

**Legal Bulletin No. 224**  
**Revisions to RCW 18.86**

*By Northwest Multiple Listing Service*  
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**1. Introduction**

On January 1, 2024, important revisions to the law that governs real estate brokerage relationships (RCW 18.86) in Washington State – otherwise known as the “Agency Law” – become effective. These are the first significant revisions since the Agency Law took effect in 1997. The revisions, which are explained in detail in this bulletin and set forth in [Senate Bill 5191](#), include the following:

- Requiring real estate firms to enter into a written brokerage services agreement with a buyer as soon as reasonably practical after commencing real estate brokerage services for the buyer;
- Changing the term “dual agent” to “limited dual agent” to reflect that a broker representing both a buyer and a seller in the same transaction is limited in the representation that the broker can provide;
- Giving buyers and sellers the clear choice whether to consent to an individual broker acting as a limited dual agent by requiring the consent to limited dual agency to be separately initialed by the consumer;
- Clarifying that a broker owes certain duties in RCW 18.86.030 to all parties in a transaction;
- Ensuring complete transparency with regard to compensation by requiring that real estate firms disclose to all parties any compensation offered to a firm by another party or another real estate firm; and
- Modernizing and simplifying the “pamphlet” that brokers must provide to consumers which explains general information about real estate brokerage relationships.

Several forms will be revised to accommodate the changes to the law. Those forms include the listing agreements and related forms, a new “Buyer Brokerage Services Agreement” (which will replace the existing buyer representation agreements) and related forms, the purchase and sale agreements, and the lease/rental agreement. “The Law of Agency” pamphlet will also be revised and shortened in a new format entitled “Real Estate Brokerage in Washington.”

NWMLS and Washington Realtors have created a one-page informational handout that brokers can provide to buyers explaining the requirements of the revised law. While the revised pamphlet provides a summary of the law, the buyer handout is specifically designed to inform buyers of the recent changes to the Agency Law and the new statutory requirement related to buyer brokerage services agreements. NWMLS and Washington Realtors have also created a similar one-page informational handout for prospective renters.

The revised forms and pamphlet are currently available on NWMLS's website as SAMPLE forms for review purposes only. The revised forms and pamphlet will be published for use on Transaction Desk and Xpress Forms on January 1, 2024. The new buyer and prospective renter handouts are available now for brokers to use to prepare buyers and renters for the upcoming changes to the law.

The revisions to the Agency Law apply in both residential purchase and sale transactions and lease transactions. Note that while this bulletin generally refers to buyers, sellers, and purchase and sale transactions, the Agency Law revisions and NWMLS forms changes similarly apply to prospective renters, lessors, and lease transactions.

## **1. Brief History of RCW 18.86**

The "Agency Law" took effect on January 1, 1997. Prior to the enactment of the Agency Law, real estate brokerage relationships were governed by common law concepts of agency, where an agent owed fiduciary duties to their principal. The Agency Law set forth how agency relationships were created, established specific statutory duties that brokers (at the time referred to as salespersons) owed to buyers/sellers, and introduced the "Law of Agency Pamphlet" that brokers were required to provide to their clients.

The biggest change promulgated by the Agency Law was the elimination of "sub-agency" (where all brokers in the transaction represented the seller) and the creation of "buyer agency." Prior to 1997, the "sub-agent" of the listing agent was responsible for finding potential buyers and providing services to the buyer, while still representing and owing fiduciary duties to the seller in the transaction. The Agency Law did away with sub-agency, acknowledged the importance of buyer representation, and established buyer agency and the specific duties that a broker owed to a buyer.

Under the Agency Law, brokers who perform real estate brokerage services for a buyer, are presumed to be the agent of the buyer, unless the broker has entered into a written agreement with the seller. To that end, the Agency Law requires real estate firms to enter into a written agency agreement with the seller, but does not require firms to enter into written agreements with buyers.

The Agency Law has been modified a handful of times over the past 25 years to add information to the pamphlet about short sales, update terminology from "licensee" or "salesperson" to "broker", and to clarify that brokers only owe statutory duties to clients (as opposed to common law fiduciary duties). But largely, the Agency Law has not been substantively altered in the past 25 years, while the business of real estate has changed dramatically.

