Section 4
Dangerous Dozen

The Dangerous Dozen

Twelve Most Common Errors when Writing Purchase and Sale Agreements

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

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Curriculum

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

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The twelve most common errors when writing Purchase and Sale Agreements

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

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

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

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

Course Objectives

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

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

1. Legal Description

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

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

- Street address This is assigned by the post office and the fire department. It does not describe the real property.
  A property can have more than one address. It could be a duplex, for example.
  There might not be a street address. For example, a property could be just land and have no residence.
  The address does not describe the size of the property. The house could sit on a city lot or several acres. The address does not indicate that.
  The address does not include the easement or other title issues. For example, the driveway may not be owned by the owner at the address.
- Tax ID number This is a number the county assessors office uses to bill for property taxes. It is not a legal description.
  One parcel can have two or more tax numbers. For example, a section of the property may be taxed differently as a wetland.
- Lot number The lot number or unit number is a number that could be part of the legal description. There are cases where it is not.
  The lot number could be a number assigned by the builder, for example, on the marketing flyers and not the actual legal lot number.
  The unit number in a condominium, for example, might be for marketing and not the actual unit on the legal description.

Why can't these property descriptions replace a proper legal description?
Where do these property descriptions originate?
What other information is necessary when using the lot and block number?

Finding a Legal Description

The legal description for a property for sale in Washington is available from a number of sources but the most accurate is the Schedule A from a title company. The last deed has the legal description.

When listing a property for sale in the Northwest MLS, it is required to include a legal description with the listing. Though, it is required, the MLS does not check whether it is a child's drawing with trees and a house or whether it is the actual legal description for the property listed.

Legal Description Errors

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

When Natalie refinanced her house a mistake was made during the purchase two years earlier. The preliminary title came up with the previous owners names. So, during the refinance, there was issues with tile insurance because Natalie was not listed on the title. It took over a month to fix the problem.

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

2. Earnest Money

Earnest money is sometimes referred to as a good faith deposit, binder or deposit. It is evidence that the purchaser intends to carry out the terms of the contract in good faith. In Washington State it is NOT required for the purchaser to pay earnest money when making an offer on a property.

Amount of Earnest Money

The amount of earnest money is not set by any laws or rules. The amount of the deposit is a matter to be agreed upon by the parties. The amount should be an amount that will:

- Discourage the buyer from defaulting or not completing performance on the contract.
- Compensate the seller for taking the property off the market,
- Cover any expenses the seller might incur if the buyer defaults.

The earnest money can vary in different regions based on the sales price of the properties, the type of financing, and/or the amount of time the property will be off the market before closing.

If the average home sells for $100,000 in one city and in another city the homes are selling for over $500,000, the amount of earnest money that is agreed upon will vary. Some agents have used 3%-5% of the sales price for the earnest money deposit but it varies per community.

On the other hand, if the buyer is obtaining financing for a property that is only $100,000 with a zero down VA loan, then sometimes the earnest money deposit is lower because their cash funds are limited.

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

Forms of Earnest Money

The purchaser can deposit earnest money in a variety of forms. It is most common for the buyer to write a personal check that is deposited into an escrow or trust account until closing.

The form of earnest money shall never be changed by the real estate licensee. If the buyer has an cash they want to use for earnest money and the seller agrees, the agent cannot deposit the cash into their personal account and then write a personal check for the same amount.

Personal Check,Cashier's Check, Money Order, Certified Check

Most earnest money is paid in the form of a personal check from the purchaser. It is deposited into a trust account at the real estate firm or the closing company. The check is made payable to the company where it is to be deposited.

If the purchaser is from out of the area, often the broker will suggest that the earnest money be paid in the form of a cashier's check, money order or certified check. That is better insure that the money is deposited into the trust account.

Wire Transfer
The purchaser often has the earnest money wired from the bank. The buyer and escrow must be very careful to avoid having the emails and calls hacked Make sure the transfer instructions are directly from escrow. Hackers often have emails that are similar to the real escrow.

Cash
There are rare instances that a purchaser wants to pay cash for earnest money. It is NOT advisable to accept the cash for a large sum and request that the purchaser return to the bank for a check. Make sure with escrow and your designated broker if a buyer wants to use cash. Money must be traceable… to make sure it is not from drugs, etc.

