

NINTH EDITION

Anita C. Hill, CRB, CBR, ASR, CAI, QSC, LMC, ITI, SRES





Massachusetts REAL ESTATE Practice & Law

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MASSACHUSETTS REAL ESTATE PRACTICE & LAW NINTH EDITION © 2015 Kaplan, Inc.
Published by DF Institute, Inc., d/b/a Dearborn Real Estate Education
332 Front St. S., Suite 501
La Crosse, WI 54601

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Printed in the United States of America

ISBN: 978-1-4754-2534-5 / 1-4754-25341

PPN: 1510-1309

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Introduction

Massachusetts Real Estate Practice & Law is a key component of Dearborn™ Real Estate Education's complete real estate principles learning system. This system offers students and educators a complete turnkey package for prelicense real estate courses, continuing education, and professional enrichment. As the demographics and structure of the real estate industry change, Dearborn™ Real Estate Education is helping students, instructors, and practitioners adapt to this new industry environment by providing more accessible and versatile educational tools.

The purpose of Massachusetts Real Estate Practice & Law is to highlight the unique aspects of the real estate business as it is practiced in Massachusetts. Questions that may be used for both testing and comprehension of the material follow each chapter. These questions are prepared in a format similar to the Massachusetts Real Estate License Examination. The answer key for the questions is included at the end of the book. After completing each chapter, you should be certain that you can answer each question correctly before proceeding to the next chapter.

Both Massachusetts-specific and general real estate law and practice are included in the licensing examination. Students need to be thoroughly familiar with the material contained in this book and any of the following principles books or software:

- Modern Real Estate Practice
- Mastering Real Estate Principles
- Real Estate Fundamentals

HOW TO USE THIS BOOK

The conversion table on the inside front cover provides a quick and easy reference for using Massachusetts Real Estate Practice & Law in conjunction with various principles books. For example, Massachusetts Real Estate Practice and Law's Chapter 2, "Seller and Buyer Representation Agreements," may be read in conjunction with Chapter 11 in Modern Real Estate Practice; Chapters 7 and 8 in Real Estate Fundamentals; Chapter 15 in Mastering Real Estate Principles; and Chapter 4 in Guide to Passing the Pearson VUE Real Estate Exam.

Acknowledgments

The publisher would like to thank Debra Martin, who provided vital professional guidance and expertise from which everyone benefits.

Thanks also goes to attorney Michael McDonagh, general counsel for the Massachusetts Association of REALTORS®, for his tireless efforts in helping us secure forms, and permissions to use those forms, in this edition.

ABOUT THE AUTHOR

Anita C. Hill, CRB, CBR, CAI, QSC, ASR, SRES, LMC, is the owner of Anita Hill Training & Seminars and has spent over 35 years establishing her credentials in the field of real estate with an emphasis on training and education. She provides training to a variety of organizations and companies throughout New England. She has been a guest speaker at several Massachusetts, New Hampshire, and Vermont Association of REALTORS® conventions and education conferences. Anita is one of two instructors in Massachusetts for the Certified Buyers Representative (CBR) course. She is also a certified instructor for continuing education classes throughout Massachusetts.

As the former Director of Professional Development for a large real estate company, she developed, coordinated, and supervised an educational curriculum for a 1,400-agent company in four training locations. She is a current member of the Board of Registration of Real Estate Brokers & Salespersons Education Committee, a Massachusetts-approved instructor for licensing and continuing education, and a member of the Northeast Association of REALTORS®, the Massachusetts Association of REALTORS®, the National Association of REALTORS®, and Real Estate Educators Association (REEA).

Preparing for the Real Estate License Examination



In Massachusetts, as in most other states, the real estate profession is regulated. *Regulation* means that the state of Massachusetts, through the Board of Registration of Real Estate Brokers and Salespersons, has established certain standards for real estate professionals. As a broker or salesperson, you will be expected to be aware of those standards and to comply with them. You are already complying with Massachusetts General Law, Chapter 112, Section 87SS by taking an approved prelicense real estate course. Your next step will probably be to take the state licensing exam.

The Massachusetts Real Estate License Examination tests your knowledge of general and state-specific real estate principles and practices—knowledge you will need as a real estate broker or salesperson. Can you locate and identify a property from the legal description on the deed? Can you explain to your client the difference between real estate and personal property? Are you aware of your responsibilities as an agent and of your ethical and legal duties to both buyers and sellers? The Board of Registration needs to determine the extent of your real estate knowledge to find out whether you meet the standard expected of real estate professionals in Massachusetts.

■ ABOUT THE MASSACHUSETTS REAL ESTATE LICENSE EXAMINATION

The Pearson VUE Format

The Massachusetts Real Estate License Examination is prepared and administered by an independent testing service, Pearson VUE, Inc., under the supervision of the Massachusetts Board of Real Estate Brokers and Salespersons. Pearson VUE offers licensing exams nationwide, but each exam is adapted to local real estate laws and practices and the priorities of the state's licensing agency. All questions are multiple choice, and the test is completely automated—you'll get your results on the spot. The examinations for both brokers and salespersons are given in two parts. The first section on either examination is called the Uniform Test and consists of 80 general real estate questions on which your scaled score of 70 will be based (70 is the passing score, and scores can range from 1 to 100). Most of those questions will determine your score, while at least 5 questions, scattered throughout the exam, are being pretested by Pearson VUE for future use. Therefore, carefully answer all questions because you do not know which of the 80 questions count toward your score. The future test questions do not affect your score in any way. The second section, the State Test, consists of approximately 40 questions on Massachusetts law and practice on which your scaled score of 70 will be based. Here, too, an additional 5–10 questions are pretest questions and will not count toward your score. Answer all questions carefully—40 questions on which your score will be based, plus 5–10 uncounted test questions. Candidates who pass one portion of the examination and fail the other need to retake only the portion they failed. The failed portion must be successfully completed within two years from the completion date on the Education Certification Form.

Following is a description of the examination content for real estate salespersons, brokers, and affiliate brokers.

General Exam

The general exam covers the following topics:

- Real property definitions, characteristics, ownership, transfer, and restrictions (sales: 15%—12 questions; brokers: 11%—9 questions)
- Assessing and explaining property valuation and the property appraisal process (sales: 9%—7 questions; brokers: 11%—9 questions)
- Agency relationships with buyers and sellers and contracts (sales: 18%—14 questions; brokers: 21%—17 questions)
- Disclosures and property conditions (sales: 11%—9 questions; brokers: 10%—8 questions)
- Real estate activities governed by federal laws such as the Fair Housing Act, ADA, antitrust, marketing controls (sales: 11%—9 questions; brokers: 9%—7 questions)
- Financing components and settlement (sales: 10%—8 questions; brokers: 11%—9 questions)
- Leases, rents, and property management (sales: 6%—5 questions; brokers: 9%—7 questions)
- Operating a real estate brokerage (sales: 13%—10 questions; brokers: 18%—14 questions)

Massachusetts Exam

The Massachusetts-specific section of the exam tests the following topics:

- Duties and powers of the Board of Registration of Real Estate Brokers and Salespersons (sales and brokers: 5%—2 questions)
- Licensing requirements (sales and brokers: 10%—4 questions)
- Requirements governing licensees (sales and brokers: 35%—14 questions)
- Additional topics, including landlord/tenant issues, Massachusetts fair housing law, property taxes, zoning and land-use regulations, condominiums, cooperatives, time-shares, Massachusetts Consumer Protection law, and environmental issues (sales and brokers: 50%—20 questions)

The Pearson VUE approach to testing is designed to test your reasoning process as well as your real estate knowledge. The examination includes questions on general real estate information and the Massachusetts Real Estate License Law and Rules and Regulations, as well as math problems and several kinds of comprehension problems.

While the Massachusetts Real Estate License Examination is designed to find out how much you know, it also is designed to find out how well you can think and apply your knowledge in appropriate situations. Many of these questions involve reading comprehension: Can you read a statement or form and answer questions based on what you have read? Other questions involve reading comprehension in combination with application: Can you read a selection or problem and answer questions based on what you have read and what you know about certain real estate principles?

Throughout this book you will find multiple-choice questions that follow the chapter sections. These questions are in the Pearson VUE test format. This format presents the question and four possible answers in a straightforward manner. There is only one correct answer to each question.

Math

Math problems relating to real estate transactions make up approximately 10% of the general portion of the examination. You may use a silent, hand-held, *battery-operated* calculator during the broker's and salesperson's license examinations.

