seller.
- The preliminary title insurance policy ordered from the Title Company.

Where have you obtained a legal description for real estate?

Legal Description Errors

In Washington State, a purchase and sale agreement, which is proper in every respect, including the property address, but omits the legal description, is not enforceable. But the courts have ruled that if the contract was drafted with an inaccurate legal description due to a mutual mistake between the parties, the contract may be reformed to reflect the parties' intent. Therefore, it is better to have an inaccurate legal description than to not attempt to include one at all.

When Natalie refinanced her house a mistake was made during the purchase two years earlier and the preliminary title came up with the previous owners names. It took over a month to fix the problem. The legal description was in correct when she purchased the property.

Have you encountered a transaction whereby there was an inaccurate legal description?

Attaching Legal Description

The courts have approved language on a purchase and sale agreement that permits agents or closers to add the legal description. The "non legal" description must be adequate enough to identify the property. Some older forms still in use in Washington State read:

> "Buyer and Seller authorize Selling Licensee or closing Agent to insert or correct, over their signatures, the legal description of the property."

The new NWMLS Purchase and Sale Agreement form just has a space to write the legal description. It can also be attached. One example is to include a copy of the last deed with the legal description to the Agreement. Circle the legal description and have parties initial it.

Real estate agents must be aware that it is imperative to attach the legal description as soon as is possible due to the question as to whether the buyer can or cannot walk prior to attaching the legal.

The process of "attaching" the legal is not well defined. It is probably best to obtain a copy of the legal description and get it initialed by all parties and forward copies to escrow.

Are legal descriptions attached to purchase and sale agreements presented on your listings?

2. Earnest Money

In order for a purchase and sale agreement to be valid, there must be consideration. Generally, the purchaser is promising to pay the purchase price in exchange for a promise from the seller to convey a good and marketable title to the property. The mutual promises are considered to be adequate to support a purchase and sale agreement. Earnest money is usually requested to prevent unreasonable withdrawal from the agreement by the purchaser. So that most often in real estate purchase transactions an amount of earnest money is held.

Amount of Earnest Money

The amount of earnest money is not defined by law. It can be any amount that is agreed upon by the buyer and the seller. The earnest money does not have to be in the form of cash or check. It can also be a promissory note. It is important to note that a promissory note may be difficult for a seller to collect upon default by the buyer.

The "safe harbor clause" if initialed by both parties on the purchase and sale agreement that limits the amount of damages to the seller only 5% of the purchase price if the buyer defaults. There is no clear answer to how to handle this issue. It is best to consult with your corporate attorney due to court cases that centered on this issue.

How do you determine what is a sufficient earnest money for your sellers to take or the buyers to provide?

Depositing Earnest Money

In November 2003 a change in handling earnest money has become effective. The real estate commission identified a common problem area in the handling of earnest money. Some brokers or agents were allowing the buyer to deliver the earnest money to the closing agent. In some cases this caused problems in that it was only later in the transaction that the listing agent or seller found out the delivery was either not made or the delivery was late which could have been detrimental to the seller. The new change prohibits a buyer from delivering the earnest money to the closing agent and makes the broker responsible for timely delivery. The change did not affect the requirement for the broker to secure a receipt from the closing agent.

Nearly every real estate purchase and sales contract has the phrase or a phrase similar to "time is of the essence." The late delivery or deposit of earnest money may be very critical to the consummation of the transaction. Please remember that brokers are always responsible for the safeguarding of client funds.

WAC 308-124E-013(4)

(4) When a transaction provides for the earnest money deposit/note or other instrument to be held by a party other than the broker, a broker shall deliver the deposit to the party designated to hold the funds. The delivery shall be made within one banking day after all parties to the transaction have signed the agreement, unless parties to the transaction instruct otherwise in writing. A dated receipt will be obtained and placed in the transaction file.

Department regulation WAC 308-124D-020(9) states that when more than one broker is involved in a transaction, the broker first receiving funds shall retain custody and be accountable for said funds. With licensees representing purchasers and depositing the earnest money into escrow, the listing agent is often left in the dark as to whether the check has been deposited or even if the check was returned unpaid. There is no process to inform the seller or seller's agent. Sometimes, they are not informed until the transaction fails to close. In addition, the agent of the buyer fails

to get a receipt from escrow for the office file that confirms that the earnest money has been deposited.

If the earnest money is deposited with the escrow office, they have different business practices than what is contracted in the purchase and sale agreement. For example, the escrow office may have to deposit the earnest money check upon receipt even though the purchase and sale agreement states it shall be deposited upon satisfaction or waiver of the home inspection.

