



## RE01R06: SELLER AGENCY

1. History of written relationship disclosure
  - a. States response to Federal Trade Commission survey - license regulation requires disclosure of licensee representation.
  - b. 1990 MA Board of Registration of Real Estate Brokers and Salespersons created its first written agency form.
  - c. 1993 MA Board of Registration of Real Estate Brokers and Salespersons revised agency disclosure form to recognize buyer agency.
  - d. Current MA regulation requires real estate licensee to disclose form of relationship to prospective buyers and sellers of real estate at the first personal meeting to discuss a specific property with a potential buyer or seller. (See 2005 Massachusetts Mandatory Licensee-Consumer Relationship Disclosure).
  - e. Open House exception (254 CMR 3.00(13)(a)(3)) - at an open house the Real Estate licensee must conspicuously post and/or provide with other written materials any relationship so that the attendees can understand the relationship they may have with the licensee conducting the open house.
2. General Definitions
  - a. Real estate broker" - Any person who for another and for a fee, commission or other valuable consideration, or with the intention or with the expectation of upon the promise of receiving or collecting a fee, commission or other valuable consideration, does any of the following:- sell, exchange, purchases, rents or leases, or negotiates, or offers, attempts or agrees to negotiate the sale, exchange, purchase, rental or leasing of any real estate, or lists or offers, attempts or agrees to list any real estate, or buys or offers to buy, sells or offers to sell or otherwise deals in options on real estate, or advertises or holds himself out as engaged in the business of selling, exchanging, purchasing, renting or leasing real estate, or assists or directs in the procuring of prospects or the negotiation or completion of any agreement or transaction which results or is intended to result in the sale, exchange, purchase, leasing or renting of any real estate. (See M.G.L., Chapter 112, Sec. 87PP).
  - b. Real estate salesman"- an individual who performs any act or engages in any transaction included in the foregoing definition of a broker, except the completion of the negotiation of any agreement or transaction which results or is intended to result in the sale, exchange, purchase, renting or leasing of any real estate. (See M.G.L. Chapter 112, Sec. 87PP).
  - c. Agent" - one who is authorized to represent and act on behalf of a principal (the principal i.e. client (buyer/seller) or real estate broker (broker of record).
  - d. Principal" - a main party to a transaction. Could be the seller/buyer or an entity. The licensee would be delegated certain responsibilities and must be aware of fiduciary duties that they may hold.
  - e. Client" also known as a Principal - a person who empowers another to act as his or her representative/agent. Client relationship = fiduciary relationship.
  - f. Customer" - generally refers to person without representation involved in a transaction. All agents have a duty to treat customers fairly.
  - g. Vicarious Liability- liability created not because of a persons actions but because of the relationship between the libel person and other parties. For example, a real estate broker is vicariously libel for the act of his or hers salespeople while acting on behalf of the broker even if the broker did nothing to cause the liability" ( [The Language of Real Estate](#)).