The problems you will be asked to solve deal with the following subjects:

- Financing
- Tax assessment
- Commissions
- Area calculations
- Settlement statement
- Profit and loss.
- Tax ramifications

RELATED WEBSITES

Pearson VUE: www.pearsonvue.com
Massachusetts Association of REALTORS®: www.marealtor.com
Massachusetts Board of Registration of Real Estate Brokers and Salespersons:
www.mass.gov/ocabr/licensee/dpl-boards/re/





Real Estate Brokerage

NATURE OF THE BROKERAGE BUSINESS

Massachusetts law distinguishes between two types of real estate professionals: real estate brokers and real estate salespersons.

Brokers

The statutory definition of a **real estate broker** is "any person who for another person and for a fee, commission, or other valuable consideration, or with the intention or in the expectation or upon the promise of receiving or collecting a fee, commission, or other valuable consideration, does any of the following:—sells, exchanges, 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 advertises or holds himself or herself 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 that results or is intended to result in the sale, exchange, purchase, leasing, or renting of any real estate" (M.G.L. c 112 § 87PP).

Salespersons

The statutory definition of a **real estate salesperson** is identical to that of a broker, except that a salesperson does not engage in completing the negotiation of agreements or transactions that result or are intended to result in the sale, exchange, purchase, rental, or lease of any real estate.

In Massachusetts, no salesperson may conduct or operate his own real estate business. All salespersons are required to affiliate with only one broker at a time, either as an employee or independent contractor, and the broker must approve any transaction entered into by the salesperson. Salespersons are not entitled to commissions from anyone other than the broker who holds his license. Brokers are responsible for regulatory violations by their salespersons.

Because of the relationship between brokers and salespersons in Massachusetts, we will refer only to brokers throughout this chapter. Readers should understand, however, that the term *broker* as used in this chapter includes salespersons as well.

THE LAW OF AGENCY

The law of agency defines the duties and responsibilities between the real estate agent and the consumer. This relationship between the principal (buyer or seller) and the agent results from a contract of employment. In such a contract, the principal (buyer or seller) gives the agent authority to act on the principal's behalf, and the agent consents to that authority.

When an agency relationship is created, the principal is called the *client*. Agents *work for* clients. The *customer* is the third party for whom some level of service is provided. Agents *work with* customers.

Creation of an Agency Relationship

An agency relationship may be created in one of three ways:

- By written agreement. The buyer or seller (principal) enters into a written or express agreement with an agent that states the terms and conditions of the relationship.
- By *oral agreement*. The buyer or seller (principal) enters into an oral or express agreement with an agent whereby both parties state the terms and conditions of the relationship verbally.
- By *implications*. The relationship is implied through the actions or behavior of both parties and does not depend upon the existence of a written or oral agreement.

Although Massachusetts does not require a listing agreement or a buyer agency agreement to be in writing, good business practices dictate the use of a signed listing/buyer contract.



Real estate brokers have a relationship of trust and confidence with the person they are representing. The broker/agent owes the principal the traditional *fiduciary responsibilities* of obedience, loyalty, disclosure, confidentiality, accountability, and reasonable care (the acronym OLDCAR).

- Obedience: An agent must follow all instructions of the principal, provided they are legal and ethical. For example, obeying instructions to not disclose a leaky roof to a buyer would be a violation of the Massachusetts Consumer Protections Statute (M.G.L.93A).
- Loyalty: The agent must act in the best interest of the principal as well as protect and advance the principal's interests before any others. For example, entering into an undisclosed dual agency relationship would be a violation of the duty of loyalty as well as a violation of license law. The only party that benefits from an undisclosed dual agency relationship is the agent.
- **Disclosure:** The principal has the right to know the same facts the agent knows. The agent must disclose in a timely manner any information which could affect the principal's interests in the transaction. Disclosure is required whether the facts are favorable or unfavorable to the principal.
- Confidentiality: The agent must keep facts, information, and discussions with the principal confidential. The agent has a duty to protect privileged information about the principal. This obligation of confidentiality survives the termination of the relationship.
- Accountability: The agent must protect all personal property received on the principal's behalf and keep accurate records of funds and documents. Commingling client funds with general account monies would be a violation of the accounting duty as well as Massachusetts license law.
- **Reasonable Care:** The agent must exercise competence and care in promoting the best interests of the principal while protecting the principal from foreseeable harm. The agent must be able to spot common problem areas and direct the principal to engage the assistance of an expert when needed or requested by the principal.



DISCLOSURE OF BROKERAGE RELATIONSHIP

Because buyers of real estate often do not understand the law of agency, and typically believe that the person who drives them around town showing them properties is "their" agent, a disclosure requirement exists.

This requirement (CMR 3.00 (13) (a)) mandates each broker or salesperson to provide to the consumer the Massachusetts Mandatory Licensee-Consumer Relationship Disclosure form in the following circumstances:

- At the first personal meeting
- When dealing with a prospective buyer or seller
- When discussing a specific property (see Figure 1.1.)

The disclosure form encourages consumers to read both sides of the form because the reverse side contains a detailed description of the different types of relationships available to them. It also states that consumers should not assume that a real estate agent works solely for them unless they have an agreement to do so.

The form was also designed to make the consumer aware of the different types of relationships available, to provide choices to the consumer, and to require real estate licensees to disclose their relationship to the prospective purchaser or seller of real estate at the first personal meeting.

The current Massachusetts Mandatory Licensee-Consumer Relationship Disclosure form defines the types of relationships that may exist between a licensee and a consumer and explains each on the back of the form. They are seller's agent, buyer's agent, facilitator (nonagent), designated seller's and buyer's agent, and disclosed dual agent.

Disclosure of a Company's Business Model

The front of the disclosure form describes the relationship the licensee has with others in her firm. This disclosure of a **company's business model** lets the consumer know whether everyone in the firm represents the consumer (traditional agency firm) or only the agent identified along with the principal broker represents the consumer (designated agency firm) (M.G.L. c. 112 § 87AAA3/4) (CMR 3.00 (13) b-e).

Traditional Agency Business Model

In a traditional agency firm, the agency relationship runs with the firm. When a licensee presents the disclosure form to the consumer, he is disclosing for everyone in the firm. Company sellers become the client of the firm, and all agents associated with the firm owe full fiduciary duties to the seller client. On the other hand, company buyers become the client of the firm and all agents associated with the firm represent the buyer client.

When a company buyer client becomes interested in purchasing an in-house listing, dual agency occurs. The company now represents both the buyer and seller equally and must be neutral as to any conflicting interest of the parties.

FIGURE 1.1

Massachusetts Mandatory Licensee-Consumer Relationship Disclosure

MASSACHUSETTS MANDATORY LICENSEE-CONSUMER RELATIONSHIP DISCLOSURE

This disclosure is provided to you, the consumer, by the real estate agent listed on this form. Make sure you read both sides of this form. The reverse side contains a more detailed description of the different types of relationships available to you. This is not a contract.

THE TIME WHEN THE LICENSEE MUST PROVIDE THIS NOTICE TO THE CONSUMER:

All real estate licensees must present this form to you at the first personal meeting with you to discuss a specific property. The licensee can represent you as the seller (Seller's Agent) or represent you as the buyer (Buyer's Agent) and also can assist you as a facilitator.

CONSUMER INFORMATION AND RESPONSIBILITY:

Whether you are the buyer or seller you can choose to have the advice, assistance and representation of your own agent who works for you. Do not assume that a real estate agent works solely for you unless you have an agreement for that relationship. With your consent, licensees from the same firm may represent a buyer and seller in the same transaction. These agents are referred to as dual agents.

Also a buyer and seller may be represented by agents in the same real estate firm as designated agents. The "designated seller or buyer agent" is your sole representative. However where *both* the seller and buyer provide written consent to have a designated agent represent them then the agent making such designation becomes a "dual agent" for the buyer and seller. All real estate agents must, by law, present properties honestly and accurately. They must also disclose known material defects in the real estate.

The duties of a real estate agent do not relieve the consumers of the responsibility to protect their own interests. If you need advice for legal, tax, insurance or land survey matters it is your responsibility to consult a professional in those areas. Real Estate agents do not have a duty to perform home, lead paint or insect inspections nor do they perform septic system, wetlands or environmental evaluations.

