



# Red Hot Issues in Real Estate

Natalie Danielson



Professional Direction

email: [clockhours@gmail.com](mailto:clockhours@gmail.com)

[www.clockhours.com](http://www.clockhours.com)

*The Best Real Estate School on the Planet!*

# Introduction

The real estate industry is constantly changing. Laws, litigation, technology, communication all affect the way a transaction happens from the initial contact with an agent or a property all the way to closing. From contracts to money real estate agents have to be on top of the current issues. This class covers some of the major topics that are affecting our business here in Washington State. Many of the same issues are shared by other states. Changes may be occurring as you read this class. If you have legal questions, direct them to the corporate attorney, the NWMLS or the REALTORS.

## Course Objectives

As a result of taking this class the agent shall be aware of some of the most recent issues in our industry

1. Be able to understand the importance of a paper trail for earnest money and procedure for disputes.
2. Know the continuing education requirements in WA state including the Core Curriculum
3. Know the importance of property information disclosure and new additions to the form.
4. Be aware of the major changes to the MLS forms.
5. Know the latest legislative issues facing real estate agents.
6. List the issues regarding using other people's photos, Zillow and off market listings.

# Red Hot Issues in Real Estate

## Curriculum Outline

<b>Session Hours</b>	<b>Topic</b>	<b>Learning objective</b> As a result of taking this class the agent shall learn:
<b>1 30 minutes</b>	<b>Legal Issues</b>	Class Action Lawsuit against REALTORS and Companies
<b>2 30 min</b>	<b>Selling Office Commission</b>	Selling Office Commission Disclosure
<b>3 20 minutes</b>	<b>Education</b>	New classes always being approved The core is required every renewal and updated
<b>4 20 minutes</b>	<b>Disclosure</b>	Buyer Beware
<b>5 30 minutes</b>	<b>Forms Changes</b>	Hot forms include Escalation, Contingency, Inspection
<b>5 20 minutes</b>	<b>Legislative</b>	Excise Tax Floating homes now listed in license laws Fingerprints
<b>6 30 minutes</b>	<b>Marketing</b>	Disclosure of firm and name as licensed Photos.. who owns them Video and audio recording Zillow is an advertising company Off market listings

# Class Action Lawsuit

## Class Action Lawsuit in 2019 Largest in History

The real estate industry is rocked across the country with a class action lawsuit against the National Association of REALTORS and most of the top real estate franchises in the country. The lawsuit originates with a seller, Christopher Moehrl in Edina Minnesota who questions the compensation paid to real estate brokers.

Christopher Moehrl is a resident Minnesota who listed his home for sale in 2017. The home was listed on the Northstar MLS. He was represented by a REMAX franchisee and the buyer was represented by a Keller Williams franchisee. As part of the transaction, he paid a total broker commission of 6%. The buyer's firm was paid 2.7% of the total commission paid by the seller. He started wondering why he was paying so much money to the buyer's agent because it wasn't evident that the commission matched the work he perceived.

The lawsuit claims a conspiracy with the National Association of Realtors, MLS's, and member brokers/firms. Briefly, the lawsuit claims:

- Realtors/MLS rules require all brokers to make a blanket non-negotiable offer of buyer broker compensation when listing on the MLS.
- The consumers are saddled with a cost that would be borne by the buyer in a competitive market.
- Without the rule, the buyer brokers would be paid by their clients and would compete to be retained by offering a lower commission.
- The Realtors and firms have kept buyer broker commissions in the 2.5 to 3% range for many years despite the diminishing role for buyer brokers.
- Buyer broker costs are similar regardless of the price of the home, yet they are paid based on the price of the home.
- Home sellers are forced to pay commissions to buyer brokers, their adversaries, in negotiation to sell their homes, therefore substantially inflating the cost of selling their homes.
- Home sellers have been compelled to set a high buyer broker commission to induce buyer brokers to show their homes. Home sellers have paid inflated buyer broker and total commissions.
- Price competition among brokers to be retained by home buyers has been restrained.
- Competition among home buyers has been restrained for the inability to compete for the purchase of a home by lowering the buyer broker commissions
- Real estate firms have increased their profits by inflated total commissions.

In addition, the lawsuit claims:

- A comparison of commissions paid in other countries with those of the US shows brokers in US are much higher.
- Commission rates have doubled over the years because house prices have risen. Rates are more than double the rate of inflation.
- There is a great conspiracy between the member firms and the MLS/Realtors.
- The buyer brokers are entirely compensated by home sellers.
- The structure of the MLS is such that an alternative MLS would not survive so there is no competition
- Realtors advise MLS to enter into non compete agreements with third party websites such as Zillow..

The example using the commission in other countries includes the UK. There is no MLS in the UK. The listing fees have sun since 2011. The seller pays on ly the listing agent who does not have the MLS fees and Realtor dues. Buyers find a house and pay a solicitor (attorney) to write up the transaction. The taxes for a buyer can be almost 15%. It is not effective to compare the two countries.

In the class action lawsuit, it includes a script used to train real estate agents dealing with a seller who wants to reduce the buyer's firm commission to save money. The training script at a major franchise gives agents a response to a seller. "When you reduce the commission, you reduce the incentive for that agent to bring a buyer to your home." The script goes on to say, "If an agent has 10 different houses to show, nine of which have an X% commission and one of which comes with a lower commission. Which house do you think they are going to show?" The lawsuit is trying to show collusion between firms.

