

MASSACHUSETTS PRINCIPLES AND PRACTICES

THE LAW OF AGENCY

Real estate agents owe the following *fiduciary* duties to their respective *clients*.

Obedience - Agent cannot exceed the authority given by the principal and must follow all lawful instructions. Obeying a client's order is not an acceptable defense for unlawful or unethical behavior. The agent must be refused.

Loyalty (Undivided) - Agent must put client's interests ahead of all others, including the agent's interests.

Disclosure (Full) - Agent must disclose affirmatively all information concerning the transaction that might affect the principal's best interests.

Confidentiality - Agent cannot disclose confidential information of the principal to others. For example, the agent may not disclose the lowest/highest price his/her principal may accept/pay nor any weakness in the principal's bargaining position.

Account (Full) - Agent is required to promptly report all money received and paid out and, upon request, to render an accounting and return all money and property to the principal.

Reasonable Care - Agent is required to protect the principal from foreseeable risks of harm; exercise care and competence to ensure the transaction of business to the best advantage and to recommend expert advice or assistance when the principal's needs are outside the scope of the agent's expertise.

The law also requires agents to engage in *fair and honest dealing* with the buyer. Information falls into three categories: that which *must* be disclosed, that which must *not* be disclosed, and that which must be disclosed upon *direct* questioning only.

Agents must inform the buyer of any material defects of the property (both title and physical) and anything permanent (rooted in the land) in the surrounding area which affects the use and enjoyment of the property which the average buyer would want to know. No more *caveat emptor* (let the buyer beware). Seller's agent should obtain written information from seller about property to *avoid litigation*. The buyer must be given this information up front and until the closing. When a buyer purchases a house on an "as is" basis, all known *hidden* defects must still be disclosed to the buyer by seller. The law does NOT allow the buyer to ignore obvious problems. Buyer and the buyer's agent also have a duty to disclose information about buyer which will adversely impact buyer's ability to purchase, such as buyer is about to declare bankruptcy.

Personal information about seller and/or buyer which do not impact the property or the ability of the party to proceed with the transaction (i.e., the lowest price a seller will take, or the highest price a buyer will pay) must not be disclosed by their respective agents. If an agent obtains **confidential information** regarding the other side, however, s/he must disclose it to his/her client.

The third category is **stigmatized** property – murders, suicides, paranormal activity. If asked directly by buyer or buyer's agent, seller's agent must answer truthfully. The buyer's agent has an affirmative duty to disclose the information to the buyer under duty of full disclosure.

THE LISTING

1. An agent cannot show property unless allowed by seller. No commission earned merely by presenting buyer to seller, must be a prior agreement to pay. In for-sale-by-owner (FSBO), buyer can make agent's commission at term of the offer.
2. Asking price is set by seller; selling price is determined by both seller and buyer through process of offer and acceptance.
3. Only the agency is being hired – the legal agent in the deal. Salespeople may **negotiate** the agency agreement and sign documents on behalf of agency with permission. If a salesperson leaves the office, he or she may *not* take clients to another agency without broker consent. An agency agreement may be terminated by: Agreement between principal and broker; death or incapacity of human **principal** or **broker** (not by severance, death or disability of **salesperson**); destruction of property, bankruptcy of principal, foreclosure, expiration of hiring, performance (closing), abandonment by agent, eminent domain.

THE OFFER (Offer to Purchase)

The offer: listing is a solicitation for offers to be made by potential buyers – seller need not accept any offer, even one at terms requested by seller. Potential buyer makes an offer in writing.

Typical terms include:

- ◆ Purchase price
- ◆ Earnest money deposit
- ◆ Time and nature of results for home inspection
- ◆ Closing date
- ◆ Mortgage contingency clause
- ◆ Expiration date for Offer

Buyer is offeror; seller is offeree.

Offers may be terminated as follows:

- ◆ Death of offeror or offeree (**Not by death of agent**)
- ◆ At end of express time limit of offer
- ◆ Destruction of object of offer
- ◆ Revocation or withdrawal of offer *before* acceptance or before a set period of time
- ◆ By offeree making counter offer
- ◆ Signed acceptance of offer by offeree creates a real estate contract (not intended to be P&S)

The seller agrees to offer by **signature**. Acceptance constitutes a real estate contract binding the parties to voluntarily perform according to the agreed conditions. If Offer is not intended to be the P&S, it must so state. It creates legally enforceable duties, usually intended to get the parties through the home inspection process. All terms and conditions set forth must be met by the parties. Depending on how Offer is worded and the outcome of the home inspection, either the parties separate with the deposit returned to offeror or they negotiate the P&S in good faith.

