

### From the Real Estate Practice Group

#### Should I use a broker?

Real estate brokers are trained to assist buyers and sellers of real estate. A broker may represent the seller, the buyer, or after proper disclosure, both parties. Brokers who represent buyers will be a member of the local multiple listing association, and because of this, they will be able to keep a close eye on what is available in certain locations, what the features of those properties are, and what the asking prices are. They will tour properties that are available by themselves, with other brokers or with you, as the client. They will know a lot about the neighborhood, the quality of the schools, the level of safety and other things. Typically, they will meet with you to assess your needs and take you around to view what's available on the market. Once you've found a property, they will assist you with amount of your offer, the terms of the offer, writing up the offer, presenting it to the seller, negotiating any counteroffers and finalizing the agreement. They will assist you in ordering title insurance, selecting an inspector, dealing with the results of the inspection, finding a lender if you don't have one and opening escrow. During the course of most transactions, a host of other issues can pop up, and a broker can assist you in resolving them.

#### How do I find a broker?

The best broker is someone you know and trust or who is referred to you by someone you know and trust. If you have no exposure to this information, it would be advisable to do your own research and identify three or four who you think would be good, and then interview them before making a final decision.

#### Is a broker the same thing as a realtor?

No. A broker is someone who has a real estate license. A realtor is a member of the National Association of Realtors®. Members of this organization are the only people who can legally call themselves realtors. Members of the National Association of Realtors® are bound to adhere to the Code of Ethics of the National Association of Realtors® and are subject to discipline for any violations. There are also State and Local Associations of Realtors® that engage in other activities supporting the industry, such as training and government relations.

#### How much should I expect it to cost?

Under antitrust laws, all real estate commissions are negotiable. However, most brokers charge between 5 – 7% of the sales price as their commission. There are flat-fee or discount brokers who will charge much less, however these brokers will perform fewer services than one who charges a higher rate.

In most real estate transactions, the seller pays the commission to the seller's broker, and the seller's broker is required by the multiple listing association to split the commission with your broker. A buyer's broker is also obliged to show you properties that may not be listed with another broker, and in that case, you can expect to be asked to pay your broker's commission yourself.

#### What does a buyer's broker do?

A full service buyer's broker will consult with you on what your needs are. They will answer any questions you have about neighborhoods, schools, crime, services, traffic and the like. They will then show you what's on the market and either tour the properties with you or show you where they are. Once you've found a property, they will help you evaluate it, write up an offer, negotiate any counteroffers and assist you with title, inspection, financing and inspection issues.

### Can I buy a property without a broker?

Absolutely, and many people do.

### What does that entail?

First, you must find a property you want to purchase. There are many ways to do this, ranging from internet searches to simply driving around and looking for “for sale” signs. A wise buyer will want to know about the neighborhood characteristics, such as schools, crime, traffic, etc, and there are various resources available for you to review. You will have to figure out how much to offer, come up with a purchase and sale agreement and negotiate directly with either the seller or the seller’s broker. If you come to terms, you will need to review the title commitment and deal with any problems related to the title. You will have to schedule an inspection and deal with any problems the inspector identifies. You will have to find a lender, apply for a mortgage and follow up on that process. You and the seller will have agreed on an escrow company, and you will have to review and approve the escrow instructions and the deed. You will then have to go to closing and sign the closing documents.

Many law firms, including this one, are qualified and happy to assist you with any of these issues.

### How do I figure out how much to offer?

There are several sources. Your county’s assessor will have data on the value of the property, but that source is generally deemed not completely accurate. There are websites such as Zillow or Redfin that will give you a better estimate, however those sources are not as familiar with current market conditions as a live person. Real estate brokers may be willing to assist you in formulating a price, but they will want to be compensated for that work. Ultimately, however, it is up to you to negotiate the price.

An important issue to keep in mind is that your lender will require an appraisal, so if the purchase price is too high, they will either deny the loan or require more of a down payment.

### What if the seller owes more than the property is worth?

This is known as a “short sale”, and the seller will need to convince the lender to release the mortgage in order to allow the sale to go through. This can be a complicated, time-consuming and unpredictable process, and at the end of the day, it may be all for nothing if the lender and seller cannot agree how to handle the deficiency – the difference between the sale price and what they owe. Be prepared for significant delays if you are purchasing a short sale, and for the possibility that the seller will not be able to deliver clear title.

### I am a minority. Are there things I should watch out for?

Absolutely. There are many things a seller could say or do that would violate the Fair Housing Act, which constitutes discrimination. In Washington, a housing provider cannot discriminate against anyone based on their:

- Race
- Color
- National Origin
- Creed
- Sex
- Disability

- Familial Status
- Sexual Orientation
- Gender Identity
- Veteran/Military Status

Cities and Counties have added on their own protected classes, including:

- Religion
- Age
- Participation in Section 8 housing assistance
- Use of a Service or Assistive Animal
- Ancestry
- Parental Status
- Political Ideology

Discrimination can be subtle. For example, an ad that states that a property is “nearby several churches” may constitute discrimination based on religion because it does not include synagogues, temples, mosques or other places of worship. Advertising a property as a “bachelor pad” will constitute discrimination based on familial status. “Senior housing” is only appropriate if the property is part of a formally created 55+ senior community. If you have any questions at all, contact your city’s office of civil rights.

