

SENATE BILL REPORT

SSB 5191

As Amended by House, April 11, 2023

Title: An act relating to reforming the real estate agency law to require written brokerage services agreements, improve consumer disclosures, and provide that certain legal duties of brokers apply to all parties in the transaction.

Brief Description: Reforming the real estate agency law.

Sponsors: Senate Committee on Law & Justice (originally sponsored by Senators Stanford, Dozier and Gildon).

Brief History:

Committee Activity: Law & Justice: 1/23/23, 1/26/23 [DPS].

Floor Activity: Passed Senate: 2/8/23, 48-0.

Passed House: 4/11/23, 97-0.

Brief Summary of First Substitute Bill

- Requires a written brokerage service agreement between a real estate firm and the principal.
- Requires disclosure of general information relating to real estate brokerage and laws related to real estate brokerage relationships.
- Provides that certain legal duties of real estate brokers apply to all parties to the transaction.

SENATE COMMITTEE ON LAW & JUSTICE

Majority Report: That Substitute Senate Bill No. 5191 be substituted therefor, and the substitute bill do pass.

Signed by Senators Dhingra, Chair; Trudeau, Vice Chair; Padden, Ranking Member; Kuderer, McCune, Pedersen, Salomon, Torres, Valdez, Wagoner and Wilson, L..

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not part of the legislation nor does it constitute a statement of legislative intent.

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Background: Real Estate Brokerage Agency Relationships. Chapter 18.86 RCW addresses the real estate brokerage agency relationships. Until 1996, the duties owed by a real estate broker were based on the common law principles of agency. Agency is a consensual relationship between two persons where one, the principal, empowers the other, the agent, to act, and the agent acts based on that authority. Agency relationships can be created expressly in writing or by words or conduct. Duties owed by an agent to a principal in a real estate transaction generally include loyalty, obedience, disclosure, confidentiality, reasonable care and diligence, and accounting.

After the passage of chapter 18.86 RCW in 1996, a number of duties concerning the relationship of an agent to the principal were set forth in statute. These statutory duties specifically superseded the common law rules applied to real estate licensees to the extent that they are inconsistent. The law was again amended in 2013 clarifying that the duties listed in the real estate brokerage agency relationship chapter are statutory duties, not fiduciary duties and these duties supersede all, not just inconsistent, common law fiduciary duties.

General Duties of a Licensee. An agent is a licensee who has an agency relationship with a buyer or seller. Certain duties apply to licensees generally when performing real estate brokerage services as an agent, including the duty to:

- exercise reasonable skill and care;
- deal honestly and in good faith;
- present all written offers, notices, and other communications in a timely manner;
- disclose all material facts known by the licensee and not easily ascertainable to a party;
- account for all money and property received in a timely manner;
- provide a pamphlet on the law of real estate agency to all parties; and
- disclose what party a licensee represents, if any, in a real estate transaction.

These duties cannot be waived. An agent need not conduct an independent investigation of the property or of either party's financial condition. The agent has no duty to verify any information the agent reasonably believes to be reliable.

Duties of an Agent. Certain duties apply between an agent and a seller, an agent and a buyer, or in a dual agency relationship, including the duty to:

- be loyal by taking no action that would be adverse to the client;
- disclose in a timely manner any conflicts of interest;
- advise the client to get expert advice on matters relating to the transaction beyond the agent's expertise; and
- refrain from disclosing confidential information about the client except under subpoena or court order.

These duties cannot be waived. The only duty that can be waived is the duty to make a good faith and continuous effort to seek a buyer for a seller or a seller for a buyer. It is not a breach of duty to the principal for the agent, in the case of a seller, to show or list competing properties, or in the case of a buyer, to show properties to competing buyers.

A licensee may represent both the buyer and the seller if all parties agree in writing. The consent to this dual agency must include the terms of compensation.

Duration of the Agency Relationship. The agency relationship begins when the licensee performs brokerage services and continues until the licensee completes the services, the agreed upon period of service is ended, notice of termination is given by one party, or the parties agree to termination. Once the brokerage relationship is terminated, an agent is obligated to account for all money and property received and to keep appropriate information confidential.

Compensation. Payment of compensation is not a factor in determining the existence of an agency relationship. A broker may be paid by any party to the transaction and may be paid by more than one party if the parties agree. A buyer's agent may be paid based on the purchase price without breaching any duty owed to the buyer.

Vicarious Liability. A principal, buyer or seller, is liable for the actions of the agent only if the principal participated in or authorized the act, or the principal benefited from the act and a court determines that no judgement could be enforced against the agent or subagent. A licensee agent is not liable for the acts of a subagent unless the licensee participated in or authorized the act.

Imputed Knowledge. There is not presumption of knowledge on the part of the principal, buyer or seller, of facts known by the agent or subagent of the principal.

Sanctions. The Director of the Department of Licensing may impose sanctions on a licensee for violation of the laws governing real estate brokerage relationships.

Summary of First Substitute Bill: Various definitions are updated to reflect changes in this act. The definition of subagent is stricken.

Agency Relationship. A real estate firm and broker must enter into a written services agreement with a seller to establish an agency relationship. The firm's designated broker and any managing broker responsible for the supervision of those brokers are also agents of the seller.

A real estate firm or broker who performs real estate brokerage services for a buyer establishes an agency relationship by performing those services. The firm's designated broker and any managing broker responsible for the supervision of those brokers are also agents of the buyer. A written services agreement must be entered into before, or as soon as

reasonably practical after, a broker begins rendering real estate brokerage services to the buyer.