This lawsuit is quite far reaching touching most of the major franchises and the National Association of REALTORS. It will most likely be in the courts for many years to come. No formal changes have been suggested by NAR to member MLS's

## **National Association of REALTORS (NAR) Responds to their Members**

The general counsel for NAR calls the lawsuit "baseless." According to NAR the question is, "Who really has the best interests of the consumers in mind? It is the attorneys for the plaintiffs or the REALTORS who help people navigate the most significant purchase/sale they'll ever make?" NAR published an article in the Fall 2019 magazine with an outline of their response. The brief article lists 4 reasons the MLS promotes a procompetitive market for real estate.

Here is an outline of the 4 reasons.

1. REALTORS are champions of homeownership, property rights and the communities they serve. They adhere to a strict code of ethics.
2. The MLS system and the way commissions are paid create competitive, efficient markets that benefit home buyers, sellers and small business. commission structure ensures greater access for a large community of home buyers who might otherwise be priced out of the market.
3. Local expert brokers play a crucial role in helping buyers and sellers achieve their goals.
4. These lawsuits are wrong on the facts, wrong on the economics and wrong on the law. Commissions are negotiable and can be negotiated at any point during the transactions.

The lawsuit has grown and the original one joined another lawsuit in August. NAR has filed a motion to dismiss the lawsuit.

## **The Department of Justice Opens Investigation**

The Department of Justice has opened it's own investigation in 2019 into real estate sales apart from the lawsuits. They have demanded information from CoreLogic, which is a platform for most of the MLS's in the country.

They are looking into whether or not MLS services prevent competition in the real estate fee structure. The question is whether agents are engaging in anti competitive practices. One such practice is that brokers in some areas can filter listings by the commission offered. In some markets, agents have been trained to only show properties with a certain minimum commission.



# Selling Office Commission

## NWMLS Changes Compensation Disclosure Rules

In response to the class action lawsuit against the National Association of REALTORS, the Northwest Multiple Listing Service (NWMLS), has changed rules that could have a dramatic impact on the real estate industry in the Puget Sound Region. NWMLS is the largest MLS in Washington State but it is not the only MLS. It is not managed or affiliated with the REALTORS.

If you drop an ice cube into a hot cup of tea, it might affect the temperature of the tea .... and it might not! There are many factors involved including timing. The rules went into effect in October 2019. Some brokers wave them off as just a reaction to the lawsuit. Others think that the way real estate compensation is negotiated will throw the industry on its head. Only time will tell.

### Three Changes to Real Estate Commission Disclosure

*The NW MLS voted to change the disclosure of commission to increase transparency and flexibility for the consumers. The changes take effect in 2019.*

#### 1. Publishing the Selling Office Commission

*The first change is that the Listing firm will be allowed to publish the Selling Office Commission (SOC) on the firm's public website. The amount of commission paid by the Seller to the Buyers' agent will be on the IDX and VOW websites and the client portal in the Matrix system.*

*"Making this information readily available to consumers allows for complete transparency with regard to buyer's broker compensation and provides consumer with additional information at the outset of the transaction," according to the NWMLS. "Early and better access to all the relevant information about a real estate transaction will help consumers make informed decisions about every component of the listing, selling, and purchasing of real estate."*

#### 2. Seller not required to Offer Commission to Buyer's Broker

*The second change removes the requirement that a listing contain an offer of compensation to the buyer's broker. That would mean that the seller may not have to publish a payment of commission to the broker that procured the buyer.*

*According to the Washington State Law of Agency RCW 18.86 : Brokers are not required to show properties as to which there is no written agreement to pay compensation to the buyer's agent.*

*The NWMLS will change the forms to alert sellers that the buyer's brokers are not required to show property for which there is no written agreement to pay compensation to the buyer's broker. This is just a notice as it has been in the Law of Agency for decades.*

### **3. Buyers' Broker can Negotiate Commission with Seller**

*If the seller does not publish an offer of compensation to the buyers' broker, the revised rule allows the buyer and the buyer's broker the opportunity, as a part of the buyer's offer, to negotiate for compensation for the buyer's broker.*

*The NWMLS explains, "This change allows for greater flexibility for sellers when listing property, while affording buyers and buyer's brokers a vehicle for negotiation for compensation (if none is offered) when making an offer to purchase." On the other hand, the commission for the buyer's broker has been typically paid by the seller at closing. If the buyer is required to pay the commission to the buyer's broker, that may affect the opportunity for the buyer to qualify to purchase the house as lenders may not let them finance the commission amount.*

*Then there is the issue of representation. According to WA state Law of Agency, the agreement to pay or payment of compensation does not establish an agency relationship between the party who paid the compensation and the licensee. The brokers that represent buyers' in transactions will lose buyers who purchase directly from the listing agent to "save" the commission. Those buyers may not understand they will have no representation in the transaction.*

### **Selling Firm Commission Addendum**

*The form 41(c) will be revised to include the three options for buyers and buyers' brokers to negotiate for compensation from the seller.*

- 1. If there is no offer of compensation in the listing, the form will allow the buyer and the buyer's broker the opportunity to negotiate for compensation for the buyer's broker to be paid by the seller:*
- 2. Consistent with the current Rule 104(d), the form will allow the buyer and buyer's broker the opportunity to negotiate for additional compensation from the seller, where the SOC is less than the buyer's obligations to the buyer's broker in a Buyer Representation Agreement; and*
- 3. If the property is not listed (i.e. a For Sale by Owner (FSBO), the form will allow the buyer and the buyer's broker the opportunity to negotiate for compensation for the buyer's broker to be paid by the seller.*

### **Buyer Representation Agreements**

*The rule revisions may increase the use of buyer representation agreements (Form 41A Buyer Agency Agreement) While not required under WA state Law, many buyer's brokers are not using the forms. The seller has an agency agreement within the context of the listing agreement. The seller has always been able to determine the level of compensation they want to offer a buyer firm.*

