SECTION ONE

INTRODUCTION

OBJECTIVES

Upon completion of this section the student should be able to:

✓ Explain the role of a real estate broker, managing broker, designated broker and firm in the context of a real estate transaction; as well as demonstrate an awareness of legal duties and obligations to the client and other parties involved.
✓ Demonstrate an understanding of what is meant by “unauthorized practice of law” by a licensee
✓ Demonstrate an awareness of when a licensee should suggest that their client seek legal counsel.
✓ Indicate an awareness of “common pitfalls” that may be encountered by licensees
✓ Demonstrate a knowledge of the ethical and legal considerations in the practice of real estate including:
  1. Relationships with Competitors
  2. Relationships with Clients or Customers
  3. Relationships with Colleagues

ROLE OF THE REAL ESTATE BROKER, MANAGING BROKER, BRANCH MANAGER AND DESIGNATED BROKER IN A REAL ESTATE TRANSACTION

DESIGNATED BROKER

Designated Broker is the title of the person who is recognized by the Washington State Department of Licensing Real Estate Division and most local Multiple Listing Services (MLS) the responsible member for the brokerage. This person is ultimately responsible for the actions of all licensees within the brokerage. Also included in this title, may be certain voting rights at the local MLS and authorization to sign certain documents. When a licensee leaves a brokerage, the designated broker is responsible for signing their license and returning it to the department of licensing in Olympia. There is only one designated broker per brokerage. Branch offices of a brokerage will be required to have a managing broker or branch manager. The nomenclature for the designated broker classification has not changed from the previous classification.

MANAGING BROKER

Managing Broker is the title of a person who may be managing a brokerage or a branch office or a licensee who has the education to manage an office, even if they are currently not doing so. The managing broker is responsible for the supervision of their licensees. Including, but not limited to: adherence of the licensees to local, state and federal regulations and making sure that contracts and transaction paperwork is done correctly.

BRANCH MANAGER
A branch manager is responsible for the affiliates of a branch office. A brokerage must have more than one office to have a “branch office.” A brokerage with a single office is not considered a “branch,” and the manager will therefore not be a branch manager. There is one branch manager for each branch offices. A branch manager is usually considered a member by most MLS’s. Licensees are usually subscribers. Members in most Multiple Listing Services (MLS’s) have voting rights in the MLS. Like a designated broker, a branch manager has the duty and authority to:

1. Supervise affiliated licensees
2. Hire affiliates
3. Terminate and “sign off” on licensees’ real estate licenses

**BROKER**

A broker is all other licenses not listed above. The name previously used for these licenses was “agent.” All “agents” (brokers) who renew their license after July 2010 will need to complete a transitional course. This will enable them to acquire the title of broker. New licensee will be required to take more course work and clock hours prior to taking their real estate exam.

**OBLIGATIONS TO CLIENTS AND OTHER PARTIES INVOLVED**

A broker has a duty to his/her client and other parties involved. The distinction between a client and a customer has to do with responsibility and agency.

**A LICENSEE IN RELATIONSHIP WITH A CLIENT MUST:**

- Be loyal
- Demonstrate lawful obedience
- Uphold confidentiality
- Act in the client’s best interest
- Disclose all pertinent information
- Provide a Law of Real Estate Agency Pamphlet

**A LICENSEE IN RELATIONSHIP WITH A CUSTOMER AND A CLIENT MUST:**

- Deal honestly and in good faith
- Not be negligent and exercise reasonable skill and care
- Account for all monies handled for others
- Disclose all material facts
- Present all offers
CASE STUDY

Susan with ABC Realty is the listing agent for the Browns. Because Susan has a listing agreement with the Browns, she has established an agency with the Browns as their broker. During an open house, the Smiths visit the home and want to buy it. Susan decides not to be a dual agent and to only represent the Brown’s. She writes up an offer stating that she is representing the Browns and that the buyers are representing themselves. She further advises the Smiths to seek independent legal counsel before signing the contract. While Susan has supplied real estate services to the Smiths by writing up the offer, the Smiths are not her clients. They are her customers and she owes a duty to the Smiths as stated above.