Promissory Note
When a buyer does not have their checkbook, is short of funds at the time of signing a purchase and sale agreement, or does not want to deposit earnest money until certain conditions are met, then they might choose to write a promissory note. The note is a "promise to pay" by the purchaser. It is very important the agent, makes sure that the promissory note is turned into a check and deposited into the trust account when due. The challenge is that they are often very difficult to collect should the buyer default. It is recommended that the promissory note be payable on a specific date and NOT be made "payable at closing." The closing date may change or the closing may not happen due to default by the purchaser. Then, the promissory note is often not collected. The note shall be made payable on or before a specified date.

Other Forms of Earnest Money
There are times that the purchaser requests to offer stocks, bonds, cars, or jewelry as earnest money for a real estate transaction. If the seller accepts another form of earnest money other than cash, the item must have a stated value. The purpose of earnest money is to show the buyers good faith in purchasing. If the buyer defaults, the buyer could stand to lose the earnest money in whatever form agreed. The seller must agree and have knowledge of any item other than check accepted for earnest money. There can be no agreements "under the table."

Depositing Earnest Money

A real estate broker is not required to have a trust account. In fact, only approximately 30% of brokers have one. Without a trust account, the earnest money is deposited into an escrow trust account. The broker is to maintain records regarding the receipt of the earnest money by the escrow company.

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

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

> WAC 308-124E-110(4)
> (4) When a transaction provides for the earnest money deposit/note or other instrument to be held by a party other than the firm, a broker shall deliver the deposit to the designated broker or responsible managing broker. The designated broker will have the ultimate responsibility to deliver the funds. A dated receipt from the party receiving the funds will be obtained and placed in the transaction file.
> WAC 308-124-205(4)
> (4) Where an agreement for the sale of real estate has been negotiated involving the services of more than one licensee, and funds are to be deposited by the purchaser prior to the closing of the transaction, the firm first receiving such funds shall retain custody and be accountable, until such funds are distributed or delivered in accordance with written instructions signed by all parties to the transaction.

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

It is important to make sure that as an agent you are accountable for all earnest money checks. Each office has procedures for the receipt and deposit of the check. In addition, if the buyers offer is not accepted, the agent has the responsibility to return the check to the buyer immediately.

The earnest money may be held by a third party in a broker, escrow or attorney trust account. The location of where the earnest money is held is written on the purchase and sale agreement.

If the earnest money is held in the broker's trust account full and accurate records are to be kept by the broker and audited by the Department of Licensing. The earnest money it is not to be commingled with the broker's own personal or business funds. If the broker uses the earnest money funds for his or her personal use it is called conversion and a violation of the Washington State Trust Account laws.

The interest from the broker's trust account is transferred into the Washington Housing Trust Fund. If the earnest money exceeds $10,000 the purchaser can elect to have the money held in a separate trust account and keep the interest less any bank charges.

If the earnest money is held in the trust account of an escrow office or title company, then the real estate agent for the buyer shall have a copy in the transaction file of a dated receipt when the deposit is made. This is required by the Department of Licensing.

If the purchaser writes a post-dated check this must be disclosed to the seller. The broker may have a policy against accepting postdated checks. The check must still be turned over to the broker or the escrow office to be held.

Earnest Money Return to Purchaser

Because earnest money is held to show the purchaser's good faith in proceeding on the terms of the contract, the return of earnest money is determined on the reason for the termination of the contract.

Before a Binding Contract
Requests for the return of the earnest money any time before the offer is binding is acceptable.

If the purchaser writes a purchase and sale agreement and the purchaser withdraws the offer before the seller has signed it, then the purchaser shall be entitled to the return of the earnest money check.

If the seller rejects the offer or signs a counter offer that is not acceptable to the purchaser then the purchaser is entitled to the return of the earnest money check.

After mutual agreement
Once the purchaser's offer has been accepted, both parties have an interest in the earnest money.

There are conditions that may have been agreed upon in the purchase and sale agreement whereby the purchaser may be entitled to the refund of the earnest money. Examples include

The purchaser may not be able to obtain financing,
The home inspection may have discovered problems that cannot be resolved and the agreement terminate,
The purchaser has a contingency to sell their present home and was not able to do so,
The seller could not provide clear title to the property, or
The seller could not sell the property.

If one of these types of situations occur, most often a rescission is drawn up by the selling agent and signed by all parties. That rescission is sent to escrow who will release the funds. If that is not an option, then it is important to go immediately to the broker to resolve any issue.

