



BUYING AND SELLING A HOME

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*** Air Force Attorneys are prohibited from representing individuals in real estate transactions***

OVERVIEW

The purchase or sale of a home is one of the most significant transactions of an individual's lifetime. In an effort to simplify some of the complexities of real estate transactions, this handout will outline the role of real estate agents, the respective rights and responsibilities of a buyer and seller, and the legal requirements involved in entering into a real estate transaction. Please note, however, that this handout is not exhaustive, and—to reiterate the above disclaimer—it is not meant to be a substitute for legal advice. Additionally, please note that, should you choose to secure a civilian attorney, once you have done so, the MANG Office of Legal Assistance can no longer provide any guidance or advice relating to the real estate transaction; to do so might interfere with an existing attorney-client relationship, and may violate the rules of ethics which governs the conduct of attorneys.

ROLE OF THE REAL ESTATE AGENT

The assistance of a qualified real estate agent can transform complex negotiations into a rewarding endeavor for all parties involved. Whether you are the buyer or the seller, you can choose to have the advice, assistance, and representation of your own agent; however, do not assume that a real estate agent is acting on your behalf, unless you have contracted with that agent to represent you.

Agency Relationship: Regulations of the Massachusetts Board of Registration of Real Estate Brokers and Salespersons require that written notice of the agency relationship of a real estate agent be provided to buyers and sellers at the first personal meeting to discuss a specific property; the buyer and seller are asked to sign an acknowledgement of receipt of the notice. Depending on whether you are buying or selling real estate, the type of real estate agent, whom you may hire, will vary.:

If you are a seller, you may authorize your listing agent to cooperate with agents from other firms to help sell your property. These cooperating agents may be subagents who represent a seller, or they may be agents of buyers. A seller can generally obtain broader exposure for a property by authorizing a listing agent to compensate a cooperating agent who successfully procures a buyer.

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If you are a buyer, you have the option of working with a seller's agent or a buyer's agent; the decision will depend upon the types of services you desire and the method of compensating the agent you prefer. A real estate agent, who is representing a buyer and who shows that buyer a property listed with the agent's office, is said to be "dual agent." Dual agency is permissible, provided that both buyer and seller have given informed consent.

In understanding the role of a real estate agent, it is also helpful to understand the difference between two of the more common types of listing agreements/services:

Exclusive Listing Agreements: Although there are several types of listings for the sale of real property that an owner may give a real estate agent, in Massachusetts, the most common is an "exclusive right to sell" agreement. Under an "exclusive right to sell" agreement, the listing agent is given the right to earn a fee for professional services, if the property is sold by *anyone*; this includes a sale made to a buyer, solely through the efforts of the owner.

Multiple Listing Service: Where a buyer works with a real estate agent, who participates in a multiple listing service (MLS), the agent can cooperate in showing a buyer any property in the MLS, even though it may have been listed through another office.

Buyers/Sellers Beware: The duties of a real estate agent do not relieve the hiring buyer/seller of the responsibility of protecting his/her own interests. That being said, if advice is desired regarding legal, tax, insurance, or other matters, the party should consult professional in that area.

Moreover, real estate agents **are not** inspectors, and they do not guarantee property condition. Real estate agents are not trained to find structural, electrical, plumbing, septic, or other problems with a home or land, and they do not guarantee the condition of the property they sell. In general, agents have no duty to inspect a property for defects, and they have no duty to verify information received from sellers, municipal departments, or other reputable sources. While real estate agents may not "knowingly [make] any substantial misrepresentation" (MGL c. 112 section 87AAA(a)), real estate agents have no liability for innocently passing along information from reputable sources to buyers, even if the information is later determined to be inaccurate. Similarly, agents, who provide buyers with names of lawyers, accountants, or other professionals, do not automatically guarantee the accuracy of the reports of those professionals. Since May 1, 2001, home inspectors have been required to be licensed by the Commonwealth, and have been required to carry errors and omissions insurance. A complete list of all licensed home inspectors is available from the Massachusetts Division of Professional Licensure.

SELLER'S RIGHTS AND RESPONSIBILITIES

Right To Accept Terms Of Listing: The seller has the absolute right to set the listing price. The real estate agent may prepare an "opinion of value" to assist the seller in setting the price. An agent may refuse to accept a listing for any lawful reason.

Right To Have All Offers Presented: By law, real estate agents are required to present all offers to a seller. The Massachusetts Board of Registration of Real Estate Brokers And Salespersons interprets this obligation as continuing until an offer has been accepted by the seller. Normally, real estate agents will not solicit buyers or continue to show property after acceptance of an offer, unless otherwise agreed. Even if a buyer makes an offer for the full listing price, the buyer cannot usually require the seller to accept, since listing prices are considered invitations to bid.

