

EFFECTIVE 01/01/08-12/31/09

ADOPTED 08/31/07

Current Issues in Washington Commercial Real Estate **A 3-Hour Mandated Curriculum & Learning Objectives**

Upon completion of this course the student will be able to:

MODULE 1 - RCW 18.86 AGENCY REFRESHER – Suggested time frame: 15 minutes

1. Discuss presumptions on agency representation. The agent represents the buyer unless the agent represents the seller, which generally requires a writing.
2. Confirm applicability to leasing and property management.
3. Discuss dual agency and requirement of written consent, which may be “after-the-fact,” but is best obtained in advance. (Standardized forms are best.)
4. Discuss limited duty of loyalty.
5. Discuss the serious consequences of failing to provide the pamphlet. The pamphlet is the centerpiece of the statute.
6. Disclose critical conflicts. Must be provided in advance of consequences.

MODULE 2 - RCW 18.235.130--OVERVIEW OF CONDUCT WHICH CONSTITUTES “UNPROFESSIONAL CONDUCT” IN ANY PROFESSION, INCLUDING REAL ESTATE LICENSEES, WHICH IS SANCTIONABLE BY THE DEPARTMENT OF LICENSING – Suggested time frame: 25 minutes

1. Explain the commission of any act involving moral turpitude, dishonesty, or corruption relating to real estate brokerage service, whether or not the act constitutes a crime. Upon a conviction, judgment and sentence is conclusive evidence at the ensuing disciplinary hearing of the guilt of the license holder or applicant of the crime described in the indictment or information, and of the person's violation of the statute on which it is based.
2. Understand misrepresentation or concealment of a material fact in obtaining a license or in reinstatement thereof.
3. Discuss advertising that is false, deceptive, or misleading.
4. Discuss incompetence, negligence, or malpractice that results in harm or damage to a consumer or that creates an unreasonable risk that a consumer may be harmed or damaged.

5. Understand the suspension, revocation, or restriction of a license to engage real estate brokerage by competent authority in another state, federal, or foreign jurisdiction. A certified copy of the order, stipulation, or agreement is conclusive evidence.
6. Discuss the failure to cooperate with the disciplinary authority in the course of an investigation, audit, or inspection authorized by law by not furnishing anything properly requested by the disciplinary authority; not furnishing a written explanation covering the matter contained in a complaint when requested; not responding to a subpoena issued by the disciplinary authority; or not providing the department access while conducting an investigation, inspection, or audit at facilities utilized by the licensee.
7. Discuss the failure to comply with an order issued by the department.
8. Explain the violation of any rule made by the department.
9. Discuss the aiding an unlicensed person to provide real estate brokerage when a license is required.
10. Explain the practice of real estate brokerage beyond the scope of authority provided in RCW 18.85.
11. Discuss misrepresentation in any aspect of the conduct of real estate brokerage.
12. Discuss the failure to adequately supervise or oversee assistants, to the extent that consumers are or may be harmed or damaged.
13. Discuss the conviction of any gross misdemeanor or felony relating to the practice of the real estate brokerage, including all instances in which a plea of guilty or nolo contendere is the basis for conviction and all proceedings in which the sentence has been deferred or suspended.
14. Discuss the interference with an investigation or disciplinary action by willful misrepresentation of facts before the department, or by the use of threats or harassment against any consumer or witness to discourage them from providing evidence in a disciplinary action or any other legal action, or by the use of financial inducements to any consumer or witness to prevent or attempt to prevent him or her from providing evidence in a disciplinary action.
15. Discuss the DOL disciplinary process, from complaint to investigation, settlement negotiations, hearing and appeal.

MODULE 3 - SELLER DISCLOSURE — FORM 17 AND FORM 17C AS THEY APPLY TO COMMERCIAL REAL PROPERTY – Suggested time frame: 30 min.

1. Discuss the overview of RCW 64.06, including history of seller disclosure and common law requirements.
2. Discuss the July 22, 2007 amendments making disclosure obligations applicable to many commercial transactions.