Who is responsible for deposit and notification for Earnest Money? **If the Purchase and Sale Agreement (P&S) states that the Earnest money (EM) goes to:**	
1. Firm's Trust Account	
P&S provides for delayed payment	Selling (Buyer) broker responsible for: • Collection of EM from purchaser and/or • Notification to principals if not collected in a timely manner
Once EM collected	Selling (Buyer) broker responsible for: • Providing EM receipts to the purchaser • Delivering EM to the firm per written policy • Selling firm responsible for: • Delivering or transmitting receipt of timely deposit to cooperating brokers
EM is returned NSF	MB or DB (or selling broker at MB/DB preference) for: • Notification to all principals (should be in writing)
2. Closing Agent	
P&S Provides for Delayed payment	Selling (Buyer) broker responsible for: • Collection of EM from purchaser and/or • Notification to principals if not collected in a timely manner
Once EM collected	Selling (Buyer) broker responsible for: • Receipts EM of delivery from the purchaser • Delivers EM to the firm per firms written policy • Firm/DB delivers EM to closing agent • Closing agent receipt EM to firm/DB/MB • Firm/D/broker provides copies of receipt to cooperating licensee /firm
Closing Agent notifies the EM is returned NSF	MB or DB (or selling broker at MB/DB preference) for the buyer responsible for: • Notification to the principals. (should be in writing.)
Purchaser (Buyer) delivers/mails EM directly to the closing agent	Selling licensee and the listing broker: • P&S should provide acknowledgement when Buyer deliver/mails funds • Should secure receipted acknowledgement from closing agent that EM has been timely received • If no acknowledgement or EM not received or not in a timely manner, the Broker should notify all parties
3. Listing Licensee	
P&S provides for Delayed payment	Listing broker responsible for: • Confirming from Selling licensee/firm collection and delivery of EM per the P&S • Receiving receipt from Buyers licensee/firm of collection and deposit/delivery of funds and /or • Notification the EM was never received in a timely manner or NSF
Once EM collected	Listing broker/firm • Acknowledges receipt of EM collected to selling licensee/firm per their policy • Acknowledgement to the Seller of receipt and delivery of EM funds and/or • Notification of NSF or funds not delivered in a timely manner

Disputes over Earnest Money if there is a Default

The seller may be entitled or think that they may be entitled to part of all of the earnest money if the purchaser defaults and fails to close the transaction as agreed.

In 1991 the Legislature created a law governing earnest money deposits as liquidated damages. RCW 64.04.005 states:
A provision in a written agreement for the purchase and sale of real estate which provides for liquidated damages or the forfeiture of an earnest money deposit to the seller as the seller's sole and exclusive remedy if a party fails, without legal excuse, to complete the purchase, is valid and enforceable, regardless of whether the other party incurs any actual damages. However, the amount of liquidated damages or amount of earnest money to be forfeited under this subsection may not exceed five percent of the purchase price.

At the time of signing the purchase and sale agreement the buyer and the seller agree that either the earnest money that doesn't exceed 5% of the sale price is the sole remedy or that the seller can elect a remedy. This is called the "safe harbor clause."

The Northwest MLS Purchase and Sale agreement states regarding default:

"In the event buyer fails, without legal excuse to complete the purchase of the property, then the following provision shall apply:

I. Forfeiture of Earnest Money. That portion of the Earnest Money that does not exceed 5% of the purchase price shall be forfeited to the Seller as the sole and exclusive remedy available to seller for such failure.

II. Seller's election of Remedies. Seller may, at sellers option, (a) keep the Earnest Money as liquidated damages as the sole and exclusive remedy available to seller for such failure, (b) bring suit against buyer for seller's actual damages, (c) bring suit to specifically enforce this Agreement and recover any incidental damages, or (d) pursue any other rights or remedies available at law or equity."

If there is a default or the transaction fails to close, the parties must agree in writing who is entitled to the earnest money.

In April 2015 a new law regarding how disputes over earnest money on residential real property improved or unimproved was signed. Within 15 days from the receipt of a written demand from a party to the transaction, the holder must either: 1 Notify all parties of the demand, 2 release the earnest money to one of more of the parties; or 3 commence an interpleader action in Superior Court.