A licensee must deal in good faith and in a professional ethical manner with all parties involved in a transaction.

“UNAUTHORIZED PRACTICE OF LAW” BY A LICENSEE AND WHEN A CLIENT SHOULD SEEK LEGAL ADVICE

A broker should avoid drafting contracts, contract provisions, and legal documents that could be construed as the product of an unlicensed practice of law. Your job is to assist your clients in completing the standard contract forms. Guide your clients by educating them on each of the clauses in the contract and how they might best draft the agreements. Advise your clients to seek proper legal counsel if the contract should extend beyond the standard form, or if your client wishes to have a custom agreement drafted. Use only standard forms in the exercise of your duties. Such forms must be reviewed and approved by real estate attorneys. Use extreme caution in adding anything to these standard forms.

CULTUM VS.HERITAGE HOUSE REALTORS

The court ruled that licensees must take great care in writing real estate contracts, use standardized forms and ensure that all additions/addendums are in line with the terms and conditions of the contract; otherwise the licensee can be held liable to for damages and losses. According to the ruling:

“[An agent] is permitted to complete simple printed standardized real estate forms, which forms must be approved by a lawyer, it being understood that these forms shall not be used for other than simple real estate transactions which arise in the usual course of the [agent’s] business and that such forms will be used only in connection with real estate transactions actually handled by such [agent] as [an agent] and then without charge for the simple service of completing the form.”

Note: Many brokerages have polices which strictly prohibit licensees from writing in additional clauses in the contract without management approval. As a licensee it is imperative that you understand your brokerage’s policies regarding this.
You are writing up a Purchase and Sale Agreement for your buyer client. Your client may be exposed to a pay cut or lay off due to some union negotiations. Conversely, he may be eligible for a promotion and a pay increase depending on the union settlement. Your client has written three very detailed paragraphs on this situation and would like it to be a contingency to the contract so that he may not be bound to complete the purchase if certain circumstances should arise. He would like this verbiage to be added to the standard form as an addendum. As the buyer’s broker, what is the best course of action that you can take?

**CHECK FOR UNDERSTANDING QUESTION**

A. Encourage the buyer to have their attorney review the Purchase and Sales Agreement and the verbiage that he would like to include  
B. Attach a copy of your client’s hand written contingency to the contract and label it Exhibit “A”  
C. Rewrite the contingency into the body of the contract  
D. Submit the offer to the seller without the contingency and without the buyer’s knowledge

The correct answer is A.

**NOTE:** As a licensee, you are prohibited from giving tax or legal advice. As such, anytime an issue arises regarding these matters, you should advise your client to seek professional advice.

**SOME CIRCUMSTANCES WHEN YOU MAY SUGGEST THAT YOUR CLIENT SEEK LEGAL ADVICE**

- When your managing broker or designated broker suggests that it is necessary  
- When there are serious misunderstandings or issues between the buyer and seller  
- When any party of the transaction is threatening a lawsuit  
- When the issue involves serious legal ramifications  
- When either party breaches the contract  
- If fraud, negligence, misrepresentation or concealment is involved  
- When any serious complications arise which are beyond your scope of knowledge  
- Unusual circumstance where a buyer may want to include certain verbiage in a contract  
- When your client is at serious legal risk
“COMMON PITFALLS” THAT MAY BE ENCOUNTERED BY LICENSEES

MISTAKES DO HAPPEN

Let’s explore some of the more common mistakes made by real estate licensees and then discuss resources that are available to help you avoid these mistakes.

- Not establishing a business plan
- Not establishing a budget
- Counting on commissions before a transaction closes
- Discipline
- Unfamiliarity with forms
- Not establishing a system
- Misrepresenting boundary lines
- Handling of earnest money
- Mistakes with the seller’s property disclosure statement
- Paperwork or contracts which are either not filled out correctly or causes a conflict within the contractual agreement
- Selling the same property twice

NOT ESTABLISHING A BUSINESS PLAN

Like any other business, a real estate business needs a business plan. A business plan is a detailed daily schedule of the actions that you will take to arrive at an established set of goals. Without a means by which to accomplish your goals, goal setting can become useless. A business plan serves the following purposes:

- Acts as a road map to aid you in reaching your goals
- Allows you to look back at your activities and determine if you are “on-track”
- Acts as in indicator of which activities and actions are producing the best results
- Aids in establishing a budget

USEFUL TIP

Obtain an ink blotter type large desk calendar. The squares are large enough for you to write a detailed plan for each day. Firstly, enter your personal and family obligations for one week in advance (such as picking the kids up from school, your exercise workout time, having lunch with your father on a particular afternoon, etc.) Then enter your action plans for real estate for the week in advance. Be detailed (such as today I plan to make 10 calls to my sphere of influence, send out 5 handwritten notes and hold a broker’s open house). At the end of the day, use a highlighter and highlight the actions that were actually completed. If an action was not completed, add it to the next day’s activities. At the end of the week check to be sure that all items were completed and that you are on track with your plan. Repeat this each week and make adjustments if necessary (perhaps you may need to devote more time to your real estate career than you originally thought that you might).
NOT ESTABLISHING A BUDGET

To be able to execute your business plan, you’ll need to have a budget. Plan carefully and be realistic about expenses. Make adjustments when necessary (such as an increase in postage or the price of gas). Check this budget often to determine if you are staying within the planned guidelines. If you are over budget, attempt to invent ways to cut back on expenses.

COUNTING ON COMMISSIONS BEFORE A TRANSACTION CLOSES

The fact that real estate transactions can be complicated is just the nature of the business. Contributing to these complications is that so many different parties are involved in a typical transaction. These parties can include the sellers, buyers, structural inspector, mortgage representatives, title companies, escrow (closing) agent and many others. Any problems encountered by any one of these parties can cause a delay in a transaction and can potentially cause a transaction to fail.

The phrase “It isn’t closed until it’s closed” is one you will hear often and you should not directly allocate these commission dollars until after you have been paid.

DISCIPLINE

As an independent contractor, you are the owner of your own business. Your designated managing broker cannot tell you what office hours you must keep. You must have your own self-discipline to keep on track with your schedule and business plan.

Identify those things in your daily life that may act as distractions. This is especially true for licensees that are working from their home.

UNFAMILIARITY WITH FORMS

Forms are one of the most important aspects of real estate. These forms, when filled out and signed by both the buyer(s) and seller(s) represent a legally binding contract between the parties. The statute of frauds states that all real estate contracts in Washington State must be in writing. Should a dispute arise between the parties, a court of law will place more weight on the written contract then on parole (oral) evidence. Use only standard forms in the exercise of your duties. Such forms must be reviewed and approved by real estate attorneys. Use extreme caution in adding anything to these standard forms.

RESOURCES THAT ARE AVAILABLE TO YOU IF YOU ARE UNFAMILIAR WITH THE FORMS:

Northwest Multiple Listing Service (NWMLS) publishes a Forms Manual that explains each clause on each of the contracts that they provide. Most brokerages will have an office copy for your reference.
TIP

Check with your brokerage to make sure that your office has a forms manual. If there is not one available, you may want to ask your broker to order a copy from the provider of the forms.

In addition, some of the online XPress Forms have an orange button at the top of the page which says MANUAL. If you click on this button, you can get information from their published Forms Manual.

NOTE: Your managing broker or designated broker can be a very good resource for you when you need help with forms. There are also forms classes taught by a number of individuals and groups such as NWMLS, WAR, and title companies, and other real estate schools

THINGS TO REMEMBER ABOUT FORMS

❖ Not all of the NWMLS forms have a MANUAL help button option at the top of the page on the XPress Forms site.

❖ Reading the legal bulletins and publications produced by WAR or NWMLS that have to do with forms and form changes is a great way to familiarize yourself with these documents.

❖ One of the best ways to familiarize yourself with forms is to simply practice filling out the common real estate forms before you have a real buyer or seller. Your clients will depend on you as the real estate professional; to not only fill out the forms correctly, but have the ability to explain all clauses in these forms should they have questions before signing.

NOT ESTABLISHING A SYSTEM

It is important to establish a system, or series of steps that you should take to carry out certain real estate actions. By establishing a system, you can use these individual steps as a checklist to make sure that you haven’t missed anything.

