



# The Legal Edge

This course includes  
**2022-2023 Residential Core Curriculum**  
**Current Issues**

by  
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*A Washington State Approved Real Estate School for Clock Hour Education under R.C.W. 18.85.*



## Clockhours by Mail

1. You will be provided with a booklet of with the class material here in a pdf format. It is a 15 CLOCKHOUR CLASS. This class INCLUDES the 2022-2023 Residential Core Curriculum
2. The course has been divided up into sections. In Washington State a “clock hour” is 50 minutes. There is a quiz at the end that can be answered as you read the material or after reading.
3. **Answer** the questions on the quiz sheet.
4. If you have any questions regarding the material or the questions, don’t hesitate to call or email Natalie Danielson.
5. **Email** Quiz and Evaluation to Professional Direction.
6. The certificate will be emailed upon receipt of quiz and evaluation.

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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# The Legal Edge... Current Legal Topics in Real Estate

Includes the 2022-2023 Residential CORE Class

## Curriculum

	Major Topics	Objective
<b>1</b> <b>30 min</b>	<b>Broker Responsibilities</b>	Broker Management Responsibilities* "Teams" Real Estate Assistants Broker Safety Secret Listings
<b>2</b> <b>30 min</b>	<b>Legislative and Legal issues*</b> <b>Dept of Licensing*</b>	Fair Housing Required class for renewals after June 2022 What records must be kept and by whom Video and Audio Recording Online Renewal*
<b>3</b> <b>30 min</b>	<b>Agency Law</b>	Agency Duties Dual Agency must be in writing When is broker responsible to present all writing communication
<b>4</b> <b>60 min</b>	<b>Real Estate Lawsuits*</b>	Seller sues broker for failure to sell overpriced listing* Buyer sues seller/broker for lack of disclosure* Buyer sues firm for not returning EM when sale fails* Class action lawsuit against Realtors for buyer broker commission
<b>5</b> <b>30 min</b>	<b>Fair Housing and Anti Discrimination*</b>	Federal, State and Local laws and protected classes* What it means for brokers Love letters
<b>6</b> <b>30 min</b>	<b>Disclosure Buyer Beware</b>	Understand disclosure on Lead Paint, Mold, Carbon Monoxide, and Geologic issues Buyer Beware Referring third party vendors

<b>7</b> <b>60 min</b>	<b>Writing Purchase and Sale Agreements*</b>	Discuss risk of unauthorized practice of law under Heritage House case Current issues and changes with forms* a. Escalation clauses b. Evidence of funds c. Inspection Addendum d. Inspection Response e. Closing and possession terms f. Financing Contingency forms
<b>8</b> <b>30 min</b>	<b>Multiple Offer Situations*</b>	How to handle multiple offers* Timely presentation of all offers*
<b>9</b> <b>30 min</b>	<b>Advertising and Social Media Guidelines</b>	Requirements for advertising and social media "One Click Away"
<b>10</b> <b>30 min</b>	<b>Property Management*</b>	Update on the newest WA Landlord/Tenant Laws* "Just Cause" eviction provisions affect rent backs and early possession* Know that brokers cannot perform property management without approval from designated broker Know that property management is a real estate activity Know the contracts and record keeping requirements and how trust funds are to be treated Identify which functions can be delegated
<b>11</b> <b>60 min</b>	<b>Risky Practices in an Abundant Market*</b>	Listing Brokers* Buyer Brokers* Professional Cooperation*
<b>12</b> <b>30 min</b>	<b>Fraud in Real Estate</b>	Know and identify red flags for fraud in real estate transactions.

**\* items marked with asterisk are required Core Curriculum topics**

# The Legal Edge... Current Legal Topics in Real Estate

## Includes the 2022-2023 Residential CORE Class

This is an overview of the most current legal issues in the real estate industry. There are changes happening constantly in all aspects of our business. This is an overview of the most current trends in the industry which also includes the current Core Curriculum and satisfies that requirement.

If you have legal questions, these must be directed to your Designated Broker or the corporate attorney.

### Objectives

As a result of taking this class the agent shall be able to understand the most current legal topics in the following areas:

1. Organizational Structure
2. Legislative and Dept of Licensing
3. Agency Law
4. Real Estate Lawsuits
5. Fair Housing and Anti-Discrimination
6. Disclosure and Buyer Beware
7. Writing Purchase and Sale Agreements
8. Multiple offers and Timely presentation
9. Advertising and Social Media
10. Property Management
11. Risky Practices
12. Real Estate Fraud

# Chapter 1

## Organizational Structures and Responsibilities

### Broker Responsibilities when in Management \*

The Designated broker of a firm can delegate certain responsibilities to managing brokers. Duties of a designated broker cannot be delegated to brokers, but only to those with a managing broker's license. Real estate license law requires that all delegations of authority be in writing from designated broker to a managing broker. While designated brokers are able to delegate many duties to a managing broker, the delegation of authority is not complete unless and until it is put into writing, signed by both the designated broker and the managing broker. Oral delegations of authority do not successfully delegate authority and do not hold up under an audit.

It has been a common practice within many real estate firms to have an additional layer of organization. Many offices operate with "teams." Though not defined under the laws, the manager of a team would only need a managing broker's license if the designated broker defined and delegated duties in writing.

The delegation of authority is NOT a delegation of responsibility. When a designated broker delegates authority to a managing broker, the managing broker is "authorized" to take action that is otherwise required, pursuant to the Licensing Law, of the designated broker. However, if managing broker fails to act or fails to act responsibly to fulfill the delegated act, then designated broker remains responsible, based on the Licensing Law, to perform the required act.

If a designated broker properly delegates authority to a managing broker to supervise the brokerage services of a team member who is licensed less than two years, and team leader fails to exercise proper supervision, designated broker remains responsible to the Department of Licensing for that failure of oversight.

The following duties are examples that would require a written delegation of authority from the designated broker to a managing broker.

- Safe handling of client funds which includes the receipt of earnest money
- Maintenance of trust accounts for real estate sales and property management
- Transaction and trust account recordkeeping can be delegated to a managing broker for a team
- Supervision of brokers within the firm. An example can be a managing broker supervising a broker licensed less than 2 years.

### "Teams"

Under Washington State License and Agency Laws, the word and concept of "team" is not defined. It has been a common practice within many real estate firms to have an additional layer of organization that includes one or more agents working together under the name of a team.

The following can be examples of current team organization

- A husband and wife working together. One can be licensed as a broker and the other unlicensed. One or both can be managing brokers.
- A team organized under the name of a "top" agent can include an entire management structure. There can be listing agents, buyer's agents, and transaction staff. The lead agent can be licensed as a managing broker and be delegated duties to supervise the others within the sub organization. Or

the lead agent can hold a broker's license and have no duties to supervise the other brokers within the team.

- A group of agents can work together as a team with or without using a team name. They can work together with clients. They can all be licensed as brokers or there can be one broker with a managing broker's license who is responsible for the team records.

When a group of agents chooses to use a name to describe their team when advertising, there must be full disclosure of the real estate firm name.

In some cases, a team may request from the designated broker that the team name be an "assumed name" under the Dept of Licensing. If that is the case, the organizational corporate structure is not changed, but the Dept of Licensing is aware that the team is organized under the firm and the firm name is not required on advertising. This is only in the case of a Designated Broker registering an assumed name for a team. The team cannot apply to the DOL for an assumed name. Only a Designated broker can do so. The Designated Broker then owns the assumed name, even if the team, for example, leaves the firm.

## Unlicensed Assistant Guidelines

In order to perform real estate brokerage services an individual must be licensed under the real estate license laws. A real estate assistant cannot perform duties that would require a license even though they have oversight by a broker. They cannot show property, complete contracts, negotiate sales or listing, interpret or explain contracts, or give information on a listing or sale that is not publicly published.



## Broker Safety

There are times when a seller, buyer or the real estate agent may be vulnerable in a real estate sales situation. In this industry real estate agents, both women AND men, need to be aware what decisions may affect their clients, the property or themselves. It is important to know what measures can be taken for self-protection, protecting identity and property, clients, and drug issues.

There are numerous statistics and stories in the country about the danger and risks taken by real estate agents. The National Association of REALTORS undertook a study in released in June 2002 that showed that 1 in every 4 agents in the study have been involved in incidents or harassing situations. Over half, 67% of agents, in the study have experienced safety concerns, incidents or harassing situations. Forty percent of the agents know of other agents that have been in safety incidents or harassing situations. In the United States according to the Bureau of Labor Statistics in 2007, there were 18 fatalities of real estate agents/property managers/community association managers. Of those 10 were homicides. These are old statistics before we had the technology today, but the dangers are still there.

Don't take risks as a real estate agent. There are times when the market is slow with desperate sellers that appear to really "need" you. There are buyers that are looking for an unbeatable deal. You might not have had a client in a long time. Don't do something that is risky just to get a deal. Follow your instinct.

- Have buyers prequalified before showing any properties.
- Have clients sign a buyer agency agreement,
- Get ID from clients and have them prequalified prior to showing homes.
- Hold open houses during daylight hours only and, if possible, have another person there.
- Do not meet buyers out at properties without meeting them at the office first.
- Make sure someone always knows where you are at all times.

- Keep an escape route when in a home alone.
- Never go into the basement with a client.
- Always follow a client up the stairs... not have them follow you.

There are many other tips... but your instincts should guide you.

Have a plan so that if you contact another agent, that agent or your office knows that requesting the “red file” is a sign that there is a serious issue, for example.

**Don't let buyer's do something stupid**

When you show prospective buyers properties, it is important to avoid potential mishaps that can result in injury or danger to them. Buyers shouldn't be climbing on the roof or messing with the electrical panel, for example.

**Sellers need to put away valuables.**

Sellers need to be counseled to put away items of value. There are many items lying around the house that have value, but the homeowners may not realize it. Their identity is at risk based on what they may leave on their desk. They have items of value from computers to jewelry to car keys that can be lifted by shady buyers.

If an agent does have a problem, they need to report it to authorities. Many agents get embarrassed or don't think it was really a serious problem, and do not report their concerns to local police. You could be saving another life!

*One agent told me in class that a friend of hers was horribly attacked at an open house. She called her sister and went directly to her house. Then she called her husband and told him she was overworked and needed a break and that she was staying with her sister for a while. She never reported the attack to the police or even to her husband!*

## Secret Listings

Pocket or secret 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 a Legal Symposium several years ago, the problems with off market and pocket listings were discussed. One entertaining and serious discussion focused on 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 an 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.

## Long Term Listing Agreements

There are companies in the real estate industry across the country that call and offer a homeowner a small amount of money in exchange for signing an agreement that they will list their property with that company. If they do not list in the future, which could be up to 40 years, the homeowner would be subject to a penalty that is about 6% of the property value at the time the homeowner breaches the contract and lists with another firm. The property value is typically determined by the real estate firm who created the contract. The real estate firm files a memorandum and not necessarily a lien on the property to cloud the title to make it so that the homeowner cannot sell unless they pay this 6% plus fees.

This has been featured on “Get Jesse” on the news with reports from other investigative reporters from across the United States.

The WA state legislature has been working on a bill to make these future listings illegal. It is still in committee.

### **Senate Bill 5399**

### **Amended April 6, 2023**

#### Summary of First Substitute Bill:

The term "future listing right purchase contract" is defined as a contract obligating an owner of residential real estate to enter into a real estate listing agreement in the future relating to the sale of the real estate.

These agreements cannot last for more than two years. An owner has ten days after entering into one of these contracts to provide a notice of cancellation which allows the owner to get out of the contract without a penalty or further obligation.

The attorney general may bring actions to enforce compliance with this section by making the provisions subject to the Consumer Protection Act.

#### House Amendments

The duration of future listing right purchase contracts is increased from two to five years.

Language is added to prohibit these types of contracts from being used as a lien against real property. The Washington Real Estate Commission is directed to convene a workgroup to examine how real estate brokerages market, establish, and enforce future listing right purchase contracts.

The definition of "future listing right purchase contract" is clarified to grant an exclusive right to list residential real estate for sale in the future.

PRO: The general view of realtors in Washington is extremely positive. People figure out what the commission is up front and they buy their homes. Only recently have there been some bad actors in this space. No one should tie up their home for 40 years.

This bill sets it up so that these agreements cannot last longer than 5 years—some will think that even this is too long. This also makes it difficult to refinance or pull equity out of your home. Banks think it is too much of a headache to work through the liens that these agreements create. People don't know what they are giving up when entering into these purchase agreements. This acts as a lien that impairs the owner's ability to unlock capital from their home. This bill addresses the length of the agreement. The freedom of contracts is paramount, but there are times where the Legislature has to protect people from unfair contracts. The American Land Title Bill has model language that can attack unfair listing agreements.

Washington State Realtors hadn't previously heard about these agreements and do not see how these could be to the benefit of the consumer. They have some technical agreements.

V Realty and Home Options are the companies that represented these future listing firms.

# Chapter 2

## Legislative and Legal Issues

### A. Fair Housing Required Class\*

In 2021 the Washington State legislature passed a law that requires every real estate broker to take a class on Fair Housing. The class is 6 clockhours that must be approved by the Real Estate Commission. The curriculum will be written by a company that they choose in early 2022. Of course, Natalie's school will offer the class and it will be found on [www.clockhours.com](http://www.clockhours.com)). Brokers and managing brokers will take the class **on their next renewal after June 1, 2022**. All subsequent renewals by all brokers must include a 3 clockhour DOL approved Fair Housing class. Natalie did attend and speak at the House and Senate Hearings and the Ways and Means Committee where they voted to budget \$250,000 to the Department of Licensing for the class. There is no information available as to how the money is to be spent, how people can be involved in the curriculum, when the curriculum is available, or what the curriculum will include.

### B. Transaction Logs

Washington State law RCW 18.85.285 requires that all FIRMS have complete transaction logs. The verbiage is as follows:

“Brokers and managing brokers must submit complete copies of their transactions to their firm. The designated broker shall keep adequate records of all real estate transactions handled by or through the firm or firms to which the designated broker is registered. The records shall include, but are not limited to, a copy of the purchase and sale agreement, earnest money receipt, and an itemization of the receipts and disbursements with each transaction. These records and all other records specified by the director by rule are open to inspection by the director or the director's authorized representatives.”

The Administrative Code WAC308-124C-105 details the required records that the designated broker must keep.

Financial records including trust account records and bank records, duplicate receipts, check register/stubs, verified bank deposits, accounting ledgers for all moneys received or disbursed.

Documents that must be retained include:

- An accurate up to date log of all agreements or contracts for brokerages services submitted by firms affiliated licensees.
- A legible copy of the transaction or contracts for brokerage services shall be retained in each participating real estate firms files
- A transaction folder containing all agreements, receipts contracts documents leases, closing documents and material correspondence for each real estate or business opportunity transaction and for any rental, lease, contract or mortgage collection account.
- All required records shall be maintained or digitally accessed at one location where the firm is licensed. This location maybe the main or any branch office.
- Audits are now held digitally/remotely by the Dept of Licensing.

The required documents include the type of real estate brokerage services provided, identify the parties, and all correspondence. Correspondence can be critical in proving what happened during a transaction. This can include text, emails, letters, handwritten notes and social media.

Documentation that must be submitted by brokers to the designated broker include files for transactions that DO NOT CLOSE! This is because the DOL can get complaints from consumers regarding transactions regardless of whether they close or not.

## C. Photos and Videos



### Are you being recorded?

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

Washington State law RCW 9.73.030 regarding recording or divulging private communication 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 like be adequate, according the Justin Haag, from the NWMLS.

### Who Owns the Photos?

The photos of your listing are owned by the photographer. How you are allowed to use those photos will depend on the contract between the photographer and either the seller, the agent or the marketing person. If a house fails to sell and the seller hires another broker, that broker does not automatically have the right to the old photos. If the seller says that it is “fine” to use the photos, make sure you verify the rights prior to using them in any public setting.

The photos are meant to be an accurate representation of the property. Photographers often take the liberty of editing including adding a blue sky and using a wide angle lens so the mini living room looks fit for all the extended relatives. Make sure that the photographer does not edit out important issues like a water tower, power lines, or add features not there.