If the holder opts to notify other parties, the holder's notice must be in writing sent by US mail and email to the parties last known addresses and include a copy of the demand. It must contain a statement that"

- The parties have 20 days from the mailing date of holders notice to provide notice of their own objection to the release of earnest money; and
- Their failure to deliver a timely written objection within 20 days will result in a release of the earnest monty to the party that made the original demand.

If the holder receives an objection within 20 days, it must file an interpleader action in Superior Court within 60 days of receiving the objection or an inconsistent demand. However, the holder may release the funds or delay filing the interpleader action if it receives consistent instruction so do so from the parties after their initial objections. If the holder receives no objections, it must deliver the earnest money to the demanding party within 10 days after the 20 day perioe expires. The holder may also file an interpleader action at any time, even if no conflicting demands were received.

If the holder of the earnest money follows the procedures outlined in the bill, it is not liable to any person for releasing the earnest money to the demanding party, unless it releases the funds on the initial demand without waiting for objections of filing an interpleader action.

An interpleader action is a lawsuit in which the holder of a sum of money deposits the money or property with the court and names as defendants the parties who assert rival claims to the money. The court then determines the ownership of the money or property and the original holder is absolved of responsibility.

Non-Refundable Earnest Money

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

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

Discuss any non-refundable earnest money with your broker.

Copies of Earnest Money Check and Identity Theft

It is important to be conscious of the casual copying of earnest money checks that occurs. There is no requirement to give the seller or the listing agent a copy of the check. Do not leave copies laying around on desks. Lenders also, do not need copies of the actual check. Anyone can copy the check and try to cash it.

The verification of deposit is most valuable.

3. Negotiating Offers, Counteroffers and Mutual Agreement

Offer and Acceptance

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

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

Digital signatures are common these days, but it does not mean that all agents are taking advantage of working paperless. If you are not, then this is the time to start learning to sell real estate without a pen in hand!

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

Counter offers

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

Withdrawing an offer

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

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

Multiple offers

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

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

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

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

Often licensees encourage the buyer to write a 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 City fair housing and 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.

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.

Make sure you are using the latest forms from the MLS and you are well versed on any policies your office might have.

Signatures

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

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

Changing Purchase and Sale Agreement Terms

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

Mutual Agreement

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

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

Contingent Offers

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

Subject To's

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

Short Sales, Foreclosures, Bank owned property

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

4. Consistent Dates

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

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

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

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

Computation of Time

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

"Time is of the essence in this Agreement," according to the Purchase and Sale Agreement.

What are examples of inconsistent dates that have caused problems in agreements or in closing agreements?

How might the problems be overcome during a transaction?

5. Notices and Addendums

Notices

Throughout a real estate transaction there are requirements for one party to give notice to another party that condition has been met or waived. Performance or further agreement is based on new information.
Examples of notices that are commonly given from one party to another include:

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

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

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

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

Receipt of Notices

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

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

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

Addendums

Use the forms! There are hundreds of forms created by the different MLS's. There is a form for just about any issue.

The Court in the Heritage House case decades ago put several restrictions on the completion of forms by real estate professionals. The court held that a real estate broker or salesperson is permitted to complete simple, printed standardized real estate forms that are approved by an attorney, provided the forms are used only on simple real estate transactions that arise in the usual course of the broker's business. Further, the completion of such forms must be done at no charge.

The Court also noted that the standard of care necessary for completing such forms and their addenda was that of a practicing attorney. It stated that "an attorney is liable for all losses caused by his or her failure to follow the explicit instructions of the client." It also noted that "when a broker undertakes to practice law and prepares a contract at variance with the client's instructions, he or she is liable for negligence."

At the time of this case, a purchase and sale agreement was only a couple pages. Today, we have hundreds of forms prepared by attorneys.

You can say in a court, "I'm just a broker and I didn't know there was a form for that issue, so I wrote my own." The chance that is any kind of excuse is crazy. There are forms created to use for almost every transaction.

When a transaction is signed and mutually agreed upon by all parties, the forms are all part of the transaction. ALL the forms go to escrow and the lender. The broker does not have the option to eliminate forms so that the lender is not aware of a secret sale of a large amount of personal property, for example.