### What is a Form 17?

A “Form 17” is legally known as a Seller Disclosure Statement and it is required under RCW 64.06. Sellers of residential real property 4 units or less must provide the buyer a copy of the “SDAS” within five days of the date a purchase and sale agreement is signed. The buyer has three days from the date they received it to rescind (cancel) the contract and receive their earnest money back. The form of the SDS is prescribed by law. In a nutshell, the Seller must disclose any defects in the physical condition of the property or title that they have “actual knowledge” of. The only three answers are “yes”, “no” and “don’t know”. Certain questions are starred with an asterisk, and if the answer to any of these is “yes”, the seller must explain the answer in more detail.

### What should I do with the Form 17?

First of all, read it closely and thoroughly. You have only three business days to cancel the contract if the Seller has disclosed something that is unacceptable to you. The cancellation must be in writing. Second, if there is anything in the SDS that tips you off to a potential defect, the law requires you to investigate further. If you fail to do so, or do not investigate thoroughly enough, a recent Supreme Court case says that you buy at your own risk. The legal principle of “caveat emptor” – buyer beware – applies in real estate transactions. This principle even applies if the seller actively conceals a defect, if that defect is discoverable by you or your inspector. So if you have any reason whatsoever to believe that the seller’s disclosures are incorrect, or that a defect in the physical condition of the property or the title exists, you have an affirmative duty to investigate further.

Unless you expressly waive it, you have the absolute right to receive the SDS and if the seller fails to provide you with one, or fails to fill it out completely, your 3-day right to cancel the contract is extended. If you close the transaction without demanding one, this right goes away.

If something changes in the property between the date your offer is accepted and the closing, the seller must “restore the accuracy of the disclosure” by either repairing the defect (subject to your right to reinspect) or providing you with a new three-day right to rescind (cancel) the transaction.

### What does a typical purchase and sale agreement say?

First of all, unless there is a broker involved, there is really no typical purchase and sale agreement. However, if the seller is represented by a broker who is a member of the MLS, you may be able to use the standard MLS form. If this is the case, the agreement will identify the parties, the property, the purchase price, the closing date, the name of the title and escrow companies, the date of the closing, the name of the broker or brokers involved and several items required by law, such as whether or not the parties want escrow to pay all lienable utilities at closing. If your offer is contingent on financing and an inspection, those addenda will need to be attached to the agreement. If the offer is contingent on the sale of your current home, that will be indicated as well. There may be other conditions unique to your transaction that are beyond the scope of this document.

Members of this firm are happy to assist you in writing up and negotiating a purchase and sale agreement and related documents.

### How much earnest money should I offer?

First of all, earnest money is considered compensation for taking the property off of the market and foregoing other offers, so most sellers will want a substantial amount. Under certain conditions, the earnest money would be forfeited if you fail to close without a legal reason, so in a falling market or a bad selling season, earnest money could be important.

Under Washington law, earnest money of 5% or less of the purchase price is subject to the “safe harbor” statute, which limits the forfeiture of earnest money to this amount if the buyer defaults. The parties can also agree to allow the seller to elect whatever remedy they want, and in that case, the limit does not apply. Most contracts provide that if the buyer defaults without a legal excuse the earnest money up to 5% is forfeited.

### What if I can't get a mortgage?

You could ask the Seller to finance the sale. However, Seller financing can be tricky. If they still owe money on your property, chances are that their loan contains a “due on sale” clause, which provides that if the property is sold, the lender has the right to demand to be paid off out of the sales proceeds. Some loans are assumable, in which case you could take over the loan and pay the seller the difference, assuming you qualify.

If neither of these apply, there are several options.

- A **Lease-purchase agreement** provides that you will lease the property now, but will pay a pre-set purchase price sometime in the future.
- A **Lease-option agreement** is slightly different in that you lease the property now, but reserve the option to buy the property later, either at a pre-set price or at a price to be negotiated on the option date.
- A **Real estate contract** provides that title will stay in the seller's name while you make payments, and will only be transferred when the financial obligation is paid in full.
- A **Private note and deed of trust** involves a promissory note and deed of trust, and together they provide that title is transferred immediately but that the seller would have a lien on the property until the note is paid off.

There are pros and cons to each of these options, which we would be happy to discuss with you.