- h. Informed Consent - Consent to a certain act that is given after a full and fair disclosure of all facts needed to make a conscientious choice." (*The Language of Real Estate*)
  - i. Subagent - An agent of a person or entity who is already acting as agent for a principal (agent of an agent).
  - j. Fiduciary - "A relationship that implies a position of trust or confidence wherein one person is usually entrusted to hold or manage property or money for another. The term fiduciary describes the faithful relationship owed by an attorney to a client or by a broker (and salesperson) to a principal. The fiduciary owes complete allegiance to the client." (*The Language of Real Estate*)
3. Establishment of Agency
- a. Express written or oral contract where agent and principal agree to terms.
  - b. Implied agency by actions and/or words
  - c. Compensation does not create an agency relationship
4. Duties That May Be Required of licensees, commonly referred to by the acronym OLD CAR.
- a. Obedience - the duty to carry out all lawful instructions of the Client
  - b. Loyalty - the duty to act in the best interest of the Client
  - c. Disclosure - the duty to disclose all information relevant to the Client
  - d. Confidentiality - the duty to keep the Client's confidential information, confidential - Duty survives termination of agency relationship. Duty does not apply to legally required disclosures such as known physical hazardous conditions of property.
  - e. Accountability - the duty to protect, isolate and account for all money, documents, or other personal property provided to the agent
  - f. Reasonable Care and Due Diligence - the duty to act competently and being capable of performing the duties undertaken
5. Types of Licensee/Consumer Relationships
- a. Seller Agency - Real estate agent represents seller on client basis and treats buyer as customer. Seller agent's duties to seller include OLD CAR".
  - b. Subagency - Where a seller or buyer client expressly or implicitly authorizes his or her broker to use other agents from other firms to find the buyer a property. The seller or buyer must provide written informed consent that indicates the following: Massachusetts law permits the broker to cooperate with other licensed brokers who will act as subagents of the seller or buyer only with the written consent of the seller or buyer and the disclosure to the seller or buyer for the potential for vicarious liability. Vicarious liability is the potential for a seller or buyer to be held liable for an act or omission of the subagent". Subagent's duties to seller or buyer include OLD CAR".
  - c. Buyer Agency - Real estate agent represents buyer client in real estate transaction. Buyer agent's duties to buyer include OLD CAR".
  - d. Single Agency - The practice of representing either the buyer or the seller but never both in the same transaction." (*The Language of Real Estate*)
  - e. Dual Agency - a real estate agent who represents both the seller and buyer in the transaction is a disclosed dual agent with written informed consent of both the buyer and the seller. A Dual Agent has a duty of confidentiality and accounting to both parties. Undisclosed dual agency is illegal. Reasonable Care and Skill will apply in the real estate transaction. Dual agent's duties to seller and buyer include OLD CAR" however the OLD R" in OLD CAR" is modified to adapt to the requirements Dual Agency.



- f. Facilitator- also known as a Non-Agent or Transaction Broker/Salesperson. The Facilitator works to complete the transaction. Although bound by license law and MGL Ch. 93A, they do not have a fiduciary relationship with the seller or the buyer. They do not represent either party in the transaction. The Facilitator must disclose all known material defects that exist. Failure to do so could result in a Chapter 93A violation. Their duties consist of accounting and any other Facilitator duties undertaken. Facilitator's has no required duties to seller and/or buyer A Facilitator is obligated to fulfill all the duties of A" ( Accountability") pursuant to the Massachusetts Real Estate License Law.
  - g. Designated Agent - A real estate licensee who has been specifically appointed or designated by the broker with whom they are affiliated to individually represent a specific client (either a buyer or seller) when selling or buying real estate. The designated agent has full duties of agency ( OLD CAR") to the client while all other licensees of the firm the Designate Agent is associated with do not represent the buyer or seller and could very well represent the other party to the transaction.
6. Termination of Licensee/Consumer Relationship
    - a. Expiration of agreement, if one existed.
    - b. Mutual agreement to terminate, change, or rescind
    - c. Completion of performance under agreement
    - d. Death or mental incapacity of Agent or Principal
    - e. Impossibility of performance (ie. destruction of property)
    - f. Bankruptcy of either party
    - g. Repudiation - the court may deem an agreement was breached and the breaching party may be held liable for damages.
  7. Dual Agency
    - a. Disclosed Dual Agent - represent both buyer and seller.
      - i. informed consent" of buyer and seller
      - ii. Failure to disclose and receive buyer and seller's consent violates state licensing regulations and agency law. Buyer and seller may rescind the underlying real estate transaction and agent may be liable for all monetary damages.
    - b. Duties of Dual Agent
    - c. Undisclosed dual agency is illegal in Massachusetts and courts require forfeiture of the commission by those found guilty of this activity among other possible damages.
  8. Seller Agency, Buyer Agency or Facilitator Compensation
    - a. Compensation Methods
      - i. Commission based on sales price
      - ii. Flat Fee
      - iii. Fee for Service/Menu Options
      - iv. Money Credited to the seller at closing
    - b. Compensation alone does not create agency representation
  9. Other Legal Issues Affecting Seller or Buyer Representation or Facilitation.
    - a. State and Federal Lead Paint Laws require that any property where a child under six years old resides must be deleaded and property owner is responsible for compliance. Real estate licensees are required to notify all prospective purchasers and lessors about the dangers of lead paint and must inform prospective buyers about buyer's 10 day right to a lead paint inspection. Federally approved state lead paint disclosure forms may be obtained from the Massachusetts Department of Public Health or local REALTOR® Boards. The three forms available are entitled the Property Transfer Lead



Paint Notification Certification form, the Tenant Lead Law Notification form, and the Tenant Lead Law Certification form.

