

FOURTEEN WAYS TO LOSE YOUR LICENSE

1. Misrepresentation (knowingly).
2. Acting in dual capacity of broker and undisclosed principal in the same transaction.
3. Acting for more than one party in the same deal without both parties knowing it.
4. Failure to properly account for or return escrow funds such as deposit money.
5. Paying unlicensed persons.
6. Making a secret profit while acting as a broker.
7. Persuading someone to break a contract for personal gain.
8. Mixing of escrow funds with personal money.
9. Failure to give both buyer and seller a copy of the Purchase and Sale agreement.
10. Violation of any other provision of the law.
11. Discrimination.
12. Conviction of a criminal offense which the Board considers a reflection on a licensee's moral character.
13. Promotion and sale of out of state land within Massachusetts is subject to Board review.
14. Affirmative soliciting for sale, lease, or the listing for sale or lease of residential property, on the grounds of alleged change of value, due to the presence of the prospective entry into the neighborhood of a person or persons of another race, economic level, religion or ethnic origin or making statements intended to induce the owner of residential property to sell or lease due to such change in the neighborhood. Such acts are referred to as "Blockbusting." Any owner, lessee, or licensed real estate broker cannot discriminate against anyone because of race, religion, creed, color, national origin, sex, age, veteran of the armed forces, or because a person is blind. This does not apply to minors.

AGENCY

TYPES OF AGENCY REPRESENTATION

SELLER'S AGENT

When a seller engages the services of a listing broker, that seller becomes the broker's client. This means the broker, and his/her subagents represent the seller. They owe the seller undivided loyalty, utmost care, disclosure, obedience to lawful instruction, confidentiality and accountability. They must put the seller's interest first and negotiate for the best price and terms for their client, the seller. (The seller may also authorize subagents to represent him/her in marketing the property to buyers).

BUYER'S AGENT

When a buyer engages the services of a broker then that buyer becomes the broker's client. This means the broker represents the buyer. The broker owes the buyer undivided loyalty, utmost care, disclosure, obedience to lawful instruction, confidentiality and accountability. The broker must put the buyer's interest first and negotiate for the best price and terms for his/her client, the buyer. (The buyer may also authorize subagents to represent him/her in locating property).

DISCLOSED DUAL AGENT

A broker can work for both the buyer and the seller on the same property provided such broker obtains the informed consent of both parties. The broker is then considered a disclosed dual agent. In this type of agency the relationship the broker does not represent either the seller or buyer exclusively and they cannot expect the broker's undivided loyalty. Also, undisclosed dual loyalty is illegal.

Key Disclosure Issues to Remember

- Disclosure must be timely. Be sure that disclosure is made when the listing agreement or buyer's representation agreement is signed or at a time set forth in your state's statute.
- If a sales associate is working with buyers as customers, be sure that a disclosure of the fact that the associate is the seller's agent or subagent is made to the buyers before any properties are shown.
- Disclosure must be meaningful. Assist sellers and buyers by providing clear written explanations of what agency relationships mean. Massachusetts provides standardized disclosure language you can use on the reverse side of the Agency Disclosure Form.
- Disclosure must be made to all parties, including other brokers.
- In most cases, buyers and sellers are not legally required to sign an agency disclosure form. If a client or customer refuses to sign, the sales associate should indicate on the form the date it was presented and that the person refused to sign.
- If you receive an offer from a cooperating licensee acting as a subagent, be sure that an acknowledged agency disclosure form signed by the buyer accompanies it.

AGENCY Q & A

Does the agency disclosure regulation apply to commercial brokers?

Yes. 254 CMR 3.00(13) applies to all real estate licensees.

Can I use the agency disclosure form to disclose dual agency?

254 CMR 3.00(13) requires a dual agent to provide written notice to both the buyer and seller at the time of obtaining the informed consent of both parties. You can request a copy of a sample dual agency disclosure form by telephoning the MAR Legal Hotline at 1-800-370-5342.

