

From the Real Estate Practice Group

Should I use a broker?

A real estate broker is trained to list and sell real estate. Most brokers know a lot about how to make a property more desirable to a wider pool of buyers. They also know how to price a property accurately, depending on what your needs are. If you want a quicker sale, they may advise you to list it at a lower price than if you're not in a hurry. Real estate brokers are also trained to write up transactions on standardized forms and to deal with matters related to title, inspections, lending and escrow. Importantly, brokers are almost always members of the local Multiple Listing Association (MLS), a consortium of real estate brokers who maintain a database of most of the properties listed for sale in a certain area. Listing a property in the MLS will guarantee maximum exposure for your property.

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.

What does a broker do?

A full service broker will consult with you on how to make your property more marketable. They will often suggest things like making certain repairs or upgrades, a fresh coat of paint, removing personal items and freshening up the landscaping. They will also research the market conditions in your area and suggest a listing price that will meet your needs. They will list the property in the MLS, which will ensure the most exposure. They will put a sign out in front of the property, prepare a website, hold open houses if appropriate and prepare and circulate flyers about the property. They will assist you in negotiating with a prospective buyer, help you deal with the title, the buyer's inspector, the buyer's lender, the escrow company and anyone else involved in the sale.

Is it worth it to hire a broker?

In many cases, yes. In others, maybe not. Everyone's situation is different. Brokers often say that they can get a higher price for your property than you might be able to, and there is some evidence that this is correct.

Can I sell my property without a broker?

Absolutely, and many people do.

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What does that entail?

First, you must prepare the property for the market. You must then find a buyer yourself. That will mean you may have to prepare a website, a flyer and other marketing materials, hold your own open house and deal with everyone who is interested. If the buyer is not represented by a broker, one of you will have to prepare and negotiate a purchase and sale agreement. There are standard forms publicly available, however they are marginal in quality. You will have to order title insurance and make sure that the buyer gets a copy of the title “commitment” and deal with any problems with the title. You will have to be there to let the buyer’s inspector and appraiser in and will have to deal with any issues they raise yourself. You and the buyer will have to jointly select and open escrow and will have to deal with any issues related to that process. Many law firms, including this one, are qualified and happy to assist you with any or all of these issues.

How do I figure out how much my property is worth?

There are several sources. Your county’s assessor will have data on the value of your 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 may not be as familiar with current market conditions as a live person. Many real estate brokers will prepare a “broker’s price opinion”, which will include an analysis of current market conditions, for compensation. The most expensive and thorough option would be to have the property appraised by a professional appraiser.

I have a loan on the property. Can I still sell it?

Yes, but unless the loan is assumable, it will have to be paid off at closing out of the proceeds of the sale.

What if I owe more than the property is worth?

If this is the case, you will need to convince the lender to release the mortgage to allow the sale to go through. This is what is known as a “short sale”. A key issue in this situation involves the deficiency – the difference between the sale price and what you owe. Some lenders will waive the right to collect a deficiency after the sale, but others won’t. This is an important issue to deal with if you are in this situation. The lender has six years from the date the last payment was made to sue to collect the deficiency. A waiver of a deficiency must be in writing. Members of this firm can assist you in these negotiations, or you could use a short sale facilitator.

How do I market the property?

That is completely up to you.

Are there things I should or shouldn’t say while marketing the property?

Absolutely. There are many things you could say or do that would constitute a violation of 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 is never advisable, and it can be subtle in form. For example, to state that your 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” would constitute discrimination based on familial status. Advertising a property as “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 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 business days from the date they receive 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 preamble to the Form 17 explains the process very clearly and sellers should read it closely. At the risk of oversimplification, the seller should read the questions on the SDS literally and answer them truthfully. 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. If something about the property changes the “accuracy” of the disclosure must be restored by either repairing the defect or revising the SDS and allowing the buyer another rescission period.

Someone wants to buy my property. What now?