It is important to make sure that as an agent you are accountable for all earnest money checks. Each office has procedures for the receipt and deposit of the check. In addition, if the buyers offer is not accepted, the agent has the responsibility to return the check to the buyer immediately. Most often earnest money is held in a trust account until closing. Approximately 30% of the real estate firms in Washington State have trust accounts used to hold earnest money deposits. The other real estate companies do not have trust accounts and the earnest money is deposited in the escrow trust account where the transaction will be closing. A copy of the receipt by escrow must be in the transaction file for the auditors!

If the Earnest money is held by Selling Broker and is over $10,000 and the Buyer completes an IRS Form W-9 Interest the interest, if any after deduction of bank charges and fees, can be paid to buyer. If the buyer does not complete the IRS form, the interest is deposited into the Housing Trust Fund Account.

Occasionally, all or part of the earnest money may be released to the seller as a part of the transaction. At that point that earnest money, if the transaction fails, may not be able to be recovered.

It must be disclosed on the purchase and sale agreement where and when the earnest money is to be deposited.

At no time is the earnest money deposited into the personal account of the real estate agent. The broker is also not authorized, unless in writing by all parties, to release the earnest money as a commission payment prior to the closing of a transaction.

The biggest problem the auditors find at real estate companies is that agents will carry a file with them for sometimes weeks and never get it to the office. Sometimes the earnest money isn't deposited and sometimes the check has been deposited but there is no paperwork.

Forms of Earnest Money

The form of earnest money is not dictated by law or rules. It can vary depending on the practice in the region of the state.

Check. Most often earnest money is paid by personal check made payable to the company that is holding the earnest money in escrow. The check must be completely filled out including the amount, payee, and date. Post dated checks must be disclosed to the seller.
Cash. It is not wise to ever accept cash as earnest money.. Advise the purchaser to go to a bank and turn the case to a cashiers check.
Promissory Note. The purchaser may not have the funds available and request to write a promissory note. Because it is often difficult to collect the funds from a promissory note, sellers are often reluctant to accept one as earnest money. But, if there is a promissory note that is to turn to an earnest money deposit at a certain date or at the completion of a certain event, it is imperative that the agent follow up and make sure the note is turned into a check and deposited.

It is important to avoid having the note deposited "at" or "prior to" closing in that closing may not occur and the note becomes worthless.

Other Forms. There have been rare cases of jewelry, stocks, or cars as earnest money. If that is the case check with your broker on the procedure to handle that kind of transaction.

Default and Earnest Money

If one of the parties defaults, the earnest money can become a sore argument. It is important to never tell a party or even guess who will ultimately receive the funds. If an agreement fails do not hesitate to contact the broker if there is any concern about who will have the right to the earnest money.

Purchaser Refund

There may be situations whereby the purchaser may be due a refund of the earnest money. These situations can include:

- The purchaser decides to not purchase the property and the seller has NOT signed the purchase and sale agreement.
- The purchaser makes a good faith effort but is unable to obtain financing and the contract provided for a contingency for financing.
- The purchaser has a contingency for the sale of his or her present home during a specified time period and the purchaser did not get an offer.
- The purchaser is unable to complete the contract due to death, for example.
- The seller backs out of the agreement or cannot provide marketable title.
- The purchaser and the seller mutually agree that the purchaser can receive the refund.

According to the Purchase and Sale agreement, if all or part of the Earnest Money is to be refunded to the buyer and purchase or financing costs are unpaid, the Selling Broker or Closing Agent may deduct and pay them.

Seller Keeps Deposit

If the Buyer fails, without legal excuse, to complete the purchase of the Property, then one of the two options chosen on the first page of the Purchase and Sale agreement become effective.

1) *Forfeiture of Earnest Money.* That portion of the Earnest Money that does not exceed five percent (5%) OF THE Purchase price shall be forfeited to the Seller as the sole and exclusive remedy available to the seller for such failure.
2) *Seller's Election of Remedies*. Seller may, at seller's option:

(a) Keep as liquidated damages all or a portion of the Earnest Money as the sole and exclusive remedy available to seller for such failure,
(b) Bring suit against the buyer for seller's actual damages,
(c) Bring suit to specifically enforce this agreement and recover any incidental damages, or
(d) Pursue any other rights or remedies available at law or equity.

Do you typically deposit earnest money in the trust account maintained by your real estate office or with the closing agent?

Do you have experience with a disagreement over the earnest money if a party defaults?

Earnest Money Disputes

There are times that there is a dispute between the purchaser and the seller regarding the earnest money if the transaction fails to close.

It is imperative that the real estate licensee NOT give legal advice or assure one or the other party that the earnest money will be kept or refunded. Often agents advise their clients incorrectly.

There are times that the earnest money may be due the seller because the purchaser defaulted. Or, the opposite case could occur. But, just because the earnest money may be due one party or another, does not mean that is the way the money is handled.