*The Buyer Agency Agreements have been in use for many years, but most brokers have been avoiding them. Form 41(a) gives the consumer the option to have an exclusive Agency Agreement or not with a real estate broker. Brokers, the NWMLS and the DOL have encouraged buyers' brokers to use the form.*

*The Buyer Agency Agreement establishes a formal, contractual relationship with the buyer. In addition, it provides for the payment of commission for the buyer's broker services in the event the seller does not offer sufficient compensation for the buyers' broker. The buyer and the buyer's broker can agree about the payment of commission. The revised form also provides that the buyer is responsible for inspecting the property to ensure that the property is suitable for the buyer's needs. This form has a provision which entitles the prevailing party in any dispute to recover its reasonable attorney's fees and costs.*

*The Buyers Agreement No Agency has also been revised with similar terms.*



# Education

## An Apple for the Teacher

There are almost 1300 course approvals and 105 schools this past year and over 500 approved instructors in Washington. There isn't available documentation as to how many live or online classes. Many of the schools and courses are national. They are not necessarily Washington State specific.

Thanks for choosing [clockhours.com](http://clockhours.com) and Natalie as an instructor for your continuing education! It is the best school on the planet! (or at least my fans think so!) The year 2020 will mark my 27th year as a real estate school in Washington State!

## Weed

Real estate agents ask me to teach a class on Marijuana. At this time there are many questions and few answers. There are major issues that can range from taking a listing that was a grow house to a commercial business unable to get financing to finalize lease. Make sure you make good decisions about disclosure. Know that financing from federal bank is not often an option. Let the client research code and neighborhood issues if they plan to grow or sell weed. There is no one resource for answers in the state or even in your local community. The guidelines are changing by the day so it is not on my list of classes to write at this time.

## Right to the Core

The Core Curriculum class required every two years is being rewritten/revised for 2020-21. Natalie has worked with the Dept of Licensing to give input for every core that we have had to take over more than a decade! On a regular basis, Natalie is asked if the core is still required. YES it is required... Just take whatever core is available (there is only one) during the two year renewal period.

Every two years EVERY broker must take the core class for each two year renewal. That is 40,000 brokers in the state have to sit through a 3 hour class. The class is usually met with groans instead of raves. The core class is a 3 hour class. It can be written as a longer class but the requirement is that it be at LEAST 3 hours.

*Just the other day an agent insisted that after being in the industry for the past 30 years that he is not required to take the core. I had to explain that it is, in fact, required to renew every real estate broker's license.*

The Association of REALTORS required that their members take an ethics class every 4 years. **The ethics class is NOT the core class.** NOT all brokers are REALTORS! Only the members of the REALTORS are required to take an ethics class at year end (not for their license renewal). It is often free online from NAR.



The core class will be revised in Jan 2020. The core class this year will just “morph” into the “new” core class. As a broker you never have to be concerned about what core to take. Just take whatever is available during the two years you have to renew! There will be only one core at any time. There are many people out there thinking that they have to wait to take the “new” core. I just shake my head. It is pretty simple. Brokers have two full years to take the core... whatever core class they walk into during that time is good!

The core curriculum is written by committee. I always say the old cliché, “A camel is a horse created by committee.” People have different expectations what should go into the core class. The complaints include:

- The information is not focusing on legal or legislative issues

- The information does not include what is happening at the Dept of Licensing.

- The information is not even current. (The Heritage House lawsuit was 30 years ago, for example, and cited in the 2018-19 core.)

- There is politics involved in the development of the Core Curriculum.

- The information repeats the same issues year after year.

Specifically, in the 2020-2021 Core Curriculum, the draft proposed an evaluation of the buying habits of Gay, Lesbian, Bi buyers, the promotion of the REALTOR Political Action Committee, the use of copyright information, promoting the Realtor organization and half of the information is just cut and pasted from the last core class that all brokers already took. I wrote letters and made calls to contact all the real estate commissioners. I attended the Sept 25, 2019 Commission meeting. I did rock the meeting! The Core Curriculum was finished for the schools to write the classes for 2020-2021 was rewritten by the DOL to fix the suggestions that I made!!!!

## Required Continuing Education in Washington

Real estate brokers still contact the school regularly asking questions about the requirements for continuing education. In the year 2010, many changes took place when license law was basically rewritten. In order to be considered “clock hours” a course must be approved by the Department of Licensing. Here are the requirements for continuing education.

If you are a real estate broker who is going to renew for the FIRST time, your renewal will occur at the anniversary of when you became licensed two years ago. You will be required to take 90 clockhours.

- 30 clockhour class called Advanced Practices

- 30 clockhour class called Real estate Law

- 30 clockhours of electives that must include a Core Curriculum class (minimum of 3 hours.)

  - The 30 hours of electives start usually with classes at the MLS. If the class is a clockhour class, you will receive a certificate that states the clockhours, school, date, name of class and the course number (typically starts with a “C”)

Brokers and managing brokers who have passed the first two years take 30 hours of electives that must include a Core Curriculum. The Core class is a part of the 30 hours.

Classes can be repeated from one renewal to the next. An agent could technically take the same class(es) every two years.

Real estate agents typically lose the certificates for the classes. It is recommended that agents first look in your email. Do a search for words like class, clock hours to see if a certificate was emailed to you for a class over the past two years. Missing certificates are much easier to locate if you provide the school with some clues as to when you took a class and what class. It is also much easier to find a certificate or registration if you provide the school with the name you used when you took the class. Many brokers are using two completely different names. The Dept of Licensing requires your license be in the name you USE not the legal name that you do not use in public. Contact the Dept of Licensing for more information.