MISREPRESENTING BOUNDARY LINES

Boundary lines for a property can be a very confusing issue. Licensees should never rely on fences or hedges or other natural markers as being boundary lines for a particular property. Boundary lines can be determined by a professional survey.
CASE STUDY 1

A buyer’s broker is showing her client a property. There is a 6 Ft fence between the property and a neighboring property. The client asks her agent if this is the property line and the agent replies yes. The client buys the property, and wants to build a workshop against the fence. There is no set-back requirement. Through a survey, it was determined that the fence was situated 10 feet in from the property line (on the neighbor’s side). The storage shed could not be built where the property owner has intended because it would have encroached on his neighbor’s property by 10 feet. The client may be able to sue the broker and the brokerage.

CASE STUDY 2

There was a hedge of tall growing juniper trees between the two properties. The client asked their buyer’s broker if hedge was the property line. The broker said that it may or may not be and that a true property line could be determined by a current survey. The broker was correct is his response to his clients.

HANDLING OF EARNEST MONEY

TRUST ACCOUNTS

When your brokerage receives an earnest money check, it should be immediately deposited into a special trust account in a federally insured financial institution, unless specific agreements provide otherwise. The name of the account must be identified by the words "Trust Account" or "Escrow Account". Funds may also be deposited to the escrow company trust account or in the selling broker’s trust account.

All funds received for this transaction, including earnest money deposits, must be deposited into either account and cannot be used for any other purpose. These funds must be deposited before the end of the next business day, unless otherwise specified and agreed by the parties in writing in the purchase and sale agreement. You, as a licensee, must be extremely careful that these funds are handled properly and in a timely manner.

When a brokerage applies for a business brokerage license, they are asked if they have a trust account and asked about information regarding the account from the Department of Licensing Real Estate Division. If the brokerage does not originally have a trust account and then adds one on some later date, there is no requirement for reporting the new account. However, if the brokerage cancels the trust account or if there is a change in the person responsible for the account (change in designated broker) then the brokerage must notify the State of Washington Department of Licensing about the change.
The broker has ultimate responsibility for this trust account and its proper use, but may delegate its management to a staff member. All records of the account must be meticulously maintained and closely supervised. Brokerages are required to have strict policies and procedures as to the handling of these funds and the accounts. Violations and mishandling of these funds may result in civil suits, criminal proceedings and disciplinary action by the Washington State Department of Licensing, which could result in possible monetary fine and/or suspension or revocation of the broker’s real estate license.

The brokerage is responsible for keeping the funds in the trust account until the transaction is completed or terminated. When that occurs, the brokerage is responsible for a full accounting of all funds disbursed from the account.

If there is a dispute between the seller and the buyer, the brokerage or escrow company must keep the funds in the trust account until the matter is resolved or until they receive a court order to disburse the funds.

**MISTAKES WITH THE SELLER’S PROPERTY DISCLOSURE STATEMENT**

**INTRODUCTION**

Washington State requires that sellers provide purchasers with a disclosure statement regarding material facts or material defects about a property (Revised Code of Washington 64.06). This applies to both real estate purchases and property transfers. This information is based on the seller’s actual knowledge of the property when completing the form. **Only the seller or legal representative of the property can complete the statement. It is important to note that real estate licensees or any other third party are prohibited from completing the statement for the sellers.**

The disclosure may be completed on a NWMLS Form 17 for Improved Property or a NWMLS Form 17C for Unimproved Property (Vacant Land).

While the seller is responsible for completing the form, it is important to note that there is liability for the agent as well. The agent is responsible for what they know or should have known.
RELATIONSHIPS WITH COMPETITORS, CLIENTS, CUSTOMERS AND COLLEAGUES

RELATIONSHIPS WITH COMPETITORS

Real estate is both competitive and cooperative. Real estate brokers and brokerages compete for listings and buyers. However, through the use of multiple listing services, they can also cooperate with one another, post their listings and advertise homes for sale to other brokers.

Having a great working relationship and a good reputation with your competitors is invaluable. Great agents want to work with other great agents in order to have a transaction proceed as smoothly as possible.