What does "informed consent" mean?

Obtaining "informed consent" means that a real estate licensee must provide enough information to enable a prospective buyer or seller to make a meaningful decision. A buyer or seller should understand how his relationship with his agent will change after he agrees to a dual agency relationship. For example a buyer or seller should be told that a dual agent cannot negotiate on his behalf, advise him on how much to offer or counteroffer, or disclose confidential information.

What is undisclosed dual agency?

Undisclosed dual agency occurs when a real estate licensee does not disclose that he owes a duty to more than one part in the same transaction. For example a listing agent shows property to her son without disclosing this relationship to her selling client. Practicing undisclosed dual agency is a violation of M.G.L. c. 112, s. 87AAA.

Can I act as a seller's agent when I plan to buy property for myself?

No. Clearly a licensee cannot act as a seller's agent when the seller and he have not competing interests. A seller's agent owes the following fiduciary duties at common law to his client: obedience, loyalty, disclosure, confidentiality, accounting and reasonable care and diligence. An agent purchasing property for himself would not place the seller's interests above his own.

What obligations does a buyer's agent owe to his or her client?

A buyer's agent owes the same fiduciary obligations at common law that a seller's agent owes his client. A buyer's agent and her client can negotiate and include specific duties in a contract, such as the agent will help the buyers find a house, provide them with advise and assist with negotiations.

Must a buyer's agent use a written contract?

No. Verbal contracts for real estate services such as a buyer's agency agreement are legally enforceable in contrast to contracts for the sale of land that must be in writing to be enforceable. While a verbal agreement is legal, entering into a written contract is the more prudent business practice. The disadvantage of a verbal contract is the difficulty of proving in the event of a dispute the terms to which the buyer and buyer's agent actually agreed.

How can a licensee be a buyer's agent if he accepts compensation from a listing agent or seller?

Compensation and agency are two separate issues. A buyer's agent who plans to accept compensation from a source other than his client should disclose this and obtain consent from his client to do so.

When does disclosed dual agency occur within a firm?

Disclosed dual agency can occur in two ways within a firm: (1) a real estate licensee shows a buyer client his own listing or (2) a real estate licensee has a buyer client who want to see the listing of another agent who works for the same firm.

I work for a firm that only represents sellers. Am I a dual agent when I show my own listing?

A listing agent who shows a buyer *customer* his own listing in a firm that represents sellers exclusively would not become a disclosed dual agent by showing the firm's listings. However, a listing agent could

inadvertently become an undisclosed dual agent by showing property to a member of his immediate family.

What should I do if my buyer client and seller client refuse to agree to have me act as their dual agent?

The question highlights the importance of developing office policies. A firm which plans to practice dual agency should anticipate and prepare for problems like anticipate and prepare for problems like these. If the buyer and seller clients refuse to enter into a dual agency agreement, an agent has two key options. First, the agent can offer to refer either his buyer or seller client to another agent within the same firm. While this would still create a dual agency situation, some clients will feel as though they are being treated more fairly than if the same individual continues to represent both buyer and seller. A second alternative is to refer either the buyer or seller to another real estate firm for representation.

HOW DUAL AGENCY CAN HAPPEN BY ACCIDENT

The Seller's Agent Leads the Buyer to Believe the Agent is Representing the Buyer

Real estate brokers representing sellers cannot perform their obligations to procure a ready, willing and able buyer for their client's property unless they seek out qualified buyers. Thus, it is perfectly natural and necessary for real estate brokers representing sellers to do everything they can to attract buyers. Buyers are attracted to brokers with whom they feel comfortable and are able to develop rapport and communication. This is no surprise because this is the essence of "selling."

Too often, however, brokers in their zeal to arrange a sale satisfactory to both parties encourage the buyer to believe that the broker is working "for" him rather than "with" him. Simply put, the broker allows or even induces the buyer to believe that he is the broker's client, when, in fact, the broker has already established a client relationship with the seller by executing a listing agreement or by acting as a subagent of a listing broker.