I would guess that about 80% of the real estate agents in Washington State do not have the required clockhours within 3 months of their renewal date! The two years creeps up quickly and usually not at a time that the agents have set aside time to take classes. A clockhour is 50 minutes. You cannot take 30 hours in a 24 hour period, for example. The guideline from the Dept of Licensing is that if you take 30 hours it must be over 4 days... no more than 10 hours a day.

Real estate brokers call and email the schools with these questions?

- Can I just get the numbers and I promise to take the classes this summer?
- Can I just take all the classes today to renew my license?
- Why do I have to take the core class when I took it last renewal?
- Oops. I took the same class last week. (same course number) Can I use both certificates?
- What can I do? If I don't get my certificates by midnight, I'll lose my license!

If an agent does not have the required courses and number of hours when they renew, the agent will not automatically lose their license. The real estate agent will be "unlicensed" when the license expires. The real estate agent cannot sell real estate without a current license. The agent cannot take a listing, show properties, answer client questions or get paid. The agent can remain unlicensed and has up until one year to get those clockhours. There are times, for example, that a real estate agent is not currently an active real estate agent due to another job or illness and lets the license expire taking the extra year to do clockhours. From my experience as a school, even those agents scramble as the year rushes up quickly.

It is no longer required to list the classes that a broker took to renew their license. It is more of an 'honor' system. But, the Dept of Licensing audits about 10% of the renewals. Brokers are emailed and asked to provide the certificates for the classes for their renewal. Natalie always suggests that you scan the certificates and email to yourself, so that if you are audited you can forward that email to the DOL from anywhere you are... even on vacation!



# Disclosure

## Let them Know

The Property Information Disclosure form was amended in 2015 to add 4 specific issues relating to accessibility including stairway lifts, wheelchair lifts, elevators, and inclines. There is now a column with the check box.. N/A. The number of pages for the form provided by the NWMLS went from 5-6 pages. This is to add that section on accessibility and the extra column.

Some attorneys used to refer to the Property Information Disclosure law as “the lawsuit.” It is a constant source of disputes because the seller often doesn’t disclose all the information about the property that would affect a buyers decision to buy. The buyer also has a tendency to rely on the form and not do further research into issues disclosed prior to the closing.

It is the buyers duty to BEWARE, INSPECT and to QUESTION.

Before a buyer has a remedy he or she has to prove diligence in light of the

information that was provided.

The reason a seller does not fully disclose is most likely to get more money for the property than if they disclosed, or to sell to a buyer who would otherwise not buy. If the real estate broker has knowledge that would affect the sale because of a lack of disclosure, the broker should discuss this with the designated broker. This can include negative stigmas which are not addressed in the property information disclosure form and only on the agency law pamphlet.

## I feel the earth move under my feet

There was a proposal to add the Dept of Natural Resources mapping for landslides to the next core class but that did NOT happen. About 13% of Washington has hazardous slide areas. There is a lawsuit in Washington where one issue is that they are claiming the agent didn’t suggest they get expert advice on matters above the agents expertise focusing on the issue of a house built on land that may be unstable. Don’t hesitate to recommend an inspection for anything a buyer might be concerned about including hillsides and wetlands.



# Forms

## Get out those Reading Glasses

The hottest issues regarding the NWMLS forms were included in the Core Class for 2020-2021. They include the following:

### Escalation Clauses

#### **What is an escalation clause and when is it utilized?**

An escalation clause is language in a purchase and sale agreement that is intended to help a buyer to beat other offers made on the property. It typically states that the buyer will pay a certain amount above the highest or competing offer the seller receives. There is a maximum price that the buyer is willing to pay sometimes called a “cap.” The NWMLS forms dealing with escalation clauses and the

explanation are necessary to have if you are considering this type of transaction.

#### **What is the advantage to adding an escalation clause to a purchase and sale agreement?**

A buyer may be anxious to purchase the house. The buyer wants to “compete” for the opportunity to purchase the home. The buyer can be making an offer lower than the list price or the offer can be the list price or higher. The amount that the buyer wants to escalate the price is limited on the contract. The buyer must be able to qualify for the contract escalation sales amount.

#### **What are the disadvantages of using an escalation clause?**

The buyer is basically putting all his/her cards on the table. The buyer is disclosing that he/she will be willing to pay more for the property. With or without competing offers, the seller could counter offer the amount the buyer might be willing to pay as his/her cap. The sellers could release that cap or maximum offer amount to the other buyers in hopes of getting another higher offer.

For a seller, it stops the negotiation. The seller could get more money possibly if the buyers just negotiate.

What is a “competing offer” when determining the escalation clause to adjust sales price?

The property might be in demand by two or more buyers. The agreed upon sales price may not appraise which could cause issues for the buyer to qualify. This needs to be addressed in the offer.

The competing offer may not actually be a “competing offer” under the definition on the forms. It may have expired or the buyer verbally made changes.

#### **What if there are 2 or more offers with escalation clauses?**

Determining the best offer can be difficult. Along with escalation clauses, the buyer may be requesting the seller to pay some closing costs or make some substantial changes or repairs like a new roof.

### **What are the buyer and seller options?**

The seller can make the decision to not accept an offer with an escalation clause. It may be a higher offer but the terms may not be acceptable.

The seller and listing broker can remove the escalation Addendum from the contract and control the price that way. The seller is not obligated to use the escalation clause.

The listing broker can contact the buyer brokers and request their best offer. The listing broker does not have to disclose what the other buyers are offering. Maybe the listing broker says there is a high offer with a certain cap but doesn't disclose that there are much needed repairs requested and buyers closing costs to pay. Without the competing offer, the second offer doesn't know. The buyer should be counseled to make their best offer and be careful trying to guess about the other offer.