- b. Real Estate Licensees are also required to tell prospective purchasers that under the State Lead Law, a new owner of a home built before 1978 in which a child will live or continue to live must have it either deleaded or brought under interim control within 90 days of taking title to the property.
  - c. For more information about the lead paint laws, consult Massachusetts General Law Chapter 111.
  - d. Home Inspector Law - In effect as of May 1, 2001 - At the time of the signing of the first written contract to purchase, real estate brokers and salesmen, or the seller if no broker or salesperson is involved in the sale, shall distribute a brochure, published by the Office of Consumer Affairs and Business Regulations, educating consumers about the home inspection process. Real estate brokers and salesmen shall not directly recommend a specific home inspection company or home inspector but may, upon request, provide a complete list of licensed home inspectors prepared by the board. This prohibition shall not apply if there is a written contractual agreement or a written agency disclosure between the buyer and the real estate broker specifying that the real estate broker is acting exclusively for the buyer as a buyer's broker." (MGL Ch. 112 sec. 87YY1/2).
  - e. Psychologically Stigmatized Property - ie. felonies, murders, suicides
    - i. Absent a specific inquiry by prospective purchaser or his/her agent to the licensed broker or salesperson, there is no duty for the licensee to either investigate or affirmatively disclose murders, suicides, allegations of ghosts or other potential stigmas. (See Chapter 294 of the Acts of 1998)
    - ii. HIV Status, State law - Questions regarding HIV status of any former or current occupant of residence should not be answered by a real estate licensee.
  - f. Mass. General Law - Chapter 93A - Consumer Protection Statute
    - i. requires seller's agent to disclose known material defects on the property to potential buyers. [actual knowledge" standard]
    - ii. Chapter 93A does not apply to persons who are not in the business of selling". Residential sellers, not in the business of selling homes, have no affirmative disclosure requirement with the exception that they must inform potential buyers about lead paint on the property.
    - iii. Due Diligence: Buyer's agent has a duty to ask questions on behalf of his or her client.
    - iv. Affirmative Disclosure Under Attorney General's Regulations
      - i. Anything that may influence a prospective purchaser
      - ii. Physical defects in the property
      - iii. Title defects and encumbrances
  - g. Sex Offender Registry
    - i. According to statute, persons over age of 18 may request information from the sex offender registry for their own protection or the protection of a child or person under their care or custody.
    - ii. The statute imposes criminal penalties for misuse of information provided to the individual making the inquiry. Customers and clients should be urged to contact the local police department to find out this information firsthand. (M.G.L. Chapter 6, Section 178D).
10. Client Counseling, Company Policy & Record Keeping
- a. Explain to seller his or her responsibilities as a client and determine sales and marketing criteria for the property.
  - b. i.e. Contact seller agent's office to see the property.



- c. Explain company policies regarding cooperation and compensation and any potential for seller agent to act as dual agent.
- d. Advantages of written company policy versus verbal
  - i. 1. Clearly defined duties of agent and client
- e. Agency relationship created between broker owner of company and seller client. Agent of broker working with seller client creates the agency relationship between the Broker of Record or Owner-Broker and client. The relationship is either limited to a specific individual or specific individuals or the entire firm. The Broker of Record or Owner-Broker is only party authorized to determine form of agency representation for company.
  - i. Massachusetts Mandatory Licensee-Consumer Relationship Disclosure is not an Agent Contract
  - ii. Record Keeping
    - i. Mandatory Licensee-Consumer Relationship Disclosure Forms - state regulation requires retaining form for 3 years
    - ii. Contracts - contract law statute of limitations is 6 years; recommend keeping records of contracts for 7 years.
    - iii. All business records - state regulations do not specify time frame.
    - iv. Escrow check copies - state regulation requires retaining copies for 3 years.
- f. In event a dispute arises possible options include
  - i. Alternative Dispute Resolution ( arbitration or mediation)