DEL ATIONSHID OF DEAL ESTATE LICENSEE WITH THE CONSUMED

	IXEE/XIIOIXOII	II OU KEAL LOIMIL I	TIOLITOLL TITLE	. THE CONCOMEN	•
(Check one)	Seller's agent	Buyer's agent	Facilitator		
IF A SELLER'S	OR BUYER'S AGENT	S CHECKED ABOVE COMPLE	ETE THE SECTION B	ELOW:	
Relationship with	h others affiliated with	(Print name of real estate fi	rm or business and lic	cense number)	
(Check one)	k one) The real estate agent listed below, the real estate firm or business listed above and all other affiliated agents have the same relationship with the consumer named herein (seller or buyer agency, not designated agency).				
Only the real estate agent listed below represents the consumer named in this form (designated seller o buyer agency). In this situation any firm or business listed above and other agents affiliated with the firm or busines do not represent you and may represent another party in your real estate transaction.					
By signing belo	ow I, the real estate li	censee, acknowledge that thi	s disclosure has bee	en provided timely to the	e consumer named
(Signature of rea	al estate agent)	(Printed name of real estate ac	nent)	(License Number/Type)	(Today's Date)
(O.g. latare c. 100	ar ostato ago,	() Into a name of roal colate a,	,	(2007)	(.out) o zaity
By signing below	v I, the consumer, ackr	nowledge that I have received a	nd read the information	on in this disclosure.	
(Signature of co	nsumer)	(Printed name of consumer)	(**	Today's Date)	
(Signature of co	nsumer)	(Printed name of consumer)	(Today's Date)	
Check here	e if the consumer declin	nes to sign this notice.			







FIGURE 1.1 (Continued)

Massachusetts Mandatory Licensee-Consumer Relationship Disclosure

TYPES OF AGENCY REPRESENTATION

SELLER'S AGENT

A seller can engage the services of a real estate agent to sell his property (called the listing agent) and the real estate agent is then the agent for the seller who becomes the agent's client. This means that the real estate agent represents the seller. The agent owes the seller undivided loyalty, reasonable care, disclosure, obedience to lawful instruction, confidentiality and accountability, provided, however, that the agent must disclose known material defects in the real estate. The agent must put the seller's interests first and negotiate for the best price and terms for their client, the seller. (The seller may authorize sub-agents to represent him/her in marketing its property to buyers, however the seller should be aware that wrongful action by the real estate agent or sub-agents may subject the seller to legal liability for those wrongful actions).

BUYER'S AGENT

A buyer can engage the services of a real estate agent to purchase property and the real estate agent is then the agent for the buyer who becomes the agent's client. This means that the real estate agent represents the buyer. The agent owes the buyer undivided loyalty, reasonable care, disclosure, obedience to lawful instruction, confidentiality and accountability, provided, however, that the agent must disclose known material defects in the real estate. The agent must put the buyer's interests first and negotiate for the best price and terms for their client, the buyer. (The buyer may also authorize sub-agents to represent him/her in purchasing property, however the buyer should be aware that wrongful action by the real estate agent or sub-agents may subject the buyer to legal liability for those wrongful actions).

(NON-AGENT) FACILITATOR

When a real estate agent works as a facilitator that agent assists the seller and buyer in reaching an agreement but does not represent either the seller or buyer in the transaction. The facilitator and the broker with whom the facilitator is affiliated owe the seller and buyer a duty to present each property honestly and accurately by disclosing known material defects about the property and owe a duty to account for funds. Unless otherwise agreed, the facilitator has no duty to keep information received from a seller or buyer confidential. The role of facilitator applies only to the seller and buyer in the particular property transaction involving the seller and buyer. Should the seller and buyer expressly agree a facilitator relationship can be changed to become an exclusive agency relationship with either the seller or the buyer.

DESIGNATED SELLER'S AND BUYER'S AGENT

A real estate agent can be designated by another real estate agent (the appointing or designating agent) to represent either the buyer or seller, provided the buyer or seller expressly agrees to such designation. The real estate agent once so designated is then the agent for either the buyer or seller who becomes their client. The designated agent owes the buyer or seller undivided loyalty, reasonable care, disclosure, obedience to lawful instruction, confidentiality and accountability, provided, however, that the agent must disclose known material defects in the real estate. The agent must put their client's interests first and negotiate for the best price and terms for their client. In situations where the appointing agent designates another agent to represent the seller and an agent to represent the buyer then the appointing agent becomes a dual agent. Consequently a dual agent cannot satisfy fully the duties of loyalty, full disclosure, obedience to lawful instructions which is required of an exclusive seller or buyer agent. The dual agent does not represent either the buyer or the seller solely only your designated agent represents your interests. The written consent for designated agency must contain the information provided for in the regulations of the Massachusetts Board of Registration of Real Estate Brokers and Salespeople (Board). A sample designated agency consent is available at the Board's website at www.mass.gov/dpl/re.

DUAL AGENT

A real estate agent may act as a dual agent representing both the seller and buyer in a transaction but only with the express and informed consent of both the seller and buyer. Written consent to dual agency must be obtained by the real estate agent prior to the execution of an offer to purchase a specific property. A dual agent shall be neutral with regard to any conflicting interest of the seller and buyer. Consequently a dual agent cannot satisfy fully the duties of loyalty, full disclosure, obedience to lawful instructions which is required of an exclusive seller or buyer agent. A dual agent does, however, still owe a duty of confidentiality of material information and accounting for funds. The written consent for dual agency must contain the information provided for in the regulations of the Massachusetts Board of Registration of Real Estate Brokers and Salespeople (Board). A sample dual agency consent is available at the Board's website at www.mass.gov/dpl/re.





To avoid confusion for the consumer, companies practicing traditional agency must instruct their licensees to check off the correct business model on the disclosure form. (See Figure 1.2.)

FIGURE 1.2

Traditional Disclosure Form

(Check one) X Seller's agent X Buyer's agent Facilitator IF A SELLER'S OR BUYER'S AGENT IS CHECKED ABOVE COMPLETE THE SECTION BELOW: Relationship with others affiliated with XYZ Real Estate Company License # B12345 (Print name of real estate firm or business and license number) (Check one) X The real estate agent listed below, the real estate firm or business listed above and all other affiliated agents have the same relationship with the consumer named herein (seller or buyer agency, not designated agency). Conly the real estate agent listed below represents the consumer named in this form (designated seller or buyer agency) in this situation any firm or business listed above and other agents affiliated with the firm or business do not represent you and may represent another party in your real estate transaction.

Designated Agency Business Model

In a designated agency firm, only the agent hired and her broker represent the client. A seller becomes the client of the designated seller's agent, the licensee listing the property, and only the designated seller's agent and the appointing broker take on full fiduciary duties in this relationship. On the other hand, a buyer becomes the client of the designated buyer's agent, the licensee listing the buyer, and only the designated buyer's agent and the appointing broker take on full representation in this relationship.

Should a buyer represented by a company agent wish to purchase a property listed by a different company agent, then the designated seller's agent will continue to act in a fiduciary capacity to the seller, and the designated buyer's agent will continue to act in a fiduciary capacity to the buyer. The appointing broker, however, will be a dual agent and neutral as to any conflicting interest of the parties.

Companies practicing designated agency must ensure that the licensees associated with their office check off the correct business model on the disclosure form. (See Figure 1.3.)

FIGURE 1.3

Designated Agency Disclosure Form

	RELATIONSHIP OF REAL ESTATE LICENSEE WITH THE CONSUMER			
(Check one)	X Seller's agent X Buyer's agent Facilitator			
IF A SELLER'S	OR BUYER'S AGENT IS CHECKED ABOVE COMPLETE THE SECTION BELOW:			
Relationship wit	h others affiliated with XYZ Real Estate Company License # B12345 (Print name of real estate firm or business and license number)			
(Check one)	The real estate agent listed below, the real estate firm or business listed above and all other affiliated agents have the same relationship with the consumer named herein (seller or buyer agency, not designated agency).			
	X Only the real estate agent listed below represents the consumer named in this form (designated seller of buyer agency). In this situation any firm or business tisted above and other agents affiliated with the firm or business do not represent you and may represent another party in your real estate transaction.			

Open House Disclosure Requirements

Massachusetts does not required that the disclosure form be given to a buyer, seller, or other licensees who attend an open house if the agent, by sign, poster, pamphlet, or other conspicuous means, discloses his agency or non-agency relationship with the seller. However, if a buyer chooses to make an offer on the property, the licensee is required to present the disclosure form prior to writing up the offer to purchase.

If, on the other hand, the consumer inquires about another property at the open house, the agent holding the open house must present the Massachusetts Mandatory Licensee-Consumer Relationship Disclosure form. The Open House disclosure sign only covers the Open House.

TYPES OF AGENCY RELATIONSHIPS

Seller's Agent

A seller who engages the services of a listing broker is the broker's client, and the broker is the **seller's agent**. The broker/agent owes the seller/principal the traditional *fiduciary responsibilities* of obedience, loyalty, disclosure, confidentiality, accountability, and reasonable care (the acronym OLDCAR) and must put the seller's lawful interests ahead of all others. The seller's agent must negotiate the best possible price and terms for the seller.

Buyer's Agent

A buyer who engages the services of a broker becomes the broker's client, and the broker is the **buyer's agent**. The broker/agent owes the buyer/principal the traditional fiduciary responsibilities of obedience, loyalty, disclosure, confidentiality, accountability, and reasonable care (the acronym OLDCAR) and must negotiate the best price and terms for the buyer, whose lawful interests must be put ahead of all others.