The listing broker and seller can counter any offer. The buyer might get a counteroffer for the amount that the buyer listed as their maximum price or "cap."

### **Calculating the sales price of the property when there is an escalation clause?**

The escalation addendum contains a worksheet to determine the sales price with an escalation clause. The "net price" is the stated purchase price (or the maximum price if the competing offer contains a price escalation clause) LESS any price adjustments such as closing costs to the buyer. When filling out the form, the purchase price of the second (competing) offer is listed. Subtracted from that price is any price adjustment like closing costs. This is important because the closing costs affect the seller's net.

*If the competing offer is \$325,000 but included \$3000 credit for closing costs the **net price** of the competing offer is \$322,000.*

The escalation amount is added to the net price of the competing offer. In addition, the credits to the buyer are added.

If the escalation amount is \$5000 and the buyer is asking for \$2000 for closing costs, the new purchase price is \$329,000.

### **What is the definition of "competing offer?"**

According to the forms, a "competing offer" must be a bona fide, arms's length written offer containing all the material terms necessary for an enforceable agreement that requires the following:

- a. The full purchase price to be paid in cash at closing
- b. closing no later than \_\_\_\_ (60 days if not filled in)
- c. is not contingent on the sale of the buyer's property.

A competing offer may include other conditions, such as buyer's pending sale of property.

## **Evidence of Funds**

### **How is the evidence of funds forms to be used on all transactions?**

It is recommended that all purchase and sale agreements that include funds other than a mortgage loan, use the Evidence of Funds form.

There have been times when the buyer claims to have funds to close a transaction, but they do not have the funds available. The buyer might "hope" that the funds will be available, for example. The Evidence of Funds form was created to allow disclosure of the funds and whether they are available or contingent. The buyer is compelled to give notice that they will provide evidence of the funds needed to close. If there are no funds at closing, this form would not be used.

# Contingency Sales and Back Up Addendums

## What is a contingency sale?

Contingency on selling and closing the buyer's property is a complicated process. Remains on the market 45 days contingency by default

A contingency sale ties two transactions together. A buyer wants to purchase a property but in order to complete the sale, needs to sell their home in order to qualify. The buyer does not want to be stuck without a home.

A seller should understand the contingency agreement. The seller has put their home under contract, but the house remains on the market during a period of time agreed to so that the buyer can get their house sold. The buyer wants to avoid a situation where they sell their house and not have a home to move into. The seller takes a risk that the buyer may not sell their house and while it is contingent other buyers may avoid the seller's house.

## Evaluating the Buyer's home

As a listing broker, it is important to evaluate the property that the buyer must sell. It may involve getting a market analysis to find out if the house is marketable.

## Bump Clause

A buyer can waive the home sale contingency if they are bumped. The buyer might risk their earnest money by waiving the contingency. If they cannot sell the house and complete the transaction, they might realize that they will lose the earnest money. The seller

## Second offer

Another buyer previews the home and writes a second offer. The seller reviews the offer and if the offer is good and they come to mutual agreement. Once the second offer is signed all around and accepted. When the second offer comes through the seller must include a form that discloses the contingency sale and the bump potential. (NWMLS Form 39) This form also includes for the second buyer to waive their rights to "walk" The second buyer (who can only buy if the first buyer walks)

## Bump period

The seller can then give the bump notice (NWMLS 44) to the first buyer.

The form gives the buyer 5 (or otherwise written) days to decide to stay and waive the contingency or to terminate. During that period,

- The buyer can give notice they sold the house,
- The buyer can terminate the contingency offer due to not selling the home
- They can waive their home sale contingency and proceed to closing without the sale of the home.

This can mean that the buyer is typically waiving other contingencies (like financing) and close in 30 days.

## Home Inspection and Loan application

The home inspection period starts when the contingent buyer and seller mutually agree on the purchase of the house. The buyer is making a good faith effort to move forward with the purchase of the house.

The seller's home is sold with the contingency, but the seller's full expect the buyers to do the inspection and apply for the loan.

### **Buyer sells their house.. contract signed**

Buyer delivers a form to the contingent seller (90K form) and a copy of the mutually agreed contract showing the sale and the time of close. The closing typically is 30 days. Form 22B determines the closing date so that closing on the first house is 3 days after the sale of the second date or the 30 days or the waiver of the contingency. If this is to extended, there must be another form. (You never use the 22Q form if there is a 22B form being used.)

### **Buyers considering using a home sale contingency**

Does a buyer need to sell their home to qualify for a loan to complete another sale? A broker should discuss with the buyer the options available such as a bridge loan, to complete the sale.

If the buyer can close without a contingency by using other funds or by getting a bridge loan, it might be to their advantage and they won't be in a position to waive options. The buyer can review title, get an inspection, and get the loan application to purchase done. The seller would have to agree to usually a bit longer closing date.

## **Inspection Addendum and response**

It is a best practice to encourage the buyer to have a professional inspection completed on the property. The inspection addendum deals with the time frame and the response. Often, the buyer requests repairs or additional inspections on specific issues. ]]

The inspection addendum has been changed to create a process dealing with the problems that are identified by the buyer's inspector. The repairs needed are determined by the buyer's contractor so that the brokers are not acting as contractors.

### **Know the changes and new language on the inspection contracts**

*"Buyer is prohibited from delivering Buyers inspection report or any pages of Buyers inspection report to seller unless the seller requests delivery."*

### **What if seller requests it?**

If seller requests a copy of the report. Make sure that you have WRITTEN instructions from the seller to provide the report.

