

The Role of the Real Estate Agent

TYPES OF AGENTS

In Massachusetts you have a choice when selecting an agent to work with during a real estate transaction. You may use a seller's agent, a buyer's agent, or a disclosed dual agent (who represents both seller and buyer). Here is information about each:

Seller's Agent: A seller's agent, also is known as the listing agent. They are hired by the owner to sell a property and their relationship usually is defined through a listing contract that, among other things, details the agent's compensation if the property is sold. The seller's agent represents the seller exclusively and owes the seller undivided loyalty, reasonable care, disclosure, obedience to lawful instruction, confidentiality, and accountability. The seller's agent must put the seller's interests first and negotiate for the best price and terms for the seller. These obligations of the agent are defined through state law and regulations.

Buyer's Agent: A buyer's agent assists the buyer in the purchase process. A buyer's agent owes the buyer undivided loyalty, reasonable care, disclosure, obedience to lawful instruction, confidentiality, and accountability. The agent must put the buyer's interests first and negotiate for the best price and terms for the buyer. These obligations of the agent are defined through state law and regulations. In past years, the relationship between buyers and agents often was defined by informal agreement. Thus, it was not uncommon for buyers to work with more than one agent thinking they'd somehow get better service or a better deal. Recently, though, buyer agency has become a specialized field with formal training, higher standards of performance, and increased liability for failing to protect a buyer's best interests. Thus, many more buyer's agents are requiring customers to sign a representation contract - just as property owners are required to do when they sell. Buyer's agents believe that their legal and ethical duty to be exclusively loyal to the buyer, combined with the significant amount of research and high level of work they do for that buyer, should be met with equal loyalty and obligation. Some buyer's agents, particularly those working without a contract, may require the buyer to pay a retainer for their services. Usually, buyer's agents are compensated through a commission sharing agreement with the seller's agent, but sometimes they are paid directly by the buyer. In a For Sale by Owner (FSBO) transaction, where there is no listing agent involved, the buyer is compensated either by the seller, the buyer, or a combination of the two. Whatever the compensation arrangement, those details should be included in the buyer representation contract.

Disclosed Dual Agent: A real estate agent may represent both the buyer and

the seller in the same transaction. This usually occurs when 1) a buyer chooses to deal directly with the seller's agent rather than getting their own agent or 2) when buyers decide to make an offer on a home that has been listed by their own buyer's agent. A dual agent must provide confidentiality and accountability to both the seller and the buyer. However, the agent must remain neutral in areas where the seller and buyer have conflicting interests - such as negotiations. So, for example, a buyer's agent can give their objective opinion of a home's value, provide advice on how much to offer, and negotiate on behalf of the buyer. A disclosed dual agent cannot do any of these things for a buyer. Thus, a dual agent cannot fully satisfy the duties of loyalty, full disclosure, or the obedience to lawful instruction required of an exclusive seller's or buyer's agent. Dual agency can occur only with the express and informed consent of both the buyer and seller. That means both the buyer and seller must be told how their representation by the agent will be limited by dual agency and they must consent to that arrangement in writing. The informed consent must be obtained before any offer to purchase a property is made. Undisclosed dual agency - where the agent is working with both the seller and the buyer without the knowledge and informed consent of both parties - is illegal in Massachusetts.

DETERMINING THE TYPE OF AGENT WITH WHOM YOU ARE DEALING

In Massachusetts, agents make clear whom they represent by filling out a state-required form called the "Massachusetts Mandatory Licensee-Consumer Relationship Disclosure." The form must be provided at the first personal meeting between you and a real estate agent to discuss a specific property. In other words, if you meet with an agent to talk about selling your home, the agent needs to fill out the disclosure form and give it to you at that time. Or, if you are a buyer and meet with an agent either to talk about or tour a property that interests you, that is the time when the agent needs to fill out the disclosure and give it to you. An exception to this rule is when an agent holds an open house for the property. As long as the agent clearly displays a notice about whom they represent, they are not required to fill out and provide disclosures to every person coming through the door.

It is important to understand that this agency disclosure form is not a contract and it says so right on the disclosure form. It does not bind you legally to that agent. It does not require you to sell or buy any property. It's simply a state-required disclosure about whom that agent represents. Here is an example of what might happen without such disclosure:

You drive by a home that interests you and call the phone number on the For Sale sign in the front yard. The real estate agent who listed the house for sale comes out to show it to you. She's very nice and before you know it you're telling her you adore the house and will pay whatever it takes to own it. What you don't

realize is that agent doesn't represent you even though she's showing you the house. Her allegiance, loyalty and duty is to that seller and she'll probably let the seller know about your comments. Thus, you may just have put yourself at a serious disadvantage when it comes to negotiating the price.

This is why the law requires real estate agents to state in writing whom they represent. If you don't get a disclosure, don't be shy about asking the agent to provide one and absolutely ask them whether they are representing the seller, the buyer, or both.

There is nothing preventing buyers from working with a seller's agent, however there are limitations and pitfalls to this arrangement. For example, the Massachusetts Association of Realtors® says the following about the issue: "...Buyers should be aware that speaking to the seller's agent is no different than speaking to the seller. In other words, buyers should not tell the seller's agent anything they would not want the seller to know, since the seller's agent is obliged to disclose all relevant information to the seller."