## **2. Senate Bill 5191**

Substitute Senate Bill 5191, which contains significant revisions to the Agency Law, was passed unanimously by the Washington State house and the senate in April

2023, signed by the Governor in May 2023, and will take effect on January 1, 2024 (the “Revised Law”). The purpose of the Revised Law is to modernize the 25-year-old Agency Law, provide additional consumer protections and clarity, enhance transparency for consumers, and increase the professionalism in the real estate brokerage industry.

### **3. Agency Relationships and Brokerage Services Agreements**

The most significant change in the Revised Law is to require brokers to enter a written “brokerage services agreement” (previously known as an agency agreement or representation agreement), not only with sellers, but also with buyers.<sup>1</sup> Note that a brokerage services agreement with the seller will still be referred to as a listing agreement and this bulletin will generally refer to a brokerage services agreement with buyers as a “services agreement”.

The Revised Law provides that *to receive compensation* from any party or firm for rendering real estate brokerage services, a real estate firm must have a services agreement with its client. In other words, the firm cannot be paid if the broker has not entered into a services agreement with their client as required by the Revised Law. In addition, the Department of Licensing, through its auditing practices, will examine the firm’s files to ensure that a firm has a services agreement with its seller *and* buyer clients.

#### **a. Buyer Agency**

The presumption that a broker is a buyer’s agent unless a firm has a written agreement with the seller has not changed. Thus, the Revised Law provides that a broker who performs real estate brokerage services for a buyer is a buyer’s agent unless:

- (1) The broker has been appointed to represent the seller in a services agreement between the firm and seller – in which case the broker is the seller’s agent;
- (2) The broker has been appointed to represent the seller in a services agreement between the firm and seller *and* the broker has been appointed to represent the buyer in a services agreement between the firm and buyer – in which case the broker is a “limited” dual agent; or
- (3) The broker is the seller (in which case the broker cannot be an agent of the buyer).

However, the Revised Law now also requires that a firm “enter into a services agreement with the principal before, or as soon as reasonably practical after, its appointed broker commences rendering real estate brokerage services to, or on behalf of, the principal.” This means that, effective January 1, 2024, a buyer broker must enter into a services agreement with the buyer.

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<sup>1</sup> A services agreement is not required when a broker (1) performs real estate brokerage services as a buyer’s agent solely for commercial real estate, (2) provides a broker’s price opinion, or (3) makes a referral by one firm to another firm and provides no real estate brokerage services in the transaction. More information about commercial transactions is provided below.

The services agreement must be entered into – *as soon as reasonably practical* – after the buyer broker begins providing real estate brokerage services to the buyer. In other words, the buyer broker must enter into a written agreement with the buyer as soon as the broker reasonably can – taking into account the circumstances of the individual situation.

Note that the requirement to enter into a services agreement also applies to sellers. However, this is not a change in practice, as the Agency Law has always required that a firm have a listing agreement with a seller.

b. Contents of a Services Agreement

The Revised Law requires that a services agreement include the following provisions:

- (1) The term (duration) of the agreement. For buyers, the agreement must include a default term of 60 days, with the option for a longer term;
- (2) The identity of the broker appointed as the agent for the principal;
- (3) Whether the agency relationship is exclusive or nonexclusive. For buyers, the agreement must include checkbox options;
- (4) Whether the principal consents to the individual broker acting as a limited dual agent, which consent must be separately initiated by the principal; and
- (5) Whether the principal consents to the supervising broker acting as a limited dual agent.

A services agreement must contain the terms of compensation, including:

- (1) The amount the principal agrees to compensate the firm;
- (2) The principal's consent, if any, and any terms of such consent, to compensation sharing between firms and parties; and
- (3) The principal's consent, if any, and any terms of such consent, to compensation of the firm by more than one party.

Services agreements with buyers must also state whether the appointed broker agrees to show the buyer properties, even if there is no agreement or offer by any party or firm to pay compensation to the broker's firm for the services provided to buyer.