### **Inspection report identifies problems.**

If a buyer is triggering the Additional Inspection Provisions then the buyer must deliver a page of the buyer's inspection report where the need or recommendation to seek additional inspections of buyers property.

### **What if there is wrongful deliver of the inspection report?**

If a buyer delivers to the seller a copy of the buyer's inspection report without seller's request, then the buyer is in breach of contract.

### **What is the remedy for that breach?**

Was there damage as a result of that breach? Were the damages material or not? Did the seller have to hire a contractor or expert to refute some finding that may or may not be accurate in the inspection report? A damages claim could be justified. The buyer doesn't evaluate if there are damages. That would be determined by the seller and their lawyer.

### **The benefit of the Form for the Brokers**

This new language and requirements were written so that brokers are not drafting their own contracts with information they are not qualified to deliver. The brokers have traditionally listed out on addendums what the broker thinks seller needs to do to complete repairs identified in the report. Brokers are not contractors and have the ability know what needs to be done to correct the items an inspector list. In addition, neither broker tries to satisfy the problems identified by the inspector.

### **How does the buyer's broker prepare the request for repairs if they can't provide pages of the buyer's inspection report?**

The contractor that does the work is the one that can determine the repairs. A buyer can get a contractor to write a bid for the repair. Attach a copy of the bid to the response. Seller then hires the buyer's contractor to perform the work identified on the bid. Must be done within 3 days before closing and the original inspector can re-inspect. This puts the buyer in control of the process to remedy the problems that the buyer believes is relevant.

### **What if the seller does not want the buyer's contractor?**

The seller can go get a bid from another contractor to make the repairs listed in the bid by the buyer's contractor. The seller typically pays for the contractor.

### **How does it get done in the time frames identified?**

On the form, the buyer can't bring a contractor into the house without the seller's permission during the original inspection period.

The **additional** inspection period of 5 days allows buyer to bring specialists into specialists into the seller's home based on inspector recommendation.

### **How to provide for additional time?**

Some brokers are shifting the time frames so that the original inspection time is less and increasing the additional inspection time. That can help brokers respond to the inspection issues.

## **Online Documents**

We are almost there... the day when we will have no paper to create a real estate transaction. If you are using a copy machine and a fax machine, it is time to just say "NO" and start using online forms and signatures.

If you are doing real estate without a smart phone, are you really serving your clients best interests? Yes, there are agents with flip phones!





# Legislative

## REAL ESTATE EXCISE TAX

### What is the Excise Tax change?

Effective Jan 1, 2020, the current flat 1.28% Washington State Real Estate Excise Tax changes to a graduated tax scale based on the selling price of the property. Taxable sales include transfers of ownership in real property and in controlling interests in entities that own real property in Washington. Real property includes any interest in land, or anything attached to land.

### Why was this enacted?

There has been discussion in the legislature for a progressive or tiered real estate excise tax for several years. That means that people that have more means should pay more tax is the underlying principle. This is referred to as the Real Estate Excise Tax or REET. Different thresholds of real estate sales will trigger a different amount of excise tax.

### What was the bill to change the excise tax?

The Engrossed Substitute Senate Bill 5998 created a graduated real estate excise tax during the 2019 Legislative Session. The text of the bill can be found at: <http://lawfilesexternal.wa.gov/biennium/2019-20/Pdf/Bills/Session%20Laws/Senate/5998-S.SL.pdf>

### What is the graduated tax scale?

This is for the state tax. Local jurisdictions can add their own tax rates.

Transactions up to \$500,000	Rate 1.10%	About a 15% about \$750 savings for most clients
Transactions \$500,000 to \$1.5M	Rate 1.28%	Remains as the same plus the savings below \$500,000
Transactions \$1.5M to \$30M	Rate 2.75%	
Transactions \$3.0M and higher	Rate 3.0%	

### How does it affect real estate transactions?

This means that about 90% of all transactions will see a decrease in the excise tax!

It is a much higher excise for tax for large transactions including commercial and multi family transactions.

### Are some sales exempt?

A sale does not include a transfer by gift, devise or inheritance or the transfer of property by tenants in common or as the result of a court decree. It does not also include the assignment of an interest in property from one spouse or domestic partner to another when in a divorce or dissolution of domestic partnership. There are a few other exceptions to the definition of a sale for this purpose that remain the same prior to the tax changes.

It will not apply to sales of timberland or agricultural land which will stay at the current 1.28% flat tax.

### **What is the change in time period affecting controlling interest transfer or acquisition?**

The REET legislation expands the period for determining whether a controlling interest (50% or more) in an entity that owned real property was transferred or acquired for this excise tax purposes to 36 months. Sellers of minority interests in legal entities that own property in Washington may find themselves subjected to REET based on transactions by other parties that occurred up to 3 years prior or after their sale. The measure of REET in a controlling interest transfer is the full value of the real property owned and not the selling price.

### **Advisory Vote on November 2019 ballot**

On November 5<sup>th</sup>, 2019 there were 12 “Advisory Votes” on the ballot in Washington State. An advisory vote is a non-binding vote. The votes will not change the law. The purpose is to advise the Legislature to repeal or maintain a tax increase.

There were 12 advisory votes about taxes on the November ballot. All the advisory votes with the exception of 3 were repealed. The voters opposed the new Real Estate Excise Tax (REET) approved by the state legislature earlier this year. According to the [latest vote count](#) by the Secretary of State’s Office, voters opposed the new REET by 65.8 percent, with the measure being rejected by all 29 counties. This opposition appears to be the strongest of all the advisory votes.