The broker who permits the buyer to believe he is acting as the buyer's agent when the broker has already formed an agency relationship with the seller is a classic example of the "accidental" dual agent. But he is a dual agent, nevertheless, as noted earlier, formalities are not required to create agency relationships. They can be created orally, or they can be implied from the conduct of the parties. The accidental dual agent creates an express agency with the seller by executing a listing agreement, and he creates an implied agency with the buyer by allowing him to believe the broker is acting on his behalf.

Examples of words or phrases often used by real estate brokers or sellers that can create implied agency relationships with buyers are the following:

1. "I'll take care of everything. I'll handle the sale for you."
2. "This listing has been on the market for six months. That tells me it's overpriced. Let's offer \$80,000 and see what they say."
3. "Trust me. I'm sure the seller won't counter at that price."
4. "If the seller is going to insist on a full price sale, I think you should tell him no. Then we can try an offer on that Maple Street house your wife liked so much. I'm sure those sellers will be more realistic."
5. "If they insist on the full \$100,000, I'll remind them that the furnace is 15 years old and the carpet is fraying. That should justify at least a \$3,000 reduction."

CAVEAT: A real estate broker working with a buyer does not automatically become the buyer's agent. The courts have consistently acknowledged that real estate brokers routinely provide buyers with a variety of valuable services and information as a natural by-product of the broker's marketing function on behalf of the

sellers. For example, it is clear that real estate brokers can do the following for buyers without creating an agency relationship:

- Show the buyer listed properties meeting the buyer's criteria concerning location, price and size;
- Describe a property's amenities and attributes and make factual representations about the property's condition and status;
- Complete a standard "Offer to Purchase" form for the buyer by inserting the terms of the buyer's offer in the blank spaces on the form;
- Transmit any offers made by the buyer to the seller or the listing broker on a timely basis;
- Inform the buyer about the availability of financing, legal services, home inspection companies, title companies, or other related services desired or required by the buyer to complete the transaction.

The critical distinction is that the information and services described above are provided by brokers working with buyers in the broker's capacity as agent for the seller or as a subagent of the listing broker.

Providing services like these to the buyer does not, in and of itself, create an agency relationship with the buyer. But when a real estate broker does more than provide market information or facilitate the completion of a transaction, and instead becomes an advocate or negotiator for the buyer, then the broker has probably created an implied agency with the buyer. This can result in an undisclosed dual agency if the broker is also the agent of the seller by reason of a listing agreement, or a subagent based upon an offer of subagency from the listing broker that was never expressly rejected.

SAMPLE DUAL AGENCY DISCLOSURE*

The purpose of this disclosure is to enable you to make an informed choice before entering into a dual agency relationship with a real estate firm. Please read this form carefully before signing.

When a buyer represented by MAIN STREET REALTY becomes interested in a property which is owned by a Seller who is represented by MAIN STREET REALTY this creates a dual agency. If a dual agency occurs, MAIN STREET REALTY will provide limited representation to both Buyer and Seller but can no longer fully represent either party. However, a dual agent must treat both parties fairly and honestly.

If a dual agency occurs, MAIN STREET REALTY cannot do the following:

1. Recommend an offer price to the Buyer or a counteroffer price to the Seller or provide advice against the interest of the other party.
2. Negotiate on behalf of either the Buyer or Seller.
3. Disclose any information that the Buyer or Seller requests to remain confidential without that party's consent except where the disclosure is required by law or the information becomes public from a source other than the real estate licensee or subsequent words or conduct of the client.

A dual agent cannot disclose

- a. That the Seller will accept less than the listed price and terms and conditions;
- b. That the Buyer will offer more than the offered price, terms, and conditions;
- c. The Buyer or Seller's motivation, need or urgency to sell or buy;
- d. The terms of any prior negotiation in which the Seller or Buyer have been involved.