As explained in detail below, the new Buyer Brokerage Services Agreement (Form 41) and listing agreements have been revised to meet these statutory requirements, in addition to other improvements to the forms. Of course, any brokerage firm forms must also comply with the new statutory requirements.

c. Commercial Real Estate

In lieu of obtaining a services agreement, a broker rendering real estate brokerage services to a buyer solely for *commercial real estate* may disclose in writing to the buyer,

before the buyer signs an offer with regard to such commercial real estate, the sources and amounts of any compensation the broker has or expects to receive from any party in conjunction with such transaction. Note that “commercial real estate” is defined by RCW 60.42.005 to include all real property except: (1) property improved by four or less residential units; (2) vacant land that may only be improved by four or less residential units; (3) certain farm and agricultural land and timberland; and (4) improved residential units such as condominiums, townhouses, timeshares, or stand-alone houses in a subdivision that may be sold on a unit-by-unit basis.

If a firm has not entered into a services agreement with a buyer of commercial real estate, the firm can use the new Compensation Disclosure (Form 42C) to disclose compensation to a buyer, before the buyer signs an offer.

#### **4. Limited Dual Agency**

As noted above, the term “dual agency” has been revised to “limited dual agency” to reflect that a broker acting as a dual agent is limited in the services that the broker can provide to a principal. Indeed, when a broker acts as a dual agent, the broker may not try to get the best contract terms for the buyer – or try to get the most favorable contract terms for the seller, as doing so would be detrimental to the other principal in the transaction – a clear violation of RCW 18.86.060(2)(a). Thus, a broker acting as a dual agent is truly *limited* in the services and scope of representation that the broker can provide to either principal.

To be a dual agent, the Agency Law and the Revised Law both require that a broker have a written agreement with the buyer, a separate written agreement with the seller, and that the buyer and seller both consent to dual agency. The Revised Law now also requires that a principal “separately initial” the consent in the services agreement that an individual broker act as a limited dual agent (also known as single agent dual agency). In addition, the law requires that the principal acknowledge that “a limited dual agent may not advocate terms favorable to one principal to the detriment of the other principal and is further limited as set forth in RCW 18.86.060.” The new Buyer Brokerage Services Agreement and listing agreements have been revised to address these requirements.

The Revised Law makes clear that the agency relationship with a principal includes the firm’s designated broker and any managing broker responsible for the supervision of the broker who acts as the principal’s agent. Accordingly, the Revised Law provides that “in a transaction in which different brokers affiliated with the same firm represent different parties, the firm’s designated broker, and any managing broker responsible for the supervision of both brokers, is a limited dual agent.” In addition, the Revised Law requires that the principal consent to the firm’s designated broker, and any applicable managing broker, acting as a limited dual agent, however unlike single agent dual agency, the principal does not need to separately initial that consent. Again, the new Buyer Brokerage Services Agreement and the listing agreements have been revised to address these requirements.

## 5. Duties Owed to All Parties

RCW 18.86.030 sets forth the duties that a broker owes to all parties in the transaction. This includes the duty to exercise reasonable skill and care, deal honestly and in good faith, timely present all written offers, disclose all material facts, and account for all money received by the broker. This section of the statute has been clarified to provide that these duties are not only owed to the broker's own client, but to all parties in the transaction. This is consistent with how this statute has been interpreted for years and aids with consumer protection.

Another duty that brokers owe to all parties is the duty to disclose who the broker represents. The NWMLS purchase and sale agreement enables brokers to satisfy this duty in the "agency disclosure" section where brokers select the appropriate box to disclose who they represent in the transaction.

The Revised Law contains a new disclosure requirement in RCW 18.86.030(g)(ii) related to compensation. Brokers must disclose to all parties "any terms of compensation offered by a party or a real estate firm to a real estate firm representing another party." This requirement ensures complete transparency for both the buyer and seller with regard to compensation in the transaction. Of course, a seller or buyer would already be aware of the agreement related to compensation with their own broker, but would not necessarily have notice, for example, of compensation offered by the seller or listing firm to the buyer brokerage firm. The changes to the NWMLS purchase and sale agreements that were made in October 2022 to disclose the compensation offered by the seller to the buyer brokerage firm will satisfy this new requirement in the vast majority of transactions.

There may be transactions, while not common, where additional compensation is offered to a brokerage firm by another firm or party, but that compensation is not part of the "offered compensation" disclosed in the purchase and sale agreement. In this situation, RCW 18.86.030 requires that such offer be disclosed to all parties in the transaction before the broker's principal signs an offer, or as soon as reasonably practical, but before the parties reach mutual agreement. Brokers can use the Compensation Disclosure (Form 42C) to disclose such offers of compensation. In addition, if the parties do not use NWMLS's purchase and sale agreement, Form 42C can be used to disclose compensation offered by the seller or listing firm to the buyer brokerage firm.

