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**PREPARATION OF PURCHASE AND SALE AGREEMENTS  
BY REAL ESTATE BROKERS AND SALESPERSONS**

For years, real estate brokers and salespersons have prepared earnest money agreements for transactions handles by the broker or salesperson. Under *Cultum v. Heritage House Realtors, Inc.* 103 Wn.2d 623 (1985),

"[A] real estate broker or salesperson 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 broker's business and that such forms will be used only in connection with the real estate transactions actually handled by such broker or salesperson as a broker or salesperson and then without charge for the simple service of completing the forms."

Adopting the position of the Washington State Bar Association, the Court stated:

"[A]lthough the completion of form earnest money agreements might be commonly understood as the practice of law, we believe it is in the public interest to permit licensed real estate brokers or licensed salespersons to complete such lawyer prepared standard form agreements; provided, that in doing so they comply with the standard of care demanded of an attorney."

The Court concluded that "there are sound and practical reasons why some activities which fall within the broad definition of 'the practice of law' should not be *unauthorized* simply because they are done by laypersons." (Emphasis added). Among those reasons, the Court identified the following considerations: public convenience and freedom of choice; brokers and salespersons prepare the agreements at no additional charge; the drafting of form earnest money agreements is merely incidental to the main business of real estate brokers and salespersons; and brokers and salespersons are specifically trained, licensed, and regulated.

"We no longer believe that the supposed benefits to the public from the lawyers' monopoly on performing legal services justifies limiting the public's freedom of choice. The public has the right to use the full range of services that brokers and salespersons can provide. The fact that brokers and salespersons will complete these forms at no extra charge, whereas attorneys would charge an additional fee, weights heavily toward allowing this choice.

"Another important consideration is the fact that the drafting of form earnest money agreements is incidental to the main business of real estate brokers and salespersons. These individuals are specially trained to provide buyers and sellers with competent and efficient assistance in purchasing or selling a home."

The Court cautioned, however:

"In a few instances earnest money agreements may be complicated and one or both parties may realize the need for a lawyer to prepare the contract rather than use a standardized form. In fact, if a broker or salesperson believes there may be complicated legal issues involved, he or she should persuade the parties to seek legal advice. More often, however, these transactions are

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simple enough so that standardized forms will suffice and the parties will wish to avoid further delay or expense by using them."

Four justices concurred in the result, but disagreed with the majority's rationale. Writing for the concurring justices, Justice Brachtenbach stated:

"I would reach the same result as the majority by forthrightly recognizing that requiring lawyer preparation of every earnest money agreement is not a practicable alternative to the broker/salesperson preparation which works reasonably well in most instances. I would accept the current practice as a fact of life in the real world. The ultimate protection to the public is the requirement that the broker/salesperson be held to the standard of care of a practicing lawyer. The competent broker/salesperson should recognize when special circumstances require more skilled and knowledgeable drafting. If that decision is made at their peril, hopefully, it will be made carefully, keeping in mind the fiduciary relationship and the requirements of the licensing statute."

In short, real estate brokers and salespersons may complete standard form earnest money agreements for simple transactions in connection with their brokerage business, but will be held to the standard of care expected of a reasonably careful attorney.

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