## D. DOL Renewal and License Online Features

### Dashboard

Every licensed real estate broker has a dashboard on the Department of Licensing Secure Access Account. This is where you keep your contact information current, renew your license, and transfer your license

### Renewals

When you renew your license, you will log in to your Secure Access Account, find your license information. You will click “renew” on the dashboard and you will be taken to a screen where you will attest that you have taken your continuing education. You will no longer list the classes, course numbers and dates. Then, you will pay using a credit card.

### Audits

The Dept of Licensing will automatically audit approximately 10% of the renewals. If that occurs you will be asked to email your certificates.

### Fingerprinting

Every six years, every licensee is to be fingerprinted. The SAW account may notify you if you are due. You will be notified when you are due for fingerprinting. In the past, fingerprint cards were mailed out. Now, there is a vendor that takes care of all fingerprinting. There are certain offices with times available and you can make an appointment.

### Changing/ Transferring

If you choose to transfer or leave a firm, that is completed through the website on your own without the permission of the designated broker. If you choose to go to another firm, that firm will “open the door” with a request and you will click to accept.

The online system was revamped in 2019 so you might want to expect that there may be some issues. The issues might be small or they might make it almost impossible to navigate through the system. Don’t pull out your hair if you have any left! It is not fun and can be very frustrating.

# Chapter 3

## Agency Law

### What are Your Agency Duties?

The Law of Agency created statutory duties which means they are spelled out in the law. Statutory duties allow brokers, consumers, and the courts to clearly understand an agent's role and responsibilities by listing them in the context of the Agency Law. Fiduciary duties of loyalty, confidence and trust are often hard to define so the laws more specifically identify the role and duties and agent has regarding their clients.

### Agency duties as outlined in the Law of Agency

As an agent, you have specific duties that are prescribed by law.

(1) Regardless of whether the licensee is an agent, a licensee owes to all parties to whom the licensee renders real estate brokerage services the following duties, which may not be waived: This means... you cannot have the seller or buyer agree that you are not going to be responsible for the following.



- (a) To exercise reasonable skill and care;
- (b) To deal honestly and in good faith;
- (c) To present all written offers, written notices and other written communications to and from either party in a timely manner, regardless of whether the property is subject to an existing contract for sale or the buyer is already a party to an existing contract to purchase;
- (d) To disclose all existing material facts known by the licensee and not apparent or readily ascertainable to a party; provided that this subsection shall not be construed to imply any duty to investigate matters that the licensee has not agreed to investigate.
- (e) To account in a timely manner for all money and property received from or on behalf of either party;
- (f) To provide a pamphlet on the law of real estate agency in the form prescribed in the statute to all parties to whom the licensee renders real estate brokerage services, before the

party signs an agency agreement with the licensee, signs an offer in a real estate transaction handled by the licensee, consents to dual agency, or waives any rights.

(g) To disclose in writing to all parties to whom the licensee renders real estate brokerage services, before the party signs an offer in a real estate transaction handled by the licensee, whether the licensee represents the buyer, the seller, both parties, or neither party. The disclosure shall be set forth in a separate paragraph entitled "Agency Disclosure" in the agreement between the buyer and seller or in a separate writing entitled "Agency Disclosure."



(2) Unless otherwise agreed, a licensee owes no duty to conduct an independent inspection of the property or to conduct an independent investigation of either party's financial condition, and owes no duty to independently verify the accuracy or completeness of any statement made by either party or by any source reasonably believed by the licensee to be reliable.

Unless additional duties are agreed to in writing, the duties of an agent are limited to the following. They cannot be waived except in section (e).

#### **Duties of a Seller's Agent**

- A. To be **loyal** to the seller by taking no action that is adverse or detrimental to the seller's interest in a transaction.
- B. To **timely disclose** to the seller any conflicts of interest.
- C. To advise the seller to **seek expert advice** on matters relating to the transaction that are beyond the agent's expertise.
- D. **Not to disclose any confidential information** from or about the seller, except under subpoena or court order, even after termination of the agency relationship.
- E. Unless otherwise agreed in writing after the seller's agent has complied with section 3(1)(f), to make a good faith and continuous effort to find a buyer for the property; except that seller's agent shall not be obligated to seek additional offers to purchase the property while the property is subject to an existing contract for sale.
- F. A seller's agent may show alternative properties not owned by the seller to prospective buyers and may list competing properties for sale without breaching any duty to the seller.

#### **Duties of a Buyer's Agent**

- A. To be **loyal** to the buyer by taking no action that is adverse or detrimental to the buyer's interest in a transaction.
- B. To **timely disclose** to the buyer any conflicts of interest.
- C. To advise the buyer to **seek expert advice** on matters relating to the transaction that are beyond the agent's expertise.
- D. **Not to disclose any confidential information** from or about the buyer, except under subpoena or court order, even after termination of the agency relationship.
- E. Unless otherwise agreed in writing after the buyer's agent has complied with section 3(1)(f), to make a good faith and continuous effort to find a property for the buyer; except that buyer's agent shall not be obligated to (i) seek additional properties to purchase while the buyer is subject to an existing contract to purchase, or (ii) show properties as to which there is no written agreement to pay compensation to the buyer's agent.
- F. A buyer's agent may show properties in which the buyer is interested to other prospective buyers without breaching any duty to the buyer.

## Discussion Questions

If you show a prospective buyer a property not listed with you and they are interested in buying that property. Do you represent them?

*Yes, you are presumed to be a buyer's agent (unless you meet one of the exceptions.) As a buyer's agent you are to make a good faith and continuous effort to find a property for the buyer until that relationship is terminated.*

Are you required to show a buyer you represent properties that are for sale by owner?

*No, you are not obligated to show a buyer properties where there is no written agreement from the seller to pay you commission. This is because all agreements for commission must be in writing according to the Statute of Frauds. So if the selling office publishes that there is no commission or the property is for sale by owner, the broker is not required to show it to the buyer.*

If you have a listing that you show to prospective buyers, are you breaching your duty to the seller by showing them other similar properties?

*No, according to the duties of a seller's agent, you can show competing properties to a buyer.*

Can you list another property in the neighborhood of a listing you currently have at a better price without breaching the duty to your seller.

*Yes, you can list competing properties without breaching your duty to the seller.*

You have a buyer that wants to purchase a property. Just after you write up the contract, another buyer calls you and wants to write up an offer also.

Can you write up the second offer?

*No, you can't write two offers on a property with two different buyers. You would be breaching your duty to the first buyer. If the offer from the first buyer fails, you can write an offer from the second property.*

### Buyer Agency Agreements

The Law of Agency creates a presumption of buyer agency. That means that when a buyer walks into a real estate company, for example, the broker is "presumed" to represent the buyer at the time that the buyer performs "real estate brokerage services." A written agreement is not required by the law to represent the buyer. There are a number of reasons why a written agreement with the buyer can clear up any confusion especially in the area of representation and compensation.

The compensation paid to the buyer's agent has typically come from the seller's costs at closing. Though it is negotiable, the commission for the buyer is seldom negotiated by the buyer's agent. The commission amount paid to the buyer's agent will now be disclosed on the NWMLS. In some cases, there will be sellers who elect to pay the buyer's a steep discounted commission or offer no commission at all. This will require the buyer's agent to have a Buyer agreement so that commission can be negotiated by both parties.

As of Spring 2023, the WA legislature is working on a law to make buyer representation agreements required under the law.

### House Bill January 2023

#### Brief Summary



Requires a written services agreement between a real estate firm and a buyer or seller.

Requires disclosure of certain information relating to real estate brokerages, such as compensation terms.

Provides that certain legal duties of real estate brokers apply to all parties to the transaction.

Modifies the Washington State Real Estate Brokerage pamphlet to include changes to the law and improvements in readability

## **Testimony**

(In support) There has not been an update to the Real Estate Agency Act in 30 years. The world of real estate has changed as there are a number of different agencies and models. Consumer expectations have also changed. When the law was originally written, consumers did not search online for houses to purchase. Case law, agency investigations, and the statute were all analyzed for opportunities to update the law.

The agency law pamphlet is rated by the Consumer Federation of America as the worst in the country because it just restates the statute.

HB 1284- 4 -House Bill Report There are a number of good changes included that will help protect the consumer by providing greater transparency and clarity. Whether the consumer is going through a real estate transaction as a seller or a buyer, it is important for them to know what their agent's responsibilities are.

Under this legislation, the buyer will also have to enter into a written services agreement with the agent. This is evolution of the industry from having a time when buyers had no representation to now having representation. This should be further evolved by requiring a services agreement. There is no other service that a person receives where there isn't a contract in place. The services agreement will increase transparency and control for the buyer because the compensation arrangements will be visible. Typically the seller creates the terms, but it is the buyer who funds the compensation. Many buyers do not realize they can negotiate the compensation. While agents can currently enter into written agreements with buyers, the vast majority do not. Written services agreements will also help explain dual agency to buyers and sellers. There have not been a lot of complaints about lack of transparency because buyers and sellers do not realize that there is anything to complain about.

A recent court case in 2020, Falcon Properties v. Bowlfits 1308, overturned a previously held understanding about broker's duties. These are the duties owed to the buyer, to the seller, and to all parties involved in a transaction. The court of appeals decision stated that duties owed to all parties are not owed to all parties, but rather the broker only owes those duties to the person they represent.

This changed what the industry understood. Without these legislative changes, brokers would not owe a duty of honesty and good faith to the buyer if they represent the seller. This fix would help protect consumers.

A written agreement with a buyer:

- **Discloses the agency relationship in writing.**  
It is important that the buyer clearly understand the agency relationship
- **Affirms that the agent has given the buyer a copy of the Pamphlet on the Law of Agency.**  
For some reason, brokers have clients sign the pamphlet that is required to provide. If the NWMLS or corporate attorneys wanted a signature on the pamphlet, there would be a place provided. The way to document that the buyer has received the pamphlet is for the client to sign the Buyer Agency Agreement.
- **Gives the buyer written consent for dual agency.**  
If a broker could possibly show an inhouse listing, for example, the broker must have the buyer understand dual agency and get a copy of the pamphlet. This is documented on a Buyer Agency Agreement. Dual agency must be agreed to in writing.
- **Details terms of compensation.**  
How much does the buyer's agent get paid? The NWMLS discloses the commission paid by the seller for the buyer's agent. If that commission is less than what the buyer's agent requires by contract with their firm, less than what will cover their time and expenses, or is nothing, then the buyer can negotiate the payment only with a Buyer Agency Agreement.
- **Puts commission in writing if there is no listing agreement.**  
If a buyer elects to purchase a house that is not listed in the NWMLS, this commission section details the amount of commission that the buyer agrees to pay to compensate their agent. If a property seller refuses to agree on paper in a listing or as a for sale by owner, to pay a commission, the buyer's agent is not required to show that property.
- **It has an attorney's fees provision**  
So that if the broker is sued and wins, the other party is responsible for their attorney's fees.

## Buyer's Agency Agreement can be exclusive or non-exclusive

A **non-exclusive agreement** means that any property information on potential listings for sale that a buyer's agent provides to a buyer, would require a payment of commission if the buyer decides to buy one of those properties during a time period.

An **Exclusive Agreement** would be similar to the idea of an exclusive listing agreement. An exclusive buyer agency agreement binds the buyer to purchase any property with the buyer's agent. It includes during a time period and within certain geographical boundaries.

## How to use a Buyer Agency Agreement?

Real estate brokers in Washington state often seem to avoid using a Buyer Agency Agreement. With the disclosure of buyer's agent commission to the sellers and the buyers, the real estate broker may be in a position to discuss and negotiate commission in order to get paid. This will require the use of the Buyer Agency Agreement.

A Buyer Agency Agreement has been available in Washington State for decades. It is not a new form, though it has recently been changed. In other states the Buyer Agency Agreement can be as long as 7 pages with terms similar to the WA state Law of Agency. Most buyer's agents use a non exclusive agreement but this could change.

## B. When You are Both Holding Hands .. Dual Agency

Under the amended Law of Agency RCW 18.86.020 it states:

“A broker who performs real estate brokerage services for a buyer is a buyer's agent unless the: . . . (c) Broker's firm has appointed broker to represent the seller pursuant to a written agency agreement between the firm and the seller, and the **broker's firm has appointed the broker to represent the buyer pursuant to a WRITTEN agency agreement between the firm and the buyer**, in which case the broker is a dual agent . . .”

This language requires an agreement between the firm and the parties and that the firm has appointed the broker as agent for both parties. It must be in writing. Checking a box on the purchase and sale agreement does not constitute an agreement in writing.

Dual agency occurs when an agent sells his or her own listing. In addition, when an agent sells an in-house listing, the broker becomes a dual agent. Undisclosed dual agency (often occurring when the agent has acted as an agent for both parties without disclosing) is where problems can happen.

The duties of a dual agent are the same in the Law of Agency as the duties of a single agent representing the buyer or seller.

When a listing agent shows his or her own listing to a purchaser that they represent, are they automatically a dual agent?

*No. Dual agency must be in writing with terms of compensation after providing the pamphlet on the Law of Agency. When representing a purchaser, the real estate agent should discuss agency with the consumer. A listing agent showing and selling to a buyer may represent the seller exclusively or be a dual agent.*

Dual agency could occur if the licensee discloses to the buyer verbally that they represent the buyer. The seller, most likely in most listing agreements, has agreed in writing to dual agency in the listing agreement. If the agent acts as a buyer's agent and is only going to represent the seller, the agent could have created an undisclosed dual agency situation. Undisclosed dual agency can create misrepresentation. If it is not in writing according to the law, the agent should not be acting as a dual agent.

# Chapter 4

## Real Estate Lawsuits

### A. Seller Sues Broker for Failure to Sell Overpriced Listing



#### Brokers obligation to convey offer to client is limited

This is an important case for many reasons. First of all, the sellers sued their listing broker because the property didn't sell when it was clearly overpriced. They claimed they were damaged by decisions that the listing agent made which are typical of most listings. But, the final decision regarding the presentation of all written communication as specified in the Law of Agency was tested and better defined. The sellers lost their case against the listing broker after probably a couple years of litigation. Consider the list price, the photos and the updates when she relisted the house, that the broker discussed possible rental and the listing specifically indicated this. When the broker took the listing, do you think there were signs of trouble?

The **Beauregard's** a real estate broker, to list and sell their property in Bellevue, Washington.. During the initial meeting with the Beauregard's at their Bellevue home, the Beauregard's mentioned they were also considering another real estate broker. Ultimately the Beauregard's chose The agent because she estimated the property could be listed at \$ 2,488,000, higher than the other agent's estimate. The agent recalls merely "shar[ing] with them that other clients ... were buying a similar sized home one block over that was listed at \$ 2,488,000" and offered that amount as an example, only after the Beauregard's insisted on her opinion. The Beauregard's maintain that the agent inflated the price to induce them to enter the Exclusive Sale and Listing Agreement (the Listing Agreement).

Ms. Beauregard told the agent that, if they did not get offers within their desired price range, they were also interested in renting their property. The Agent concedes this alternative was discussed, but the Listing Agreement contracts The agent to "sell" the property, and specifically indicates that the "firm need not submit to Seller any offers to lease, rent, execute an option to purchase, or enter into any agreement other than for immediate sale of the Property."

