



## RE57R07: BROKERAGE RELATIONSHIPS

1. HISTORY OF BROKERAGE RELATIONSHIPS
2. Fundamentals of agency are unchanged for hundreds of years, but application of agency law and other brokerage relationships are constantly changing.
  - History of Agency: English common law evolved from master-servant relationship. Law of agency is a common-law concept.
  - Respondeat Superior "Let the master answer. This maxim means that a master is liable in certain cases for the wrongful acts of his servant, and a principal for those of his agent." Black's Law Dictionary
  - Review history of agency, disclosure form in Massachusetts and its evolution into the 2005 revision. This section applies to real estate brokers or salespeople engaged in the purchase or sale of land with a building intended for use as a one to four unit residential dwelling or to the purchase or sale of land on which a building is intended to be constructed for use as a one or two unit residential dwelling.
  - Define basic terms in real estate brokerage relationships (use examples of each).
    1. AGENT - "One authorized to represent and to act on behalf of another person (called the principal)." The Language of Real Estate (the principal i.e. client (buyer/seller) or real estate broker (broker of record).
    2. CLIENT - (also known as a Principal) A person who is represented by an agent. Client relationship = fiduciary relationship.
    3. CUSTOMER - A buyer or seller who is unrepresented by the real estate licensee
    4. DESIGNATED AGENT Individual Agency - "A designated agent is that agent designated to be the agent for the buyer or seller to the exclusion of all other agents in the brokerage (real estate office or firm). Another salesperson in the firm could be designated the agent of the other party without thereby creating a dual agency for the individual agents." The Language of Real Estate
    5. DISCLOSED DUAL - Simultaneously representing both the buyer and seller
    6. AGENT - the seller with the informed consent of both
    7. FACILITATOR - Otherwise known as a transactional broker/salesperson or non-agent. 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.
    8. PRINCIPAL - (also known as a Client) The primary party in a transaction, e.g. the buyer or the seller, the party who hires an agent to represent them



9. SUBAGENT - An agent of a person who is already acting as agent for a principal (agent of an agent)
  10. AGENT vs. BROKER - While an individual may act in both capacities, and often does, the terms have different meanings.
3. Use of "Massachusetts Mandatory Licensee-Consumer Disclosure"
- When it must be presented:
  - No matter what relationship is established with a buyer or a seller, the disclosure is to be provided by the licensee immediately when all three of the following circumstances exist.
    1. At the first personal meeting
    2. To discuss a specific property
    3. With a prospective buyer or seller
  - Explain how to complete the mandatory disclosure form:
    1. Seller's agent, or buyer's agent, or facilitator
    2. Traditional agency vs. designated agency
    3. Who can sign the form? Who must sign the form?
    4. If a consumer declines to sign the form, there is a check-off box.
      1. Broker/salesperson is still required to complete the licensee section of the form and provide their license number.
      2. Consumer still must receive a copy of the form they will not sign.
      3. Broker must retain mandatory disclosure form for three years.
      4. 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.
  - Consent to dual or designated agency is a separate step.
4. OTHER TERMS AND DEFINITIONS
- 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
  - 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
  - VICARIOUS LIABILITY
  - A principal may be responsible for the actions of their agent.



- "Liability created not because of a person's actions, but because of the relationship between the liable person and other parties. For example, a real estate broker is vicariously liable for the acts of his or her salespeople while acting on behalf of the broker even if the broker did nothing to cause the liability. (See respondeat superior)". - The Language of Real Estate
- 5. Duties that may be required of licensees Referred to as "**OLD CAR**"
  - "OLD CAR"
    1. **O**bedience Agent must carry out all lawful instructions of client.
    2. **L**oyalty Agent must act in best interest of client.
    3. **D**isclosure Agent must disclose all information relevant to client.
    4. **C**onfidentiality Duty to keep confidential client's information or discussion. Duty survives termination of agency relationship. Duty does not apply to legally required disclosures such as known physical hazardous conditions of property.
    5. **A**ccountability Agent must protect and account for all money, documents, or other personal property given to her by the client.
    6. **R**easonable Care & Due Diligence
      - Agent must act competently, capable of performing duties within scope of license requirements.
- 6. Types of Brokerage Relationships in Massachusetts and the Duties Required for each
- 7. (NOTE: Review of duties for agents and facilitator should be brief. Stand-alone continuing education courses are offered for seller and buyer agency and facilitation to provide further detailed reference on the responsibilities of these roles).
  - SELLER AGENCY - Real estate agent represents seller as the client and treats buyer as a customer. Agent's duties to Seller client include "OLD CAR".
  - SELLER SUBAGENCY - When seller client expressly authorizes his/her agent to use other agents to market seller's property. Subagent's duties to seller include "OLD CAR". Specific legal requirements to offer subagency to cooperating brokers are: Written informed consent must be obtained from seller client to offer subagency, the consent must state the following: That the broker may cooperate with another broker who is then a subagent of the seller. Further, that vicarious liability is the potential for a seller to be held liable for a misrepresentation or an act or omission of the subagent and that the seller authorizes the broker or salesperson to offer subagency.
  - BUYER AGENCY - Real estate agent represents buyer as the client in real estate transaction. Agent's duties to buyer include "OLD CAR":
  - BUYER SUBAGENCY (not commonly used) - Only when buyer client expressly authorizes his broker to use other agents to assist buyer in locating property for purchase. Subagent's duties to buyer include "OLD CAR". Specific legal requirements to offer subagency to cooperating brokers are: Written consent must be obtained from buyer client to offer subagency, the consent must state the following: That the broker may cooperate with another broker who is then a subagent of the buyer. Further, that vicarious liability is the potential for a buyer to be held liable for a