If a transaction fails to close, the brokers should attempt to get a separate written rescission agreement signed by all parties before releasing the earnest money. The earnest money must be released within 30 days according to the licensing laws.

If one party makes a demand for earnest money because a transaction fails to close and refuses to sign a rescission agreement, then the broker files an interpleader action and lets the courts determine who is to receive the money. Often, it can cost the parties more in court costs and attorney fees to fight for the funds. Even if it appears that the buyer defaulted, the courts may rule that they should still be refunded their earnest money. There is no open and shut case in a court.

The Designated Broker of an office can choose to give the earnest money to one client but must put in writing their intention to give the other party notice.

Non-Refundable Earnest Money

If the attorneys and brokers that collectively write the purchase and sale agreements did not include a form for a non-refundable earnest money, then it might be wise to be especially careful to draft your own contract.

The problem gets very complicated if the seller is given buyers money and then the seller fails to close the transaction for a variety of reasons including death or the seller does not have enough equity.

Discuss any non-refundable earnest money with your broker.

Copies of Earnest Money Check and Identity Theft

It is important to be conscious of the casual copying of earnest money checks that occurs. There is no requirement to give the seller or the listing agent a copy of the check. Do not leave copies laying around on desks. Lenders also, do not need copies of the actual check. The verification of deposit is most valuable.

3. Negotiating Offers, Counteroffers and Mutual Agreement

Offer and Acceptance

After writing a purchase and Sale agreement for a purchaser it MUST be presented to the seller according to the Law of Agency. It can be presented in a variety of ways. It does not have to be presented in person. If there is an offer currently pending on the property, the offer still must be presented to the seller according to the Law of Agency.

A copy of the offer must be given to all parties "at the time of execution," according to Washington State License Law. That means that when writing an offer with purchasers, a copy must be given when they sign their names. When an offer is presented to the sellers, the sellers MUST receive a copy of the offer at the time of signing. Whenever an offer is countered or changed… all parties must receive a copy at the time that they sign.

When a purchaser makes an offer on a property the purchase and sale agreement often has an "offer expiration date" on the form. The seller can sign this agreement exactly as written, deliver a signed copy to the purchaser or the agent of the purchaser, and the offer becomes accepted.

Counter offers

If the seller chooses to "counter" the purchaser's offer with another price or different terms, then the offer from the seller becomes a new "offer" to the purchaser. The purchaser can choose whether to sign the counter or not. At any time after writing the counter by the seller but prior to the buyer signing, the seller can withdraw the counter offer.

Withdrawing an offer

At any time prior to the seller signing and delivering a copy back to the purchaser, the purchaser can withdraw the offer.

The agreement provides for dates for offer acceptance and counter offer. At any time prior to those dates and prior to signing and delivery, the offer or counter can be withdrawn. Time is of the essence. There is never any reason to reasonably delay an offer or a counter offer to one or more parties.

Multiple offers

If another offer is presented, it is imperative that if the seller signs the second offer, that is is "subject to the failure of the first offer." Too often sellers sign a second offer without withdrawing the counter on the first offer. Therefore, sellers have sold their property to more than one party.

If there are multiple offers on a property, the seller has several options.

- The seller can choose just one offer at that time, even if it is not the highest price. But, the seller CANNOT choose an offer over another because of the description of the buyers. For example, the seller cannot choose the single man over the mixed race couple. Another example would be choosing the "perfect" family over another buyer. Offers must be chosen based on the offer…. NOT the people according to Federal Laws.
- The seller can reject all offers.
- The seller can counter offer on more than one offer. But the risk is at the property may end be being sold to more than one buyer. Many attorneys and brokers advise against this or creating a "race to the finish."

When representing a buyer in a multiple offer situation it is important to structure the offer so that the buyers have their "best foot forward."

There are a number of situations where the buyers can sign "escalation clauses." These agreements basically say that they will match or go a certain dollar figure higher than the highest offer. This would encourage the seller to choose that offer due to the fact it would be the highest.

It gets more complicated when there are a number of offers with similar clauses. Sometimes the clauses have limits as to the highest amount the buyer will pay. Often they require a copy of the second highest offer.

Signatures

All parties must sign a contract in order to be enforceable. At no time does the fact that a licensee representing a party as an "agent" have any authorization to sign contracts for the principal. If a principal asks the real estate agent to just "sign" or "initial" for them, the real estate agent must answer emphatically … "NO." The only time a principal can authorize another party to sign contracts in their place is with a valid Power of Attorney. That Power of Attorney must be one that escrow would honor. So, make sure that as an agent, you obtain a copy of the Power of Attorney and forward it immediately to escrow to assure that it is valid.

In Washington State a husband cannot sign for a wife just because we are a community property state. The community property laws do not authorize one spouse to sign for another. In order to do so, the spouse must have a valid Power of Attorney.