There are some pitfalls, which are very important to remember, for example, Antitrust. Let’s take a closer look at Anti-Trust issues in the real estate industry and how to avoid them.

ANTI-TRUST OVERVIEW

Anti-Trust Laws and Unfair Business Practices are designed to promote the policy and practice of COMPETITION. Some of the symptoms seen from lack of competition are higher pricing and diminishing quality of a service or product.

Real Estate Agents compete with one another to obtain listings for sale. At the same time, they often cooperate with one another to secure buyers for those listings. This dual situation of competition and cooperation, which is unique to the real estate industry, can present many opportunities for Anti-Trust violations.

In light of this risk, the National Association of Realtors (NAR) has produced a 16 minute video entitled “Anti-Trust and Real Estate” which can be obtained through NAR or viewed from the Northwest Multiple Listing web site. This informative video explains the basis for Anti-Trust Laws and how they pertain to you as real estate professional.

The foundation for federal Anti-Trust laws is the Sherman Act of 1890.

THE SHERMAN ACT OF 1890

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

NOTE: the emphasis of this act is to prohibit the restraint of trade to allow for greater competition
THE THREE TYPES OF ANTI-TRUST VIOLATIONS THAT ARE MOST IMPORTANT IN THE REAL ESTATE INDUSTRY

CONSPIRACY TO FIX PRICES

Conspiracy to fix prices is a violation of both State and Federal Anti-Trust Laws for there to be ANY agreement between competing real estate brokers to fix the prices that each will charge to a third party.

EXAMPLE OF CONSPIRACY TO FIX PRICES

Brokerage A and Brokerage B agree to charge all their clients \( x \)% commission on all listings.

Brokerage A, Brokerage B and Brokerage C agree to pay a set amount to outside brokers for any referral

Brokerage A tells her clients that her brokerage charges 6% commission on all their listings and that all other brokers charge the same amount as it is a “standard” in the industry.

IMBALANCED COMMISSION SPLITS

Imbalanced Commission Splits are when agents need to be especially careful of imbalanced exploitative splits when cooperating with others agents on listings. An exploitative split is one that:

(a) Minimizes the agent’s costs of cooperation with other agents
(b) Maximizes the agent’s commission because they sell their own listings
(c) Maximizes the agent’s commission when they sell other agent’s listings

EXAMPLE OF AN IMBALANCED COMMISSION SPLIT

A listing agent offers 1% to buyer’s agents who sell his or her listings. Yet the broker seeks 3% of the commission when he or she sells the listing of other brokers who have 6% total commission.

NOTE: This splitting structure discourages cooperation from other agents and increases the likelihood that the broker can sell his or her own listing.

CONSPIRACY TO BOYCOTT

The conspiracy to boycott happens when a group of competitors agree not to deal with another firm or when brokers collectively decide not to deal with a third party to eliminate competition. Here’s an important distinction:

NOTE: Individuals each have a right to choose who they will and will not do business with. It is the collective action of group which is prohibited by Anti-Trust Laws.
CASE STUDY

Over a lunch meeting, Agent A from XYZ Realty and Agent B from ABC Realty agree not to show the listings of Makko Realty. They further state that if no other brokers will show the Makko Realty listings than Makko should be out of business in no time. This is a conspiracy to boycott to eliminate competition.

PENALTIES FOR ANTI-TRUST VIOLATIONS

THE DEPARTMENT OF JUSTICE

The U.S. Attorney General may enforce criminal or civil Anti-Trust Violations. Civil action may be investigated by the FBI and criminal actions may be investigated through a grand jury.

- A corporation that is found guilty may be fined up to $10 Million.
- An individual that is found guilty may be fined up to $350,000.

PRIVATE CAUSES OF ACTIONS

Persons or firms that have been injured by Anti-Trust Violations may recover treble (three times) their actual damages and reasonable attorney’s fees.

- An injunction may be placed to prohibit further activities.

THE FEDERAL TRADE COMMISSION (FTC)

A complaint filed with the FTC could result in an extensive investigation and a cease and desist order could be placed upon the person or firm in violation.

COURT SUPERVISION

The courts may have the right to supervise the business that is in violation for up to 10 years.