While some observers put little stock in non-binding advisory votes, others feel the results will likely shape discussions regarding existing taxes and any new revenue proposals. It could have been misunderstood by many of the voters as the graduated scale could benefit such a high percentage of home sellers.

## **Blooming FLOWRs**

There are a variety of types of houseboats, floating homes and barges in Washington State. They used to be listed on the MLS until an attorney at the MLS decided some were actually "vessels" and needed a vessel license. This meant that many floating on water residences could not be listed on the MLS and sold by real estate agents. Other floating homes on the same dock could be listed. But, Linda and Kevin Bagley championed a bill to amend the definitions in real estate license law to add Floating on Water Residences to real estate brokerage services. Floating homes will all be back on the MLS! If you are interested in selling a floating home, know that there are many issues that are involved in those sales... from the ownership/lease of the dock, the HOA’s, the floatation, parking, etc. Ask many questions and if it is beyond your expertise, get advice and possibility work with an agent who knows this business.

## **Press hard**

In 2013, 17% of fingerprints were rejected. This number was cut in half in 2014 as the Dept of Licensing sent out two fingerprint cards. The extra card was kept on file in case there was a problem with the first card. It eliminated over 750 people from having fingerprints retaken. It has been discussed, but no action taken to eliminate the requirement that brokers get fingerprinted every 6 years. As of 2017, the DOL hired a contractor to be responsible for fingerprinting and background checks. Make sure that you go online to the DOL website to make an appointment for fingerprinting if your license is requiring it this year.

Real estate brokers that were in the first crop fingerprinted will again go through the routing. These kinds of questions are constantly asked.

Why do we have to get fingerprinted again? Because they don’t keep your prints on file.

Why do I need to get fingerprints for real estate when I have had this done before. (my gun permit, teacher, school bus driver, etc) Because government agencies don’t share like we taught our kids.

Why do I receive two fingerprint cards? Because if the first one does not take the department will have a second one to avoid having you start again.  
Why do people still get real estate licenses if they have a black mark on their record. Because it is up to the discretion of the staff at the Dept of Licensing.

The Department of Licensing has contracted with a company to process the fingerprints and the background checks. You NO longer go to the police station to have this done. Check the DOL website to see the locations and MAKE AN APPOINTMENT.

## Renewing your License

You have a dashboard at the dept of Licensing website. [Dol.wa.gov](http://Dol.wa.gov). When you renew you check a box saying that under penalty of perjury that you have taken the required clockhours. Then you pay. There is no listing of classes or clockhours. If you are audited, you must email back the certificates for your renewal.



# Marketing

## Really. Are you hiding the firm you work for?

Real estate brokers have to hang their license with a designated broker. Licensing law says that a broker must disclose the firm in a clear and conspicuous manner on all advertising. The guidelines from the Dept of Licensing state that this disclosure must be within “one click” on any webpage. Brokers are making it difficult for a consumer and the Dept of Licensing to find

what firm they are licensed with. How about your signs? Is the firm name obvious? One proposal that may be discussed is whether brokers should have to display their license number on all advertising as loan officers do.

*Take a look at your signs, websites, cards, and any advertising medium. Can the consumer easily recognize the firm name and the broker name as licensed?*

## Photos of your listings

At the dining table of your brand new listing with all the agreements signed, the sellers hand over a thumb drive and prints of their beautiful home. They ask you to use the photos when marketing their home. The photos might have wonderful panorama shots. They also might include spectacular drone photos. Maybe the photos were taken with a drone near a lake with a float plane landing area or next to a small runway shared by the homeowners. The big question to ask your seller... “Do you own or have the rights to those photos?” On the listings agreement the seller agree that they own or have permission for the photos. There is an “indemnification statement.” In addition, the drone photos are still regulated by the FAA. The FAA has tracked down photographers who have taken photos illegally, for example, too high or near airports. If the sellers don’t have permission to use the photos, there could be a battle with the photographer.

## Video and Audio recording

Just about every person is always walking around with a camera and video camera in their pocket.

Washington State laws regarding recording or divulging private communication RCW 9.73.030 requires consent to record any private communication between two or more individuals by an electronic device without getting consent of all the participants. Consent would be considered obtained when one party has announced to all other parties engaged in the conversation, in any reasonable effective manner, that such communication or conversation is about to be recorded or transmitted. This statute has been on the books for over 30 years.

When sellers list their home for sale they open the doors to brokers and clients to preview the property. In this day of constant electronic recording, it would almost be expected that buyers would take photos inside the house. In addition, there are sellers that have installed and hidden video sometimes including audio recording in the house.

If there is any chance that the seller has audio recording, they should notify any person entering that they may be recorded. A prominently displayed sign would most likely be adequate, according to Justin Haag, from the NWMLS.

## Zillow is an advertising medium

This year the changing business practices meeting met with an attorney and public relations executive from Zillow. The discussion was open to questions from the attendees and committee members even on the conference call. It was interesting to me because there was such a heated discussion it seemed about Zillow at a previous meeting yet there really was nothing to say when they were clear they are an “advertising medium like an online classified newspaper” and “Zillow has no intention of selling real estate.” The two hottest issues seem to be the “Coming Soon” listings on Zillow that are violations of our NWMLS and that Real Estate agents are letting lenders pay for their advertising on Zillow.

Real estate brokers are under the impression that the NWMLS feeds the listing information directly to Zillow for publication. That is NOT a correct assumption. Zillow gets the listing information most often from the real estate firms themselves. In some cases, real estate brokers provide the information.

## Off Market listings and Sales

Wow, this was a hot issue discussed at the Washington Realtor Legal symposium. Pocket listings are violating our MLS rules. They also are not good for the homeowner as they will most likely not get full value if not exposed to the open market. This could leave the agent with some liability.