Single Agency

The single agency broker represents only one party in the transaction, either the buyer or the seller. Some companies practicing single agency choose to offer their services exclusively to buyers; therefore, all sellers of properties shown are customers. Other companies choose to offer their services exclusively to sellers, and all buyers they work with are customers. Still other single agency companies represent both buyers and sellers but never both in the same transaction. Should a buyer client wish to purchase an in-house listing, one of the clients (buyer or seller) is referred to another company.

Disclosed Dual Agent

A broker may represent both the buyer and the seller on the same property. To act as a dual agent, the broker must first obtain the informed written consent of both parties. Fiduciary duties are owed to both parties with a modification in the duties of obedience, loyalty, disclosure, and reasonable care. While the disclosed **dual agent** is obliged to treat both parties equally and honestly, neither can expect the broker's undivided loyalty, full disclosure, or obedience to lawful instructions that is required of an exclusive seller or buyer agent. A dual agent must still account for funds received on behalf of a client and must maintain the confidentiality of material information received from either client.

Agents associated with a traditional brokerage firm offering dual agency must disclose, using the disclosure form currently mandated, that when hired by the consumer all the agents associated with the brokerage firm will represent the consumer. The agent must obtain **written consent to dual agency** using either the Massachusetts Consent to Dual Agency form (see Figure 1.4) or may include the information, as required in the regulation, in either the seller or buyer agency agreement. In addition, the agents must provide a **written notice**, such as Notice of Dual Agency (see Figure 1.5) to their respective client(s) when dual agency is identified.

The process for dual agency is: Disclosure→ Consent→ Notice

Undisclosed dual agency is illegal, and a broker who acts on behalf of more than one party to a transaction without disclosure may lose her license. (M.G.L. c.112 sec.87AAA)

FIGURE 1.4

Massachusetts Consent to Dual Agency



MASSACHUSETTS CONSENT TO DUAL AGENCY

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.

Buyers and sellers should understand that material information received from either client that is confidential may not be disclosed by a dual agent, except: (1) if disclosure is expressly authorized; (2) if such disclosure is required by law; (3) if such disclosure is intended to prevent illegal conduct; or (4) if such disclosure is necessary to prosecute a claim against a person represented or to defend a claim against the broker or salesperson. This duty of confidentiality shall continue after termination of the brokerage relationship.

BUYER/SE	LLER ACKNOWLEDGMENT	
I acknowledge and agree that	noth the buyer and seller as a dual	{{insert name of agent. I hereby consent to
Signature of Buyer Seller (check one)	Print Name	Today's Date
Signature of Buyer Seller (check one)	Print Name	Today's Date
BROKER/SALE	SPERSON ACKNOWLEDGMENT	
I acknowledge and agree to represent the below signifies that I understand the dution the consumer that I am a dual agent and shall be neutral with regard to any confliction	es and responsibilities of that relate therefore will assist the buyer and	tionship, and explained to
Signature of Broker/Salesperson	License Number	Today's Date



MASSACHUSETTS ASSOCIATION OF REALTORS® 03.25.05/3483



Form No.. 710

Notice of Dual Agency



NOTICE OF DUAL AGENCY

[For use when previous consent was obtained from seller in listing agreement and from buyer in buyer representation agreement]

Broker previously gave notice of the potential for a dual agency relationship to occur in connection with your real estate transaction. That disclosure was contained either in the Exclusive Listing Agreement (for Seller) or in the Exclusive Buyer Representation Agreement (for Buyer). You previously gave your consent to that relationship.

Broker now gives notice that a dual agency has occ Buyer and Seller in connection with the property d		icensees represent both
Buyer and Serier in connection with the property of	(the "Property").	
A dual agent is authorized to assist the buyer and conflicting interest of the buyer and seller. Consect the duties of loyalty, full disclosure, reasonable carduty of confidentiality of material information and Dated:	seller in a transaction, but shall be nec quently, a dual agent will not have the re and obedience to lawful instructions	e ability to satisfy fully
Dated:		
BROKER Or Authroized Representative:		
Signature	Print Name	Date
Ack	nowledgment [optional]	
I acknowledge receipt of this Notice of Dual Agend	cy.	
SELLER BUYER [check one]		
Signature	Print Name	Date
SELLER BUYER [check one]		
Signature	Print Name	Date

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Form No. 712

Subagent

A **subagent** is the agent of an agent. If the original agency agreement permits it, an agent may delegate some of his authority or responsibility to a third party. A subagency is created when one broker, usually the seller's agent, appoints another broker (with the seller's permission) to help perform client-based functions on the principal's behalf. The subagent is also an agent of the principal and therefore can create vicarious liability for the seller. Massachusetts requires agents to obtain written permission from their client (seller or buyer) prior to offering subagency. The written notice must state that "vicarious liability is the potential for a seller or buyer to be held liable for a misrepresentation of an act or omission of the subagent" and that in signing the notice, the seller or buyer authorizes the agent to offer subagency.

Facilitator/Nonagent

A facilitator is also called a nonagent. A facilitator is a middleman between a buyer and seller (or landlord and tenant) who assists both parties with the transaction without representing either party's interests. A facilitator has the duty to present all properties honestly and accurately; disclose known material defects, as required under M.G.L. c. 93A; provide reasonable skill and care; and account for funds. The facilitator does not have a duty of confidentiality with regard to any information received from the seller or purchaser. A facilitator relationship can change at any time to an exclusive relationship by agreement between the agent and the consumer. Should either the buyers or the sellers choose to change their relationship to that of clients, then the agent must present a new disclosure form indicating the change in relationship (see Chapter 2).

Designated Buyer's or Seller's Agent

A designated agent is a licensee in a brokerage firm who is appointed by the broker or another real estate agent (the designating agent) to represent a seller or buyer. One licensee within the same firm is appointed to represent the seller, and one licensee within the same firm is appointed to represent the buyer. The licensees are then the agents of the persons for whom they were designated.

The agent designated to represent the buyer will owe the buyer/principal the traditional fiduciary responsibilities of obedience, loyalty, disclosure, confidentiality, accountability, and reasonable care (the acronym OLDCAR) and must negotiate the best price and terms for the buyer, whose lawful interests must be put ahead of all others.

The agent designated to represent the seller will owe the seller/principal the traditional fiduciary responsibilities of obedience, loyalty, disclosure, confidentiality, accountability, and reasonable care (OLDCAR) and must negotiate the best price and terms for the seller, whose lawful interests must be put ahead of all others.

The broker or appointing agent becomes a dual agent and does not represent either the buyer or seller solely and, therefore, must remain neutral in regards to any conflicting interests of the buyer and seller. All other licensees associated with the firm will not represent either buyer or seller unless so appointed.

Agents associated with a brokerage firm that offers designated agency must disclose to the consumer, using the disclosure form currently mandated, that the brokerage practices designated agency. The agent must obtain written consent to designated agency using either the Massachusetts Consent to Designated Agency form (see Figure 1.6) or may include the information, as required in the regulation, in either the seller or buyer agency agreement. In addition, the agent(s) must provide a *written notice* to their respective client(s) when designated agency is identified (see Figure 1.7).

The process for Designated Agency is: Disclosure→ Consent→ Notice.

Companies that practice designated agency must be sure to keep information of a confidential nature in a secure place that is not accessible by all agents. For example, a listing folder that is kept in a file cabinet that is available for all agents to access should contain only property specific information, such as a copy of the MLS listing sheet, plot plan, seller's statement on property condition, deed, tax card, et cetera. Additional information, such as the listing agreement, financial data, offers received, or anything pertinent to the seller, should be kept in a secure, locked file accessible only by the broker and listing agent.

Discussions regarding listings or buyers at office meetings must be about the property only and not about the people.

Adding or substituting a designated seller or buyers agent would require permission in writing from the buyer or seller client.

When covering for another agent who is on vacation, written permission should be obtained from the client (buyer or seller) for the covering agent to become a designated agent of that client.

If an office uses mentors, then the mentor should also be a designated agent of the client.

FIGURE 1.6

Massachusetts Consent to Designated Agency



MASSACHUSETTS CONSENT TO DESIGNATED AGENCY

A designated agent is a real estate licensee who has been appointed by a broker or salesperson to represent a buyer as a "designated buyer's agent" or to represent a seller as a "designated seller's agent." When a buyer or seller consents to designated agency only that designated agent represents the buyer or seller. Any other agents affiliated with the broker may represent another party to the transaction and by consenting to designated agency the buyer or seller permits those agents to represent another party. Individuals who are designated agents owe fiduciary duties to their respective clients.