Changing Purchase and Sale Agreement

Never make changes on the Purchase and Sale agreement AFTER the final signatures. If there is a change, a new addendum is drawn up and signed (not initialed) by all parties and then forwarded to escrow.

Mutual Agreement

Mutual agreement occurs after the last party signs the Purchase and Sale Agreement with no changes and the agreement is delivered to the other party. When there is constructive delivery, then there is mutual agreement. Constructive delivery can occur when the agreement is:

(a) Received by the other party … buyer or seller
(b) Received by the agent representing the other party
(c) Received by the licensed office of the other party, or
(d) Received by the broker of the other party.

Faxing a copy of the agreement to the HOME office of the real estate agent representing the other party may not be considered delivery. They may not receive it.. or claim they did not receive it. It is always recommended that if it is to be faxed to the other agent, it is also faxed to their licensed office.

Just about all the other dates rely on this date. But, this date is not written on the agreement. It is imperative that the real estate agent confirm this date with the other agent and write this date in the transaction folder.

Contingent Offers

There are times that a buyer must sell and close a transaction on their current property in order to close on another property. This is written up as a contingent offer. The sale of the property is contingent on the successful sale and closing of the buyers home.

Subject To's

Often, to complete a transaction there are factors that are written in the agreement that are "subject to" a certain event occurring. For example, the transaction may be subject to the closing of the buyers house. The sale might have been contingent and the buyers home sold, but is still needs to close so the funds are available for the purchase.

Short Sales, Foreclosures, Bank owned property

There is no one answer to any of these types of transactionsl As the market readjusts, and the number of short sales and foreclosures climbs, there will be changes in the way the paperwork is handled. In many cases, the banks are not staffed to handle the large volume of sales.

4. Consistent Dates

There are so many dates that must be adhered to during the course of a real estate transaction. Many of the dates are agreed upon by the parties. Other dates are written as part of the agreement as "default dates" if no date is written in the blank. There are statutes that define time periods for certain factors in the agreement.

Often the dates on the agreements do not follow in a logical sequence and do not clearly define the duties of the parties and time frames for notices.

The following are examples of notices and times frames that could create inconsistent dates commonly seen on purchase and sale agreements:

- Closing date
- Inspection contingency
- Feasibility study
- Notice of removal of contingency for sale of home
- Property information disclosure form
- Lead Paint inspection
- Resale certificate review
- Attaching legal description
- Depositing earnest money
- Notice from seller to buyer for waiver of financing contingency

Computation of Time

According to the Purchase and Sale Agreement, any period of time stated shall start on the day following the event commencing the period and shall expire at 9:00 p.m. of the last calendar day of the specified period of time, unless the last day is a Saturday, Sunday, or legal holiday as defined in RCW 1.16.050, in which event the specified period of time shall expire on the next day that is not a Saturday, Sunday, or legal holiday. Any specified period of 5 days or less shall not include Saturdays, Sundays, or legal holidays.

"Time is of the essence in this Agreement," according to the Purchase and Sale Agreement.
What are examples of inconsistent dates that have caused problems in agreements or in closing agreements?

How might the problems be overcome during a transaction?

5. Notices

Throughout a real estate transaction there are requirements for one party to give notice to another party that condition has been met or waived. Performance or further agreement is based on new information.

Examples of notices that are commonly given from one party to another include:

- Removal of contingency for sale of home
- Land registration
- Inspections
- Review of Resale Certificate
- Review of property disclosure form
- Financing contingency
- Revocation or offer or counteroffers

All notices required or permitted in, or related to, the Purchase and Sale Agreement must be in writing unless specified otherwise in the agreement. If notice is not given then the contract may be terminated. There must be a consequence if the notice is not given in a timely manner or at all.

The purchase and sale agreement states the notice can be signed by at least one party in the case of a husband and wife. Experience has shown many agents that it is best to get both signatures to be on the safe side.

An agent writes on an addendum, "This is NOTICE that the closing date shall be extended one week to June 7th." This is not a 'notice." This is a change to the terms of a contract. A notice includes terms that are already agreed upon. A notice is like a fork in a road. The parties know that they are traveling down a certain road and at a certain time due to some certain event, one party will choose one of the forks in the road. When they make the choice they give "notice" to the other party. That notice, according to some purchase and sale agreements only needs to be signed by one of the parties.

Receipt of Notices

Receipt of notices to the buyer can be by the selling licensee or the licensed office of the selling licensee or by the seller by the listing agent or the licensed office of the listing agent. According to the Purchase and Sale Agreement, receipt by the Selling licensee of a Real Property Disclosure Statement, Public Offering Statement and/or Resale Certificate shall be deemed receipt by the buyer. The Selling Licensee and Listing Agent have no responsibility to advise of a receipt of a notice beyond either phoning the party or causing a copy of the notice to be delivered to the party's address shown on this agreement. Buyer and seller must keep agents advised of their whereabouts in order to receive prompt notification of a receipt of a notice.