WHAT EVERY AGENT MUST DO

- Massachusetts law prohibits real estate agents from "knowingly (making) any substantial misrepresentation" about a property.
- All agents (regardless of whom they represent) also are required to disclose any material defects of a property that they know about. Agents are not required by law or regulation to conduct their own search to determine such problems. No matter whom they represent - sellers, buyers, or both - all real estate agents are required to act fairly with all parties involved in the transaction, including those to whom they are not contractually obliged.

AGENTS LIMITATIONS

- Real estate agents are not trained to find structural, electrical, plumbing, septic and other problems with a home or land and do not guarantee the condition of property they sell. Sellers or buyers who want to ascertain the condition of a property should hire a licensed home inspector and, if needed, other specialty inspectors to examine the property.
- Agents who provide clients with names of lawyers, accountants, home inspectors, or other professionals are doing so as a courtesy. They do not and cannot automatically guarantee the accuracy of the reports of those professionals. Sellers and buyers should not consider a recommendation by their agent to be a requirement to hire someone. You are free to hire

whomever you choose and you should do your own due diligence before making a decision. It should be noted here that since May 1, 2001 home inspectors have been required to be licensed by the state and to carry errors and omissions insurance.

SERVICES THAT REAL ESTATE AGENTS MAY PROVIDE

Seller's agents, buyer's agents, or disclosed dual agents may do some or all of the following:

- Help buyers understand the local housing market. Seller's agents should not provide buyers with comparable properties for a home that agent is listing unless they do so with full, informed, and written consent of the seller.
- Research properties on the market for buyers within their stated price range.
- Provide important disclosures to buyers about a property being shown.
- Assist prospective buyers in obtaining legal forms and presenting an offer to purchase.
- Provide buyers with information about schools, communities and taxes.
- Provide general information to both buyers and sellers about issues such as financing and required property inspections.
- May accompany buyers to property inspections.

Seller's agents may do some or all of the following:

- Provide the seller with information about the local housing market.
- Do a market analysis on the seller's home and recommend a selling price.
- Work with the seller to complete all required disclosures and documents.
- Provide the seller with ideas on how to make the property more appealing.
- Familiarize the seller with the real estate transaction process, including inspections, timelines, and the seller's costs and responsibilities.
- Provide the seller with referrals to attorneys, accountants, home improvement contractors, landscapers, cleaning services and any other assistance they may need to get the house ready for the market.
- Advertise and market the property, including placing it on the Multiple Listing Service with the seller's permission.
- Hold a tour of the property for other real estate agents who will provide valuable feedback and tell their buyers about the property.
- Conduct an open house of the property for the public.

- Provide accompanied showings of the property, meaning no showing happens unless the seller's agent is there.
- Obtain and analyze feedback on the property from other real estate agents and potential buyers who tour the property.
- Present the seller with any offers to purchase the property and advise the seller on how to respond a particular offer.
- Negotiate price, terms, and conditions of the sale on behalf of the seller. (A disclosed dual agent cannot get involved in negotiations.)
- Finalize the offer to purchase and all related paperwork and provide copies of all documents to the seller and the seller's attorney.
- Attend all property inspections to represent the interest of the seller.
- Negotiate any concerns involving the property inspections, get them in writing, and provide them to all appropriate parties in the transaction.
- Confirm the completion, execution, and distribution of the final Purchase and Sale Agreement.
- Help the seller keep track of all contractual deadlines and assist in obtaining deadline extensions, if needed.
- Confirm the date, time, and location of the closing.
- Advise the seller on the process for obtaining required closing documents such as the smoke detector inspection certificate and utility company letters showing all accounts are paid to date.
- Accompany the final walk-through of the seller's home before the closing.
- Attend the closing, if required or requested.

Buyers' agents also may do some or all of the following:

- Help the buyer understand the housing market where they are looking to make a purchase.
- Research properties on the market for the buyer, within their stated price range.
- Provide the buyer with direct access to MLS listings, if they wish.
- Provide the buyer with information about schools, communities, and taxes.
- Assist the buyer to prequalify for a mortgage before they start looking at property.
- Familiarize the buyer with the real estate transaction process, including financing, inspections, timelines, and the buyer's costs and responsibilities.
- Provide the buyer with referrals to attorneys, accountants, mortgage lenders, home inspectors, or other such professionals.
- Accompany buyers to open houses and take them to private showings of properties that interest them.
- Provide the buyer with in depth research on a property, including prices on comparable properties, before the buyer makes an offer to purchase.

- Provide the buyer with important disclosures about a property being shown or a property for which the buyer wishes to make an offer.
- Assist the buyer in obtaining legal forms and making an offer to purchase.
- Present offers to purchase on the buyer's behalf.
- Negotiate price, terms, and conditions of the sale on behalf of the buyer. (A disclosed dual agent cannot get involved in negotiations.)
- Finalize the offer to purchase and all related paperwork and provide copies of all documents to the buyer and the buyer's attorney.
- Attend all property inspections to represent the interest of the buyer.
- Negotiate any concerns involving the property inspections, get them in writing, and provide them to all appropriate parties in the transaction.
- Confirm the completion, execution, and distribution of the final Purchase and Sale Agreement.
- Help the buyer keep track of all contractual deadlines and assist in obtaining deadline extensions, if needed.
- Confirm the date, time, and location of the closing.
- Advise the buyer on the process for obtaining required closing documents, such as the final mortgage commitment and a homeowners insurance binder.
- Accompany the buyer during the final walk-through of the seller's home before the closing.
- Attend the closing, if required or requested.