If you are a seller you are advised that:

- a) 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;
- b) 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; and
- c) 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.

Conversely, if you are a buyer you are advised that:

- a) the designated buyer's agent will represent the buyer and will owe the buyer the duties of loyalty, full disclosure, confidentiality, to account for funds, reasonable care and obedience to lawful instruction;
- b) 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; andc) if designated agents affiliated with the same broker represent the seller and buyer in a transaction, the
- c) 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.

BUYER/SELLER ACKNOWLEDGMENT

I acknowledge and agree that authorized to represent me as a designated agent. I h	nereby consent to designate	[insert name of licensee] is ted agency.	
Signature of Buyer Seller (check one)	Print Name	Date	
Signature of Buyer Seller (check one) BROKER/SALESPERS	Print Name SON ACKNOWLEDGMEN	Date	
I acknowledge and agree to represent the above named consumer as a designated agent and my signature below signifies that I understand the duties and responsibilities of that relationship, and explained to the consumer that I am their agent, together with any other licensees expressly appointed as their designated agent; and that the appointing broker/salesperson may become a "dual agent;" and that no one else affiliated with my firm represents them.			
Signature of Broker/Saleperson	License Number	Date	

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Form No. 711

Notice of Designated Agency



NOTICE OF DESIGNATED AGENCY

[For use when previous consent was obtained from seller in listing agreement and from buyer in buyer representation agreement]

Broker previously gave notice of the potential for a seller in connection with your real estate transaction. has been appointed by a broker or salesman to repranother licensee associated with the same broker transaction. That disclosure was contained in the Exception Description of the Exception of the Exceptio	It was disclosed that a designated a resent a buyer or seller and, with is authorized to represent the otherwise Listing Agreement (for Seller now gives notice that a designate	agent is a licensee who consent of that client, her party in the same er) or in the Exclusive d agency has occurred
(the "Property"). More specifically,	[name o	f affiliated licensee(s)]
has/have been appointed as a Designated Seller's Age	nt(s) and that	
[name of affiliated licensee(s)] has/have been appoint BROKER Or Authorized Representative:	ed as a Designated Buyer's Agent(s).
Signature	Print Name	Date
	wledgment optional] gency.	
SELLER BUYER [check one]		\wedge
Signature	Print Name	Date
SELLER BUYER [check one]		
DEPER De l'Extrement		
Signature	Print Name	Date
MACCEODMS" © 2005 MASSACHUSETTS	ASSOCIATION OF REALTORS®	(E)

03.25.05/348372



AGENCY TERMINATION

The agency relationship may be terminated at will by either the principal or the agent. Neither party has to have a reason to terminate the agency; however, certain duties may continue after termination, such as confidentiality and accounting.

The relationship may also be terminated for any of the following reasons:

- Expiration of agreement
- Mutual agreement to terminate or rescission
- Completion of performance under agreement
- Death or insanity of buyer's/seller's agent or client principal
- Impossibility of performance (e.g., destruction of property)
- Incapacity (i.e., mentally incapable) or bankruptcy of either party
- Breach by one of the parties (in which case the breaching party might be liable for damages)

The broker cannot claim expenses from the principal unless this was specifically provided for in the hiring contract. If, however, the agency contract provides that the relationship is to continue for a specific period of time, such as an exclusive-right-to-sell listing for 90 days, early termination exposes the seller to a potential lawsuit for expenses and damages by the broker. If the broker has done something wrong that gives the seller good cause to terminate the contract, or if the seller removes the property from the market, then the likelihood that the broker will recover compensation for expenses incurred or a commission if the property is sold is considerably lessened.

Compensation

A real estate broker works under a contractual agreement with his employer. In Massachusetts, this agreement may be created in one of three ways:

- Orally
- In writing
- By implication, where the broker and the seller behave as if they have an agreement

A written agreement between the broker and the principal is not necessary to create an enforceable brokerage contract. The *statute of frauds* requirement of a written agreement applies to conveyances of property, but it does not apply to employment agreements such as listing contracts. Note, however, that an *exclusive-right-to-sell listing agreement* must be in writing to be enforceable in court. Brokers and salespersons are advised to always execute a written contract.

IN PRACTICE Students should clearly understand that several contracts are typically involved in a real estate transaction: the *listing agreement*, which is a service contract between the seller and the broker; a *buyer representation agreement*, which is a service contract between the buyer and the broker; the *Offer to Purchase*, which is the initial contract between the seller and the buyer; and the *Purchase and Sales Agreement*, which is the final contract between the seller and the buyer. Both the Offer to Purchase and the Purchase and Sales Agreement are required to be in writing, although an exclusive-right-to-represent agreement must also be written to be enforceable in court.

The essence of a listing contract between a seller and a broker is that the real estate professional will use her knowledge and skill to find a buyer who is ready, willing, and able to purchase the property under the terms and conditions stated in the contract.

The broker must be careful to properly list the property (see Chapter 2) and find out all the seller's terms and conditions. Such conditions include (1) the asking price for the property, (2) any special financial considerations that may be involved, and (3) what personal property will be conveyed along with the house.

After a broker has done the job he was hired to do, he should be entitled to compensation. It sometimes bothers an owner when a broker rushes back to the office immediately after being hired, calls a prospective buyer whom he knows is looking for the type of property involved, and obtains a signed contract of sale with no apparent effort. Of course, the same owner is likely to squawk if the broker seems to be taking too long to find a buyer. However, the broker is paid for the *result*, whether it takes hours, days, weeks, or months to produce a ready, willing, and able buyer.

In the past, the general rule was that as soon as a broker produced a ready, willing, and able buyer and a binding contract was signed, the commission was earned, whether or not the sale ever went to closing. Owners always have been able to protect themselves by including in the listing or the sales contract a provision that no commission is payable until the sale actually closes. A seller may also reserve the right, in the listing agreement, to reject any purchaser or to condition the commission on producing a buyer who meets certain specified requirements.

Tristram's Landing v. Wait

The Massachusetts Supreme Court in *Tristram's Landing v. Wait*, 367 Mass. 622, 327 N.E.2d 727 (1975) held that a broker is entitled to a commission only when the following three conditions are met:

- The broker produces a purchaser ready, willing, and able to buy on the terms fixed by the owner.
- The purchaser enters into a binding contract with the owner to purchase the property.
- The purchaser completes the transaction by closing the title in accordance with the provisions of the contract.

Under a brokerage agreement, a real estate broker is entitled to a commission from the seller only if these three requirements are met. This is called the Tristram's Landing rule.

If the contract is not consummated because of the buyer's financial inability to perform, or because of any other buyer default, the broker has no right to a commission from the seller. However, a seller and a broker could agree in the written listing or sales contract on the extent to which the forfeited earnest money deposit might be shared in the event of a buyer's default.

On the other hand, a narrow exception to the Tristram's Landing rule exists: if the failure to complete the contract is the result of the seller's wrongful act or interference. In this situation, the broker is entitled to receive a commission based on the contract presented.

However, for the broker to receive commission, the first two conditions of the Tristram's Landing rule must be met: (1) production of a purchaser willing and able to buy on terms fixed by the owner and (2) formation of a binding contract for purchase. The seller's wrongful act or interference must have upset the completion of a sale—the third Tristram's Landing condition—that was called for by a binding purchase and sale agreement entered into between a broker's client and the seller. Conduct is considered wrongful if it is in itself a violation of an existing legal duty or obligation. The listing contract might also include terms that a commission must be paid if the broker presents a customer who is ready, willing, and able and the seller refuses to sign a contract.

Even if the broker succeeds in finding a ready, willing, and able buyer who meets all the terms and conditions of sale described by the seller in the listing contract, she still has not earned a commission unless the seller signs a contract to sell. Should the owner refuse to sign a contract of sale, and as long as there is no bad faith in the refusal, no commission is earned (of course, the seller may be liable to the broker for damages). The practical reality of this rule is to get the seller's signature.

A broker can earn a commission, then, if the sale is not consummated because of the seller's default or the seller's decision not to complete the transaction. However, remember that the seller must enter into a contract to sell and then either refuse to comply or be dealing in bad faith.

Procuring Cause

In some cases, a broker may claim a commission by showing that he was the **procuring cause** of a sale even though the broker did not actually complete the terms of the employment agreement. Generally, the mere introduction of a potential buyer to a property does not entitle the broker to a commission. The broker needs to demonstrate that he was the efficient, effective, or final cause or force bringing about the actual sale. This requires that the agent has set into operation a continuing and uninterrupted chain of events resulting in the agreed objective of the parties: the sale. Introducing a seller to a prospective buyer or interesting a customer in a property that she later buys may satisfy that test. The broker's case is particularly strong if the seller impedes or precludes the broker from negotiations or involvement in the sale.