The parties signed the Listing Agreement on November 11, 2015. The Listing Agreement did not include a list price, but listed the property as viewable by "Appointment," "Call Listing Office," and through the "Multiple Listing Service (MLS) Keybox." The agent also listed the property as owner-occupied despite it being vacant because for "premier properties," the agent prefers to go to the property before a showing, turn on the lights and heat, discuss key features of the home with the buyer's broker, and ensure the doors are locked after the showing. Additionally, the agent maintains that the property was not truly vacant because some of the Beauregard's' furniture was present, and a vacant property is more susceptible to theft. The Beauregard's maintain that The agent never

fully explained to them that the property was listed as owner-occupied or as viewable by appointment, and had they known, the Beauregard's would have never agreed to those terms. Those terms, however, were clearly listed in the Listing Agreement signed by the Beauregard's. ¶ 6 On December 4, 2015, The agent e-mailed the Beauregard's, recommending a list price between \$ 1,950,000 and \$ 2,150,000. Ms. Beauregard replied that she thought they had discussed a higher starting price range. The agent arrived at the suggested list price after conducting market research, which included two comparable properties in the same neighborhood. The first was listed for \$ 2,488,000, but sold for \$ 2,285,000. The second was listed for \$ 2,249,000, but sold for \$ 2,175,000. The property is a stacked three level floorplan, lacking an open floorplan, and with recent market preference trending towards open floorplans, The agent suggested a lower list price to compensate for the market trends. The Beauregard's disagreed with The agent's recommendation and the property was listed for \$ 2,288,000 with a \$ 5,000 "paint/deck stain credit" and went active on December 9, 2015.

The parties characterize the discussions about listing the property over the holiday period differently. The Beauregards maintain they contacted The agent about delisting the property over the holiday season, but The agent never responded because she was vacationing in France. The agent maintains that there was less inventory on the market, and listing over the holiday period would capitalize on buyers trying to relocate before the New Year.

During the months following the initial listing, The agent's office hosted at least 18 open houses at the property. No prospective buyers submitted offers during that period. The Beauregard's contend that the lack of offers was because The agent failed to follow-up with prospective buyers and used old photographs in the listing. At several points during her representation, The agent recommended that the Beauregard's drop the list price because other nearby properties had recently lowered their prices and attracted buyers. On February 3, 2016, the Beauregard's agreed to reduce the price to \$ 2,173,000, stating "[w]e had always felt the \$2.28 was ambitious, but wanted to try it." The agent recommended a further price reduction on March 20, 2016, to \$ 1,998,000, but the Beauregard's disagreed. On March 6, 2016, the Beauregard's notified The agent they wanted to switch real estate agents because they felt The agent was not following up with prospective buyers and had too many other listings in the Bellevue area. The agent convinced the Beauregard's to give her a second chance. The agent and the Beauregard's made several changes to the property and updated the listing photos, which showcased the re-sodded backyard, the exterior paint job, and updated interior photos.

Ultimately, the Beauregard's terminated their listing agreement with The agent in April 2016, and entered a new agreement with another broker. The property sold on August 17, 2016 for \$ 1,850,000.

The Beauregard's filed their complaint alleging The agent breached statutory duties, was negligent, and violated the CPA. The Beauregard's advanced a theory that The agent's cumulative breaches caused their property to remain on the market for too long, leading to low offers from prospective buyers. The Beauregard's claimed that The agent fraudulently induced them to enter the Listing Agreement by inflating the value of their property to \$ 2,488,000.

During discovery, the Beauregard's recovered an e-mail from another broker with Windermere, sent to The agent on April 6, 2016 asking whether the Beauregard's would be interested in renting as opposed to selling because he had a client looking to move in mid-June from San Francisco, and rent a house. The agent replied that the Beauregard's were not interested in renting the property. Ultimately, the prospective renter never rented a property in Bellevue, and stayed in a hotel only for a couple of months before moving back to San Francisco. The Beauregard's contend that The agent was required by [RCW 18.86.030\(1\)\(c\)](#) to inform them of this "offer" to rent their property, failed to do so, and if this "offer" was conveyed, they would have accepted.

The email read, "Shot in the dark, but wondering if your client at XXX Bellevue 98004 might be interested in renting their house as opposed to selling, I have a friend moving from SF in mid June looking for a rental to get acquainted with the area. He and his family are looking in West Bellevue area like Clyde Hill,

Medina, Hunts point, Yarrow point and surrounding. \$ 3500/mo is his target monthly2000+ sq/ftHouse2+ bedrooms. He is willing to sweeten the offer by paying cash in full for a year if needed and looking for 1-2 years.”

The Beauregard's argued that The agent breached her duty by:

- (1) Inducing them to enter the listing agreement dated November 11, 2015 by way of negligent pricing advice by proposing a value of \$ 2,400,000.
- (2) advising them to list their home at an unmarketable value of \$ 2,288,000 and bad pricing thereafter.
- (3) Failing to clearly discuss the listing terms including orally clarifying that other agents would be informed of the suggestion for appointment.
- (4) Informing other agents that she should be contacted prior to any viewings.
- (5) Recommending that the Beauregard's list their home over the dormant holiday season.
- (6) Failing to respond to the Beauregard's inquiry of December 21, 2015 about de-listing the home over the holidays.
- (7) Utilizing old photos of the 2013 listing that were not representative of the home at the time of current marketing.
- (8) Failing to follow up with interest [sic] buyers in the spring of 2016.
- (9) Failing to inform the Beauregard's of the April 6, 2016 offer to rent their home for a 2-years [sic] lump sum cash payment.
- (10) Elevating her own financial incentives over and above the Beauregard's express and/or implied goals.

The statutory duty to convey all "written offers, written notices and other written communications" is triggered once a broker is rendering "real estate brokerage services." See [RCW 18.86.030\(1\)\(c\)](#). As discussed above, the amendment to chapter 18.86 makes clear that "[t]he duties under this chapter are statutory duties and not fiduciary duties. This chapter supersedes the fiduciary duties of an agent to a principal under the common law." [RCW 18.86.110](#).

Brokers owe these duties "to all parties whom the broker renders real estate brokerage services." [RCW 18.86.030](#). "Real estate brokerage services" is defined as "the rendering of services for which a real estate license is required under chapter 18.85 RCW." Chapter 18.85, which governs real estate licensure, defines "real estate brokerage services" to mean "any of the following services offered or rendered directly or indirectly to another, or on behalf of another for compensation or the promise or expectation of compensation." [RCW 18.85.011\(17\)](#). Thus, while the statute explains that the duties are not waivable, they are owed when only a broker is acting for "compensation or the promise or expectation of compensation."

In the e-mail The agent received from Williams, the e-mail specifically asked if the Beauregard's would be interested in renting their house, as opposed to selling. The e-mail communication does not fall within the "real estate brokerage services" that the Beauregards contracted with the agent because Williams clearly indicated that the interested party only wanted to rent the property. Since The agent's scope of agency was limited to selling the property, The agent was not expecting compensation from renting the property. Therefore The agent did not have a duty to communicate the rental inquiry.

## B. Buyer sues Seller/Broker for Lack of Disclosure

Buyers in residential transactions receive Property Information Disclosure statements from the seller according to state law. Most buyers assume that these are accurate and rely on them. Most buyers assume that they will have a remedy if the seller's disclosures are fraudulent. But the law retains that the buyer duty is to beware, inspect and to question.

On February 25, 2013, the Court of Appeals decided *Douglas v. Visser*. In that case, the Terry Visser, a *real estate broker*, and his wife purchased a fixer house in Blaine with the intent to fix and rent it. Much of the structure of the house was rotten to the point that the workers could not get nails to hold. The seller told them to make it look good and cover it up so that it could be sold.



The seller checked “no” and “don’t know” on many items on the Property Information Disclosure report. The Buyer asked for more information and a copy of the seller's pre-purchase inspection. The Seller hand wrote some answers and didn’t provide the previous inspection. The Buyers hired a home inspector who noted three small areas of rot. But the inspection report said that they were not structural and that the buyer should deal with them if the rot spread. After closing, the buyers discovered that the house was uninhabitable and essentially had to be rebuilt from scratch. They sued the seller. The buyer prevailed at trial. The trial judge found that the seller had committed fraud and awarded the buyer the cost to rebuild the house. The seller appealed.

The Court of Appeals reversed the trial judge's decision and sent the case back for the trial judge to dismiss the claim and award the seller attorney fees. Once the buyers were aware of some rot at the house, they were required to investigate further even though the discovered rot was minor and in a different location.

*According to the decision, the buyers did not have a duty to make an exhaustive invasive inspection or endlessly ask further questions. They merely had to make further inquiries after discovering the rot or at trial show that further inquiries would have been fruitless. The buyers could not get relief by asserting that the defect was worse than anticipated.*

But before a buyer has any remedy, he or she will have to prove diligence in light of the information that was provided. It is the buyer's burden to prove diligence, not the seller's burden to prove a lack of diligence.

A buyer should assume that there is no real remedy for any misrepresentations by the seller. The buyer has a duty to follow up on every defect that is found and every uncertainty about the property. If the buyer could have discovered the truth with diligence, the buyer will have no claim.





## C. Drafting of Contracts and Return of EM

Dora E. Edmonds signed a buyer/broker agreement with an agent of John L. Scott Real Estate, Inc. The agent showed her a house listed by another Scott agent and, after reassurance from the agent that a basement drainage problem would be fixed and warranted, Edmonds signed an earnest money agreement for the purchase of the house. As the closing date approached, the basement was still wet, and Edmonds demanded the return of her earnest money.

John L. Scott's general counsel unilaterally determined, without investigation, that the drainage problem had been fixed. He declared Edmonds in default and disbursed half of her earnest money to the sellers and half to the agents involved in the transaction. Edmonds sued.

The trial court found that John L. Scott breached its fiduciary duty with respect to its disbursement of the earnest money, breached the earnest money agreement, was negligent in the preparation of the earnest money agreement, and committed two violations of the Consumer Protection Act (CPA). The court awarded Edmonds damages, including \$10,000 in exemplary damages for each CPA violation, and awarded her attorney fees and costs.

Pursuant to standard company practice, Edmonds' file was turned over to Scott's general counsel for handling. Without conducting any factual investigation into Edmonds' complaints regarding the water in the basement, and without undertaking to ascertain whether any warranties covered the work, Scott's counsel unilaterally determined that the drainage problem had been remedied. Less than a week later, the basement flooded again. When Edmonds refused to close on the ground that the water problem had not been fixed, Scott's counsel declared her in default and directed Scott's trust department to disburse half of her \$5000 earnest money to the sellers and half to the agents.

The court found that the listing agent failed to disclose material facts by failing to disclose the extent of the drainage work that had been performed prior to Edmonds' signing the earnest money agreement and by presenting a property information form containing statements she and the buyer's agent knew were false. These acts according to the court violated the Consumer Protection Act.

The trial court's conclusion that buyer's agent was negligent in preparing the earnest money agreement. The court found that to protect Edmonds' desire for a dry basement, the buyer's agent inserted the following language into the inspection contingency addendum to the earnest money agreement: "Seller to furnish copy of warranty for drainage work done." The court also found that the buyer's agent prepared the notice of disapproval of inspection report and intentionally omitted the basement water problem from the notice, telling Edmonds that it did not need to be included because she was already protected by the language he had added to the inspection contingency addendum.

*The court concluded that these actions by her agent fell below the standard of care of an attorney in preparing legal documents relating to the purchase of a residence.*

Licensed real estate brokers, when completing earnest money agreements, are required to comply with the standard of care of a practicing attorney according to the Heritage House case. The language the buyer's agent inserted in the earnest money agreement was insufficient to protect Edmonds' interests with respect to the water problem and fell below the standard of care of a reasonable and prudent attorney in preparing a purchase and sale agreement. To protect Edmonds' interests, there should have been an identification of who was doing what work, the right to inspect the work, and to specify when the work was to be completed, the right to require that the work be done to the buyer's satisfaction, an assurance that the warranty was assignable to her, and the availability of other remedies. Further, as illustrated by this litigation, the language inserted by her agent was entirely insufficient to protect Edmonds' interest in purchasing a house with a dry basement.

The court also found that listing agent breached the earnest money agreement by failing to deliver the warranties as to the drainage work. In addition, the court found that Scott's disbursement of the earnest money constituted conversion, a breach of fiduciary duty, and a violation of the Consumer Protection Act.

Disbursement of the earnest money without a written release is permitted only when the agreement terminates according to its own terms. An agreement terminates by its own terms only upon the happening of an event specifically identified in the agreement as one that will cause such termination.

The problem had not been corrected, as evidenced by the continued flooding of the basement after Scott's counsel declared the problem fixed and Edmonds in default. The unfairness of this practice is self-evident. Further, as Scott acknowledged, it followed this policy dozens, perhaps hundreds, of times in a period of four years, so the practice has the capacity to deceive a substantial portion of the public. Scott may simultaneously act not only as the seller's agent but also in furtherance of its own financial interests as well.

*This is a very old case but still used by the courts. After the decision was rendered in this case, most Washington State real estate firms stopped using their trust accounts to hold earnest money and instead it was held by escrow. The laws changed regarding distribution of earnest money in the case of a default and a demand for the earnest money.*

*Also, there were false statements on the Property Information Disclosure forms and the broker wrote addendums that didn't protect the purchaser's interest. Be very careful drafting addendums because you are held up to the standards of a practicing attorney.*



## D. Class Action Lawsuit in 2019 challenges Commissions Paid to Brokers

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 filed in 2019. It is the largest class action lawsuit in history! 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.

The class action lawsuit, 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

The Department of Justice has opened it's own investigation in 2019 into real estate sales apart from the lawsuits. 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.

## Northwest MLS 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. NWMLW is the largest MLS in Washington State but it is not the only MLS. It is not managed or affiliated with the National Association of REALTORS or the Washington Association of REALTORS. This is the information released in 2019.

### 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.*

### **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 that in that case, 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. 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 Dept of Licensing have encouraged buyers' broker 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.*



*If you drop an ice cube into a hot cup of tea, it might affect the temperature of the tea .... and it might not!*

We do not know what the future will bring. Maybe the lawsuit will evaporate or maybe it will change our industry exponentially. The NWMLS, though not called in the lawsuit, did respond immediately. Change is inevitable, but we do not know the extent of the change. Only time will tell. Predictions ... are just that... looking into a glass ball pretending that the wizard can actually see something.

Most currently in 2021, there is a franchise that is challenging the Realtors Association (they own most of the MLS in the country) that they should be able to list property without the seller offering a buyer's broker commission.

# Chapter 5

## Fair Housing and Anti Discrimination\*

There are times when “disclosure” is against the law. There are Federal, State and Local Fair Housing and Anti Discrimination Laws.

### What is a protected class?

People that identify as a person in a group listed as a protected class share common characteristics. Every person can identify as being in one or more protected class. We all share our race, religion and national origin with many other people. Protect classes are not necessarily minorities. It is when we are discriminated against because of that characteristic that special protection is granted under Federal, State and local laws.

### Are you a member of a protected class?

Yes, every person has characteristics under the laws. Every person can be described by race, color, sex, religion, and other protected classes. It is when those characteristics are used to show a limitation, preference or discrimination that any person can have protections under the laws.

## Federal Laws

The Fair housing and anti discrimination laws do not just protect “minorities.” They protect people that are discriminated because of certain reasons or “protected classes.” The laws created “protected classes” to identify groups of people that have been discriminated against. The Federal Fair Housing Act prohibits discrimination based on protected classes for the sale or lease of residential property. It prohibits discrimination in advertising, lending, real estate brokerage, and certain other services in connection with residential transactions.

The protected classes are:

Race                      Color                      Religion                      Sex                      National Origin                      Familial Status                      Handicap/Disability

There are exemptions to the federal laws but they apply very rarely. There is no exemption for any transaction involving a real estate licensee.

## Washington State Law on Discrimination

In Washington State there is the Law against Discrimination. The law prohibits unfair discriminatory practices in real estate transactions including the sale lease, appraisal, brokering, exchange, lending and offering real estate brokerage services. The law covers all real estate transactions, not just residential housing as the Federal Law does. The Washington law on discrimination is stricter and has no exemptions.

## Washington State Human Rights Commission (WSHRC)

The Commission has a cooperative agreement with the Department of Housing and Urban Development (HUD) to process and investigate dual-filed housing complaints for which our Commission receives funding under the Fair Housing Assistance Program (FHAP). The Commission is a FHAP agency because our law is substantially equivalent to the federal Fair Housing Act. Most of the Commission's housing cases are dual-filed with HUD; however, the state fair housing law is more expansive than the federal fair housing law and occasionally the Commission will prepare a complaint with Commission jurisdiction only.

These are some of the issues/ cases and examples of what you should know regarding the protected classes in Washington state.