COMMISSIONS

Commission is an "expense" or "loss" or "debit" to the seller. The commission is usually based on a percentage of the selling price; it is determined by seller and broker - agreement of parties. The key to brokerage questions is to divide each sales price into two piles of money only, both by dollar amount and percentage: what the seller receives initially and what the broker receives initially.

The Formula:

$$\frac{\text{seller's \$ or broker's \$}}{\text{selling price}} \times \text{seller's \% or broker's \%}$$

The most common problem:

You are a broker. Seller says to you that he wishes to clear \$47,500 **after** paying you a 5% commission. What should the property sell for?

Our Solution:

\$47,500 (95%)	seller share	<u>\$47,500</u>
<u>5%</u>	broker share	? x .95
100% selling price		\$47,500/.95 = \$50,000 [A]

Seller wishes to net \$36,000 on sale of land after paying you a 10% fee. What should the property sell for?

\$36,000 (90%)	seller share	<u>\$36,000</u>
<u>10%</u>	broker share	? x .90
100% selling price		\$36,000/.90 = \$40,000 [A]

Seller nets \$21,500 on sale of her home. She had expenses of 6% commission plus an expense of \$318 and another expense of \$84. What did the property sell for?

\$21,500	seller share	<u>\$21,902</u>
318	broker share	? x .94
<u>84</u>		
\$21,902 = 94% + 6% = 100%		\$21,902/.94 = \$23,300 [A]

A commission arrangement is 7% of first \$50,000 plus 3% of any selling price over that amount. What was the selling price if total commission is \$4,475?

\$4,475	commission	\$50,000
<u>-3,500</u> (.07 x \$50,000)	<u>\$975</u>	<u>+32,500</u>
\$ 975 (.03 x ?)	(32,500) x .03	\$82,500 [A]

MASS RECORDING STAMPS: (documentary, excise, revenue, transfer, conveyance)

- ◆ An expense typically paid by grantor at the recording of the deed. Any inaccuracies on the stamps do not affect the validity of title transfer because the stamps are a function only of the recording procedure, a form of tax.
- ◆ The fee is \$4.56 per every \$1,000 of sales price (or \$2.28 per \$500 or increment thereof) (Barnstable County is \$6.12 per \$1,000 or \$3.06 per 500). Dukes/Nantucket also collect 2% for land trust. The selling price is rounded up to the next highest \$500 increment. If a loan is assumed, the loan is netted out of the purchase price. Example: purchase price is \$100,000, seller still owes \$80,000, buyer assumes repayment of loan and pays seller \$20,000, then stamps are calculated on \$20,000.
- ◆ **Example:** A property sold for \$110,200. What is the transfer fee?
- ◆ Step 1. \$110,200 becomes \$110,500
- ◆ Step 2. Divide \$110,500 by \$1,000 = 110.5 **or** by \$500 = 221
- ◆ Step 3. Multiply 110.5 x \$4.56 = \$503.88 **or** 221 x 2.28 = \$503.88

MUNICIPAL TAXES

- ◆ Property is assessed annually according to value (**ad valorem**).
- ◆ Tax rate is an expression of annual municipal budget divided by total assessed value (tax base) of the community.
- ◆ Individual property assessment multiplied by community tax rate = **annual property tax**. Fiscal year for property taxes is July 1 to June 30. Tax is due **November 1** and **May 1**. Municipality can collect tax quarterly: August 1, November 1, February 1 and May 1.
- ◆ A property owner who feels his/her property is unfairly assessed must first pay the property tax and then file for an **abatement** within the statutory time.
- ◆ **Special Assessments**
 - ◆ Additional taxes for property enhanced by expenditure of public funds (a **Betterment**), increasing abutting property value. Examples: sewers, water lines, curbing, sidewalks, street paving.
 - ◆ These special taxes are usually paid to the municipality over a number of years at a reasonable rate of interest.