Note that the duties owed to sellers in RCW 18.86.040, to buyers in RCW 18.86.050, and the duties of a limited dual agent in RCW 18.86.060 have not substantively changed. The one update to a buyer's agent's duties is to eliminate the provision that provided that a buyer's agent is not required to show properties to which there is no agreement to pay compensation to the buyer's agent. This issue is now addressed between the buyer and buyer broker in the services agreement.

## 6. The Real Estate Brokerage in Washington Pamphlet

The Agency Law requires that brokers give the “Law of Agency” pamphlet to any party to whom the broker rendered real estate brokerage services before the party signs an agency agreement or signs an offer in a transaction. The Law of Agency pamphlet was a verbatim recitation of the law.

The pamphlet required by the Revised Law, entitled “Real Estate Brokerage in Washington”, has been modernized and simplified. Rather than simply restating the statute like the prior Law of Agency pamphlet, the updated pamphlet describes real estate brokerage relationships in a more concise, consumer friendly manner.

The Revised Law requires that a broker provide the pamphlet to any party to whom the broker renders real estate brokerage services “as soon as reasonably practical but before the party signs a services agreement.” In other words, brokers should give the pamphlet to their client as soon as possible. In addition, brokers must provide the pamphlet to any party who is not represented by a broker before the party signs an offer or as soon as reasonably practical. This means that a listing broker in a transaction with a buyer who is not represented needs to provide the pamphlet to the buyer. Also, a buyer broker representing a purchaser of a “for sale by owner” property would need to provide the pamphlet to the seller.

## 7. New Buyer Brokerage Services Agreement

The new Buyer Brokerage Services Agreement (Form 41) is similar to the prior buyer agency agreements published by NWMLS and replaces the Exclusive Buyer’s Agency Agreement (Form 41), the Non-Exclusive Buyer’s Agency Agreement (Form 41A), and the Buyer’s Representation Agreement – No Agency (Form 41B). Of course, a firm is not required to use NWMLS’s Buyer Brokerage Services Agreement and can create its own agreement, so long as the agreement complies with the Revised Law.

Some of the new provisions in the Buyer Brokerage Services Agreement (Form 41) based on the Revised Law are as follows:

- The default expiration date is 60 days from the effective date, with an option for a longer term. Note that similar to the listing agreements, the agreement no longer allows either party to terminate the agreement by simply providing notice to the other party;
- An option is included for the parties to select an exclusive agency relationship or a non-exclusive agency relationship – including a brief explanation of the differences;
  - In an exclusive agreement, the buyer may *not* enter into an agency relationship with another real estate firm for services in the same geographic area covered by the services agreement.
  - In a non-exclusive agreement, the buyer may enter into non-exclusive agency relationships with other real estate firms.

- A provision is included regarding “limited dual agency” with initial blocks for a buyer to consent to the individual buyer broker acting as a limited dual agent; and
- A new section is included to address whether the broker will show properties to the buyer for which there is no offer from the seller to compensate the buyer broker and the buyer has not agreed to compensate the broker.

a. Revised Compensation Section

The structure of the compensation section in new Form 41 has been significantly revised. In new Section 5, the firm and buyer must agree upon the compensation for the buyer brokerage services. There are a variety of options including a percentage of the purchase price, a flat dollar amount, and any “other” compensation arrangement that the firm and buyer may agree to. There is also an option to designate a different compensation amount in the event the buyer broker is a limited dual agent representing both the buyer and the seller.

Note that the buyer does not automatically agree to pay the compensation that is set forth in new Section 5. Some buyers may not have funds to pay their broker, may be unable to lawfully compensate the buyer broker (e.g. VA regulations prohibit buyer paid compensation), or may be unwilling to agree to upfront compensation. As set forth below, there is an option in the form to request that the seller pay any compensation that is not already covered in an offer of compensation that may be made by the seller in the listing.