### **Race /Color in Housing**

It is illegal to discriminate on the basis of race or color

### **Creed/Religion in Housing**

It is illegal to discriminate based on a person's religious beliefs.

### **National Origin**

It is illegal to treat people unfavorably because they are from a particular country or part of the world, because of ethnicity or accent, or because they appear to be of a certain ethnic background even if they are not. It is illegal to discriminate based on a person's national origin. The Washington State Human Rights Commission does not ask or record immigration status

### **Sexual orientation and Gender Identity in Housing**

It is illegal to treat someone including an applicant or employee unfavorably because of that person's sex. Discrimination against an individual because of gender identity, including transgender status, or because of sexual orientation is discrimination.

*It's a discriminatory practice for an owner or any other person engaging in a real estate transaction to discriminate against a person in the terms, conditions, or privileges of that real estate transaction because of sex, including gender identity and expression.*

*A resident in an apartment building worked as the property caretaker while the landlord resided in Florida. The resident said that the landlord visited the Hawaii property to hold retreats for his business and first met her in 2012 when she was using a name traditionally associated with the male gender and presented as male. After the landlord saw her expressing her gender identity for the first time in person, however, the caretaker claimed that the landlord harassed, threatened, and forced her off the property. At the hearing, the resident testified that she suffered emotional distress as a result of the landlord's actions. An expert on bias crimes against lesbian, gay, bisexual, and transgender individuals testified about the pervasive stigmatization of transgender individuals and research indicating that transgender women are at greater risk of being subjected to violence. In light of this heightened risk of harm, an expert said that transgender individuals have reason to take threats of violence seriously.*

*March 2019*

*The Fair Housing Coach*



## **Sexual Harassment in Housing**

*In Massachusetts, the Justice Department filed a lawsuit alleging that female residents of rental properties were subjected to sexual harassment in violation of the Federal Fair Housing Act.*

*The complaint alleged that an employee, a Level 3 registered sex offender, also harassed and assaulted female residents. The complaint alleged that the landlord engaged in harassment that included making unwelcome sexual advances and comments; engaging in unwanted sexual touching; offering to grant tangible benefits—such as reducing rent amounts—in exchange for engaging in sexual acts; refusing to provide needed maintenance services or taking other adverse housing actions against female residents who resisted or objected to his unwelcome sexual harassment and intimidating female residents by monitoring them from outside their apartments or rooms. After the owner received notice of the employee’s alleged sexual harassment of residents, the owner failed to take action to prevent future harassment. Sept 2019 The Fair Housing Coach*

## **Familial Status**

This case has not gone to court yet. It is a good practice to have two “persons” per bedroom. Federal fair housing laws and in WA state do not have occupancy standards.

*Apartment Building refuses to rent to families with children*

*HUD charged a couple who owns an apartment building in Georgia with violating fair housing law by refusing to rent to, imposing different rental terms and conditions on, and making discriminatory statements about families with children. The Fair Housing Act makes it unlawful to discriminate against families with children under the age of 18. Housing may exclude children only if it meets the Fair Housing Act’s exemption for “housing for older persons.”*

*The mother of two minor children filed complaints alleging that the apartment building owner employed a policy limiting the number of children that could rent apartments. The Owner’s business voicemail announced the policy to people who phoned looking for housing. Their policy allows only one child in a two-bedroom unit and two children in a three-bedroom unit.*

*“Landlords and property owners don’t have the right to deny housing to families simply because they have children. The Fair Housing Act generally prohibits landlords from limiting housing to families with a certain number of children. HUD is committed to enforcing the Act to ensure that families with children are given equal housing opportunities,” said Paul Compton, HUD’s General Counsel. September 2019 The Fair Housing Coach*

*Families allowed to use common spaces*

*In Las Vegas, HUD recently approved a settlement between a resident and the owner and manager of a housing community to resolve allegations of discrimination against families with children. A mother filed a complaint alleging that the property manager made her son and other children leave a recreational area of the complex after observing the children playing without their parents observing. The woman’s complaint also alleged that the community maintained an unwritten policy that children couldn’t use common spaces without adult supervision.*

*Under the agreement, the community agreed to pay \$5,000 to the mother and to allow her to terminate her lease without penalty if she chose to do so. The community also agreed to provide fair housing training for its employees and circulate a letter to residents stating that children do not need to be supervised in order to use the development's common areas. Individuals renting units at apartment complexes have a right to use any amenities that are available, and this applies to families who have children.*

*August 2019*

*The Fair Housing Coach*

#### *Mother and Children Denied sale of Condo in King County, Washington*

*The King County Office of Civil Rights resolved a fair housing case involving familial status discrimination where Respondents paid the Charging Parties \$18,500 and received fair housing training.*

*A mother and her two children, ages 11 and 14, had dreamed of buying a condominium in their favorite subdivision on the Eastside. When a unit became available in the subdivision, they eagerly contacted their broker to arrange a walk-through. When they arrived at the condominium, the unit owner told them that children weren't allowed in the subdivision. They attended an open house at the condo the next day to speak to the owner's real estate agent. They were terribly disappointed when the real estate broker confirmed that children were not allowed to live in the subdivision.*

*Under the local, state and federal fair housing laws, it is illegal discrimination to deny housing to families with children under the age of 18. There is an exception under the federal Housing for Older Persons Act (HOPA) that allows housing for persons age 55 and older, or 62 and older if certain conditions are met; housing complexes that qualify for this exception should be obvious from their signage and publications. However, this condominium subdivision did not qualify for that HOPA exception. KCOCR took the complaint and confirmed the owner's statement.*

*The owner noted that she had been on the condo board a few years earlier and that it was her understanding that there was a no children policy. The owner's real estate broker denied telling the potential buyers that children could not live in the subdivision; however, OCR investigators located another woman with children who was also told by the broker at the open house that children were not allowed to live there. OCR resolved the case with the real estate agent and the real estate company for \$16,500 before the investigation was completed. The owner paid the potential buyers an additional \$2,500 after a finding of Reasonable Cause was issued by OCR. All Respondents took fair housing training. This cost the broker and their company a large sum.*

#### *Single Woman fights discrimination in Tacoma, Washington*

*In May of 2004 a young woman said she encountered discrimination when she tried to buy a house in Tacoma ... not because of her skin color, age, religion or ethnicity. She was discriminated because she is single. She made an offer on a lovely two story house in Tacoma. "It was my dream house. A house that I wanted to purchase to raise a family," she said. The asking price was \$196,000. She offered \$199,000 and was pre approved for the mortgage.*

*The Listing Agent, when responding to her offer said, "Your guys deal was a better one but they decided to go with the other deal just because it was a married couple and they felt they would be a little more stable.... They were a bit nervous about it being a single woman trying to buy the house and they were just concerned it would come down to financing and something could possible go wrong."*

*It was discriminatory. The Federal Fair Housing act clearly states that it is unlawful to discriminate based on sex and familial status. The case was settled with the real estate company prior any court hearing. The sellers of a house are liable under Federal, State and Local Fair Housing and anti discrimination laws. The buyers have the right to purchase property regardless who they are or what their background. The real estate company settled with the buyer after it hit the news.*

### **Honorably Discharged Veteran and Military status in housing**

It is a violation to discriminate against individuals on the basis of military status or being an honorably discharged veteran. A housing provider should not ask questions about political beliefs related to military service or questions based on the assumption that veterans and service members have PTSD or other mental health conditions or disabilities. It is ok to offer incentives to people who are military personnel or veterans.

### **Handicap/ Disability**

A housing provider including landlords, property managers, homeowners, and condominium associations cannot discriminate against persons with disabilities and must reasonably accommodate persons with disabilities.

If you or someone living with you is disabled, there are additional protections. Your housing provider may not:

- Refuse to allow reasonable modifications to a dwelling or common area, at your expense, if necessary, for the person with the disability to use the housing. In the case of a rental, the landlord may, where it is reasonable to do so, condition permission for a modification on the renter agreeing to restore the interior of the dwelling to the condition that existed before the modification.
- Refuse to make reasonable accommodation in rules, policies, practices, or services when they may be necessary to afford a person with a disability equal opportunity to use and enjoy a dwelling. This can include service and comfort animals, parking, access, etc.

A reasonable accommodation could include an assistance animal. Fair Housing law does not have a training requirement for such animals. In order for a person to have an assistance animal, the person must have a disability, request the animal as a reasonable accommodation, and must be able to show that the animal is necessary because of the person's disability by presenting a note from a medical provider. Emotional support and comfort animals would be included. Fair housing does not limit the species of service animals.

*A resident in a California apartment claimed that her lease was illegally terminated based on her disability. The resident claimed that the community terminated her lease because throughout her tenancy, she experienced multiple medical emergencies that required the assistance of an ambulance to transport her to the hospital. The property manager allegedly reported that other residents had complained about these emergencies. Housing providers cannot terminate or decline to renew a lease simply because they disfavor tenants with disabilities. And to the extent a tenant with a disability needs a reasonable accommodation, landlords must provide it unless it would constitute an undue financial or administrative burden, a fundamental alteration of the program, a direct threat to the health and safety of others, or would cause substantial physical damage to the property of others.*  
*Nov 2019 The Fair Housing Coach*

### **Hate and Bias crimes in Housing:**

Hundreds of hate crimes are reported in Washington state every year. According to the national FBI hate crime statistics 2017, 27.5% of all hate crime incidents across the nations occur in or near residences and family homes. In Washington state a person is guilty of malicious harassment if he or she maliciously and intentionally commits causes injury or damage to property or threatens a person or group of persons because of her or her perception of the victim’s race, color, religion, ancestry, national origin, gender, sexual orientation or handicap.

**Substance Use Disorder**

Substance use disorder is a condition that results in impairment in daily life. And is covered under the definition of “disability. Excluding individuals who take medications for Opioid use Disorder from housing may be discriminatory according the WSHRC.

**Local Discrimination laws**

Cities and counties across the country are developing their own guidelines and laws. It is important to remember that the most laws in the county or city must be adhered to because often they include more stringent rules and a larger list of protected classes. Note the following list from the Puget Sound Area.

**Seattle Anti Discrimination Laws**

**Illegal discrimination is when:**

- You are treated differently from others in a similar situation; **and**
- You are harmed by the treatment; **and**
- You are treated this way because of your membership in a protected class (i.e., race, gender, etc.) or
- Your request for a reasonable accommodation due to a disability is refused without a valid business reason.

**Seattle currently includes these protected classes:**

Age ** Ancestry Color Creed	Disability Gender Identity Parental status * Political ideology	Race Religion Sex Sexual Orientation	Use of Section 8 certificate Use of service animal Veteran or Military status
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\*Not applicable to Employment or Fair Contracting cases

\*\*Not applicable to Public Accommodations cases

**Retaliation**

It is against the law for someone to penalize or discriminate against you because:

- You file a discrimination complaint
- You cooperate with a discrimination complaint
- You cooperate with the enforcement of a discrimination complaint
- You comply with anti-discrimination laws

You can file a separate charge of discrimination if someone has retaliated against you. SOCR will conduct a separate investigation.

**Harassment**

Seattle's anti-discrimination laws also protect you from harassment. Harassment is conduct that is directed at you because of your race, religion, gender, sexual orientation, disability, national origin, etc. Harassment can include: Threats, Slurs or epithets, Threatening acts, Posting offensive materials on walls, bulletin

boards, e-mail, etc. To be considered harassment, conduct must be serious and frequent enough to create a hostile environment and Interfere with your ability to work, live, or enjoy a public place.

**Tacoma Fair Housing**

The Tacoma Human Rights Division investigates and resolves complaints alleging discrimination in housing which violates the Law Against Discrimination of the Official code of the City of Tacoma, as amended, and the Federal Fair housing Act. The protected classes include:

Race	Religion	Sexual orientation	Veteran / Military status
Color	Age	Ancestry	Familial Status
Sex	National origin	Section 8	Disability
		Gender Identity	



**These questions/statements would be illegal under Fair Housing laws!**

- Do the buyers have children?
- What is the race of your clients?
- Will the family go to the church next door?
- Is the buyer gay?
- Does your son have a mental disability?
- This is a family neighborhood. I don't think they would fit in.
- Is the buyer single?

- Are the buyers married? (marital status is protected. Escrow needs to know how they take title.)
- Are the buyer's seniors?
- A married couple is more stable than a single woman. (major lawsuit on this statement)
- This would not be a good neighborhood for disabled children.

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

*Some people believe that a seller has the right to sell to any buyer they choose. But, in fact, when we “own” property we have a “bundle of rights.” Just as we cannot put an industrial plant in a residential neighborhood or construct an addition that is 30 feet high in a subdivision, our rights are limited by federal, state and local laws, codes and restrictions. Sellers are required to obey the fair housing and anti discrimination laws when they sell their property.*

Often, people in condominiums and apartments want to discourage or eliminate children from the complex. A condominium board in Seattle was working on changing the rules to eliminate children because they didn't like that grandchildren were living in a unit. That cannot happen. In another case an offer wasn't accepted on a property because the daughter was disabled.

The Washington State Human Rights Commission was created to administer the law. It is to formulate policies and make recommendations to government agencies. It is composed of 5 members appointed by the Governor with the advice and consent of the Senate.

Not all cases go to the courts. People face discrimination every day. But, in the real estate industry, we have an obligation to uphold the laws to protect the rights for housing for all people.

## Love Letters from Buyer to Seller

Whether using a poem, photo collage or a love letter, buyers are trying to “promote” their offers to the sellers. Especially when the market heats up and buyers may be competing with other offers that may even be higher, writing a personal letter to appeal to the sellers emotionally to accept the buyers offer is becoming more common. The love letter is an attempt to entice the seller into accepting an offer based on factors that have nothing to do with the purchase and sale agreement. There are articles all over the internet, samples of letters, and even templates.

Though it may appear innocent enough, the love letters can encourage a seller to discriminate when choosing a buyer for their home. The seller and the real estate agents must not violate Federal, State and local anti discrimination laws. Home owners selling their home cannot legally choose one buyer over another based on a protected class. Protected classes are NOT “minorities.” EVERY person falls under protected classes.



The love letters most often describe the buyers as a “married couple with children.” Familial status is a protected class in the Federal Fair Housing Act. Familial Status and Marital Status are protected in almost every State and Local anti discrimination law. If a single woman, a gay couple with no kids, a man who will not have children, or a senior are bypassed because the seller goes with emotion and chooses the “little family,” the seller would be discriminating against the other buyers who have just as much right to purchase the property. Many times the letters include photos of the little family and their pooch. The sellers could be encouraged to discriminate based on race, color, religion, sex, national origin, familial status or disability based on the photo.

Love letters that are highlighted in articles throughout the internet most often come from a husband and wife with children. Many are accompanied by photos. Examples of love letters straight from an article encouraging them include:

“Dear \_\_\_\_ Family,

My name is Christine and my husband’s name is, Nik. I was born and raised in \_\_\_\_city and Nick was born in \_\_\_\_\_. We have a wonderful, smiling 4 month old, Lily. We spent our dating time in Capitol Hill and enjoyed it very much. Green Lake, Ravenna and Maple Leaf are where we hope to raise our children and put down long term roots. When we started our house search, proximity to this neighborhood was our priority. Your home is the first we have seen that genuinely meets all of our wants and needs. We can picture ourselves drinking coffee while watching our children play in the backyard. We would be deeply grateful to you if our offer is chosen. Sincerely, a married couple with child”

“Dear Sellers,



I am a single woman who is thrilled about purchasing your home. I have lived in the neighborhood for many years and have saved up money to purchase my first house. This house is perfect for me and my commute to work, my volunteering at the Austrian Club, and the proximity to my diverse family. I have a stable position at planned parenthood and I volunteer to help the homeless. Sincerely, the single buyer”

Are the letters discriminatory? Consider how often a real estate agent would encourage buyers that originate from another country, are disabled, have misunderstood religious beliefs, is LGBT? Consider...