misrepresentation or an act or omission of the subagent and that the buyer authorizes the broker or salesperson to offer subagency.

- FACILITATOR - A facilitator assists the seller and/or buyer in reaching an agreement, but does not represent either the seller or buyer in the transaction. A facilitator is NOT an agent. 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. This relationship must be disclosed at the first personal meeting to discuss a specific property. Facilitator's duties include only the "AR" of "OLD CAR" (a/k/a transactional broker/salesperson, non-agent and contract broker/salesperson).
- DUAL AGENCY - A real estate licensee who represents both the seller and buyer in the same transaction is a disclosed dual agent with written informed consent of both the buyer and the seller (see below). Fiduciary duties are owed to both buyer and seller. Undisclosed dual agency is illegal. A dual agent assists the seller and buyer in a transaction but shall be neutral with regard to any conflicting interest of the seller and buyer. Consent may be obtained in a listing agreement, buyer agency agreement, or on a stand-alone consent form. If consent is obtained prior to the identification of a transaction then a "Notice of Dual Agency" must be provided prior to the execution of the offer to purchase. Sample form for consent is available at [www.mass.gov/dpl/boards/re](http://www.mass.gov/dpl/boards/re). Duties of a disclosed dual agent include only the "CAR" of "OLD CAR".
  1. Written consent form must state: A real estate broker or salesperson may act as a dual agent who represents both prospective buyer and seller with their informed written consent. A dual agent is authorized to assist the buyer and seller in a transaction, but shall be neutral with regard to any conflicting interest of the buyer and seller. Consequently, a dual agent will not have the ability to satisfy fully the duties of loyalty, full disclosure, reasonable care and obedience to lawful instructions, but shall still owe the duty of confidentiality of material information and the duty to account for funds.
  2. Buyers and sellers should understand that material information received from either client that is confidential may not be disclosed by a dual agent except if disclosure:
    1. is expressly authorized;
    2. is required by law;
    3. is intended to prevent illegal conduct; or
    4. is necessary to prosecute a claim against a person represented or to defend a claim against the broker or salesperson.
  3. This duty of confidentiality shall continue after termination of the brokerage relationship.
  4. Notice form must provide:
  5. "When consent to dual agency has been given by a seller or prospective purchaser in advance of the identification of a potential transaction, written notice of dual agency must



also be given by the broker or salesperson to the seller and prospective purchaser after a transaction has been identified stating that the broker is dual agent with regard to the transaction. Written notice of dual agency shall satisfy section 13(b) herein and such written notice shall be given prior to the seller and prospective purchaser entering into a written agreement for the purchase or sale of residential property." Section (13) (b) (2) of 254CMR 2.00

6. Consent forms must be signed by both the buyer and seller AND the broker or salesperson; however, signatures may appear on counterparts (separate forms).
7. Consent forms must be kept for a minimum of three (3) years.
8. Process for dual agency should always be:
  1. disclosure
  2. consent
  3. notice (if applicable)