Nature of Seller's Duties to Condition of the Property: Every seller has the duty to respond fully and accurately to any request for information about a property. This is true whether the information is

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requested directly by a prospective buyer, or whether the information is requested by a real estate agent, who, in turn, may pass along the information to a prospective buyer. Answers that are misleading or are half-truths are improper. If a seller is unsure of information, the seller should not guess, but should qualify his answer; otherwise, the buyer may be misled. Sellers may be required to provide information about the presence of lead paint or urea formaldehyde foam insulation, where applicable.

Septic Systems And Cesspools: Massachusetts environmental regulations require that a property, which is serviced by a septic system, cesspool, or other private waste disposal system, be inspected within two (2) years before sale [three (3) years, if pumped at least once each year, or within six (6) months after sale, if weather conditions prevent a pre-sale inspection]. Only licensed inspectors and soil evaluators may conduct such inspections. Should a system fail an inspection, the buyer and seller may negotiate who will pay to repair or replace the system, or, if the agreement for sale contains a contingency clause, the buyer may decide to withdraw. The fact that a system passes a Title V inspection is not a guarantee that the system will continue to function properly. Even a properly maintained system may only last an average of 15 to 20 years.

Smoke Detector Certificates: Massachusetts law requires that all residential structures be equipped with approved smoke detectors and carbon monoxide detectors, upon sale. The local fire department will issue a certificate to prove compliance.

BUYER'S RIGHTS AND RESPONSIBILITIES

Condition of Property: At his/her own expense, a buyer may wish to employ a professional home inspector, lead paint inspector, termite/pest inspector, sewage/septic system inspector, engineer, or other expert of his choice to evaluate the property as a condition of an offer. Massachusetts law does not automatically give buyers the right to a home inspection, but it is generally advisable to have an inspection performed. If the buyer desires that the obligation to purchase be contingent upon an inspection, the buyer should include an inspection contingency clause in any offer. The buyer should also check public records to verify information concerning taxes or assessed value, zoning, and history of work performed.

Lead Paint, Hazardous Or Toxic Materials: In purchasing any property, the buyer should conduct special tests to determine the presence of toxic or hazardous materials; such materials include lead paint, radon, airborne asbestos, urea formaldehyde foam insulation (UFFI), oil spillage, et al. Information from the Department of Public Health will be supplied to you concerning lead paint and UFFI, where applicable. For residences built before 1978, Massachusetts and federal law requires that buyers be given the right to take up to ten (10) days to inspect a property for the presence of lead paint; this right may be waived. High levels of lead may result in brain damage or other serious injuries to children. Massachusetts law does not prohibit the sale of properties containing lead paint or other potentially hazardous substances.

Fair Housing Laws: Real estate agents and sellers are required by state and federal law to treat all parties in a property transaction equally and without regard to race, religious creed, color, national origin, gender, sexual orientation, age, genetic information, ancestry, marital status, presence of children, military service/veteran status, physical disability, mental disability, or receipt of public assistance.

LEGAL REQUIREMENTS FOR TRANSACTION

Contract Requirements: Generally, agreements for the purchase of real property must be in writing, and they must be signed to be enforceable. An offer signed by the buyer that includes all essential terms and

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is accepted and signed by the seller can constitute a binding contract. A written counteroffer made by the seller that is accepted in writing by the buyer can also constitute a binding agreement. Many real estate agents have forms of such agreements for use by clients and customers. Often a more detailed agreement, known as a "Purchase and Sale Agreement" (P&S), will be signed by the buyer and seller, after an offer has been accepted; the P&S will then replace the earlier agreement. If you are unsure of your risks and responsibilities under any proposed agreement, you should contact a qualified attorney to assist you.

Deposit By The Buyer: It is customary for a buyer to give a deposit or binder as a show of good faith at the time an offer is presented. While the amount is negotiable, it is typically 5 percent to 10 percent of the purchase price. Normally this deposit is held in escrow, and it will not be deposited until the seller has accepted the buyer's offer.

Mortgages And Financing Contingency Clauses: If it will be necessary to obtain a mortgage for the purchase, the buyer must fall within lender's guidelines to qualify for a loan. Loan packages, mortgage interest rates, points (pre-paid interest or administrative fees), and terms vary from one financial institution to another, and they will be adjusted from time to time. If it will be necessary to obtain a mortgage, the buyer should make an offer contingent upon receipt of a mortgage commitment within a specified period of time. Careful compliance with the exact conditions in a mortgage contingency clause is crucial.

Title Examination And Title Insurance: Most banks and mortgage lenders require that an examination of the seller's title to the property be conducted to determine whether the property is marketable and whether it will provide adequate security for the loan being made. Lenders generally require title insurance up to the amount of the loan; for an additional fee, title insurance can be obtained to protect the portion of the purchase price that the buyer paid.

For further information, visit the Massachusetts Office of Consumer Affairs at www.mass.gov/oca.