■ FOR EXAMPLE A broker is hired with an open listing for an indefinite period of time and a 6% commission. On Monday, the broker shows the owner's house to a buyer. On Tuesday, the owner fires the broker. On Wednesday, the owner calls the buyer and negotiates the sale of the property.

Technically, the broker has not done her job. She did not present the owner with an offer from a ready, willing, and able buyer. However, the broker was the *procuring cause* of the sale; she was responsible for the owner and buyer getting together and for the property being sold. The broker could sue for a commission and would likely win.

Normally, the courts examine the broker's continued efforts to consummate the sale as well as the good faith of both the buyer and the seller. A broker may often have a provision in the listing contract that says that he is entitled to a commission if the property is sold to a customer of the broker within a specified period of time after the listing ends. This is called a protection clause. To protect all parties, owners should be provided with notices or lists of potential buyers to whom the property has been shown. The most difficult problem occurs when a buyer inquires about the property because of a sign that the broker has placed on it and then buys the property directly from the owner.

Massachusetts courts will not generally allow a broker to collect a commission if the transaction that results is different from the original transaction. *How* it is different and *why* it is different are important considerations in determining the broker's entitlement to a commission. The court will consider whether or not some new force instigated the sale after the broker ended his efforts. The court examines each case on its own facts.

Multiple Commissions

When one broker is the procuring cause and another broker succeeds in getting the seller and the buyer to sign the sales contract, the owner could end up having to pay more than one commission. While possibly burdensome for sellers, this ensures that both brokers are compensated for doing their jobs. For example, if the owner changes real estate agents after the expiration of a listing agreement and the new agent sells the property to a buyer who originally contacted the first agent, the owner may owe commissions to both agents. The original broker's right to a commission is clear because she introduced the buyer to the property and thus was the procuring cause. The second broker is entitled to a commission because he did exactly what was specified. There is no obligation to split a single commission. This is an excellent argument in favor of the exclusive-right-to-sell listing contract that will avoid this problem. In Massachusetts, if the owner has exclusively engaged a new agent after the expiration of a listing agreement, the owner will not be liable for commissions to both current and former agents. This is discussed further in Chapter 2.

Brokers or salespersons who are REALTORS® resolve these disputes by the rules of the REALTORS® association, so there are no multiple commission situations.

Attachment

When a broker is entitled to a commission and the seller refuses to pay, a writ of attachment may be filed against the seller's property. An *attachment* is a legal writ or proceeding by which property is made subject to a lien pending the outcome of a suit. Note, however, that an attachment is not itself a lien but rather a court injunction preventing a seller's conveyance of the property while litigation is pending. By means of an attachment, the sale of the real estate is prohibited until the suit has been heard in court. If the owner attempts to close the sale, she will be obligated either to settle the suit by paying the commission or to somehow guarantee that the amount can be paid. The owner will not be able to transfer or sell the property until it is free of the attachment. Often, an owner cannot afford to wait for the suit to be heard and is forced to pay the commission.

When an attachment is sought, the courts may demand that notice be given to the owner and that a hearing be held prior to the issuance of the writ of attachment. This process ensures that an owner will have an opportunity to demonstrate why the attachment is improper or to make other arrangements for guaranteeing the potential financial obligation.

■ CONSUMER PROTECTION LAW (MASSACHUSETTS GENERAL LAW, CHAPTER 93A)

In addition to the obligations placed on the broker by the fiduciary relationship, Massachusetts brokers must comply with the provisions of the Massachusetts Consumer Protection Act (MCPA; M.G.L. c. 93A). The purpose of the MCPA is to level the playing field between consumers and businesses in all areas, not just real estate. The MCPA outlaws unfair and deceptive acts or practices in the conduct of any trade or commerce, including advertising, offering for sale, rent, or lease; or selling, renting, leasing, or distributing any service or property whether real or personal, tangible or intangible.

The major significance of the act to the real estate broker is that it increases the broker's responsibility for her statements and omissions. Under common law, a broker could be held liable only for *intentional* misstatements she made to the buyer. If the broker received inaccurate information from the seller and passed it on in good faith to the buyer, the broker generally could not be found guilty of misrepresentation. But under the MCPA, the broker can be held liable for *any* untrue claim or representation made to the buyer, whether directly, indirectly, or by implication, as well as for omissions and nonstatements. *Fraudulent intent need not be proven for such a claim to be considered illegal.* In practice, this means that if a seller gives a broker false information and the broker then presents this information as fact, the broker can be held liable for misrepresentation.

Because the MCPA is designed to provide equal bargaining power, facts that a broker *should* know or have reason to know need to be disclosed if they would tend to caution a buyer against entering into a contract. The fact that the buyer never asked a question about something important relating to the property does not relieve the broker of the responsibility to disclose relevant information.

In addition to this broad statement of liability, the MCPA lists specific actions considered to be *misrepresentations*. These include, but are not limited to,

- making false claims about a product's construction, durability, safety, or strength;
- making false claims concerning the ease with which a product can be repaired or maintained;
- making false claims about financing terms or availability;
- advertising that something has a quality, value, or usability that it does not have:
- substituting different goods for those advertised (i.e., bait and switch); and
- offering guarantees without disclosing the nature and extent of the guarantees.

The MCPA does not define *unfair or deceptive acts or practices*, but rather the act leaves it up to the courts to look at the circumstances of each case. In general, the courts have found that a behavior is considered deceptive if it could reasonably be found to have caused a person to act differently from the way he otherwise would have acted.

The MCPA makes no exception for puffing in advertising or otherwise. *Puffing* is an exaggerated or superlative comment or opinion not made as a representation of fact. An example of puffing would be to say, "This is the prettiest house in the neighborhood." Under common law, puffing is permitted; fraudulent misrepresentation of fact is not. But the MCPA makes no distinction between claims presented as fact and those presented as opinion.

The broker may be held liable for a misstatement in an advertisement even if she later informs the prospective buyer that the statement was incorrect.

IN PRACTICE All representations that have the capacity to deceive buyers or influence them in any way have been declared illegal, including those that were previously considered to be mere sales rhetoric.

Common law originated from the unwritten laws of England. It is developed through court decisions and case law rather than through legislative mandates or statutory law.

Affirmative Disclosure

Equally important under the MCPA is the broker's duty to disclose all facts relating to the sale. In the past, sellers and brokers were required under common law to disclose only defects they knew about that could not be discovered in a normal inspection of the premises. Now, however, it is illegal to fail to disclose to a buyer or prospective buyer any fact that might influence the buyer or prospective buyer not to enter into the transaction, whether or not the buyer or prospective buyer requests the information.

Whether the buyer actually would have refused to complete the transaction if certain facts were disclosed appears to be immaterial—the possibility alone of such a refusal seems to constitute a violation of the law on the broker's part. A broker may also be held responsible even if the buyer agrees to purchase the property under conditions other than those originally agreed on (e.g., a lower price).

However, with stigmatized property issues, absent a specific inquiry about an incident by the prospective buyer, there is no duty for the broker to either investigate or affirmatively disclose murders, suicides, allegations of ghosts, or other potential stigmas. The broker must answer to the best of his knowledge any question posed by the prospective buyer, with the exception of questions regarding HIV, AIDS, or any other disease that reasonable medical evidence suggests to be highly unlikely to be transmitted through occupying a dwelling. (M.G.L. c. 93 § 114)

Home Inspection Law

Under the Home Inspection Law of Massachusetts (M.G.L. c. 112 § 87YY1/2), real estate agents are prohibited from making direct referrals. Upon request, they may provide assistance to a buyer in accessing the information on licensed home inspectors, including providing a complete list of home inspectors prepared by the Consumer Affairs Board. A real estate agent acting as a buyer's agent with a written contractual agreement between the agent and buyer may make direct referrals. All real estate agents are required to provide to the consumer a copy of Home Inspectors: Facts For Consumers About Home Inspections (see Figure 1.8). Homeowners who sell their own property, without the services of a broker, are also required to provide the brochure to potential buyers.

IN PRACTICE Both the Home Inspector's Board and the Real Estate Board consider the displaying of home inspector brochures a recommendation. Therefore, it is highly advisable that offices working with buyers as both customers and clients not display brochures in conference rooms or other highly visible areas.

FIGURE 1.8

Facts For Consumers About Home Inspections





Commonwealth of Massachusetts ~ Office of Consumer Affairs ~ Division of Professional Licensure

About Home Inspections

A standard home inspection is a visual examination of the physical structure and major interior systems of a residential building consisting of one to four dwelling units. An inspection can be likened to a physical exam by a physician; however, it should be clearly understood that a home inspection is not to be confused with an appraisal, a building code inspection, a guarantee of any kind, and/or an insurance policy on the condition of the property.