It is recommended when writing a contract whereby a party has to complete some performance it is usually recommended that action be required instead of action to terminate the contract.

What are some of the challenges that you have had regarding giving notice on a contract?

6. Possession

In a perfect real estate transaction all the parties agree, closing occurs, and the parties all move that day. But, that is not necessarily reality due to changes for deadlines to perform by one or both parties that affect the closing dates. In addition, there are times where the relocation and actual moving expenses may appear to outweigh the concerns for possession by the buyers before closing or for possession for the seller after closing. But, with possession at any other time other than closing brings with it rights and responsibilities, as well as, liability for some or all parties and agents. If possession takes place prior or post closing then that may fall under landlord tenant laws.

Closing occurs when the transaction is recorded in the county AND the funds are available to the seller. Often the words "signing" and "closing" are used in place of one another. If the buyer does not get possession of the property at closing, this fact must be addressed in the contract. The liabilities and responsibilities must also be addressed. The seller may have to pay "rent" to the buyer if the seller remains in the property after closing. The cost of one day of a buyers mortgage payment may be greater than a hotel for the seller!

The party who is purchasing that moves in prior to closing or the seller that remains in the home have liabilities. They do not have an ownership interest in the property. Examples of problems that can occur include:

- The sale fails and the buyer does not have a place to move and therefore stays as a tenant. There may or may not be an enforceable rental agreement. It may be very difficult to evict the buyer.

- The buyer does damage to the property in the course of moving and claims the seller must be responsible for the repairs.

- The seller cannot close on the new home in the time frame given and therefore wants to remain in the house for a longer period of time. The buyer has a tenant, with or without an enforceable agreement that may have to be evicted.

- The house burns down to the foundation and destroys the home as well as the buyers personal property. The sellers insurance company may cover the loss of the house but not the buyers furniture, etc.

If a purchase and sale agreement spells out the terms of the rental, should a rental form be attached as a part of the agreement?

7. Property Information Disclosure

Property Information Disclosure

Since 1994, Washington State Property Information Disclosure law RCW 64.06 requires a seller of residential real estate in Washington State 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. There are sellers that are exempt, for example, estate sales. If the seller does not provide the buyer with the form, then the buyer has the right to rescind the transaction prior to closing.

The sellers provide it to the buyer. If not, the buyer can choose to not close. There are some sellers that are exempt. The Disclosure Law Form deals strictly with the structure of the property itself.

If the seller does not provide the buyer with the form and the seller does not disclosure a material defect, the fact that the sale closes does not automatically relieve the seller from disclosure.

The seller, with or without the form, is required to disclose all material defects.

If the seller has to check any yes answer on the Environmental section of the Property Information Disclosure form then the seller MUST provide that to the buyer.

According to some attorneys, no other single document in a real estate purchase and sale agreement has generated as much litigation as this particular form. Over 2/3^{rds} of all real estate lawsuits center on misrepresentation.

If the seller is concerned that disclosure may harm their chances of getting the sales amount they hope to get, then most likely the item they don't want to disclose could cost them a fortune in the future.

Seller fills out the form.

From the day real estate agents were presented with the form, brokers, the MLS and trainers have clearly recommended that the seller is the only one to complete the document. The agent must NOT help or assist in the filling out of the form.

There are times that the agent has reason to believe that information on that form is not correct. In those cases, it is not wise to "play ignorant" and not question the information that you are passing on to the buyer. If the buyer is "damaged" you may find yourself in a lawsuit trying to explain why you didn't question grossly inaccurate information you "should" have known.

Negative Stigmas

One of the most controversial topics today is the issue of "negative stigmas" that may affect the buyer's decision to purchase the property. The form does not ask about any defects other than those that directly affect the structure or the title.

A negative stigma may be described as a murder, ghost, barking dog, drug house in neighborhood, or a sex offender in the neighborhood.

If the agent is faced with one of those types of issues, do not make the decision whether or not to disclose with the seller. This is the time to meet directly with the broker and/ or the corporate attorney! A buyer can sue if information that affects their decision to buy is not disclosed.

Past or Corrected Defects

Another hot issue concerns material defects that HAVE been corrected in the past and are no longer "existing." In too many lawsuits in the past decade sellers have chosen not to disclose and the problem has resurfaced putting the real estate agent and broker in a courtroom. If you are faced with this question by the sellers, it is probably in their best interest to DISCLOSE!