- If you were a single man who wanted to buy a house within good commuting distance to work and on more than one house you were turned down because the sellers sold to a little “family” for less than your offer. or
- If you were two women who just took advantage of the new same sex marriage equality law in Washington State and you lost on these three houses because the sellers sold to a “family.” or
- If you come from a proud immigrant family and you have an accent and a name that is often

mispronounced and your offer was not accepted more than once from sellers.

Sometimes... ok... maybe often... the “perfect family” is not perfect. The husband could be abusive, the son could be a sex offender, the daughter might like to deal drugs. Choosing an offer based on a “sweet” letter and a nice photo could be just what the “family” was hoping for.

Everyone, regardless of their background, beliefs, health/disability, etc, has the right to purchase a home in the area chosen. The seller violates anti-discrimination laws when a seller chooses one buyer over another using any information that could be construed as discrimination. The buyers that lost the property have the right to file a case of discrimination. Real estate agents are bound by federal state and local discrimination laws.

As a selling agent, when you pass on the letter to the sellers and the seller’s agent, you cannot claim you had no knowledge of the contents of the letter. As a listing agent, if you pass the letter on to the sellers, then you are giving them a reason to discriminate. The sellers may not understand the laws. Real estate

agents have a duty to understand the laws and cannot claim “ignorance” when it come to fair housing. It is important for real estate agents to know the laws and instruct the sellers to “Choose the Paper .. not the People” when choosing a buyer for the property.

## Implicit Bias affecting Discrimination

Implicit bias is an unconscious association, belief or attitude toward others in a social group which can result in stereotyping others like them. Even without knowing it, everyone has their own implicit biases that are a result of learned association and social conditioning. These biases affect decisions that people make about others that can be negative or positive. Most people don’t realize that they exist but by being more aware of decisions made in your real estate business.

A simple example is that you might have grown up in a family or community that thought people that were green or that had purple hair or that had an accent were not as .... Pick one... (smart, successful, trustworthy, etc.) You might not even realize it when you were sitting in front of a client that a bias for or against a social class of people is affecting your decisions. It is not just a racial bias, but it can include other unconscious assumptions that we make about other people. In one study quoted in Psychology today in June 23, 2017, found that 75% of men associate “male and work” and female & family” more quickly than the opposite pairings. The same associations were marked by 80% of the women in the study.

The way we were raised, what we watch in the media, the people that we socialize with, and our own experiences affect our own biases. We tend to seek out patterns. It is one way that we sort out information in our complicated world.

A stereotype, is a belief that a certain attribute is a characteristic of members of a particular group. They are acquired effortlessly, and we are more likely to rely on them when cognitive load is high. We just take a shortcut to process all the information. Our brain is busy because we are distracted, tired, or in a hurry, so our brain gives us the answer quickly from the stereotypes we have adopted.

Examples of implicit bias are all around us in our daily workplace and social interactions. Discrepancies between men and women regularly impact relationships that lead to decisions at work. Studies have shown that men interrupt women three times more often than men interrupt other men. In general, women are guilty of interrupting other women more than they interrupt men, according to an article in the Washington Post February 2021. They also state that “a growing body of evidence reveals that when women (and racial minorities) advocate for diversity, they tend to get penalized for being self-serving and nepotistic. When (white) men make the same case, they are more likely to get heard.”

In an investigative report by Newsday, November 2019, discovered that Black home buyers were being discriminated against. Real estate agents were providing an average of 50 percent more listings than they gave to black counterparts. 39 compared with 26.

In Washington State, as in other places in the country, systemic racism and biases can make it more difficult for people to become homeowners. Real estate agents need to be aware of their own implicit biases and stereotyping that is affecting their relationships with customers. The National Association of Realtors does have a free video on Implicit Bias on the website.



# Chapter 6

## Property Disclosure

Most lawsuits against brokers are in the area of misrepresentation. The majority are based on water problems including storm water runoff, leaking basements, failed roofs, broken or leaky pipes, Siding problems, adequate water supply and mold.

The Property Information Disclosure is a state law RCW 64.04. The sellers fill out the form. The buyer has to waive right to receive one. There are some sellers that are exempt. The Disclosure Law Form deals strictly with the structure of the property itself. Agents are NOT to fill out the form.

The form is a vehicle for the seller to disclose any information about the structure and title of the property. If there are facts that are not asked on the form, the seller can attach additional pages. The liability for inaccurate disclosure by the seller has been fought in the courts. The buyer should definitely not rely on the form when making decisions to purchase. It is important for a buyer to get a thorough home inspection and anything that arises as a concern should be investigated further.

What must be disclosed by the seller is not completely defined. The only statutory definition of material fact is in the Law of Agency RCW 18.86. It states that information that “substantially, adversely affects the value of a property” or information that “impairs or defeats the transaction” is a material fact. In more simple terms, a seller and agent need to disclose anything that would affect the buyer’s decision to buy or how much would be paid.

The Law of Agency also says that certain information is NOT considered a material fact.

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

If you happen upon a prospective listing whereby there was a “negative stigma” that could affect a buyer’s decision to buy, it is important to contact the broker and corporate attorney about disclosure to the buyer! The Law of agency is not connected to the property information law.

**A seller is required to fill out the environmental portion of the Seller Disclosure form if there is a “yes” answer to an environmental question.**

### Internet availability Disclosure

Washington State legislature did pass a change to the Property Information Disclosure law that adds the availability of internet access as a disclosure item.

## Lead Paint Disclosure

When a property being sold/leased was built before 1978, the owner/landlord must fill out a “Lead Based Paint Disclosure” form. This is a Federal law that requires a seller or landlord to provide the buyers or tenants about lead based paint. The owner of the property must disclose the location of any known lead based paint on the property and if the property has been inspected. If it has been inspected, the owner must provide the buyer/tenant with a copy of the inspectors report. The seller must also give a buyer 10 days to inspect for lead based paint. The seller/landlord must also provide the buyer with a booklet called “Protect your Family from Lead In your Home.”

## Mold Disclosure

In 2005 Washington State passed a law that requires landlords to provide documentation warning tenants of “the health hazards associated with exposure to indoor mold.” This information must either be given to the tenants individually or posted in a public area. It is important that this information is disclosed to you prior to signing a lease, as it is the obligation of the landlord to do so. Furthermore, it is required that the landlord maintain a residence that is “fit for human habitation,” and in accordance with existing health codes or ordinances established by the State of Washington. It is also the responsibility of the landlord to maintain the structural integrity of the building and that the “dwelling unit [is] in reasonably weather-tight condition.” However, there are no specific requirements of the landlord to test or remove toxic mold. It is advised that when you suspect mold is present to contact a lawyer prior to moving forward.

## Carbon Monoxide Detectors

Carbon Monoxide is a poisonous gas that cannot be seen or smelled and can kill a person in minutes. It can quickly build up to unsafe levels in enclosed or semi-enclosed areas. Generators in garages or near intakes and use of charcoal or gas grills indoors are common causes of CO poisoning during power outages. Problems with exhaust on furnaces can also be a cause.

Beginning in January 2011 WA state law requires Carbon Monoxide alarms to be installed in all new single family homes and residences including apartments, condominiums hotels, and motels. Existing homes, apartments, condominiums, hotels, motels must have them installed by January 2013. Owner-occupied single family residences, legally occupied before July 2009 are not required to have CO alarms until the property is sold. In that case, the seller is required to equip the residence with CO alarms before any other person legally occupies the property.

In Washington state over 300 people were treated at hospital emergency rooms or CO poisoning and 8 people died during a serious December 2006 windstorm. Between 1990-2005 over 1000 WA residents were killed by Carbon monoxide poisoning.



Anna Faris  
@AnnaFaris

Follow

I'm not quite sure how to express gratitude to the north Lake Tahoe fire department- we were saved from carbon monoxide- it's a stupidly dramatic story but I'm feeling very fortunate



*Anna Farris, an actress known for starring in the TV show "Mom" is originally from Washington State. Over Thanksgiving 2019 she rented a home with her family at Lake Tahoe, a popular vacation destination. Two family members on the multi-generational vacation felt ill and left the holiday dinner to get checked out at a local hospital, where they found out they had carbon monoxide (CO) poisoning, according to Erin Holland, public information officer for the North Tahoe Fire Protection District.*

*The fire department responded to the rental home — nine people were checked out and treated there, and two additional people were transported to a hospital.*

*The actress tweeted a photo of the family's empty table with several half-empty plates: "I'm not quite sure how to express gratitude to the north Lake Tahoe fire department - we were saved from carbon monoxide - it's a stupidly dramatic story but I'm feeling very fortunate"*

*There was no carbon monoxide detector in the rental home.*

*When firefighters arrived and tested carbon monoxide levels, they found readings as high as 55 parts per million (ppm), more than five times the maximum recommended indoor levels of 9 ppm.*

*"The youngest member of the family, had they been exposed longer, could have gone into a coma," Holland said. "Every minute makes a difference. We're really glad this story had a happy ending."*

# I feel the earth move under my feet

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 a hill that may be unstable. Don't hesitate to recommend an inspection for anything a buyer might be concerned about including hillsides and wetlands.

Washington State conducts a Geologic Survey to maintain an assessment of the volcanic, seismic, landslide, and tsunami hazards in Washington. That assessment must include identification and mapping of hazards, as well as an estimation of the potential consequences and the likelihood of a geological hazard event. While performing its existing obligation of mapping volcanic, seismic, landslide, and tsunami hazards, the state Geological Survey is required to apply the best practicable technology, including light detection and ranging (Lidar) mapping. Further, the Survey is required to acquire new data, coordinate with state and local government agencies to compile and share data, and create and maintain a publicly available database of Lidar and geological hazard maps and geotechnical reports prepared while acquiring the new data.

Information on the geology including landslide hazard, tsunami evacuation and earthquakes is available at the Dept of Natural Resources website.



In early 2022 a house in the Magnolia area of Seattle slipped off it's foundation during a record rain storm. It is located on Perkins lane which has previously been the site of several homes that have been destroyed on the hill. The owners had to be rescued and were not seriously injured. When they purchased the house ten years ago, a geologic survey done. In the past couple years they had the retaining wall in the backyard rebuilt.

## Referring Third Party Vendors

When a real estate broker refers a third party vendor it is important to stay within the laws to minimize risk. There are times when the transaction is outside the expertise or scope of the broker and it is important to refer clients to a competent third party vendor.

When referring home inspectors, the designated broker must establish a written office policy that includes a procedure for referring home inspectors to buyer or sellers. The policy must address the consumers right to freely choose a home inspector of their choice and prevent any collusion between the home inspector and the real estate broker. The broker referring a home inspector to a buyer or seller with whom they have had a prior relationship, including, but not limited to, a business or familial relationship, then full disclosure must be provided in writing prior to the buyer or seller using the services of the home inspector according to WAC 308.124C-125(9)a

When referring a client to a vendor, the vendor must have the appropriate license when it is required according to RCW 18.235.130(9)



# Chapter 7

## Writing Purchase and Sale Contracts

### Specific Forms and Issues\*

In 2021, the NWMLS again made changes to the forms. They are summarized and added to the changes that were required to be discussed in the Core at the start of 2020. Most of the changes that are not included here are primarily minor... for example: Selling firm changed to Buyer Brokerage Firm. If you have any questions on the form changes, contact the NWMLS or your office. If a form is not a standardized form from the NWMLS, make sure that you contact your designated broker. Real estate brokers and managing brokers are limited to filling out preprinted forms prepared by an attorney according to the results of the “Heritage House” case years ago.

### The Listing Agreement Form 21

The following changes were made to the Listing Agreement.

1. Seller consents to Firm receiving compensation from more than party.
2. Buyer Brokerage is an intended third party beneficiary of this agreement.
3. FAIR HOUSING. (This sentence on Fair Housing was added to the agreement.) Seller acknowledges that fair housing laws prohibit discrimination based on sex, marital status, sexual orientation, gender identity, race creed, color, national origin, citizenship or immigration status, families with children status, honorably discharged veteran or military status, the presence of any sensory, mental or physical disability, or the use of support or service animal by a person with a disability.

## A. 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 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. 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.

**Purchase Price (revisions to paragraph)**

If a Seller receives a Competing Offer for the Property prior to accepting this offer, with a Net Price equal to or greater than the Net Price of this offer, then the Net Price of this offer shall be increased to \$\_\_\_\_\_ more than the Net Price of the Competing Offer. In no event, however, shall the new Purchase Price of this offer exceed \$\_\_\_\_\_

The term “Net Price” means the stated Purchase Price (or the maximum price if the Competing Offer contains a price escalation clause) including any price adjustments such as credits to Buyer for closing costs or credits to seller.

**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.

NOTE: the worksheet has been changed. Read it carefully.

*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 COMPLETE COPY of a bona fide, arms' 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.

### **Seller's acceptance (new paragraph requires competing offer.)**

Competing Offer Required for Escalation

"Seller's escalation of this offer shall not be effective unless it is accompanied by a complete copy of any Competing Offer used to escalate the purchase price, including any escalation provision. Purchase Price, including any escalation provision. If Seller fails to provide an offer to be used as a Competing Offer to Buyer at the time of mutual acceptance, then Buyer shall be entitled to purchase the Property at the non-escalated Purchase Price."

### **Notice to Seller Competing offer (These are new paragraphs in the revisions)**

Notice to Seller Competing Offer (entire paragraph added)

If the offer provided by Seller does not qualify as a Competing Offer under Paragraph 2 of this Addendum, Buyer shall deliver notice to Seller of that fact within \_\_\_\_ days (3 days if not filled in) of mutual acceptance. If Buyer fails to timely give such notice, the offer shall conclusively be deemed to qualify as a Competing Offer under Paragraph 2 of this Addendum.

If Buyer provides such notice to Seller, Seller shall have \_\_\_\_ days (2 days if not filled in) to give notice of termination of this Agreement. If Seller timely gives such notice, the Earnest Money shall be refunded to Buyer. If Seller does not timely give such notice of termination, then Buyer shall be entitled to purchase the Property at the non-escalated Purchase Price.

The parties shall use the "Escalation Addendum Notice" (Form 35EN) for notices required by this section.

### **Three new sections were added on the new revisions.**

Notice to Seller- New Purchase Price (These are new paragraphs)



If the new Purchase Price calculated by Seller is incorrect, Buyer shall deliver notice to Seller of that fact within \_\_\_\_\_ days (3 days if not filled in) of mutual acceptance. Buyer's notice shall include Buyer's calculation of the new Purchase Price. If Buyer fails to timely give such notice, the new Purchase Price stated above shall conclusively be deemed to be correct.

If Buyer provides such notice to Seller, Seller shall have \_\_\_\_\_ days (2 days if not filled in) to give notice of termination of this Agreement. If Seller timely provides such notice, the Earnest Money shall be refunded to Buyer. If Seller does not timely give notice of termination, then Buyer's calculated new Purchase Price in Buyer's notice shall conclusively be deemed to be correct.

The parties shall use "Escalation Addendum Notice" (Form 35EN) for notices required by this section.

## B. 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.

## C. Inspection Addendum Form 35

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.

### **Inspection Contingency. (New added sentence)**

The revisions added "Buyer may engage specialists (plumbers, electricians, roofers, etc.) to conduct further inspections of the property."

**Inspection Report.** The Buyer shall not provide the inspection report, or portions of it, to Seller, unless Seller requests otherwise or as required by Paragraph 5.

### **Paragraph 5 Waiver of Contingency by Buyer. (Added paragraph)**

If Buyer provides any portion of the inspection report to Seller without Seller's prior written consent or as required by Paragraph 5, the inspection contingency shall conclusively be deemed waived.

### **Seller Consent.**

The selection of either checkbox below by Seller shall not be considered a counteroffer. Seller requests that Buyer provide the inspection report to Seller.

If Buyer requests repairs or modifications to the Agreement, Seller requests that Buyer provide to Seller only the portions of the inspection report related to the requested repairs or modifications to the Agreement.