First of all, congratulations! Second, get ready, because you’re going to be busy. You must first negotiate and sign a purchase and sale agreement. Earnest money is always advisable, and you must receive the money and deal with it as provided for in the agreement. You will need to pick a title insurance company and order a title “commitment”, which is a preliminary statement of what is recorded against the title to your property. That must be delivered to the buyer, and if they have any objections, you will have to address them. You will also need to agree upon an escrow company and contact them to “open escrow”. It is usually advisable to use the same company for title insurance and escrow, and most companies will provide a discount to anyone who uses them both. The buyer will want to have the property inspected, and you will have to make the property available for whenever this will happen. The inspector may identify defects in the property and you must negotiate with the buyer over how to address them. If there are major defects, chances are that the buyer’s lender will refuse to make the loan until they are fixed and corrected. If the defects are minor, you can either fix them and allow the buyer to reinspect and approve them or you could opt instead to reduce the price and let the buyer deal with them. This will all have to be negotiated. Next, the buyer’s lender will require an appraisal, which means that you will have to make the property available to them. If the appraisal comes in at less than the sales price, the lender will limit the amount of the loan, and you will have to either reduce the price or convince the buyer to put more cash into the transaction. After that, you will be contacted by the escrow company. They will send you and the buyer draft “escrow instructions”, which you and they must approve, and a deed, which you must approve. If everything goes as planned, escrow will contact you to make an appointment to come in and sign the closing documents. They will do the same for the buyer, and after all documents are signed, the deed will be recorded and you will receive the sales proceeds. Whichever of these two occurs last will be the official “closing” of the sale.

What does a typical purchase and sale agreement say?

If the buyer is represented by a broker, they will produce a purchase and sale agreement. And if the broker is a member of the MLS, chances are that the agreement will be on the standard MLS form documents. 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 the offer is contingent on financing and an inspection, those addenda will be attached to the agreement. If the offer is contingent on the sale of the buyer's 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.

How much earnest money should I ask for?

First of all, earnest money is considered compensation for taking the property off of the market and foregoing other offers, so it should be substantial. Under certain conditions, the buyer forfeits the earnest money if they fail to close without a legal excuse, 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 without a legal excuse. 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 as what are called "liquidated damages."

What if the buyer wants me to finance the sale?

Seller financing can be tricky. If you still owe money on your property, chances are that your loan contains a "due on sale" clause, which provides that if the property is sold, they have the right to demand to be paid off out of the sales proceeds. Some loans are assumable, in which case the buyer could take over the loan and pay you the difference, assuming they qualify. You or your representative will need to check with the lender.

If neither of these apply, there are several options.

- A **Lease-purchase agreement** provides that the buyer 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 the buyer leases the property now, but reserves 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 your name while the buyer makes 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 you as 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?

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 types 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.
- **Owner'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 owner'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 let the buyer inspect the property?

Absolutely, for several reasons. First, their lender will most likely require it. Second, an inspection puts the buyer on notice of any potential problems, which transfers the legal risk to them, even if you accidentally forgot to disclose defects on the Form 17. Third, it exonerates you from any liability if the buyer discovers any subsequent defects. Fourth, if the sale fails to close, you will know what repairs will need to be made or what disclosures will need to be revised before you try to sell it to someone else.

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

What if there are problems with the title?

Under the law, title to the property must be marketable at closing, which means that you must remove any defects the buyer objects to. Under most contracts, the buyer has 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, the 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. They may not even need to go inside any structure on the property.

After the appraisal, escrow will provide you with draft “escrow instructions” and a draft deed. 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 if the buyer is using institutional financing. Your costs as the seller are in one column and the buyer’s costs are in the other. In the version you will see, your column is filled out, but the buyer’s side is blank. The opposite is true for the buyers.
- A **deed**. Most transactions close with a **statutory warranty deed**, in which you as the seller warrant the right to convey title, that the title is clear, that there are no undisclosed encumbrances on the title and that the buyer is entitled to “quiet enjoyment” of the property (i.e. a clear title). The second alternative is a **quitclaim deed**, in which you 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

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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 deed is specified in the purchase and sale agreement and is an important consideration for sellers of real property.

- **A real estate excise tax affidavit.** In a “REETA”, you and the buyer swear under penalty of perjury that the sale price is the actual price of the transaction. As the seller, you are required to pay an excise tax of 1.78% of the purchase price at the closing. The REETA is the form on 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. Most instructions are much more detailed because the escrow agent has significant potential liability.

Should I let the buyer move in early?

Not without defining your legal rights in a “pre-closing rental addendum”. If the buyer moves in before closing, you will become a landlord and the buyer will become a tenant in the eyes of the law. If the sale doesn’t close for some reason, you may have problems evicting the buyer. 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.

Should I stay after closing?

Not without defining your rights in a “post-closing rental addendum”, which must contain specific language stating that it applies after closing. If you occupy the property after closing, you become a tenant and the buyer becomes 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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