During an inspection, the inspector will review the readily accessible exposed portions of the structure of the home, including the roof, the attic, walls, ceilings, floors, windows, doors, basement, and foundation as well as the heating/air conditioning systems, interior plumbing and electrical systems for potential problems.

Home inspections are not intended to point out every small problem or any invisible or latent defect in a home. Most minor or cosmetic flaws, for example, should be apparent to the buyer without the aid of a professional.

Timing of the Home Inspection

A home inspector is typically hired by a potential homebuyer right after the offer to purchase contract is signed, prior to executing the final purchase and sales agreement. However, before the potential buyer signs the offer to purchase contract, he/she should be sure that there is an inspection clause in the contract making the purchase obligation contingent upon the findings of a professional home inspection. This clause should specify the terms to which both the buyer and seller are obligated.

Selecting a Home Inspector

Good referral sources for home inspection services are friends, neighbors, or business acquaintances who have been satisfied with a home inspector. In addition, lawyers and mortgage brokers may also recommend a home inspector. The names of local inspectors can be found by searching the Division of Professional Licensure website at www.state.ma.us/reg/boards/hi, or in the Yellow Pages where many advertise under "Building Inspection Service" or "Home Inspection Service."





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Untitled

FIGURE 1.8 (Continued)

Facts For Consumers About Home Inspections (continued)



Real estate brokers and salesmen may not directly recommend a specific home inspection company or home inspector unless representing the buyer as a buyer's broker. Brokers, however, may provide assistance to buyers in accessing information on licensed home inspectors.

A current home owner may also want to get a home inspection to identify any problems, especially if the owner plans to sell the home in the near future.

Following are additional tips when searching for a home inspector:

- As of May 2001, home inspectors are required to be licensed in the Commonwealth of Massachusetts. A home inspector's license should be verified prior to hiring. Consumers should not be confused by home inspector "certifications" offered by, or sold by home inspection trade societies or companies, obtained via home study courses, or provided by home inspection companies that certify their own home inspectors. Since the home inspection business is unregulated in most states, certifications are available to anyone. A home inspector's license can be verified with the Board of Registration of Home Inspectors at its website or by calling the Board at (617) 727-4459.
- The home inspection company that is retained should welcome the potential buyer's
 presence at the home inspection. The home inspector should be willing to address all of
 the buyer's questions and provide a full verbal and written report.
- Those hiring an inspector should expect an open door policy from the home inspection company to be able to ask questions about the content of the home inspection report in the future.

During the Home Inspection

While not necessary, it is recommended that the buyer be present for the inspection. This allows the buyer to observe the inspector, ask questions directly, and obtain a better understanding of the condition of the home, how its systems work, and how to maintain it. The written report may be easier to understand if the buyer was present during the inspection.

It is important that safe access and sufficient lighting is provided so that the inspector can inspect the property.

Inspectors must provide a written evaluation report based on the standards of compliance in accordance with Massachusetts General Laws Chapter 146.

At the conclusion of the home inspection, the buyer should be well informed of the condition of the home. It should be known if there are visible, apparent problems, if repairs need to be made, or whether or not there are any risks of concealed damage, and whether further investigation is recommended and/or required.





FIGURE 1.8 (Continued)

Facts For Consumers About Home Inspections (continued)



Other Inspections and Tests to Consider

It is strongly recommended that potential buyers consider having the following inspections and/or tests performed prior to signing the final purchase agreement: lead paint, pests, wood destroying insects, including termites, and air quality including radon gas. While some home inspectors are qualified to offer these services, these inspections and tests are not part of the basic home inspection and should be contracted through qualified licensed professionals in those fields. It should also be noted that the seller is required, under 105 CMR 651.010, to provide the potential buyer with an affidavit disclosing the presence of Urea Formaldehyde Insulation if it exists. In addition, the seller under 105 CMR 460.750(A) shall disclose if the property has been inspected for lead paint and provide copies of any lead paint reports concerning the residential permises or any dwelling unit therein.

Filing a Complaint

While most licensees conduct themselves as true professionals, the Division of Professional Licensure will take action against those licensees who fail to maintain acceptable standards of competence and integrity. In some cases, complaints are made by dissatisfied consumers, however, dissatisfaction alone is not proof of incompetence or sufficient grounds for disciplinary action.

If you have a serious complaint about a home inspector, call or write the Division's Office of Investigations and ask for a complaint form. The Division's Office of Investigations is located at 239 Causeway Street, Boston, MA 02114. The phone number is 617-727-7406. A copy of the complaint form can also be downloaded from the Division's website (www.state.ma.us/reg/).





Persons Affected by the Law

The MCPA (93A) applies to all listing, selling, and cooperating brokers and all salespersons affiliated with these brokers as either employees or independent contractors. Sellers, developers, and builders also come under the act's authority. However, the law does not apply to owners who sell their homes privately. The Massachusetts Supreme Court has reasoned that because buyers and private sellers enjoy equal rights under the common law, extending the act's protection to buyers involved in private sales would give them an unnecessary advantage.

The broker is also a vendor of services, and the degree to which she advertises or makes claims about the speed, quality, or diligence of these services brings the broker/owner (and broker/seller) relationship under the MCPA. The substantial impact on the landlord/tenant relationship under this act is discussed in Chapter 12.

Enforcement

The attorney general of Massachusetts has the power to issue rules and regulations for interpreting and enforcing the act. Although the attorney general may intervene whenever a violation occurs, usually this only happens when a violation involves a large number of consumers. Individuals who have sustained losses as a result of unfair or deceptive practices may bring a lawsuit themselves:

- 30-Day Demand Letter. A consumer must first give the alleged violator 30 days written notice of the claim, describing the unfair practice and the resulting loss so that the accused can investigate the claim and offer to settle it out of court.
- Damages. If the consumer rejects the offer and a court finds that it was indeed reasonable, the consumer may recover no more than the amount of the offer.

If the court does not consider the offer reasonable, the consumer may be awarded the amount of actual damages or \$25, whichever is greater. The court may double or triple the amount of damages if (1) the unfair or deceptive act or practice was a willful and knowing violation, or (2) the accused refuses in bad faith to make a reasonable offer to settle. In addition, the court can offer equitable relief, including an injunction to prevent the defendant from engaging in future unfair or deceptive acts, or willfully and knowingly violating the statute.

Multiple damages will not be awarded if the accused did not violate the act willfully, although the consumer will still receive attorney's fees.

Recommendations

If the broker knows of a problem or discovers one during an inspection, he must disclose that information to the buyer or prospective buyer, identify its source, and state whether or not he has verified it. When the broker makes any sort of claim or representation, he should disclose both the source and whether or not he has made an attempt to personally verify that information. The broker cannot be held responsible for the truthfulness of the claims if he has not tried to verify them. However, if the broker has tried to verify the claims or received information that could be

used for verification, he must say so. The broker is not required to conduct any investigation of property that is beyond his level of competence.

Cooperating brokers also must identify the source of their representations and disclose their attempts at verification and any facts that might cause the prospective buyer not to complete the transaction. Cooperating brokers should make independent investigations of property they are involved with whenever possible.

The MCPA overrides the common-law agency duty of confidentiality in some circumstances. A broker must disclose *facts about the property* to the buyer even if the seller revealed them to the broker in confidence. If the seller has stated that the roof leaks, for example, the broker must pass on this information to the prospective buyer. But the broker need not reveal any personal information about the seller, such as the seller's willingness to accept an offer that is less than the listing price.

For a buyer to recover damages for the nondisclosure of a material fact, the buyer must prove that (1) the seller or broker knew of the material defect, (2) the seller or broker failed to disclose the problem, and (3) she would not have purchased the property if she had known of the defect.

To help the broker prove that he did not mislead the buyer, a special clause has been added to some purchase-and-sale agreements issued by real estate boards. The clause requires buyers to list the representations the broker made that they relied on when deciding to make the purchase.

■ FOR EXAMPLE

- 1. The seller knows that 20 acres of his 100-acre property have been used as a dumping ground for hazardous and toxic materials since 1974. When he sells to the buyer, who plans to build a health spa and retreat center on the land, both the seller and his broker neglect to mention the contamination. The seller will be liable to the buyer. The broker will be liable as well.
- 2. In a 1994 case, a broker showed purchasers a house in their price range. They were new to the city and asked about the safety of the neighborhood. The broker said that it was okay. Three days after they moved in, the purchasers' new home was burglarized, and they sued the broker for misrepresentation. The court did not find the broker liable because he had no knowledge—and had no reason to know—of any facts suggesting the neighborhood was unsafe (*Grynowicki v. Silvia* (1994), 1994 Mass. App. Div. 173).