## D. Inspection Response Form 35R

### **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.”*

### **Do not give the inspection report to seller without permission. Revision to Form 35 Inspection Response. (new sentence)**

*New revision adds, “If buyer provides any portion of the inspection report to Seller without Seller’s prior written consent or as required by Paragraph 5 of Form 35, the Inspection Contingency shall conclusively be deemed Waived.”*

### **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?**

“If Buyer provides any portion of the inspection report to Seller without Seller’s prior written consent or as required by Paragraph 5, the inspection contingency shall conclusively be deemed waived.” as per the new revisions on Form 35.

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 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.

## **E. Closing and Possession Terms**

### **What is the definition of "closing?"**

According to the state purchase and sale agreement form, "closing" means the date on which all documents are RECORDED **and** the sale proceeds are AVAILABLE to the seller. Any period of time measured in days on the purchase and sale agreement shall start on the day following the event and shall expire at 9:00 pm of the last calendar day of the specified period of time.

### **Computing Time Backwards** (New paragraph)

According to the revisions to the Purchase and Sale agreement the computation of time is specified when counting backwards from the Closing Date. COMPUTATION OF TIME. Counting backwards from closing sentence added. When counting backwards from Closing, any period of time measured in days shall start on the day prior to Closing and if the last day is a Saturday, Sunday or legal holiday as defined in RCW 1.16.050, the specified period of time shall expire on the next day, moving forward, that is not a Saturday, Sunday or legal holiday (e.g. Monday or Tuesday).

Seller is to deliver the keys and garage door remotes to the buyer on the closing date the possession date (whichever occurs first.)

The closing date cannot fall on a Saturday, Sunday or a Legal holiday or when the county recording office is closed.

## **F. Financing Addendum Form 22A**

### **Loan Application.**

The sentence was added about waiver of financing contingency. "If not waived, the Financing Contingency shall survive the Closing Date."

Also added... "Buyer authorizes Listing Broker and Seller to inquire about the status of Buyer's loan approval with lender any time prior to Closing.

Buyer will execute an authorization form, if required by lender, to accomplish the same."

Financing contingency section changed. Select only A or B Now it states.

A. Seller's Notice to Perform

At any time \_\_\_\_ days (21 days if not filled in) after mutual acceptance, Seller may give 'Notice to Perform' requesting that buyer waive the Financing Contingency and that seller may give notice to terminate the agreement at any time 3 days after deliver of that notice. If buyer does not earlier waive the Financing Contingency. NWMLS Form 22AR shall be used for this notice.

Notice of Termination. If buyer has not previously waived the Financing Contingency, Seller may give 'Notice of Termination' of this Agreement any time 3 days after delivery of Notice to Perform. If Seller gives the Notice of Termination before buyer has waived the Financing Contingency, this Agreement is terminated and the Earnest Money shall be refunded to buyer. NWMLS Form 22AR shall be used for this notice.

B. Automatic Waiver of Financing Contingency (added this paragraph)

Waiver

The Financing Contingency shall conclusively be deemed waived unless within \_\_\_\_ days (21 days if not filled in) after mutual acceptance, Buyer gives notice of termination of this Agreement. If Buyer gives timely notice of termination, the Earnest Money shall be refunded to Buyer after Buyer delivers written confirmation from Buyer's lender as required by Paragraph 4.

Appraisal Less Than Sales Price.

Buyer's waiver of the Financing Contingency under this Paragraph 2(b) will; or will not (will not, if not filled in) constitute waiver of Paragraph 5 (Appraisal Less Than Sales Price).

VA Amendatory Clause (added)

"If the Buyer is obtaining VA financing, it is expressly agreed that, notwithstanding any other provisions of this contract, the purchaser shall not incur any penalty by forfeiture of earnest money or otherwise be obligated to complete the purchase of the property described herein, if the contract purchase price or cost exceeds the reasonable value of the property established by the Department of Veterans Affairs. The purchaser shall, however, have the privilege and option of proceeding with the consummation of this contract without regard to the amount of the reasonable value established by the Department of Veterans Affairs."

**Increased Down Payment for Low Appraisal Form 22AD was rewritten.**

The increased Down Payment for Low Appraisal Addendum "Supersedes the "Appraisal Less than the Sale Price' provision in the Financing Addendum as follows:

Appraisal Addendum (Form 22AA)

This Increased Down Payment for Low Appraisal addendum modifies the Appraisal Addendum (Form 22AA) as follows:

- Disclosure of Contingent Funds.

Buyer is relying on a loan or loans (the "Loan(s)") to purchase the Property, but this Agreement is not contingent on Buyer obtaining the Loan(s). Buyer shall pay  $\theta$  \$ \_\_\_\_\_; or  $\theta$  \_\_\_\_\_ % of the Purchase price down, in addition to the Loan(s). a.b.

- Additional Down Payment.

If Buyer's appraised value of the Property is less than the Purchase Price" provision in the Financing Addendum (Form 22A)., Buyer shall pay additional funds up to \$ ("Buyer's Additional Funds") towards Buyer's down payment to close the sale. Buyer represents that Buyer has sufficient funds to close this sale in accordance with this Addendum. Buyer may not terminate the Agreement if (a) Buyer's appraised value and (b) Buyer's Additional Funds are equal to or greater than the Purchase Price.

- Buyer's Notice to Seller.

If Buyer becomes aware that the sum of (a) Buyer's appraised value and (b) Buyer's Additional Funds is less than the Purchase Price, Buyer shall deliver written notice to Seller of that fact, including a copy of the appraisal, within days (3 days if not filled in).

- Seller's Right to Reduce Price or Terminate.

If Seller receives the above notice from Buyer, Seller may deliver notice to Buyer within days (3 days if not filled in): (a) reducing the Purchase Price to an amount equal to the appraised value plus Buyer's Additional Funds, or (b) terminating the Agreement, in which case the Earnest Money shall be refunded to Buyer. If Buyer waives the appraisal contingency in the Appraisal Addendum (Form 22AA), Buyer shall be obligated to purchase the Property for the Purchase Price and Seller shall not have the right to terminate the Agreement under this Paragraph 2(d).

## **Financing Contingency Notice Form 22AR**

Seller's Notice to Perform (prior form said "seller's right to terminate")

Seller requests that Buyer waive the Financing Contingency as provided in Paragraph 2(a) of Form 22A. If Buyer does not earlier waive the Financing Contingency, Seller may terminate this Agreement any time 3 days after delivery of this notice.

Seller's Notice of Termination

Seller provided the above Notice to Perform to Buyer at least 3 days prior to the delivery of this notice. Buyer has not previously waived the Financing Contingency and therefore, Seller gives notice that Seller elects to terminate this Agreement. Seller instructs the party holding the Earnest Money to disburse the Earnest Money to Buyer.

# Chapter 8

## Multiple Offer Situations



### Multiple Offers on a Listed Property\*

In an active market like most of the state is experiencing with limited inventory, a well-priced house for sale can generate more than one offer. There are no laws or rules that are written that specifically deal with multiple offer situations. The law does state:

“All offers must be presented to the seller in a timely manner.”

All offers must be presented to the seller even if the seller has signed another offer.

#### Evaluating the Offers

The seller then can evaluate the offer based on the price offered, the buyer’s ability to close based on the lender’s letter and the terms that must be acceptable. The real estate listing broker needs to focus on those issues. The real estate broker is not an attorney nor a lender. Determining one buyer is more qualified than the next based on factors including the money down could be very misleading because a buyer who is well qualified might choose to put less down while a buyer with questionable credit may be required to put more down by the lender. Choosing one buyer over another based on how well they might “fit” in the neighborhood is a discriminatory practice.

It is important to stick with the MLS forms when preparing and presenting purchase and sale agreements. Avoid attempting to write contracts on the blank addendum or you could enter the world of the unauthorized practice of law.

#### Seller Options

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.
- 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.”
- The seller can negotiate based on the “escalation clause’ that a buyer may have included in their contract.

**All offers MUST be presented**

It is most important to bear in mind the laws that pertain to all real estate transactions must be kept in mind. Under the Law of Agency RCW 18.86.030, “it is the duty of a broker to present all written offers, written notices and other written communications to and from either party in a timely manner, regardless of whether the property is subject to an existing contract for sale or the buyer is already a party to an existing contract to purchase.”

**The listing broker sorted the offers from best to worst.**

If there are multiple offers and the listing broker sorts out the top one, two or three offers, the seller still has the right to review all the offers presented. Even if broker knows that buyer cannot or will not agree to seller’s proposal, broker must present buyer’s written offer to seller. When seller has already entered a purchase agreement and a competing offer is presented by a new buyer, the listing broker must present it---even if broker anticipates a bad reaction by seller.

When buyer and seller are in contract and seller proposes written modification of the agreement, it is never up to buyer’s broker to reject the modification... Even if broker knows that buyer cannot or will not agree to seller’s proposal, broker must present seller’s written proposal to buyer.

**Disclosure of Multiple Offers**

According to the REALTOR Standards of practice clearly requires disclosure of the existence of multiple offers, with the sellers’ permission, if a buyer or cooperating broker asks about the existence of multiple offers.

**Counter offers**

A counter offer is a new offer. Avoid countering two offers at once with “a race to the finish” ending. The house could be sold twice. The seller can accept another offer in a backup position subject to the failure of the first offer.

**Avoid selling the house twice**

If another offer is presented, it is imperative that IF the seller signs the second offer, it should be “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.

**Avoid Discrimination**

Often licensees encourage the buyer to write a letter, sometimes referred to as a “love letter,” to convince the seller to choose their offer. But, many of the letters include information about the buyer so that the seller could end up choosing one buyer over another violating Federal, State and local fair anti-discrimination laws. A seller can choose who to sell their house to as long as they do NOT discriminate. If one of the other buyers has any reason to believe there is has been a limitation, preference, discrimination or disparate treatment because of a protected class, then that buyer has the right to file a claim. So, as a licensee, it is important to encourage the sellers to choose the “paper” not the “people” when choosing between multiple offers.

**Escalation Clauses**

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. Sometimes they require a copy of the second highest offer. Sometimes the seller counters at the higher sale price even without another offer.

## Offer Accepted

When a seller accepts an offer, it is important for the listing agent to take the responsibility to inform the other buyers that their offer was not accepted. It is important to note that this “failure to present offers” has become a significant discipline issue for DOL. It is unlikely that listing brokers are actually failing to present all offers timely. It is far more likely that listing brokers are failing to give unsuccessful buyer brokers proof that seller actually reviewed and rejected buyer’s offer, leaving buyer and buyer’s broker to wonder whether seller saw buyer’s offer at all. Buyers and buyer brokers, frustrated by not getting the property and uncertain as to whether buyer’s offer was seen, are more likely to file a complaint with DOL, claiming listing broker failed to present the offer. When DOL investigates, listing broker will have to prove that listing broker timely presented all written offers. Unfortunately, a typical listing file contains no proof of timely presentation.

Listing brokers can avoid this DOL investigation and discipline altogether by giving buyer brokers the courtesy of notification that seller rejected buyer’s offer. Returning the offer with the word “rejected” written across the face of the offer, signed and dated by seller, provides proof of seller’s timely review and rejection of the offer.



## Timely Present All Written Offers\*

The market for properties for sale has been incredibly active as we moved into the 2020’s. It is important to look for the best “apple in the bunch” when a seller receives multiple offers. Two factors are

### **Offers must be presented in a Timely Manner**

“Regardless of whether the licensee is an broker, a licensee owes to all parties to whom the licensee renders real estate brokerage services the following duties, which may not be waived:” (RCW 18.86.030 (1) (C))

“To present all written offers, written notices and other written communications to and from either party in a timely manner, regardless of whether the property is subject to an existing sale or the buyer is already a party to an existing contract.”

The determination of timeliness, however, is not always so clear. “Timely” will be impacted by many forces, often outside the control of a broker. Seller may leave on vacation with instructions to hold all offers until seller’s return. Buyer may be hospitalized unexpectedly and unable to receive written communications until released. There can be any number of factors that affect “timely” in a given transaction. However, if presentation of a written offer, notice or communication is delayed by forces beyond broker’s control, broker should include evidence or a notation of those factors within the transaction file. In defense of a complaint, broker may need to be able to prove that presentation was “timely” given the circumstances, according to the Washington Realtors. If seller instructs delay, broker should document that instruction, in writing, in broker’s transaction file.

The most basic duty of a seller's broker is to help the seller get the best price and terms. It is important to note that if you have a listing that is sold pending; you must still present other offers. The seller cannot sign two agreements, of course, unless one is a back up or subject to the failure of the first offer. If buyer or seller makes an offer to the other, after mutual acceptance, typically an offer to modify the contract, that offer must be presented timely. If a different buyer makes an offer to seller after seller is already in a binding agreement with a buyer, that new offer must also be presented timely to seller.



**Is it ok for a listing broker to hold an offer waiting for a possible higher offer?**

The offers on a property must be presented to the seller. It is not right to withhold an offer hoping for another one to be written. It is clear that sitting on one written offer while the seller accepts another offer is a very bad practice and clearly violates the law.

If the listing broker receives an offer that he or she believes is not a complete offer it is far lower than what the seller might accept, or was received after the other offers, the listing broker still has the responsibility to present the offer to the seller. When written offers come in that are so low they are offensive or so poorly written they are indecipherable, it is not up to listing broker to determine whether those offers should be presented.

If a summary of each offer is presented to seller, to assist seller in processing the information, the entirety of each offer must also be provided to the seller. It is unlawful for a broker to present something less than the offer as written. Make sure the seller has the ability to review the entire offer.

**Does the listing broker have to postpone presentation until the offer review date?**

Often there is a date chosen to present all offers to the seller. An offer may have an expiration date prior to that date. If seller is unavailable or refuses to review an offer prior to expiration, then listing broker's file should reflect those circumstances. Even if seller set an offer review date in the future, broker must notify seller if an offer comes in from a buyer with an expiration date prior to seller's established review date. Seller must be informed that an offer will expire, and thus be void, before the pre-determined offer review date. It is always up to seller whether seller will review an offer earlier than the review date listed.

Any written offer, notice or communication, to or from a party, if it is within the scope of brokerage services, should be presented in a timely manner. The duty to timely present all written offers persists even after mutual acceptance.

# Chapter 9

## Advertising Requirements

### Advertising Laws

License law has required that the name of the real estate firm as licensed be on all advertising. But, many real estate agents were putting the name of the office so small and hidden in their advertising that it was nearly impossible to identify the actual real estate office where their license was hanging. The new license law changes in 2010 specify that the Firm Name must be on all advertising so that it is very clear to the consumer.

A firm must advertise using their firm name (or an assumed name registered with the state) as licensed. WAC 308-124B-210

- (1) All advertising or solicitations without limitation for brokerage services, to include the internet-based advertising, web pages, e-mail, newspaper, and other visual media must include the firm name or an assumed name as licensed.
- (2) Brokers and managing brokers advertising using a name, title, or brand without obtaining an assumed name license must:
  - (a) Always use and display the firm's licensed name or the firm's licensed assumed name in a clear and conspicuous manner in conjunction with the use of such name, title, or brand.
  - (b) Not use a name, title, or brand which suggests a legal entity separate and distinct from the firm, such as "Inc.," "LLC," "LLP," "Corp.," "firm," or "company."
  - (c) Not use name, title, or brand commonly understood to reference a firm or an office, such as "realty," "realtors," "firm," or "real estate."
  - (d) Receive advance written approval from the firm's designated broker to use an unlicensed title or brand.

All advertising by an individual licensee or a licensee operating as a team must always have the firm name unless the team name has been registered with the state as an "assumed name."

The firm name must be "**clear and conspicuous**" in any advertising.

- This means the representation or term being used is of such a color, contrast, size or audibility is presented in a manner so as to be readily noticed and understood. RCW 18.85.011.
- It is a violation of license law if a licensee advertises in any manner without including the firm name or assumed name as licensed in a clear and conspicuous manner. RCW 18.85.361(8).

This is a consumer protection issue because it is important for the consumer to recognize the firm as licensed and have appropriate contact information should they want to contact the DOL or the firm. Many agents don't use their firm name on their internet advertising.

If the broker or team has an "assumed name" that was registered by the designated broker, then that broker or team can use the approved name and is not required to have disclosure of the firm on advertising. For example, a team might have the Double Team name instead of using the firm name or the designated broker has a group of agents working on another particular focus of real estate and does not want the firm name used.