8. Inspection Clauses

There are few transactions today that don't have an inspection of some sort included in the agreement. The inspection clauses written in contracts are disputed more often than almost any other clauses. The NWMLS has an inspection clause addendum. In addition, many companies have their own clauses. Each contract is slightly different, but the smallest addition or deletion of words can change the parties responsibilities dramatically.

Negotiating a transaction after an inspection can be extremely time consuming and stressful on all parties. But, it appears that few transactions actually fail strictly due to the inspection.

In Washington State, home and building inspectors are required to be licensed. They are required to have a pest inspection license with the state under the Department of Agriculture that enables them to identify pest related issues that can include, for example, dry rot. Check to see if the inspectors you work with are **licensed**. Your office must have a section in the policy manual about the referral of home inspectors. Make sure there is full disclosure if there is any conflict of interest or if the home inspector is related, for example. In addition, real estate agents refer clients to a minimum of three home inspectors.

There are organizations that inspectors can join as members. The most well known professional inspection organization is ASHI (the American Society of Home Inspectors) To be a member an inspector must have experience, completed a large number of inspections, pass a test and take continuing education.
Inspection clauses can include:

- Residential home inspection,
- Structural or soils analysis,
- Neighborhood review,
- An environmental analysis, or
- Pest inspection.

The seller has the duty to disclose any material facts that would affect the buyers decision to buy or how much the buyer is willing to pay. The seller is not relieved of liability because the buyer had an inspection.

The buyer may have an inspection that could reveal a problem that the seller may have to correct and disclose to future buyers. For example, the new purchase and sale agreement in the NWMLS requires that the buyer get the sellers permission to test for the contamination of the soil near an underground storage tank.

What are some of the challenges that you have had regarding the inspection clauses?

Have other agents requested that your purchase waive the inspection?

9. Personal Property

There are way too many times that an item that one party considers personal property is not included in the sale to the dismay of the other party. This can happen due to an inadvertent error; a blatant discrepancy on the purchase and sale agreement, or a party to the transaction that makes a decision to leave or take items that may be considered real property. Often there are inaccurate assumptions that can cost one party or a real estate agent a large sum of money.

It would be difficult to find a long time real estate agent that has not had to foot the bill for an item that because of a disagreement between the parties over an item of property that may be either real or personal property. Often the cost to replace the item far outweighs the cost to fight out the issue between attorneys. There are other issues that have had to be argued by attorneys for years.

The best way to avoid the problem is to be very clear in the purchase and sale agreement what is included in the sale. If there is an item that is listed on the listing or the flyer that details the listing information, but that item is not written into the purchase and sale agreement. Each side could argue the point as to who rightfully owns the item, which could be a washer and dryer, for example. The seller could argue that the listing is between the seller and the real estate firm and the buyer is not a part of that agreement. The buyer could argue that he relied upon the information that the seller provided as a part of the marketing when the buyer determined the price to offer on the purchase and sale agreement. There is never one clear answer.

Examples of items that can cause disagreement as to ownership include:

- The refrigerator if it is a "Sub-zero" type because it could be considered "built-in."
- The rose bushes
- The hot tub
- The chandelier
- The swing set or children's play equipment
- The remote control for the garage door opener
- The wall to wall "rug" in the dining room.
- The "built-in" bookcases

What are examples of items that you ended up purchasing in order to keep the transaction together or to please one party?

10. CCR's and Land Use Issues

Residential homes in subdivisions or plats, townhomes, and condominiums usually have Covenants, Conditions and Restrictions that the homeowners are bound to adhere to. It is important that the buyers take the time and review them for anything that might affect their enjoyment or use of the property. CCR's can include restrictions such as the following:

- No pets or size and weight of pets
- Parking spaces
- Parking of boats or RV's
- Time to do laundry
- Percent of tenants
- Satellite dishes and antennas
- Maintenance
- Height restrictions
- Type of window coverings

In addition, it is important for the purchaser to review the rules and responsibilities of the owners and the homeowners associations. For example:

- When does control pass from builder to owners association on a new construction
- Are the roofs on townhomes common areas or not
- Who is responsible and what are the costs to maintain a private road.
- When is the owner allowed to mow the grass or do laundry?
- What are the rules regarding parking? Is the space deeded? What about guest parking? What about beat up cars in the cul de sac? What about motorhomes?
-

The intended use of the property has been the source of several lawsuits in the past few years. For example:

- Can the property be used as a day care facility for a small number of children?
- Can the property be used as an adult home?
- Can the owners conduct business out of their home?

In addition to reading the CCR's, it would be wise to read the minutes for the homeowners meetings for the last year or so.

The purchaser may believe that what is being purchased is different that what was represented in the purchase and sale agreement or that the later use is limited to not allow the purchaser to use the property in the way that they had planned. Common examples include:

- The multi family building is a legal duplex according to the zoning, not a triplex as it is being used.
- The land cannot be developed into smaller lots due to the growth management act.