LOSS OF BROKERAGE OR REAL ESTATE LICENSE

It is possible for a brokerage or an individual to lose their license to practice real estate.
CHECK FOR UNDERSTANDING QUESTION:

In matters dealing with Anti-Trust, who might bring suit for violations?
A. Department of Justice
B. Private individuals who have been violated
C. The Federal Trade Commission (FTC)
D. All of the above

THE CORRECT ANSWER IS D

CASE STUDY

An agent was touring a group of homes with his buyer clients. He had prepared a list of 6 homes to tour. While viewing one of the homes the clients see a home next door to one of the listings and inquire about viewing this home as well. Their agent explains that this home is listed with a limited service company and that all traditional brokerages were refusing to show homes listed by these brokerages with non-traditional business models.

NOTE: This falls under the category of Conspiracy to Boycott and is illegal.

RELATIONSHIPS WITH CLIENTS AND CUSTOMERS

As we discussed earlier in the section, a licensee had very specific duties to clients and customers. Let’s take a look at some definitions regarding agency and clients.

DEFINITIONS

An agent (broker): A person who is:
- employed by another person
- Has the authority to act for that person
- Has the authority to exercise some discretion while acting for another person

Principal: The person who hires or appoints an agent (broker) to act on his/her behalf

Agency: The relationship between the agent and their principal

FIDUCIARY RESPONSIBILITY

DUTIES THAT A LICENSEE HAS TO HIS/HER PRINCIPAL ARE:
- Loyalty
- Disclosure of material facts
- Confidentiality and trust
- Accounting of all funds handled (Earnest Monies)
- Reasonable care and not to be negligent

NOTE: When an agency relationship is created, the licensee is bound by a fiduciary responsibility to his/her client.
CREATING AN AGENCY

An agency can be created in two different ways:

Expressed Agency – the creation of an expressed agency can be oral or written, but is usually written.

Implied Agency – an implied agency is created through words or actions

EXAMPLE OF EACH:

Joline asks John to list her property and they sign a listing agreement and create a marketing plan. This is an example of an expressed agency.

Joline has been thinking about selling her property. When Joline mentioned this to Pete, at her office, Pete said that he may be interested in purchasing this property and would like to view the home that same evening. Joline calls her friend John, who is a broker, and asks if John could meet them at her property and assist them. This is an example of implied agency.

OTHER TYPES OF AGENCY

Agency by Ratification – Once an agency had been established then this form of agency reinstates an earlier understood agreement

Ostensible Agency- This agency is formed when a principal allows a third party to believe that an agency exists

Agency by Estoppel– When a principal does not stop an individual from representing his/ or her interest, they create an agency. The principal failed to prevent (estoppel) the agency.

DEGREES OF AGENCY

UNIVERSAL AGENCY

In this type of agency, the agent is given the legal authority to transact and represent ALL matters for the principal. One common example of a universal agency would be that of a manager of a professional athlete. This agent may handle negotiations for contracts and compensation with the team, and may be responsible for managing all of the player’s investments and may manage any endorsements for the athlete.

GENERAL AGENCY

This type of agent is authorized to act for the principal in a particular business or trade. Some examples of this type of agency would include a sales representative who represent a company in a particular territory, or a real estate salesperson who is a general agent for their broker for the purpose of transaction real estate.
SPECIAL AGENT

In a special agency, the agent is allowed to perform a specific act or transaction only. Examples of this might include a real estate broker who is authorized to sell a home for a principal, or a real estate agent who is authorized to negotiate for a specific buyer on a specific property or an attorney-in-fact who has a specific power of attorney for a particular purpose.

RELATIONSHIPS WITH COLLEAGUES

Having a good relationship with your colleagues is invaluable. Let’s look at just some of the benefits of having a strong positive relationship with your colleagues:

They may have clients who might be interested in your listings

- Sharing of information, new legislation and new regulations
- They may be able to assist you with open houses
- You might establish a relationship where each of you tends to each other’s real estate business when one of you is ill, on vacation or needs time off
- The ability to share marketing ideas
- Cost effectiveness of touring and previewing properties together
- Exchange of any information that would be beneficial to your business