Off market listings are considered any listing that is not exposed to the open market, which in our case is the local MLS. Pre-listing, coming soon or whisper listings are where the broker has engaged a seller in a limited marketing arrangement to premarket or sell prior to executing a listing agreement.

During the Legal Symposium in May 2015, Christopher Osborn spoke at length about the problems with off market and pocket listings. One entertaining and serious discussion included the motive for a real estate broker to have a “pocket listing” agreement with a seller instead of an actual signed listing agreement with the MLS. The excuses listed included: the seller did not want to be identified, the house needed to be staged, the owner not ready to show, the property is high end, the owner wants to limit exposure (could be dangerous under fair housing), the owner wants to “test” the market, etc. All those are basically excuses and as a real estate instructor I also hear them in my classes.

As a real estate agent and member of the MLS and most often the REALTORS, you are bound by the laws, rules and guidelines in order to sell real estate for a commission in our state. The NWMLS rule says that “Members shall not promote or advertise any property in any manner whatsoever, including but not limited to yard or other signs, flyers, websites, email, texts, mailers magazines, newspapers, open houses, previews, showings and tours, unless a listing for that property has been delivered to NWMLS or input by the member and has not been cancelled or expired.”

Most often, the broker is not disclosing to the firm. Most experts believe that having pocket listings that are not exposed to the open market are simply motivated by greed.

The median sales price for a listing that sells through the MLS is between 9%-30% higher than if property sold as off market. The value of the MLS is much greater than the consumers realize.

If you do sell a property that was not exposed to the open market through the MLS, it is important to have a seller representation agreement if the broker is representing seller on a sale to a buyer the seller has identified.

## Rookies

A total of 7803 people took the real estate exam in 2014. This is a 26% increase over last year. Of those 3938 were issued licenses, which is a 32% more than 2013. Because so many taking the exam sneak in with a cell phone, the implementation of metal detectors will most likely happen soon. Helps avoid cheating. People are flooding into this profession.

You have more competition than you have had in probably a decade! That means those “Rookies” are out there in the community doing the marketing that you were taught when you were new. Are you in touch with all your family, friends, past clients, neighborhood... your entire sphere? About 20% of your sphere NEEDS your services at any given time. That means that if you are not available, they may end up with a rookie. Now that is not to say that rookies are not capable and often great agents... We were all rookies but, they now have two years of oversight by a managing broker. They are after your sphere... the people you are not connecting with regularly. The other advantage that rookies have, is that many of them are young and well versed in social media!

Statistics generally show that about only 20% of the rookies stay for a full two years. Real estate sales is not an easy business to succeed in. If you are reading this class, I can guess that you are succeeding! Congratulations!

## Red Hot Issues in Real Estate

1.	The class action lawsuit was started because a home seller questioned why the buyers agent getting paid so much.	T	F
2.	The class action lawsuit claims that real estate companies collude to keep commissions high.	T	F
3.	The National Association of REALTORS calls the lawsuit "Baseless."	T	F
4.	The NWMLS changed their rules so that the selling office commission the seller agrees to pay can now be published.	T	F
5.	A real estate broker is required to show houses in the MLS even though there is no commission to be paid.	T	F
6.	It is a best practice for the brokers to have a Buyer Agency Agreement signed when working with a buyer.	T	F
7.	A broker must take 90 clockhours prior to their very first renewal.	T	F
8.	A real estate broker is not to renew their license without completing the required clockhours.	T	F
9.	It is the buyer's duty to BEWARE, INSPECT AND TO QUESTION when some problems have been identified in an inspection.	T	F
10.	An escalation clause can be difficult to negotiate.	T	F
11.	The net sales price when determining the final sales price includes the escalation clause and any buyer concessions.	T	F
12.	If a buyer must put down a substantial amount of cash, it is a good practice to have the Evidence of Funds form signed.	T	F
13.	A contingency contract with a bump clause typically requires the buyer to sell their first house in a given amount of days.	T	F
14.	If a second offer is presented when there is a contingency, the seller is required to bump the first offer.	T	F
15.	When a buyer completes an inspection, the buyer is not allowed to give the seller a copy without seller's permission.	T	F
16.	Under the inspection contracts, the buyer gets contractor bids on any work that must be done.	T	F
17.	The real estate excise tax was changed to a sliding scale in WA state.	T	F
18.	The real estate excise tax will now be less for most homeowners.	T	F
19.	All floating homes can now be listed on the MLS.	T	F
20.	Note, that photos taken of the listing may not be able to be used outside of the marketing of the property.	T	F

I attest that I have read the materials and have answered the questions. Name \_\_\_\_\_ Date \_\_\_\_\_



### Mandatory Evaluation

- Did you read the material in the booklet on this date? YES / NO
- Did you complete the quiz and attach answer sheet? YES / NO
- Did you fill out and sign this form? YES / NO
- Paid by using secure payment on the front of the website. Paypal processes the credit cards. YES / NO
- Why did you choose to take this course? Topic? Time? Cost? Ease? Other?
- A "clock hour" is 50 minutes. This 3 hour class should take about 2 hrs 30 min. How long did it take you to complete the course? \_\_

Will the material you learned improve your performance?	
Were the course materials easy to follow?	
Were the course materials relevant to your profession?	
Were your objectives met by attending the class?	

What are 3 things that you learned from the course?

1. \_\_\_\_\_ 2. \_\_\_\_\_ 3. \_\_\_\_\_

Red Hot Issues in Real Estate		
Print Name CLEARLY	Signature	Company
Address	City Zip Code	Phone
	Email	
License Renewal Date		Date 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! Natalie*

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