These types of problems can be avoided prior to closing. In Seattle, for example, a land use certificate for multi family be obtained prior to closing. If a developer plans to subdivide land, it is imperative that the developer determine its feasibility prior to closing.

What are other examples of "deal killers" or misrepresentation issues that have arisen after closing regarding the intended use of the property?

11. Form 34, the Blank Addendum

The second you start filling out a blank addendum you COULD be in a situation where you are "practicing law." The Heritage House case years ago gave us, as agents, the ability to fill out preprinted forms for a real estate purchase and sale.

" The licensee can complete simple printed standardized real estate forms, which forms must be approved by a lawyer. It is being understood that these forms shall not be used for other than simple real estate transactions which arise in the usual course of the broker or salesperson and without charge for the service of completing the forms."

But, once we start drafting our own forms or contracts we are doing the job of an attorney.

There can so much ambiguity with the addendum itself or with the rest of the contract. It is difficult to find a blank addendum that doesn't have some sort of "loophole" embedded in it.

There can be challenges writing addendum's that cover an issue as common as a buyers walk through. For example, these phrases are often used and are not well defined.

- Workmanlike manner
- Work done in a professional manner
- Broom-clean
- Buyers satisfaction
- Prior to closing

The buyer or the seller may not agree on the meaning of a phrase as in this circumstance and a bit of wrestling can ensue!

Identify the risk when writing an addendum. It is best to recommend action rather than inaction or terminating the contract. Spell out the action, the time frame, and the consequences if the action is taken or not approved.

Try to use the preprinted forms available from the NWMLS or your corporate forms. There are hundreds of forms created to address most of the issues we deal with when negotiating a transaction.

What are examples of items that were written on and addendum that caused problems during the transaction?

12. Ownership, Liens, Closing, and Extensions

Ownership

It is important to know who owns the property prior to preparing a purchase and sale agreement. Though it seems like an obvious, the "seller" may not be the only person with ownership interest. The parent or spouse may also show on the title and the seller decides to list the property without their consent or signature.

Check ownership by ordering a copy of the preliminary title report from a title company. It will include the last deed. This should show the most current owners of the property.

Liens

Sellers most often have some type of lien against the property. We commonly refer to a loan on a property as a "mortgage" when in fact it is often a "deed of trust." There may be other liens, judgments that affect the seller's bottom line and often their ability to sell the property. Read the preliminary title report for liens and judgments.

Closing

The transaction closes, usually, when the sale is recorded and the funds are *available* to the seller. Many purchasers and sellers are under the misconception that closing occurs when all the parties sign the documents.

After signing, which usually occurs about 48 hour prior to closing, the documents are reviewed a final time by the escrow officer, the title insurance company and the lender. Then, the transaction is recorded in the county. There are certain times and deadlines for recording closings and these can vary from county to county. To record a transaction, the escrow or title company actually has to hand carry the documents to the county and physically wait in a line. The last day of the month is just the worst day to try to meet deadlines.

Extensions

If the transaction cannot close on or before the date on the earnest money, it is imperative to get that extension in writing. Make it clear what the parties intend and what the consequences may be for not completing performance.

If the closing date is extended and the deposit is increased or made non-refundable, be very careful to cover all your bases. Is the deposit earnest money and subject to the safe harbor clause?

Issues that may arise and cause the parties to extend the closing date can include:

- The financing has not been approved.
- The appraisal was not done in a timely manner or was not acceptable.
- The seller or buyer is unavailable to sign.
- A cloud appears on the title.
- The property has a defect that must be repaired.

What are issues that have caused parties in your transactions to extend the closing date?

The Dangerous Dozen

Quiz

1 Legal Description

1. T/ F ___The street address of a property can be used in place of a legal description on a purchase and sale agreement.

2. T / F ___The best place to find an accurate legal description is on the mailbox.

3. T / F ___A purchase and sale agreement may be unenforceable without a legal description.

4. T / F ___There could be more than one tax ID number on one property.

2 Earnest Money

5. T / F ___The amount of earnest money for a transaction is always 5% of the price.

6. T / F ___Real estate firms do not have to have trust accounts.

7. T / F ___The agent can deposit the earnest money into his personal account.

8. T / F____If the buyer cannot obtain financing, then the earnest money may be refunded if the terms of the contract allow.