Section 6 of the new Form 41 provides that the seller may, but is not required to, offer compensation to the buyer brokerage firm. The form then accounts for different scenarios that might arise depending on the amount of compensation offered by the seller, and these options correspond to the seller’s offer of compensation adjustments that a buyer may negotiate with a seller on the Buyer Broker Firm’s Compensation Addendum (Form 41C):

- Seller’s Offer Equal to Compensation. This section provides that if the seller’s offer is equal to the compensation agreed upon between the parties, the buyer will accept the seller’s offer and the buyer is not obligated to compensate firm.
- Seller’s Offer Greater Than Compensation. This section provides options for how to distribute amounts offered by the seller that are greater than the agreed upon buyer brokerage firm compensation.
- Seller’s Offer Less Than Compensation. This section provides options for the situation where the seller’s offer of compensation is less than the agreed upon amount. The buyer can commit to directly pay any balance to the buyer brokerage firm or the parties can agree that, as a part of buyer’s offer, they will request the seller pay the balance. Or the parties can agree upon some other arrangement.



Note that if the buyer does agree to pay compensation to the firm (assuming the compensation in the buyer brokerage agreement is more than the seller's offer), the compensation is due at closing, unless the parties agree to another payment arrangement in the agreement (e.g., an upfront fee paid to the firm).

In Section 7, Form 41 provides the "Compensation Terms", outlining when compensation is due under an exclusive agreement and a non-exclusive agreement. For exclusive agreements, if the buyer purchases property in the agreed upon geographic area during the term of the agreement, compensation is due at closing (unless otherwise agreed). For a non-exclusive agreement, if the buyer purchases property in the geographic area during the term of the agreement and the firm represents buyer in such purchase, compensation is due at closing (unless otherwise agreed). Similar to the "tail provision" in the listing agreement, the form addresses compensation following the expiration of the term. Section 7 also includes buyer's consent to the firm receiving compensation from more than one party and to firms sharing compensation (if applicable) as long as the firm discloses the terms and amounts as required by the Revised Law.

The next section in the form addresses showings, listings, and VA financing. As required by the Revised Law, the form contains a provision that addresses whether the broker will show properties to the buyer for which there is no offer from the seller to compensate the buyer broker and the buyer has not agreed to compensate the broker. The form also provides that the broker will bring properties to the attention of the buyer regardless of a seller's offer of compensation, unless the parties agree to the contrary. Finally, Form 41 states that in a VA financed transaction, the compensation must be paid by the seller (as VA regulations prohibit the buyer from paying compensation).

Form 41 includes contact information for the buyer and the buyer broker, including the license numbers for the buyer broker and the firm.

b. Related New and Revised Forms

There are several forms that have been created or revised related to the changes to RCW 18.86.

NWMLS will publish an Amendment to the Buyer Brokerage Services Agreement (Form 41A) that can be used to extend the term of the agreement, change the nature of the relationship (exclusive vs. non-exclusive), appoint additional brokers to represent the buyer, modify the buyer's selection regarding limited dual agency, revise the compensation, or make any other change to the agreement.

A new form, the Tenant Brokerage Services Agreement (Form 41T), is similar to the Buyer Brokerage Services Agreement and is for use by brokers representing a prospective tenant. An addendum to Form 41T will also be published similar to Form 41A. As provided in RCW 18.86, "buyer" includes "tenant" and "seller" includes "landlord".

As mentioned above, the new Compensation Disclosure (Form 42C) can be used to disclose compensation to a buyer of commercial real estate and in other circumstances required by RCW 18.86.030, where compensation offered by a party or firm to the other firm in the transaction is not disclosed in the purchase and sale agreement.

The Termination of Buyer Representation (Form 53) will be revised consistent with the changes to the new form Buyer Brokerage Services Agreement.

## **8. Revised Listing Agreements and Related Forms**

The listing agreements (Form 1A, Form 1B, Form 16A, Form 16B and Form 63) have also been revised and reformatted to accommodate the requirements of the Revised Law. The revisions include the following:

- Creating a new paragraph for the “term” of the listing, with the expiration date and the automatic extension of the agreement for pending transactions;
- Adding a new section for “limited dual agency”, together with a new initial block for seller’s consent for the listing broker to act as a limited dual agent;
- Noting in the “List Date” paragraph that the seller may instruct the listing broker to limit marketing and impose showing requirements to address any privacy concerns;
- Clarifications to the compensation section, including moving the entire section to the second page of the form and reformatting some of the paragraphs; and informing the seller that offering compensation to the buyer brokerage firm is not required;
- In the event seller retains the earnest money on buyer’s breach, giving the parties the ability to negotiate whether, after deducting costs advanced by the firm, the seller retains the balance or the seller and listing firm divide the balance equally;
- Adding an “Other” section to the end of the form; and
- Including contact information for the seller and the listing broker, including the license numbers for the listing broker and the listing firm.