Municipal Tax Sale

Tax is the priority lien against real estate. Property owner who doesn't pay tax may lose property by tax auction. Buyer by tax sale doesn't take absolute title because, unlike a mortgage foreclosure, old owner of property may redeem ownership typically within one year of sale by paying back taxes with interest.

TAX MODEL – Determining Annual Property Tax

Question 1 – THE TAX RATE

A town requires \$20,000 for its budget for the following fiscal year. The total assessment of the community is \$1,000,000. What will be the tax rate?

		\$20,000 annual budget
total assessment	x	tax rate?
\$1,000,000		

ANSWER: .02 per \$1

\$20,000 divided by \$1,000,000

\$2.00 per \$100

\$20.00 per \$1,000 of assessed value per annum (per mill/millage)

The tax rate is .02 per \$1 which means that each taxpayer must give the tax collector two cents for each one dollar of assessed value.

To express a tax rate on a per \$100 of assessed value, **multiply** the .02 by 100 for an answer of \$2 per \$100 and if you multiply .02 by 1,000 you have a rate of \$20 per \$1,000.

The reverse is true: a tax rate of \$20 per \$1,000 becomes expressed on a dollar basis by **dividing** \$20 by \$1,000 ("per" means divide) or .02 per \$1

Question 2 – The ASSESSED VALUE

What is the assessed value of a \$100,000 house if each taxable house in a town is assessed at 60% of its market value?

		? assessed value
market value	x	tax ratio
\$100,000		60%

ANSWER: \$60,000

\$100,000 x .60

Question 3 – THE TAX

What is the quarterly tax on a \$100,000 house which is assessed at 60% of its value in a town with a tax rate of .02 per \$1 of assessed value?

		? annual tax
assessed value	x	tax rate
\$60,000		.02 per \$1

\$60,000 X .02 = \$1,200 (annual) divided by 4 = quarterly tax

ANSWER: \$300

POLICE POWER

Zoning Ordinances - are a means of regulating and controlling land and its use even though the property is privately owned. Mass law 40A provides legal framework for local zoning law. Limits: certain residential/commercial uses; heights; minimum setbacks from street; minimum distance from property lines; minimum lot sizes (40B overrides this); limitation on type of business allowed, hours of operation, etc.

Setbacks - a distance from frontage, side lines and rear lot lines before foot of building (foundation) is allowed.

Variance - a formal legal process to permit doing something that an existing zoning ordinance forbids.

Nonconforming Use - a legal use that existed prior to the enactment of the ordinance.

Conditional Use Permit (Special Permit) - allows a special use if deemed desirable for the public good or convenience.

BUILDING (sanitation) CODES - define basic requirements for construction, performance and maintenance standards, not specific materials or designs. Limit on number of people allowed in rental based on square footage.

EASEMENTS: An irrevocable right or interest one party has in the land of another; a non-possessory interest in land of another; a burden on the estate of someone; ***a right running with the land***

Examples: Right of way for pipes, walking/riding. Ingress: to go in - Egress: to go out.

Easement Appurtenant

- ◆ Two ***adjoining*** lots.
- ◆ Owner of one lot has right of way across next lot.
- ◆ ***Dominant tenement*** is the party with right; receives benefit - an ***appurtenance***.
- ◆ ***Servient tenement*** is the party whose property is burdened - an ***encumbrance***.

Creation of Easements Appurtenant

- ◆ By deed - a voluntary giving of a right.
- ◆ By prescription - adjoining owner uses land of neighbor openly, continuously, adversely and without permission for statutory number of years (20 years).
- ◆ By necessity (implied grant) - court orders a right of way for land-locked land.

Easements In Gross

- ◆ Owner gives ***personal*** right in writing, to another who does not own adjoining lot. Example: use of property to access a lake for a certain number of years.

LICENSES

- ◆ Personal, revocable (at any time) and non-assignable ***permission*** to enter upon land of another for a particular purpose. Example: business invitee; ticket holders to theaters or sporting events.

ENCROACHMENTS

- ◆ Unauthorized intrusion on land of another discovered by **survey**.
- ◆ Inaction may result in encroaching neighbor claiming a legal right to continue use (adverse possession). Doctrine of laches: claim against encroachment made too late given circumstances.
- ◆ Examples: mis-aligned fence; patio extending over lot line; tree branches overhang boundary and roots encroach underground.