6. Possession

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

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

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

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

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

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

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

7. Property Information Disclosure

Property Information Disclosure

Since 1994, Washington State Property Information Disclosure law RCW 64.06 requires a seller of residential real estate in Washington State to provide a buyer with a disclosure statement as designed by law prior to the closing of the transaction whether or not the sale occurred with a real estate broker or without a broker. There are sellers that are exempt, for example, estate sales. If the seller does not provide the buyer with the form, then the buyer has the right to rescind the transaction prior to closing. The sellers provide the form to the buyer. If not, the buyer can choose to not close. There are some sellers that are exempt. The Disclosure Law Form deals strictly with the structure of the property itself.

If the seller does not provide the buyer with the form and the seller does not disclosure a material defect, the fact that the sale closes does not automatically relieve the seller from disclosure. *The seller, with or without the form, is required to disclose all material defects.*
If the seller has to check any "yes" answer on the Environmental section of the Property Information Disclosure then the seller MUST provide that to the buyer.

According to some attorneys, no other single document in a real estate purchase and sale agreement has generated as much litigation as this particular form. Over 2/3^{rds} of all real estate lawsuits center on misrepresentation. If the seller is concerned that disclosure may harm their chances of getting the sales amount they hope to get, then most likely the item they don't want to disclose could cost them a fortune in the future.

But lawsuits make it clear that the buyer cannot rely on the Property Information Disclosure form and it is hard to prove fraud should the seller not disclose. It is important for the buyer to **BEWARE, INSPECT and to QUESTION**! Do not rely on the form. It can be difficult to go after the seller with damages.

Seller fills out the form.

From the day real estate agents were presented with the form, brokers, the MLS and trainers have clearly recommended that the seller is the only one to complete the document. The agent must NOT help or assist in the filling out of the form.
There are times that the agent has reason to believe that information on that form is not correct. In those cases, it is not wise to "play ignorant" and not question the information that you are passing on to the buyer. If the buyer is "damaged" you may find yourself in a lawsuit trying to explain why you didn't question grossly inaccurate information you "should" have known.

One of the most controversial topics today is the issue of "negative stigmas" that may affect the buyer's decision to purchase the property. The form does not ask about any defects other than those that directly affect the structure or the title.
A negative stigma may be described as a murder, ghost, barking dog, drug house in neighborhood, or a sex offender in the neighborhood.
If the agent is faced with one of those types of issues, do not make the decision whether or not to disclose with the seller. This is the time to meet directly with the broker and/ or the corporate attorney! A buyer can sue if information that affects their decision to buy is not disclosed.

Past or Corrected Defects or Inaccurate information

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

8. Inspection Clauses

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

Home inspectors will have to be licensed according to new legislation. In addition, real estate agents will have to refer clients to a minimum of three home inspectors.

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

In Washington State, home and building inspectors are required to be licensed. Your office must have a section in their policy manual about the referral of home inspectors. Make sure there is full disclosure if there is any conflict of interest or if the home inspector is related, for example. In addition, real estate brokers are encouraged to refer clients to several home inspectors, but it is important to review your office policy.

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

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

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

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

If a buyer has an inspection where defects are disclosed, the buyer is not to just give the seller the inspection without permission. Let's say there is more than one inspection and one inspector finds what he/she thinks is a defect and it is not. They the seller could be liable to disclose this incorrect defect. Be careful to understand the disclosure issues regarding the inspections. Read the changes to the Inspection Addendum carefully. Only release info to seller with permission.

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

Have other agents requested that your purchaser waive the inspection?

9. Personal Property

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

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

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

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

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

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

10. CCR's and Land Use Issues

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

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

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

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

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

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

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

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

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

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

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

11. Form 34, the Blank Addendum

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

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

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

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

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

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

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

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

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

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

12. Ownership, Liens, Closing, and Extensions

Ownership

It is important to know who owns the property prior to preparing a purchase and sale agreement. Though it seems like an obvious, the "seller" may not be the only person with ownership interest. The parent or spouse may also show on the title and the seller decides to list the property without their consent or signature. Check ownership by ordering a copy of the preliminary title report from a title company. It will include the last deed. This should show the most current owners of the property.

Liens

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

Closing

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

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

Extensions

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

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

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

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

Never assume that because the buyer did not close on the specified date, that the deal has failed and sell to another party. The courts will evaluate whether the buyer was acting in good faith. This happened a few years back. The listing broker received a better offer and assumed that because of a glitch in the mortgage situation delaying closing a few days, that the road was clear for the next buyer. The first buyer after a few checks to an attorney is now the proud owner of the property. Real estate agents are not attorneys or judges!