## 8. ALTERNATIVE BUSINESS MODELS

- TRADITIONAL AGENCY - When a licensee enters into an agency relationship with either a buyer or a seller, all licensees in the same brokerage firm automatically are agents of that buyer or seller. In the event of an in-house transaction where the brokerage firm represents both the buyer and seller, a dual agency might occur.
- SINGLE AGENCY - The licensee or firm only represents either buyers or sellers but never both and will never practice dual agency.
- DESIGNATED AGENCY - With written consent a real estate agent can be appointed by another real estate agent (the appointing agent) to represent either the buyer or seller provided the buyer or seller expressly agree to such designation. (Appointments are done within the same firm.) The real estate agent once so designated is then the agent for either the buyer or seller, but never both. The consumer who is represented becomes the agent's client. The designated agent must put their client's interests first and be an advocate for the best price and terms for their client. In situations where the appointing agent appoints both a designated seller's agent and a designated buyer's agent for the same transaction, the appointing agent becomes a "dual agent (see above for description)." Consent may be obtained in a listing agreement, buyer agency agreement, or in a stand-alone consent form. If consent is obtained prior to the identification of a transaction, then a "Notice of Designated Agency" must be provided prior to the execution of the offer to purchase.
- Sample form for consent is available online at [www.mass.gov/dpl/boards/re](http://www.mass.gov/dpl/boards/re). Duties include "OLD CAR".
  1. If you are a seller, you are advised that:
    1. The designated seller's agent will represent the seller and will owe the seller the duties of loyalty, full disclosure, confidentiality, to account for funds, reasonable care and obedience to lawful instruction;



2. All other licensees affiliated with the appointing broker will not represent the seller nor will they owe the other duties specified in paragraph (a) to that seller, and may potentially represent the buyer;
  3. If designated agents affiliated with the same broker represent the seller and buyer in a transaction, the appointing broker shall be a dual agent and neutral as to any conflicting interests of the seller and buyer, but will continue to owe the seller and buyer the duties of confidentiality of material information and to account for funds.
2. If you are a buyer you are advised that:
1. The designated buyer's agent will represent the buyer and will owe the buyer the duties of loyalty, full disclosure, confidentiality, accountability for funds, reasonable care and obedience to lawful instruction;
  2. All other licensees affiliated with the appointing broker will not represent the buyer nor will they have the other duties specified in paragraph (a) to that buyer, and potentially may represent the seller;
  3. If designated agents affiliated with the same broker represent the seller and buyer in a transaction, the appointing broker shall be a dual agent and neutral as to any conflicting interests of the seller and buyer, but will continue to owe the seller and buyer the duties of confidentiality of material information and to account for funds.
3. POLICY/LLEGAL ISSUES FOR DESIGNATED AGENCY PRACTICE
1. All firms practicing designated agency should adopt an office policy regarding their practices to ensure the protection of confidential information of clients.
  2. Designated agency must start with correct disclosure referenced above.
  3. All agents of the firm should be disclosing their affiliation with a firm that practices designated agency (refer to above usage of agency disclosure form). Agents should not practice single agency and designated agency -
  4. CONFLICT OF INTEREST. (USE EXAMPLES!!!)
  5. The designated real estate broker or salesperson exclusively represents the seller or buyer and is responsible for the performance of any duties owed to the seller or buyer. The designated broker or salesperson may not share known or acquired information with any other real estate agent or person that would harm the seller's or buyer's interest in the real estate transaction, except for known material defects in real property. The designated broker or salesperson shall have an affirmative obligation to disclose known material defects in real property.
  6. The appointment by a broker or salesperson of another affiliated broker or salesperson to represent a seller or buyer shall not limit the liability or responsibility of the appointing agent for any breach of duty by the designated broker or salesperson. The appointment of the broker or salesperson to represent the seller or



buyer shall extend only to those brokers or salespersons as appointed by the appointing broker or salesperson and consented to by the seller or buyer.

9. CONCLUSION Legal requirements regarding disclosure should be emphasized.

- Important note: Setting compensation among competitors is a violation of Anti-Trust Laws.

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The Brokerage Relationships course will provide an overview to the types of relationships available in real estate brokerage in Massachusetts. This Continuing Education module is not intended to be a comprehensive study on the practice of agency. All brokers and salespeople are encouraged to take a full module on agency in conjunction with this course to further enhance their knowledge and professional practice.

### Required Handouts

- MASSACHUSETTS MANDATORY LICENSEE - CONSUMER RELATIONSHIP DISCLOSURE
- "Massachusetts Consent for Dual Agency" form
- "Massachusetts Consent for Designated Agency" form

### Suggested References

- The Language of Real Estate by John Reilly, 6 th edition
- 254 CMR 3.0MGL C 112 § 87AAA 3/4