Similar to the buyer forms, there are several other listing related forms that will be revised.

The Listing Agreement Addendum (Form 1C), the Business Opportunity Listing Agreement Addendum (Form 16C), and the Listing Agreement Addendum- Lease/Rental Listing Agreement (Form 63A) will be revised with changes similar to the listing agreement. As a reminder, every listing entered into the NWMLS database must contain the provisions in the Listing Agreement Addendum (Form 1C). This includes firms who use their own listing agreements and also listings where the parties may seek to modify NWMLS’s standard listing agreements (Form 1A and 1B).

The Addendum to Exclusive Listing Agreement (Form 18) will be revised to be consistent with the changes to the Revised Law including extending the term of the

agreement, appointing additional brokers to represent the seller, modifying the seller's selection regarding limited dual agency, or any other change that the parties may agree to.

The Appointment of Subagent (Form 1S) will be removed from publication, as the Revised Law does not include "subagency".

Similar to the changes to the listing agreements, the Seller Representation Agreement (Form 47) will be revised to comply with the requirements of the Revised Law.

## **9. Purchase and Sale Agreements and Lease/Rental Agreement**

There are minor changes to the purchase and sale agreements, including updating the vernacular to "limited dual agent" in the agency disclosure provisions, removing the consent to dual agency (as that is required in the services agreements) and updating the name of the pamphlet. Also note that General Term k (Notices and Delivery of Documents) has been clarified to specifically allow for e-mail delivery to an unrepresented buyer or seller.

The Lease/Rental Agreement (Form 68) will be revised similarly. Additionally, the timeframe for the lessor to provide tenant with a statement of the basis of retaining any of the deposit and a refund of any portion due, has been extended from 21 days to 30 days, consistent with revisions to RCW 59.18.280.

## **10. Existing Agency Relationships and Pending Transactions**

Listing agreements signed prior to January 1, 2024 should be amended to address the seller's consent to limited dual agency. To do so, firms can use the Addendum to Exclusive Listing Agreement (Form 18) and check the applicable box to address the seller's consent to limited dual agency for the individual listing broker. If the seller does not consent, the listing broker cannot act as a limited dual agent. For any new listing signed on or after January 1, 2024, brokers must use the new listing agreement.

Purchase and sale agreements for transactions pending (mutually accepted) before January 1, 2024 should not be amended. Purchase and sale agreements written on or after January 1, 2024 should be completed on the new forms.

For buyer brokers who have existing agency relationships, brokers should have buyers sign the new Buyer Brokerage Services Agreement (Form 41) if the broker will continue to provide services to the buyer on or after January 1, 2024. If a broker and a buyer have an existing written agency agreement, the parties should update their agreement using a new form that complies with the Revised Law on January 1, 2024.

Finally, for buyers who are party to an existing purchase and sale agreement that is waiting to close, there is no need for the buyer to sign a services agreement. However,

if that sale fails, and the broker will continue to provide services to the buyer, the parties must enter into a services agreement as required by the Revised Law.

## **11. Availability of Revised and New Forms**

SAMPLE copies (including both clean and redline/blueline copies) of the revised and new forms are available on NWMLS's website for your review. A SAMPLE copy of the new Real Estate Brokerage in Washington pamphlet is also available for your review. Please note that you should not use the SAMPLE copies of the forms for any client agreements or transactions.

The new one-page informational handout for buyers is available on NWMLS's website and may be given to buyers at any time. The buyer handout is specifically designed to inform buyers of the changes to the law, including the new requirement regarding services agreements. Brokers can also give the one-page informational handout for prospective renters to their clients at any time.

A subset of the revised and new forms will be available for order in hard-copy on December 15<sup>th</sup> and will be available for use on Transaction Desk and Xpress Forms on January 1, 2024. NWMLS will remove the old version of the forms at the same time. You should recycle your old forms to prevent any inadvertent use.