CONDOMINIUMS

- ◆ **Master Deed** is the enabling declaration recorded at registry of deeds, describes all of the real estate in full and the form of the condominium association.
- ◆ **Bylaws Of Association** are recorded Rules and Regulations of self-government (buyer entitled to see these before deciding to buy – enforceable in court.
- ◆ **Unit Deed** describes individual unit of each owner, recorded at time of each sale.
- ◆ Individual ownership of single units in a multi-unit development, with common ownership of areas such as roof, outside walls, parking, recreational areas, etc.
- ◆ Each unit owner has a proportionate ownership interest in common areas. The owner may sell, lease and mortgage, although other owners may have right of first refusal. High rise condos are sometimes called vertical subdivisions.
- ◆ Unit owners also pay a monthly fee for operating expenses and reserve funds for common areas. Failure of unit owner to pay fee gives association a super-priority lien (for up to 6 months of fees) ahead of other private lienholders, like lender. 6D closing certificate confirms fees are paid to date. Individual unit owners are taxed separately, common areas are not taxed. Failure of unit owner to pay lender results only in unit foreclosure only.
- ◆ Risks: insufficient capital reserves for major replacements, more investor-owned units than owner-occupied units, lack of professional management for larger complexes. An apartment property changed to a condominium is a *conversion*.

COOPERATIVES

- ◆ A corporation that acquires realty to provide the shareholders with housing. Each shareholder receives: A **stock certificate** as ownership in coop (personal property); a **proprietary lease** as right of possession of a particular unit. A monthly fee is assessed against each party as a proportionate share of any mortgage debt, operating expenses, municipal tax and reserve fund. Risks: entire property is lost to foreclosure/tax sale if co-op liabilities are unpaid due to some coop owners not paying their share; shares are either sold back to coop or coop approves new buyer.

TIMESHARING

- ◆ Vacation ownership and possession for specific week(s) in fee simple and undivided interest in common areas (condo laws apply). Owner may trade for another period of time and/or location. Known as **interval ownership, prepaid vacation, floating use period, fractionals**.

MASSACHUSETTS FAIR HOUSING LAWS

- ◆ Discrimination prohibited based on the following **protected** classes: age, sex, marital status, sexual orientation, veteran status, race/color, religious creed, public assistance status, ancestry, disability (mental or physical), genetic information, national origin, familial status (having children), gender identity.
- ◆ If the client asks agent to break the law, agent must refuse the agency.
- ◆ HIV/AIDS is considered a disability (for federal level too).
- ◆ No sexual harassment of tenants/buyers.

EXEMPTIONS (situations in which fair housing does not apply)

- ◆ A private individual who owns 3 or fewer single-family houses. Limited to one sale of income house every two-years.
- ◆ Rentals in **owner-occupied** two family houses.
- ◆ Sale, rental or occupancy to its own members of dwellings owned or operated by a **religious organization** for non-commercial purposes if membership in that religion is not based on exclusion of protected classes.
- ◆ Sale, rental or occupancy to its own members of lodgings owned or operated by a **private club** for non-commercial purposes. (If club owned a motel or convention facility, the club's commercial activities are under Fair Housing laws.)
- ◆ **No** exemptions allowed on basis of **race public assistance status**. No refusal for family in rentals because of lead paint. **No** exemptions allowed if a **real estate agent** is used in the transaction. **No** exemptions allowed if discriminatory **advertising** is used

ENFORCEMENT

- ◆ Complaint with the Massachusetts Commission Against Discrimination (MCAD) must be made within 300 days. MCAD decision against an agent results in an automatic suspension of license for **60** days. A second violation within two years results in a 90 day suspension.

Residential rental money – landlord is allowed to collect only the following at the beginning of the rental period:

- ◆ First month's rent and reasonable lock and key fee.
- ◆ Security deposit limited to **one month's** rent. Landlord's statement of condition required within 10 days of rental beginning. Landlord's itemized/notarized claim against deposit or its return must be made within 30 days of rental ending. Lesser of 5% interest or current bank rates on security deposit due each year to tenant within 30 days of annual tenancy anniversary.
- ◆ Last month's rent collected in advance. Interest earned due to tenant each year within 30 days of annual tenancy anniversary, but last month's rent does not have to be deposited, in which case 5% interest is owed.