# Social Media Advertising Guidelines

Licensed entities can use the internet in multiple ways to contact consumers about real estate services and to advertise properties or their services. More ways to use the internet are likely to be invented. Disclosure will help to ensure that online consumers know when they are dealing with a licensed entity, who they are and where their primary business office is located.

## Disclosure

**Licensed Firm Disclosure** should contain the following information:

- The firm's name or assumed name(s) as licensed or registered with WA Real Estate Dept of Licensing. If not a licensed firm doing business in the State of Washington, the city and state in which the firm is located.

**Licensee Disclosure** should contain the following information:

- The licensee's name as shown on their license as issued by the WA Real Estate Dept of Licensing.
- The registered firm name or assumed name in which the licensee is affiliated as registered with WA Real Estate Dept of Licensing.

**Full Disclosure** refers to both "licensed firm disclosure" and "Licensee disclosure."

## Internet Guidelines

All internet related advertising that consumers can view or experience as a separate unit should require full disclosure. The burden of proof of such full disclosure falls on the licensee, the firm and the designated broker when addressing a consumer complaint. This disclosure does not apply once an agency relationship has been established with a buyer or seller. Examples of online communications include:

### **Social Media and Banner Ads**

Full disclosure should be prominently displayed and easily understood and be no more than "**One Click Away**" from the viewable page. Each real estate firm should have and maintain a written policy regarding their licensee's use of social media. Banner ads must have one click away disclosure unless it is on the ad.

### **The Web**

Whenever a licensed entity owns a website or controls its content, every viewable page should include full disclosure. A viewable page is one that may or may not scroll beyond the borders of the screen and includes the use of framed pages. If you give permission for a 3<sup>rd</sup> party to advertise your listings, it is important to maintain regular and thorough oversight to ensure that the information is correct. It is important to adhere to copyright laws.

### **Email, Newsgroups, Discussion lists, Bulletin Boards, chats or texts, instant messaging**

Such formats should include full disclosure at the beginning or end of each message. This would not apply to communications between a licensee and a member of the public provided that the member of the public has sent a communication to the licensee and the licensee's initial communication contained the disclosure information required above.

# Guidelines Brochure for Real Estate Brokers

The Dept of Licensing for WA State published an Advertising Guidelines brochure for real estate Brokers.

## Procuring Prospects Online

The internet poses additional potential problems that may require caution on the part of licensees when procuring prospects.

- A. Licensees maintaining individual websites should ensure that when listings expire, sell, or have a price change that the information is updated in a timely manner.
- B. Websites maintained by the MLS should be updated in a timely manner
- C. Information provided to third party websites should be updated in a timely manner. The licensee should provide written communication of any change of listing status to the publisher in a timely manner.
- D. Licensee shall not give the impression that they are licensed in jurisdictions where they have no license.
- E. Licensed entities should not advertise other licensed entities' listings without written permission. If given, the licensee should not alter the online display or any informational part of the listing without written permission of the Designated Broker or Listing Broker.
- F. Metatags are descriptive words hidden in a web site HTML code that search engines use to index the site. Most sites use common words such as real estate, Washington, city names, homes, houses, etc. Those uses are fine. Some website owners have also inserted competitor's names into the metatags, so that when a potential customer searches for their site, the competitor's site will also come up as a match. This should not be done. Courts have ruled that this constitutes trademark infringement.
- G. Licensees shall periodically review the advertising and marketing information on their website and update as necessary to assure that the information is current and not misleading.

These guidelines are subject to change at any time and as practice on the internet evolves, additional guidelines may be added. Licensees should be aware that all statutes and rules respecting advertising apply equally to the internet. This would include websites, email and any other potential online identification, representation, promotion or solicitation to the public that is related to licensed real estate activity. Licensees advertising on the internet should seek legal advice regarding compliance with local, state and national regulations. Compliance with WA Real Estate Dept of Licensing guidelines does not ensure compliance with other jurisdiction guidelines, laws or regulations.

# Chapter 10

## Property Management

### A. State Landlord Tenant Law Changes



In March 2020, due to the Covid 19 pandemic, Washington State Governor Inslee issued a proclamation to prohibit a number of activities related to evictions by all residential landlords operating residential rental property in the state. Since then, the Governor has issued multiple extensions. The legislature in WA has passed a number of bills to protect tenants and help with keeping more tenants in housing. In addition to the changes affecting the state, local jurisdictions also have passed laws affecting property management. This is just a summary of the bills that in some cases are many pages long. They can be accessed by Googling the bill number and the word tenant.

#### **Late rent Pay or Vacate notice**

Twenty six states have longer than WA State's 3 day pay or vacate notices prior to eviction. In July 2019, this was increased to 14 days. The Landlord must wait 2 weeks to start the eviction process. There is now a uniform eviction notice available to landlords written in plain language including information on civil legal aid resources available. It is a mandatory form required that is in multiple languages and must be in plain language.

Change in rent notice extended from 30 to 60 days.

Any tenant payment must apply to rent prior to any other charges.

Landlord must provide documentation for any damages.

Additional reforms to the eviction process in the bill include the use of judicial discretion in non-payment of rent cases, requiring consideration of factors beyond the tenants' control. In certain cases, landlords will be able to access the Dept of Commerce's mitigation fund for reimbursement of any shortfall in rent. SB 5600 Effective July 2019

#### **Increasing rent**

The timeline to raise rent has been extended to 60 days no matter how small or large the increase. This includes increases to base rent and other reoccurring fees not defined as rent. The increase cannot become effective prior to the completion of the term of the rental agreement.HB 1440 Effective July 2019

## **Notice when Converting Use of Rental**

Requires Landlords to provide a minimum 120-days written notice for a termination of tenancy when converting use, demolishing the property or doing substantial rehabilitation, or changing the use of the premises. If Landlord fails to provide this notice, they could be liable for up to three times (3x) the monthly rent to the tenant. HB 1462 Effective July 2019

## **Military Rental Termination**

The military clause clarifies the condition where service members can terminate rental agreements early or with less notice. The notice changes to 20 days after receiving orders. The tenant must provide a copy of the military orders. HB 1138

## **Right to Counsel for Indigent Defendants**

Subject to funding, indigent tenants in filed eviction cases can ask the court to appoint a lawyer to help them. A person is "indigent" if they receive public assistance or their annual income, after taxes, is at or less than 200% of the federal poverty guidelines.

## **Standards for Initial Payment Plans Landlords must offer Tenants**

Landlords, upon receipt of a tenant's written request, must permit the tenant to pay deposits, nonrefundable fees, and last month's rent in installments.

Rental period of 3 months or long, the tenant may elect to pay in 3 equal installments

In all other cases, tenant may elect to pay in two equal installments.

A landlord is not required to permit a tenant to pay in installments if all the deposits and fees do not exceed 25% of the first full months rent and payment of the last months rent is not required.

A landlord who refuses monthly installments is subject to a penalty of one months rent plus attorney fees.

If the tenant defaulted, the court must determine if they are low income or experiencing hardship to see if the landlord is eligible for Landlord Mitigation Program. HB 1694 Effective June 2020

## **Grace Period Prior to Assessing Late Fees**

The landlord may not charge late fees for rent that is paid within 5 days following its due date. The tenant may propose that the due date for rent be altered to a different date if the tenant is able to show primary income is not received until after the date rent is due. HB 2535 Effective June 2020

## **Tenant Protection during public health emergencies, Legal representation in Eviction, and landlord access to state rental assistance programs.**

For any rent fees or other charges assessed to a tenant that became due between March 2020 and December 31, 2021 the following rules apply:

Landlord prohibited from imposing late fees on debt, reporting the delinquency or an unlawful detainer based upon the debt to a prospective landlord, Landlord is prohibited from inquiring about or considering disclosure of a prospective tenant medical records unless to evaluate a reasonable accommodation or modification.

A prospective landlord is prohibited from:

Taking adverse for prospective Tenant's nonpayment, denying discouraging application or make unavailable a rental based on prospective tenant's medical history including prior or current exposure or infection to Covid 19. Inquiring about or requiring disclosure of a prospective tenant's medical records unless necessary to evaluate a reasonable accommodation.

### **Landlords must give "Just Cause" for Eviction**

This is a law that affects almost all tenancy. It makes it much more difficult and extends timelines for landlords to evict tenants. Landlords cannot just evict a tenant for no reason. The moratoriums are ending, and this extends time limits and creates requirements to protect tenants.

In this new law, landlords must give tenants one of 16 good reasons for ending rental agreements and evicting tenants. Among other things, this means there are no more 20-day notices to vacate for no reason. Before, landlords could refuse to renew month-to-month agreements for no reason, except in a few Washington cities.

These causes include failure to pay rent, landlord seeks possession (90 day notice), committing waste or unlawful activity, owner sells (90 day notice), Property demolished (120 day notice), property condemned, owner elects to stop renting premises (120 day notice), rental agreement expired and tenant doesn't renew, breach of subsidized housing requirement, required to register as sex offender during tenancy (60 day notice) and more.

If a tenant fails to pay rent, then there is a process that begins with notice which must adhere to time frames, offering a repayment plan and then the Resolution Pilot Program prior to any efforts to evict a tenant. If the landlord and tenant fail then, the landlord file an unlawful detainer action. This process takes many months. The text of the law is very lengthy... It is difficult to follow. If a client gets into this situation, make sure that you refer them to an attorney who specializes in this line of work.

**The new Just Cause Landlord Tenant law can be found at:**

**RCW [59.18.650](#) Eviction of tenant, refusal to continue tenancy, end of periodic tenancy—Cause—Notice—Penalties. HB 1236 Effective April 2021**

### **Eviction Resolution Pilot Program ERP**

The Eviction Resolution Pilot Program (ERP) was mandated and applies to all counties in the state.

The objective of the ERP is to bring all parties to the table with trained eviction specialists, explore the amount of rent in arrears and circumstances, and discover a range of other terms that might move to resolve the matter.

Prior to filing an unlawful detainer action for non payment of rent, landlord must provide notice to the tenant informing them of the ERP along with a 14 day termination notice for nonpayment.

The ERP notice must include the following:

- Contact information for dispute resolution center, counting housing justice project or housing advocacy services.

- Notice that the information on multiple languages and tenant information on finding a lawyer is available

- The contact info or the landlord or the landlord's attorney



The statement “failure to respond to this notice within 14 days may result in the filing of a summons and complaint for an unlawful detainer action with the court.”

### **Landlord Mitigation for Unpaid Rent**

If tenant defaults on debt owed under repayment plan, the landlord may apply for reimbursement from the landlord mitigation program or file an unlawful detainer action subject to ERPP. SB 5160 Effective April 2021

## **B. “Rent Backs” Fall Under Landlord Tenant Laws**

If a buyer allows the seller to occupy the property after closing for one day or more, the buyer becomes a landlord. The same is true if a seller gives the keys to a buyer prior to closing! Trying to evict a seller or buyer as a tenant can take many months. Legal requirements must be met from offering a repayment plan to Eviction Resolution Mitigation. If the seller/tenant was offered occupancy without rent, this can become more complicated because the rent must be negotiated in a repayment plan?

Your agency relationship, most likely, terminated at the time of closing. You need to be careful practicing law by advising clients either to offer a rent-back or on how to deal with a tenant that will not vacate. Also, the buyer becomes a landlord if the seller retains possession or the seller becomes the landlord if the buyer moves in prior to closing.

**As the eviction moratoriums are going away as the pandemic wanes, the laws are becoming very strict to protect the tenants from becoming homeless. The new Just Cause law can be found at: RCW 59.18.650 Eviction of tenant, refusal to continue tenancy, end of periodic tenancy—Cause—Notice—Penalties.**

Even though the NWMLS has forms 65 for occupancy prior and after closing, it is best for a broker to refer any buyer or seller to obtain legal advice prior to agreeing. The seller or buyer as a tenant could be in a situation through no fault of their own where they cannot move! It can become very complicated. There is a Legal Hotline video on Youtube at <https://youtu.be/Yz7Gt3bZq5U>

If you are involved in property management, it is important to know the laws that have been designed to help protect tenants. These are state laws affecting all jurisdictions. In the City of Seattle, there are other protections and landlord tenant changes.

As the eviction moratorium in the state and local jurisdictions, there will be tenants who have accumulated debt. There are programs to help tenants and landlords. It is best to consult an attorney if you are faced with needing to evict a tenant.

## **C. Designated Broker responsible for Property Management**

When a broker is performing property management, the ultimate responsibility falls on the designated broker. This can also include properties owned by the broker. The broker has a higher duty and may be handling consumer funds. The consumer could possibility go to the firm if there is a problem.



When marketing a property owned by a broker, it is only required to disclose that the broker is licensed. But, if there is a problem, the tenant could go after the real estate firm the broker is licensed under. So it is important to make sure that the designated broker is aware of all property management activities.

## **The Designated Broker must be in the Know!**

All properties managed by the firm must be supported by a written management agreement signed by the Designated Broker and the owner according to WAC 308-124D-215. This is important... the contract must be signed by the Designated Broker!

Property management agreements must include:

- The firm's compensation
- The type of property and number of units
- Whether or not the firm is to collect and disburse funds and for what.
- Authorization if any to hold security deposits
- Frequency of submitting summary statements to the owner

Each owner of property managed by the firm must be provided a summary statement as provide in the property management agreement for each property showing the carried balance, total rent receipts, owner contributions, other receipts, itemization of all expenses paid, number of units and ending balance. The firm may provide other service for the owners of properties with full disclosure of Broker's relationship with any parties providing services. Any amendment or modification to the property management agreement must be in writing.

An employee who is not licensed as a broker can do a limited number of property management activities of homes they don't own when working for a managing broker. It is important to also review the guidelines for unlicensed activity in the next section. An unlicensed person cannot advertise or tell the public that they are providing property management services or hold or authorize disbursement of trust funds. But, the unlicensed person can do the following.

- Delivering a lease/rental agreement
- Receiving a check made out to the real estate firm
- Showing a rental unit.
- Executing rental agreements under the direct instruction of the managing broker.
- Providing information about the rental unit
- Assisting with the administrative, clerical, financial or maintenance tasks.

An out of state landlord must have a representative in the county where the landlord has tenants so that issues about the unit can be resolved. Landlords are required to provide tenants with information warning about health hazards associated with exposure to mold according to Washington State laws. They also must disclose about lead if built before 1978.

## **Property Management Trust Funds**

Trust accounts for property management transactions are exempt from the interest-bearing requirement of RCW 18.85.285.

Interest-bearing accounts may be established for Property Management funds if in writing for an individual owner established in writing with interest to accrue to the owner and for only damage or security deposits for tenants of residential properties managed by the firm with interest paid to the owner under certain provisions under the Landlord-Tenant Act RCW 59.18.270.

Mortgage payments for the owner are not permitted to be deducted from the trust account if it contains security deposits or funds belonging to more than one client. A single check maybe be payable to the firm for property management fees and commissions if supported by a schedule of commissions. Property management commission shall be withdrawn at least once monthly.

When the property management agreement is terminated, the funds shall be disbursed according to the agreement including the damage or security deposited.

# Chapter 11

## Risky Practices in an Abundant Market\*

### A. Listing Brokers

#### 1. Falsifying Information on Competing Offers

Of course, falsifying information in a real estate transaction is illegal. There are brokers that actually justify relaying false information when there are competing offers. This is in violation of the Uniform Regulation of Business and Professions Act (URBPA) RCW 18.235.130. You have a duty to deal honestly and in good faith. A broker does not have the “right” to be dishonest because the broker is “following” the advice of their principal. That does not relieve a broker from their duty to deal honestly and in good faith. If there is ever a conflict, the broker should consult with the designated broker.

#### 2. Offer Instructions

All offers must be presented to the seller. If there are offer instructions, they must be signed and agreed upon by the sellers.