A limited dual agent provides limited representation to both the buyer and the seller in a transaction. Limited dual agency requires the consent of each principal in a written services agreement and may occur in two situations (1) when the buyer and seller are represented by the same broker, and (2) when the buyer and seller are represented by different brokers in the same firm.

Service Agreements. A written services agreement must contain the following:

- the duration of the agreement;
- the name of the broker appointed as an agent for the principal;
- whether the agency relationship is exclusive or nonexclusive;
- whether the principal consents to limited dual agency;
- the terms of compensation;
- an agreement with a buyer, whether the broker agrees to show a property when there is no agreement or offer by any party or firm to pay compensation to the broker's firm; and
- any other agreements between the parties.

A service agreement is not required when a broker performs real estate brokerage services as a buyer's agent solely for commercial real estate.

Broker's Duties to All Parties. A broker owes the following duties to all parties in a transaction:

- to exercise reasonable skill and care;
- to deal honestly and in good faith;
- to timely present all written offers, written notices, and other written communications to and from either party;
- to disclose all existing material facts known by the broker and not apparent or readily ascertainable to a party;
- to account in a timely manner for all money and property received from or on behalf of either party;
- to provide the statutorily required pamphlet explaining real estate brokerage in Washington to all parties to whom the broker renders real estate brokerage services and to any unrepresented party;
- to disclose in writing who the broker represents; and
- to disclose in writing any terms of compensation offered by a party or a real estate firm to a real estate firm representing another party.

Limited Dual Agent Duties. A limited dual agent may not advocate terms favorable to one principal to the detriment of the other principal. A broker, acting as a limited dual agent, owes the certain duties to both parties including the duty to disclose any conflicts of interest and to not disclose any confidential information from or about either principal.

Compensation. In any real estate transaction, a firm's compensation may be paid by the seller, the buyer, a third party, or by sharing the compensation between firms. To receive compensation from any party, a firm must have a written services agreement with the party the firm represents or must provide a "compensation disclosure" to the buyer in a transaction for commercial real estate.

Short Sales. If a sale is a short sale, the seller's real estate firm must disclose to the seller that the decision by any beneficiary or mortgagee, to release its interest in the property for less than the amount the seller owes to allow the sale to proceed, does not automatically relieve the seller of the obligation to pay any debt or costs remaining at closing, including real estate firms' compensation.

Miscellaneous. The pamphlet brokers are required to provide to all parties to a transaction is updated to reflect the changes in the law. Numerous language and technical changes are made.

Appropriation: None.

Fiscal Note: Available.

Creates Committee/Commission/Task Force that includes Legislative members: No.

Effective Date: The bill takes effect on January 1, 2024.

Staff Summary of Public Testimony on Original Bill: *The committee recommended a different version of the bill than what was heard.* PRO: The real estate industry has changed quite a bit since the mid-1990s and so have consumer expectations. This proposal will increase transparency within real estate agency law by requiring that consumers, buyers, and sellers sign a brokerage services agreement to establish an agency relationship. This creates a platform for the buyer to be able to ask questions and negotiate compensation at the beginning of the relationship which reasonable and competent brokers already do. This bill does not lock buyers into paying for services and protects the integrity of the representation and compensation process for clients, brokers, and firms. Buyers and sellers will have to initial their consent to dual agency, and both parties must agree whether their relationship will be exclusive or nonexclusive. This bill would require that the agency law pamphlet is written in lay terms, creating better understanding of the relationship and compensation issues with respect to dual agency.

CON: This bill is misguided and neglected to seek input from the principal players. The good this bill does, such as simplifying the agency pamphlet, is minor and does nothing to correct the problems of the brokerage system in Washington State. None of the problems of the market are related to brokers not using buyer agency agreements. Recently, the multiple listing service has made changes to the commission system which have addressed almost all

the problems listed here. For the most part, buyer agency agreements just lock in buyers to firms and brokers. This bill will coerce buyers into written agreements. The bill should put some restrictions on what the buyer agency agreement can provide and make some requirements about what they must provide. This bill should make dual agency illegal. Every buyer and seller should have an agent representing their interest. This bill makes no changes to improve what has happened over the last several years. Something must be done to bring brokers under control. Disclosure of material fact should be required to be disclosed to the opposite side. The current law creates a balance between buyers and sellers.

Persons Testifying: PRO: Bill Clarke, WA Realtors; Annie Fitzsimmons, Legal Counsel - WA Realtors; Sabrina Jones-Schroeder, Exit Real Estate - Designated Broker; WA Real Estate Commissioner; Justin Haag, NW Multiple Listing Service; Chris Osborn, Stoel Rives LLP; Lars Neste, Demco Law Firm, PS.

CON: Kary Krismer; Doug Tingvall.

Persons Signed In To Testify But Not Testifying: No one.

EFFECT OF HOUSE AMENDMENT(S):

- Establishes that the default term for a services agreement between a broker and a buyer is 60 days, but allows a buyer to enter into a longer term.
- Requires the services agreement between a broker and a buyer to include checkbox options for the buyer to select whether the broker relationship is exclusive or nonexclusive.
- Requires the broker to obtain the other party's acknowledgment that they received the pamphlet.
- Adds a description of what exclusive and nonexclusive agency relationships are to the pamphlet.