Other important cases are *Urman v. South Boston Savings Bank* 424 Mass. 165 (1997) and *Underwood v. Risman* 414 Mass. 96 (1993), which reaffirmed that there is no liability under Chapter 93A for nondisclosure of a defect unless the seller or broker has actual knowledge of the defect. In a more recent case, *Quinlan v. Clasby* (2008) 71 Mass Appeals Court 97 concluded that a real estate broker's failure to verify zoning status before putting it on the market does not constitute an unfair or deceptive practice under M.G.L. c. 93A. However, in the case of *Dewolfe v. Hingham Center Limited* 464 Mass. 795 (80 Mass. App. Ct. 765 - SJC 1168 April 2013) where a real estate broker unintentionally misrepresented the zoning classification of a property and the buyer relying on the information was unable to use

the property as he intended, the broker was found to be held liable under M.G.L. c. 93A. The court also held that the standard exculpatory clause on representations and warranties found in the Greater Boston Real Estate Board's standard Purchase and Sales Agreement did not protect the broker from the lawsuit.

Sex Offender Law

Any people over the age of 18 may request sex offender information from their local police department or by writing to the Sex Offender Registry Board, provided they are seeking it for their own protection; that of a child under the age of 18; or another person for whom the person requesting the information has responsibility, care, or custody. Information is available only if the offender has a duty to register and has been classified by the Board as a Level 2 or a Level 3 offender:

- A low-risk offender is classified as Level 1.
- A moderate-risk offender is classified as Level 2.
- A high-risk offender is classified as Level 3.

When information is provided to a person requesting such information, the law prohibits that person from using the information for the purpose of harassment or discrimination.

See M.G.L. c. 6 § 178C-178P: Sex Offender Registry Law; M.G.L. c. 123A: Sexually Dangerous Persons; and M.G.L. c. 265 § 13B-13B-3/4: Jessica's Law, which provides mandatory sentences for certain sexual assault crimes against children.

IN PRACTICE If a seller or listing agent has knowledge of a sex offender living in the neighborhood, then disclosure of facts is the best approach, giving the buyer the opportunity to investigate and decide. A buyer's agent should limit her responsibility to investigate such matters by including language in her buyer representation agreement. Should buyers desire the information, then the buyers' agent should direct them to either the Sex Offender Registry Board website or the local police department.

Massachusetts Privacy and Security Laws

Any person who receives, stores, maintains, or processes (or has access to) personal information on a resident of Massachusetts in connection with providing services, goods, or employment must have a Written Information Security Program (WISP) in place to protect any personal information collected (201 CMR 17.00) (M.G.L. c. 93H).

Personal Information

The regulation defines personal information as "a resident's first name and last name or first initial and last name in combination with any 1 or more of the following data elements that relate to such resident:

- (a) Social Security number;
- (b) driver's license number or state-issued identification card number; or
- (c) financial account number, or credit or debit card number, with or without any required security code, access code, personal identification number or password, that would permit access to a resident's financial account; provided, however, that "Personal

information" shall not include information that is lawfully obtained from publicly available information, or from federal, state or local government records lawfully made available to the general public."

The regulation requires safeguarding of all paper, electronic, and other records; computer systems; and storage media, including laptops and portable devices that contain personal information.

Breach of Information

In addition, M.G.L. c. 93H requires that any person or business that knows or has reason to know of a breach in security must file a written notice with the attorney general and the director of the Office of Consumer Affairs. The notice must contain "the nature of the breach of security or unauthorized acquisition or use, the number of residents of the commonwealth affected by such incident at the time of notification, and any steps the person or agency has taken or plans to take relating to the incident."

In accordance with Section 4 of Chapter 93A, a violation of M.G.L. c. 93H allows the attorney general to bring an action against a person or business to cure any violation of this chapter and for any other relief that may be appropriate.

The Office of Consumer Affairs and Business Regulation has provided several documents to assist businesses in their efforts to comply with the regulation:

- Frequently Asked Questions: www.mass.gov/ocabr/docs/idtheft/ 201cmr17faqs.pdf
- 201 CMR 17.00: www.mass.gov/ocabr/docs/idtheft/201cmr1700reg.pdf
- A Small Business Guide: Formulating a Comprehensive Written Information Security Program: www.mass.gov/ocabr/docs/idtheft/sec-plan-smallbiz-guide.pdf
- Compliance Checklist: www.mass.gov/ocabr/docs/idtheft/compliance -checklist.pdf
- Requirement for Security Breach Notification under M.G.L. c. 93H: https://malegislature.gov/Laws/GeneralLaws/PartI/TitleXV/Chapter93h/Section1

■ THE MASSACHUSETTS REAL ESTATE LICENSE LAW

The Massachusetts Real Estate License Law and the rules and regulations of the Board of Registration of Real Estate Brokers and Salespersons will be the subject matter of questions on your state license examination and the law that governs your professional life after you are licensed (see Chapter 10).

RELATED WEBSITES

Massachusetts Association of REALTORS®: www.marealtor.com

Massachusetts Board of Registration of Real Estate Brokers and
Salespersons: www.mass.gov/ocabr/licensee/dpl-boards/re/

Massachusetts General Laws: https://malegislature.gov/Laws/GeneralLaws/

Massachusetts Home Inspectors Consumer Fact Sheet: www.mass.gov/ocabr/government/oca-agencies/dpl-lp/consumer-fact-sheets/home-inspectors-consumer-fact-sheet.html

Massachusetts Office of Consumer Affairs and Business Regulation, Division of Professional Licensure: www.mass.gov/ocabr/government/oca-agencies/dpl-lp/



CHAPTER 1 QUIZ

- 1. An enforceable listing agreement does *NOT* have to be in writing because the
 - a. broker has a fiduciary relationship with the principal.
 - b. principal has a fiduciary relationship with the broker.
 - c. law of agency does not apply in the case of a listing agreement.
 - d. statute of frauds does not apply to a listing agreement.
- **2.** Which of the following is *NOT* necessary for a broker to be entitled to a commission?
 - a. A signed listing agreement
 - b. A ready, willing, and able buyer
 - c. Closing of title by purchaser
 - d. A binding contract between seller and purchaser
- The Massachusetts Consumer Protection Act requires that the
 - a. broker keep all information that the seller has provided confidential.
 - b. broker disclose everything that the seller tells him.
 - broker disclose known material information that might affect the sale even though the buyer does not ask for it.
 - d. seller disclose all facts that might affect the sale.
- 4. Six months after the buyer bought a house, the roof leaked during a rainstorm. When the house was listed the seller told the broker that the roof leaked, but they agreed not to tell any prospective buyers. The broker claims that the buyer did not ask about the roof. Under these facts, the buyer
 - a. can sue the broker under MCPA.
 - b. cannot sue the broker under MCPA.
 - c. can sue the seller under MCPA.
 - d. cannot do anything because the leaking roof could have been discovered by inspection.

- 5. A buyer's agent
 - a. owes the buyer the traditional fiduciary duties.
 - b. retains the right to hire subagents.
 - c. must obtain the informed consent of all parties.
 - d. may act on behalf of both buyer and seller.
- **6.** Obedience, loyalty, disclosure, confidentiality, accountability, and reasonable care are the
 - a. responsibilities required by the MCPA.
 - b. elements required to prove that an agent is entitled to a commission.
 - c. traditional fiduciary duties owed by a principal to an agent.
 - d. traditional fiduciary duties owed by an agent to a principal.
- 7. A broker is legally entitled to a commission if she
 - a. produces a buyer who is ready, willing, and able.
 - b. produces a purchaser and a binding contract, and the transaction closes.
 - c. has a signed listing contract.
 - d. introduces the seller to the eventual purchaser.
- 8. Broker Albert shows the owner's house to a buyer on March 7. On March 10, Albert's listing expires and the owner lists the house with broker Betty. On March 15, the buyer calls Betty and asks to see the house again. Broker Betty enters into an exclusive right to represent the buyer, helps the buyer obtain mortgage preapproval, and shows several other homes for comparison. On May 1, the sale closes. With regard to the commission, Albert
 - a. is entitled to nothing.
 - b. and Betty are both entitled to a full commission.
 - c. is entitled to one-half of Betty's commission.
 - d. is entitled to all of Betty's commission.

- 9. An oral agency relationship may be terminated
 - a. only for good cause.
 - b. only under the terms of the contract.
 - c. at will by either party.
 - d. only if one party breaches the contract.
- **10.** What types of agency are MOST commonly practiced in Massachusetts?
 - a. Seller's, buyer's, and undisclosed dual
 - b. Subagency, disclosed dual, and seller's
 - c. Seller's, buyer's, disclosed dual, and designated
 - d. Seller's, buyer's, and full fiduciary



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