3 Offer and Counteroffers and Mutual Agreement

9. T / F ___An offer can be withdrawn anytime prior to the seller signing.

10. T / F ___The seller cannot withdraw an offer prior to the offer expiration date.

11. T / F ___A seller must counteroffer any offer that is presented.

12. T / F ___Mutual agreement can occur on the phone.

4 Consistent Dates

13. T / F ___There can be as many as a dozen dates on a purchase and sale agreement.

14. T / F ___Often agreements have "default dates" if no date is written on the contract.

15. T / F ___According to most purchase and sale agreements, a specified period of 5 days or less INCLUDES Sundays.

16. T / F ___ The day after Thanksgiving is always considered a legal holiday.

5 Notices

17. T / F ___ "This is notice that the closing date shall change to June 2nd" is a notice.

18. T / F ___According to some purchase and sale agreements a notice need only be signed by one of the parties.

19. T / F ___A notice can be compared to a fork in the road.

20. T / F ___ Receipt of a notice can occur by the agent of the other party.

6 Possession

21. T / F ___Possession usually occurs at the time of closing.

22. T / F ___If the seller remains in the property after closing, the seller's insurance might not cover damage.

23. T / F ___A purchaser that moves into the property prior to closing may not move out quickly if the transaction fails to close.

24. T / F ___ It is important that the purchaser and the seller confirm with their insurance companies as to coverage if possession is not on closing.

7 Property Information Disclosure

25. T / F ___The Property Information Disclosure form is for Washington State transfers of property.

26. T / F ___If the seller does NOT provide the buyer with the form, the buyer can walk from the transaction prior to closing.

27. T / F ___Only sellers listed with an MLS are required to fill out the form.

28. T / F ___ There are some sellers that are exempt from the law to fill out the form.

8 Inspection Clauses

29. T / F ___Many residential sales include a condition for a home inspection.

30. T / F ___A home inspection is required by the property information disclosure law.

31. T / F ___All home inspectors in Washington State are all required to be licensed.

32. T / F ___ Many home inspectors are also licensed pest inspectors in the state.

9 Personal Property

33. T / F ___A blatant discrepancy on the purchase and sale agreement can lead to a misunderstanding about whether an item of personal property is included.

34. T / F ___The best indication as to whether an item is included is evidence of a written agreement signed by all parties.

35. T / F ___Often the cost to replace the item outweighs the cost of the attorneys.

36. T / F ___ Real estate agents have been know to pay for an item that is under dispute.

10 CCR's and Land Use Issues

37. T / F ___The size and weight of a pet can be limited by rules in a Condominium.

38. T / F ___A property in a residential development with certain restrictions in the CCR's may not be able to have a business such as a day care facility.

39. T / F ___Because a property is advertised as a tri-plex does not mean it is zoned as one.

40. T / F ___ Often developments with CCR's have ongoing homeowner association meetings.

11 Form 34 the Blank Addendum

41. T / F ___Filling out a blank addendum could be considered drafting legal contracts and be outside of our responsibilities as an agent.

42. T / F ___It is important that the blank addendum be completed with many loopholes.

43. T / F ___It is recommended that the blank addendum clearly identify the action to be taken, the time frame and the consequences if the action is not taken.

44. T / F ____ The Heritage House case gave agents the ability to fill out PREPRINTED forms drafted by attorneys.

12 Closing and Extensions

45. T / F ___A transaction closes when the sale is recorded in the county and the funds are available to the seller.

46. T / F ___An escrow company records the sale by assigning it a number and entering that number into a computer.

47. T / F ___When the buyer signs the documents and brings the final check to escrow, the transaction is closed.

48. T / F ____ A cloud on the title can delay closing.

Summary

49. T / F ___All real estate contracts must be in writing according to the Statute of Frauds.

50. T / F ____ An agent can sell their services for a fee just to draft purchase and sale agreements for any homeowner selling their property on their own.

Answer Sheet…Dangerous Dozen

1		31	
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I attest that I have read the materials and have answered the questions.

Date Course Started _____ Date Course Completed _____

Print Name_____Company _____ Signature_____

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Phone (425) 821-8585 Email: clockhours@gmail.com

Mandatory Evaluation

You can mail by US Mail the paperwork and tuition or Scan and include a credit card number.

Did you read the material in the booklet on this date? YES / NO

Did you complete the quiz on the answer sheet? YES / NO

Did you enclose Tuition ($3 for 3 hrs, $40 for 5 hrs, $50 for 7.5 hrs) YES / NO

Did you fill out and sign this form? YES / NO

Paid by Check or Visa/MC # _ _ _ _ _ _ _ _ _ _ _ _ _ _ _ _ exp _ _/_ _

Why did you choose to take this course? Topic? Time? Cost? Ease? Other?

A "clock hour" is 50 minutes. A 5 hour class should take about 4 hrs 10 min.

How long did it take you to complete the course? _____

	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?	1	2	3	4	5

What are 3 things that you learned from the course?

1.

2.

3.

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

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Email	Twitter.com name
License Renewal Date	Date(s) Class taken

Thanks for taking this class! I really appreciate the agents that take clockhours from my school! I am always working on my classes and writing new ones! Visit my website! Natalie

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