#### 3. Review Dates for Offers in the Future

All offers on a property must be presented to the sellers. Often listings include in the offer instructions a seller’s review or presentation date. Regardless, the listing broker has a responsibility to present all offers to the sellers right away usually within the day of receipt. Offers have expiration dates and they are often prior to the review or presentation date listed. The seller does have the right to choose an offer prior to a published review or presentation date.

#### 4. Misleading Photos in Listings

Photographers have been editing listing photos on just about every listing. They often adjust lighting, change the sky to be blue and sunny, and use wide angle lenses to change the look of the rooms. But, when the photos change something that affects what the purchaser is buying, that is another thing. For example, cropping out power poles, would be misleading. Though a buyer might see them as they drive up, the photos are also for prospects that evaluate the property just by the photos. The listing broker is responsible for photos that are misleading.

#### 5. Present all Offers in a Timely Manner

This has been said more than once in the class. When a listing broker receives a written offer, it is imperative that it is forwarded to the seller right away which should be within the day.

#### 6. Every Action taken is the Seller’s Choice

Listing brokers must remember to know decisions that should be made by the sellers and not brokers decisions. Some brokers have a protocol for listings and don’t give their sellers options for decisions.

## **B. Buyer Brokers**

### **1. Dangerous Inspection Practices**

Washington State is experiencing a wild real estate market with prices climbing constantly, low inventory, and multiple offers. Because of this, buyers have had to waive inspections in order to be competitive. Leaving them to purchase a property without knowledge of its underlying condition. Seller's have ordered pre-inspections to get their property in peak condition, but in the sellers mind, it also opens up problems that they would feel a need to fix and/or disclose.

### **2. Striking the Information Verification Paragraph**

The information Verification paragraph gives the buyer the opportunity to discover errors. The default time limit is ten days. This can be shortened. By striking it, the seller is asking the buyer to waive a right to verify information that may be critical to the buyers decision to buy.

### **3. Earnest Money early release**

Earnest money is held by a neutral third party. The purpose of earnest money is for liquated damages in the event of a default. The assumption when it is released to the seller is that the seller is protected should the buyer fail to close. But, there are circumstances that a transaction fails to close that are of no fault of the buyer. For example, if the seller passes away, the sale is void and yet the buyer has lost the earnest money. The heirs have no obligation to release that money. They could choose to file a lawsuit but it would probably cost more than the loss. Earnest money is best left in the hands of a neutral third party to protect all in case of a default.

### **4. Post Closing Possession or Rent-Back by the Seller**

Washington State passed a law in 2021 focusing on the reasons a landlord can evict a tenant and the process that must be followed. A seller that closes on a property and negotiates remaining in the property for as little as one day after closing whether they are paying rent or not are subject to the new landlord tenant laws. If they refuse to vacate, the buyer does not have the right to just file an unlawful detainer suit to evict them. The new process can take months and could very well last a year. The seller might refuse to vacate because of something like a broken hip or a covid diagnosis. The buyer might be waiting with the truck full of their furniture and bathrobes but cannot move. The buyer who is now a landlord, will be required to pay the mortgage. It is recommended that a broker never write a seller rent-back or a buyer early possession without the client confirming with an attorney.

### **5. Buyer waiving right to receive Form 17**

In an active market such as the one Washington State has been experiencing, buyers have been put in a position to waive their rights in order to be in a competitive position when there are multiple offers. The Property Information Disclosure form is a state law. It is in the best interest of the seller, buyer and their brokers to never waive receiving the form. If the seller elects to not fill out the form, they are still required to fill out the environmental section if applicable.

## C. Professional Cooperation\*

Every two years when the core curriculum is updated, this paragraph is included. The agent on the other side of your transaction may appear to be less competent. Remember, that agent may be of the same opinion as you.

To keep a transaction moving smoothly toward closing, it is important to keep open lines of communication and respond in a timely manner. All commission issues need to be in writing.

One of the biggest complaints in the real estate industry is that the conduct and professionalism of the broker on the other side of the transaction.

One of the biggest complaints from consumers and real estate brokers deals with communication. The broker so often didn't answer the phone and there wasn't a return call is an example. From my own experience, if I call ten real estate agents today, I will probably get about 20% to actually answer the phone even if they just called or emailed me. Only about 20% will call back after leaving a voice mail.

When involved in a transaction, real estate brokers need to have good communication skills. There is no real estate class, designated broker lecture, or motivational seminar that can transform an agent into one that has good communication skills. Success in this business does depend on effective communication. For this month, take the challenge to answer the phone and follow up with people in a timely way!

The type of complaints can include:

- The broker did not answer phone calls or does it sporadically
- The assistant to the broker does not know anything about the transaction
- The Broker did not file the paperwork on time.
- The broker will not confirm the earnest money received.

# Chapter 12

## Fraud in Real Estate Transactions

As a real estate agent or a loan officer in Washington State, it can be hard sometimes to imagine that there could be a criminal sitting next to you at the office, across the table during a real estate transaction or online processing a mortgage loan. But, fraud is rampant in our industry. Money and property are being stolen almost invisibly. The only currency is paper and documents. It is quiet and very clean with a pen or a computer mouse. Most people involved in fraudulent transactions don't experience a great amount of guilt. In many cases, people are unaware of the crime committed and the consequences of their actions. No one *seems* to get hurt. There are no deadly weapons. The victim is not even bleeding.

Ignorance does not "save" you in our court systems. If you are sitting in court and you say you didn't know you were involved in a fraudulent transaction, you don't get a free pass to get out of jail.

What echoes throughout real estate offices and mortgage companies is the excuse that "everybody is doing it." We heard that when we were children but it didn't save us when we did something wrong.

### **White Collar Crime**

The FBI has placed "White Collar Crime" as a seventh on the top ten list of investigative priorities. The FBI categorizes white-collar crimes as deceit, concealment, or in violation of trust and are not dependent on the application or threat of physical force or violence. Such acts are committed by individuals and organizations to obtain money, property, or services to avoid the payment or loss of money or services, or to secure a personal or business advantage. White-collar criminal activities can include money laundering, bank fraud, and fraud against the government.

According to the FBI, mortgage fraud is a material misstatement, misrepresentation, or omission relating to the property or potential mortgage relied on by an underwriter or lender to fund, purchase or insure a loan. It is the intentional enticement of a financial entity to make, buy or insure a mortgage loan when it would not otherwise have done so, had it possessed correct information. If the misrepresentation alters a decision, then misrepresentation becomes fraud, which is a state and federal crime punishable by up to 30 years in prison and \$1,000,000 fine.

In many cases, the opportunity to make money quickly and quietly becomes attractive to people that are scheming. Sometimes, people see others as easy targets.

Often real estate agents, mortgage brokers and investors get caught up in transactions that can easily make them money with only a few twists and turns. They don't see a hurt victim and use the "everybody is doing it" reasoning to justify fraud. Some perpetrators are of the criminal mindset and others just go along because it appears to be safe and quasi legal. Not very many agents and lenders have been "caught" but the Washington State Department of Financial Institutions and the FBI Financial Institution Fraud Unit are busy at work. You could be part of their next investigation. Do you look good in an orange jumpsuit?

There are a number of schemes in the market that are fraudulent. It is important not to participate in any transaction where there is not full disclosure or participate in any possible fraud.

### **Wire Transfer Fraud**

The most common scheme in the market today is Wire Transfer Fraud. Hackers will get into an agents email and follow it. They will harvest the information on the buyer, escrow and title and then just before title send an email to the buyer to deposit or wire funds into a different account than the escrow instructions. Once wired, the funds are completely gone. One clue is sometimes the escrow email will be a gmail account. This is so common today and there is no way for the agent or escrow to know the buyer has received an email with different escrow instructions. So EDUCATE Your buyer!

### **Foreclosure Rescue**

There are numerous foreclosure rescue schemes. Red flags for fraud and schemes include guarantees to stop foreclosures, a promise that the homeowners can buy the house back, promise to transfer the title or even eliminate the mortgage.

Other types of fraud include:

- The Advanced Fee Fraud where a person is asked to send some fee to process a transaction for an out of country buyer to purchase a property, to get a million dollars out of a country, or to start the process to get an inheritance from a relative that perished in the tsunami. Those are only a few examples. In the case of the real estate example, they often offer higher than asking price and promise higher commissions.
- Mortgage Fraud where a lender does anything from falsifying loan documents, creates fake employment verifications, and uses inflated appraisals. There are about a thousand ways to commit mortgage fraud.
- Mortgage elimination where a homeowner with a mortgage is convinced that the mortgage can disappear with the payment of a fee and the signature on some documents.
- Lease and Rental fraud where a listing, vacant house or a rental currently on the market is advertised by a fake owner who offers the property much less than market rent value and asks the prospective tenants to fill out an application and send along a deposit.
- Short Sale Flopping is when a buyer makes an offer on a short sale to a bank and resells it prior to closing to another party to pocket money.

Two very large cases of fraud in Washington State have received national attention in 2010-2013.

*The Hellickson Company boasted about being the nation's leading firm specializing in short sale properties. Michael Hellickson started his real state career in 1991, before he even graduated from high school. With over 417 Short Sales, and more than 325 REOs in under 10 months, he boasted as being in the top 1% of all agents nationally! Hellickson sold over 473 homes in less than 8 months according to his website. But his real estate career in Washington State ended after a long investigation by the Washington State Department of Licensing.*

*Shawn Portmann was involved to such a great extent in loan fraud that an entire bank in Pierce County closed. He was touted as the most successful loan officer in the country. He boasted that he could get anyone a loan to buy real estate no matter their circumstances.*





# The Legal Edge....Current Legal Topics in Real Estate

## Quiz

### Organizational Structures

1. The word "team" is covered in a section of real estate license law. True / False
2. A designated broker can delegate duties to a managing broker in writing but the Designated broker remains responsible. True / False
3. An unlicensed assistant on a team can show properties to prospective clients. True / False
4. In the NWMLS a real estate agent can promote a listing before being turned into the MLS. True / False

### Legislative and Dept of Licensing

5. You will renew your license by opening a Secure Access Washington account online. True / False
6. A seller must get consent if they are video and audio recording buyers in the house. True / False
7. All brokers will be required to take a 6 clockhour fair housing class for their renewal after June 2022. True / False
8. The firm must keep complete logs for all transactions including contracts and documentation. True / False

### Agency Law

9. A statutory duty means that an agent's responsibilities are spelled out in the Law of Agency. True / False
10. An agent is required to show buyers all properties available regardless of commission offered. True / False
11. An agent can list the identical property next door to their own listing even if it is a better value under the Law of Agency True / False
12. Dual agency MUST be in writing prior to writing the purchase and sale agreement. True / False
13. It is highly recommended to have a written buyer agency agreement with a buyer. True / False

### Real Estate Lawsuits

14. A seller can sue an agent if a listing fails to sell due to inflated list price seller requested on the listing agreement. True / False
15. Brokerage Services are real estate activities rendered on behalf of another with the expectation of compensation. True / False
16. The statutory duty to convey all written communications is triggered once a broker is rendering real estate brokerage services. True / False
17. A buyer should assume there is no remedy for misrepresentation by a seller if the buyer could have discovered the defect. True / False
18. The largest class action lawsuit has been filed in the country against the National Association of REALTORS. True / False
19. The lawsuit claims that there is conspiracy and collusion between brokers to keep total commissions high. True / False
20. The lawsuit claims that there is a diminishing role for buyer brokers yet the commissions have increased due to the market True / False
21. Unauthorized practice of law would occur if a broker preparing contracts falls below the standard of care of an attorney. True / False

### Fair Housing and Anti Discrimination

22. Everyone is a member of a protective class if characteristics are used to discriminate against him/her. True / False
23. Washington Law on Discrimination includes gender identity. True / False
24. It is a violation in Washington to discriminate against individuals on the basis of military status. True / False
25. A broker should not ask questions about a person's background when determining housing preferences. True / False

26. "Does your son have a mental disability?" is a question that would be in violation of the Fair Housing Laws. True / False
27. A "love letter" can sway a seller to choose a buyer due to familial, marital status or cultural background. True / False

#### Disclosure

28. Availability of internet must now be disclosed on the Property Information Form. True / False
29. The seller or landlord must disclose lead paint on a disclosure form if the house is built prior to 1978. True / False
30. Tenants must be warned about the health hazards associated with mold by providing documentation from Dept of Health. True / False
31. Carbon Monoxide is identified by an unusual smell and it is harmless. True / False
32. Buyers should take steps to follow up on any defect identified in an inspection report. True / False
33. All firms must have a written office policy about the referral of Home Inspectors. True / False
34. About 13% of Washington has hazardous slide areas. True / False

#### Writing the Purchase and Sale Agreement

35. Real estate agents are limited to filling out pre-printed forms prepared by an attorney. True / False
36. When a seller elects to work with a buyer's escalation clause, the seller must provide the buyer with the competing offer. True / False
37. A seller can choose to not accept an offer with an escalation clause. True / False
38. The escalation forms to determine sales price include the buyer closing costs so that there is a net price. True / False
39. The evidence of funds form is important to use if the buyer is dependent on a large amount of cash for the purchase. True / False
40. If a second offer is signed by the seller, it triggers the bump clause. The first buyer can waive the contingency to purchase. True / False
41. The buyer is prohibited from delivering the buyer's inspection report to the seller unless the seller requests delivery. True / False
42. The buyer is responsible for identifying problems and providing the seller with a contractors estimate for items to be repaired. True / False
43. Closing occurs the moment both sellers and buyers have signed the documents. True / False
44. If a seller has signed an offer, the listing agent is not required to present any other offers other buyers may write. True / False
45. There is no law requiring notification on multiple offers, but it is a good practice to notify a buyer that their offer was rejected. True / False

#### Multiple offers and Timely Presentation

46. The seller must receive all offers and has the right to review each one in a multiple offer situation. True / False
47. A seller can reject all offers in a multiple offer situation. True / False
48. A seller can choose one buyer over another because they feel they will better "fit" the house or neighborhood. True / False
49. The listing agent can review all offers and present in entirety only the top three potential offers. True / False
50. Offer review date on a listing means that the listing agent is NOT obligated to present offers in a "timely manner." True / False

#### Advertising and Social Media

51. The firm name as licensed must be on all real estate brokers advertising. True / False
52. When a broker advertises online, the firm name must be disclosed in a clear and conspicuous manner within one click. True / False

#### Property Management

53. The designated broker must sign all property management agreements. True / False
54. Washington state law has extended the time period for notification of tenants to increasing rent to 60 days. True / False

#### Risky Practices for Buyer and Selling Brokers

55. Any offer on a property listed for sale must be presented as soon as possible which should be within a day of receipt. True / False
56. Every action in a listing must be the seller's choice. True / False
57. Striking the paragraph to verify information takes a buyer's right to check sellers disclosed information. True / False
58. Form 17 disclosure is a state law. It is in the best interest of the parties to not waive receiving the form. True / False
59. A seller must disclose on Form 17 anything in the environmental section regardless if they want to waive completing the form. True / false

#### Fraud in Real Estate Transactions

60. Ignorance does not save you in a court of law. True / False
61. A real estate agent could jeopardize their real estate license or even go to federal prison for committing acts of Fraud. True / False
62. The biggest fraud that is hitting real estate transactions is wire fraud. True / False



## Quiz for The Legal Edge.. current legal topics and Core 2020-20121

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15		36		57	
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I attest that I have read the materials and have answered the questions. The mandatory evaluation is attached!

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

PROFESSIONAL Direction, Email: [clockhours@gmail.com](mailto:clockhours@gmail.com)



# 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 pay Tuition (\$50 for 15 hrs) YES / NO
- Did you fill out and sign this form? YES / NO
- Paid with credit card by using the payment link on front of website. YES / NO

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

A "clock hour" is 50 minutes. This 15 hour class should take about 12.5 hrs.. 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. \_\_\_\_\_

## The Legal Edge... current legal topics in real estate Includes Core 2022-2023

Print Name CLEARLY	Signature	Company
Address	City Zip Code	Phone
	Email	
License Renewal Date	Date Class taken	Notes

*Thanks for taking this class! I really appreciate the agents that take clockhours from my school. Natalie Danielson*

**Professional Direction**  
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