### What is title insurance?

As obvious as it sounds, title insurance is an insurance policy that ensures that the title to the property is “marketable” at the closing. Marketable title means that the property is suitable for the buyer’s intended use, title-wise. There are three levels of title insurance:

- **Standard coverage** insures marketable title, access to a public right of way and no defects in the title such as forged deeds, etc.
- **Homeowner’s coverage** provides standard coverage, plus limited coverage of the boundaries of the property, and costs slightly more than Standard Coverage.
- **Extended Coverage** provides standard and homeowner’s coverage, but also coverage for “matters of survey”, meaning that the property is surveyed and the boundaries and dimensions are insured, subject to encroachments identified on the survey. Because of the cost of a survey, extended coverage is the most expensive.

Usually, the seller provides title insurance to the buyer in the amount of the purchase price, which is known as an “owner’s policy” and the buyer provides title insurance for their lender in the amount of the loan, which is known as the “lender’s policy”.

### Should I have the property inspected?

Absolutely, for several reasons. First, your lender will most likely require it. Second, an inspection puts you on notice of any defects in the property, and if they’re significant, you can cancel the contract or ask for a price reduction. Third, the inspection may identify potential future problems, which legally transfers the risk to you. For example, the inspector might identify an area that is wet, but not yet rotted, and tell you that this will need to be addressed in the future. If you don’t investigate further, and if the defect is more significant than originally thought, the risk is on you and you will have no recourse against the Seller. Buying a property without having an inspection and following up on any potential defects is legally and financially reckless. Fourth, you will learn a lot about the condition of the property.

### What if the inspector finds problems?

If the problems are significant, they will have to be addressed, because most lenders will not loan on a property with a serious defect. Usually, that means that the seller will have to fix them and allow you to reinspect the property after the repairs are completed. Sometimes the lender will allow the parties to “hold back” purchase funds, so that you can have the repairs made after the closing. In this case, you will obviously want a price reduction in the amount of the repair costs. If the problems are minor, you and the seller can either ignore them, have the seller fix them or agree to reduce the purchase price. As a buyer, you should know that the inspector’s job is to make the property look as bad as possible, so be prepared to see the “bad side” of the property you want to buy.

### What if there are problems with the title?

Under the law, title to the property must be marketable at closing, which means that the seller must remove any defects object to. Under most contracts, you have until the day of closing to object to the title, so it’s highly advisable to clear up matters related to the title as early on in the process as possible. It’s also important to define “marketable title” in the purchase and sale agreement for this reason.

### What happens next?

Assuming title has been cleared and the property has passed inspection, your lender will want to send in an appraiser to evaluate the property. The appraiser will need to see the property, but their viewing of it will be much less thorough than an inspection.

After the appraisal, escrow will provide you and the seller with draft “escrow instructions”. You or your lawyer should review these to make sure they are consistent with the terms of your sale, as described in the purchase & sale agreement. Assuming any issues with these are resolved, you will next be contacted for an appointment to come in and sign the closing documents.

Legally, you have the right to see the closing documents before the signing appointment, and you may choose to review them or have your attorney review them. Most people waive this right, intentionally or unintentionally.

### What documents will I be asked to sign at closing?

A detailed description of every document is beyond the scope of this document, plus every closing is different in some way. Generally, you will be presented with some variation of the following:

- A **HUD-1 settlement statement** detailing the costs of the transaction. Your costs as the buyer are in one column and the seller’s costs are in the other. In the version you will see, your column is filled out, but the seller’s side is blank. The opposite is true for the sellers.
- A **deed**. Most transactions close with a **statutory warranty deed**, in which the seller warrants the right to convey title, that the title is clear, that there are no undisclosed encumbrances on the title and that you are entitled to “quiet enjoyment” of the property (i.e. a clear title). The second alternative is a **quitclaim deed**, in which the seller make no warranties. A quitclaim deed is commonly used in a divorce or other “partition” of commonly owned property. A third option, which is used in a foreclosure or in the sale of a property owned by a bank or the estate of someone who has passed, is called a **bargain and sale deed**. The form of the deed is very important.
- A **real estate excise tax affidavit**. In a “REETA”, you and the seller swear under penalty of perjury that the sale price is the actual price of the transaction. The seller is required to pay an excise tax of 1.78% of the purchase price at the closing. The REETA is the form in which the tax is calculated.
- The **escrow instructions**. In the purest form of escrow instructions, the seller instructs escrow to get the money from the buyer, and the buyer instructs escrow to get the deed from the seller.

### Should I move in early?

Not without defining your legal rights in a “pre-closing rental addendum”. If you move in before closing, the seller will become a landlord and you will become a tenant. If the sale doesn’t close for some reason, you will either have to move out or face eviction. If there is damage to the property, there may not be insurance. In addition, the law is not clear on what the rights of the parties are prior to closing in this situation. A well-written pre-closing occupancy agreement will alleviate these potential problems.

### What if the seller wants to stay after closing?

Do not agree to do this unless you and the seller have defined your rights in a “post-closing rental addendum”, which must contain specific language stating that it applies after closing. If the seller occupy the property after closing, they become a tenant and you become a landlord and the same problems identified above apply in reverse order. A well-written post-closing rental addendum will alleviate these potential problems.

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