



RE02R06 BUYER AGENCY

1. **Introduction**
2. **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 licensees 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).
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. Note: Compensation does not create an agency relationship.
4. **Duties That May Be Required of licensees, commonly referred to by the acronym OLD CAR.**
 - a. **O**bedience - the duty to carry out all lawful instructions of the Client
 - b. **L**oyalty - the duty to act in the best interest of the Client
 - c. **D**isclosure - the duty to disclose all information relevant to the Client
 - d. **C**onfidentiality - 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. **A**ccountability - the duty to protect, isolate and account for all money, documents, or other personal property provided to the agent
 - f. **R**easonable Care and Due Diligence - the duty to act competently and being capable of performing the duties undertaken
5. **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" - commonly known as person who engages agent for representation.
- 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*)

6. 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. Buyer Agency - Real estate agent represents buyer client in real estate transaction **Buyer agent's duties to buyer include "OLD CAR"**.
- c. Subagency - (Rare) Where client expressly or implicitly authorizes his/her broker to use other agents to assist in locating and buying property for buyer. The buyer must sign language that indicates the following: "Massachusetts law permits the broker to cooperate with other licensed brokers who will act as subagents of the buyer only with the written consent of the buyer and the disclosure for the buyer of the potential for vicarious liability. Vicarious liability is the potential for a buyer to be held liable for an act or omission of the subagent". Subagent's duties to seller or 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.

7. Termination of Buyer Agency Relationship

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- a. Expiration of agreement
- b. Mutual agreement to terminate or rescission
- c. Completion of performance under agreement
- d. Death or Insanity of Buyer Agent or Client Principal
- e. Impossibility of performance (ie. destruction of property)
- f. Incapacity (ie. mentally incapable) or Bankruptcy of either party
- g. Repudiation - either principal or agent withdraws consent, court may deem this a breach of fiduciary obligation and breaching party may be held liable for damages.

8. Buyer Agency Compensation

- a. **Commissions are always negotiable.**
 - i. The seller decides what fee they are willing to pay for their broker's services and how much that listing broker should offer a broker who brings a buyer to close the transaction.
 - ii. Commissions can be negotiated at any point throughout the transaction, including at the outset and any time before the transaction closes.
 - iii. The market decides commission rates, and commissions are always negotiable. Consumers have the choice of who they want to pay and how they want to pay them.

b. Compensation Methods

- 1. Commission based on sales price
 - a. paid by buyer directly via contract between broker and buyer
 - b. b.paid from transaction by listing broker via agreement between listing and seller broker (MLS)
 - i. **Historically, the seller's broker pays the buyer broker's commission for finding a ready, willing and able buyer**



- iv. Flat Fee
- v. Fee for Service/Menu Options
- vi. Money Credited to the seller at closing
 - 1. A sellers credit for commission works much like sellers credit for closing costs and prepaids.
 - 2. Lenders will not allow buyer to pay commission through loan directly.
 - 3. If the Buyer is obtaining a loan or loans to purchase the Property, Seller's credit to Buyer is subject to the Buyer's lender(s) approval of such credit.
 - 4. Any amount not approved by Buyer's lender shall be paid to Buyer Brokerage Firm.
- b. Compensation alone does not create agency representation
- c. The Buyer's Agent cannot represent their services as 'free' unless there is no compensation from any source to the Buyers Broker

9. 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.



d. **Payment for Dual Agency in the Listing Agreement**

10. 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)2. 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
 - 1. Anything that may influence a prospective purchaser
 - 2. Physical defects in the property iii. Title defects and encumbrance
- 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).
- h. Buyers "Love Letters" are letters written by the buyer to the seller to induce them to select their offer.
 - i. May violate Fair Housing Law
- i. Escalation Clause as method to obtain advantage over competing buyers
 - i. Used to escalate offer price when there is a hot sellers' market.
 - ii. To make the offer more attractive than competitors, buyers in some situations add an "escalation clause" or "escalation addendum" to their offer in an effort to outbid competitors.
- 11. Federal Trade Commission and Department of Justice
 - a. Timeline of communication regarding issues with competition
 - i. Steering
 - ii. Pricefixing
 - iii. Antitrust
 - iv. Anticompetitive practices
 - b. Lawsuits
 - c. Industry's responses
 - i. <https://www.nar.realtor/competition-in-real-estate>



ii.

12. Client Counseling, Company Policy & Record Keeping

- a. **Written Exclusive Buyer Agency Agreement**
 - i. **Not mandatory in MA at this time**
- b. Explain to buyer his or her responsibilities as a client and determine search criteria for the property.
- c. Ex. Contact buyer agent's office to see a property.
- d. Explain company policies regarding cooperation and compensation and any potential for buyer agent to act as dual agent.
 - i. Advantages of written company policy versus verbal
 - 1. Clearly defined duties of agent and client
 - 2. **Clearly states compensation agreement between buyer and buyer broker**
- e. Agency relationship created between broker owner of company and buyer client. Agent of broker working with buyer client creates the agency relationship between the broker of record and client. Owner broker is only party authorized to determine form of agency representation for company.
 - i. Mandatory Licensee - Consumer Relationship Disclosure is not Buyer Agent Contract
 - ii. Record Keeping
 - 1. Mandatory Licensee - Consumer Relationship Disclosure Forms - state regulation requires retaining forms for 3



2. Contracts - contract law statute of limitations is 6 years; recommend keeping records of contracts for 7.
 3. All business records - state regulations do not specify time frame.
 4. Escrow check copies - state regulation requires retaining copies for 3 years.
- f. In event a dispute arises possible options include
- i. 1. Alternative Dispute Resolution (arbitration or mediation)
- 13.The future of Buyer Agency**

REQUIRED HANDOUTS

- 1) Massachusetts Mandatory Licensee-Consumer Relationship Disclosure
- 2) Mass. General Law - Chapter 294 of the Acts of 1998
- 3) Mass. General Law - Chapter 112, Section 87YY

Suggested References:

Buyer Representation in Real Estate by Dianna Brouthers and Roger Turcotte
Agency Relationships in Real Estate, 2 nd ed., by John Reilly
Moehrl v. N.A. of Realtors

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