- a. How to determine if a seller must provide a Form 17 or Form 17C. If the seller's property is "improved" by one to four residential dwelling units, a residential condominium, a residential time share, or a mobile or manufactured home, the seller must provide Form 17 to the buyer. It does not matter if the property is "commercial" or is purchased for "commercial" purposes. If the seller's property is not "improved" as defined above, but the zoning for the property would allow any part of the property to be used for residential purposes (including mixed commercial and residential use), then the seller must provide Form 17C to the buyer.
- b. How to determine if the seller can demand that the buyer waive the "right to receive Form 17 or Form 17C." Both forms 17 contain a section entitled "Environmental." If the seller's answer to any question in this section is or would be "yes," then the seller must provide the buyer with at least the "Environmental" section of Form 17 or Form 17C. The buyer can waive the right to receive answers to the balance of the questions in the form. Because one of the questions in the Environmental section of the form is "Has the property been used for commercial or industrial purposes?" there will be few occasions when your seller's answer to that question will be "no," thus there will be few occasions when the seller need not provide the Form 17C.
- c. How to provide the buyer with the Form 17 or Form 17C and the broker's role in the process. Form 17 or the Environmental portion of Form 17 is not intended to be a part of the parties' contract and the seller would be disadvantaged by incorporating Form 17 or the Environmental section thereof into the contract. Therefore, the seller should provide Form 17 to the buyer as a separate document and not as an addendum to the contract.
- d. How to document the buyer's waiver of the right to receive all or portions of the Form 17. Whether the seller provides the buyer with the completed form, provides the buyer with only the Environmental section of the form, or seeks the buyer's complete waiver of the right to receive the completed form, the preprinted form should be provided by the seller to the buyer in its entirety and the waiver provision in the form used as opposed to including waiver language in the purchase and sale agreement
- e. When to provide the buyer with a Form 17. The consequence of failing to provide the Form 17, when it is required to be provided by law, is that the buyer retains a unilateral, absolute right of rescission until the earlier of three business days after receipt of Form 17 or closing. If the seller provides Form 17 to the buyer more than three business days before mutual acceptance of the purchase and sale agreement, then there is no right of rescission at all. In other words, the three-day period runs from the date of delivery of the form, not the date of mutual acceptance of the

contract. If the property is not exempt and the seller neglects to provide Form 17, the seller should provide the form as soon as possible in order to commence the three-day period as soon as possible.

- f. Duty to supplement Form 17 answers. The statute requires that a seller deliver an amended Form 17 to the buyer if the seller becomes aware of additional information or an adverse change which makes the initial disclosures provided to the buyer inaccurate.
- g. Explanation for “Yes” answers. The statute requires that any “yes” answers to any questions that contain an asterisk (*) in Form 17 be “explained.” There is no definition of what “explanation” is necessary, but the complete failure to explain a “yes” answer would likely render the disclosure inadequate.
- h. How to resolve uncertainties. The statute makes clear that it is the seller’s obligation to provide Form 17. A broker is not liable for inaccurate information provided by the seller, except to the extent that the broker is aware of the inaccurate information. On the other hand, a broker may be liable for failing to ensure that a seller provides Form 17 if the property is not exempt. Questions about whether to provide Form 17 or what to disclose on Form 17, should be resolved by a lawyer. It is not unreasonable that a broker does not know how to answer questions about this new legislation.
- i. If the seller refuses to provide Form 17 the only consequence is that the buyer retains a right of rescission until three days after the seller provides Form 17 or until closing. The law does not “mandate” that the seller to provide the form nor is it “illegal” not to provide the form.

MODULE 4 - THE APPLICATION OF PRO-COMPETITIVE LAWS TO COMMERCIAL BROKERAGE AND THE ACCOMMODATION OF INNOVATIVE AND EMERGING BUSINESS PRACTICES – Suggested time frame: 30 minutes

1. Discuss the innovation in commercial brokerage, including leasing, Virtual Office Websites, limited service brokers, and referral practices.
2. Discuss the basic antitrust principles, including price fixing and group boycott, with examples in real estate brokerage.
3. Discuss the limits of competition and the concept of tortious interference with business expectancy or contract and application to real estate brokerage.

**MODULE 5 - TENANTS IN COMMON AND THE PROLIFERATION OF THE
MARKETING AND SALE OF TICS – Suggested time frame: 20 minutes**

1. Define tenancy in common and discuss the use and abuse of “TICs.”
2. Discuss the license(s) requirement to market and sell TICs and the current status of the law. Note difference between buyer and seller representation.
3. Discuss the risks associated with marketing and sale of TICs without a license when one is required.
4. Discuss promoter and consumer risks in marketing, sale and purchase of TICs.

MODULE 6 – LISTINGS – Suggested time frame: 30 minutes

1. Auctions/Bid
 - a. Discussion of issues presented
 - b. Potential abuses.
 - c. Need for clarity in process.
2. Zero Commission
 - a. Limits ability of cooperating broker to participate and compete with listing agent.
 - b. Potential for conflict of interest between buyer-tenant’s agent and principal