ACKNOWLEDGEMENT

I have provided this dual agency disclosure form to the undersigned Seller(s) and Buyer(s).

(Signature of real estate agent)
MAIN STREET REALTY

(license number)

(date)

We have read this dual agency disclosure form and give our informed consent to enter into this dual agency relationship with MAIN STREET REALTY.

Seller: _____ Date: _____

Seller: _____ Date: _____

Buyer: _____ Date: _____

Buyer: _____ Date: _____

- NOTE: This is a sample form only. Review by your firm's legal counsel before use or adoption is recommended.

The 2003 AGENCY PROPOSAL: SIMPLIFICATION BY STANDARDIZATION

Why is MAR proposing to file legislation to clarify real estate agency practices?

The MAR Board of Directors directed the Agency Implementation Committee to take whatever steps necessary to provide clear guidelines to specifically permit the practice of facilitation in Massachusetts, require express written approval of sellers for sub-agency to occur; and, to create the opportunity for designated agency in Massachusetts.

How does the proposed statute clarify current practices of agency in real estate brokerage?

The statute provides guidelines to the practice of agency in real estate transactions. The statute includes definitions of applicable relationships in a transaction. It provides new and improved tools to practitioners practicing dual agency. Further, the proposal defines what information licensees must keep confidential in a transaction.

Does the proposed statute address facilitation/transaction brokerage?

Yes, the proposed statute specifically defines facilitation and requires that the REALTOR® disclose this relationship beforehand. Facilitators, also known as transaction brokers, are non-agents and therefore do not establish a fiduciary relationship with consumers. Unless otherwise agreed, a facilitator does not owe a consumer the duty of confidentiality or any other fiduciary duty owed by an agent.

Does the statute require REALTORS® to obtain written permission from a client to offer subagency?

Yes, the statute requires that the agent obtain written consent from their client before offering subagency. Such written consent may be incorporated into a brokerage services contract (listing contract, buyer agent contract, etc.) and shall contain a statement notifying the person whom the real estate broker represents that the principal may be liable for the acts or omissions of the subagent within the scope of the subagency.

What is designated agency and how does it work?

Designated agency is a form of real estate agency that is currently practiced in 26 states. Designated agency is a process where the broker of record designates one or more agents to represent a seller and designates one or more agents to represent a buyer in the same transaction. Before a designation may occur the consumer must consent. The relationship with the consumer begins and ends with the designated agent and does not extend to the other agents in the office. Under this proposal, in a designated agency firm, the broker is a dual agent and retains all legal and ethical responsibility for the transaction.

Under the proposed statute will REALTORS® need to change the way they do business?

Designated agency is **optional**. A firm must decide whether or not it wants to be a designated agency firm. A firm who chooses not to practice designated agency can continue to operate the way it did prior to the legislation, the only difference is a modified disclosure form along with enhanced tools to help them do business. The proposed bill specifically protects other legal agency options, such as exclusive agency and dual agency.

What kind of consent must a brokerage firm obtain to practice designated agency?

A firm must obtain "informed consent" from the consumer prior to the practice of designated or dual agency. Informed consent is the legal standard which involves the consumer understanding the level of service they are consenting to in their transaction. The statute provides a presumption of this informed consent if the consumer executes the new consent forms created within the statute.

Can a dual agency situation still occur in an office that practices designated agency?

Yes, the supervising broker will become a dual agent if his/her firm represents the seller and the buyer. Further, if the same agent is the agent for both sides of the transaction, he or she will be a dual agent.

The new mandatory disclosure form refers to "affiliated licensees." What is an affiliated licensee?

Affiliated licensees are all of the licensees within the same firm as the licensee who provides the mandatory disclosure form. If an agency relationship is established an additional disclosure regarding whether the affiliated licensees represent the consumer is required.

How will confidential information be handled in a brokerage firm which practices designated agency?

An office practicing designated agency will need to adopt an office policy to protect confidential information from other affiliated licensees who may become designated agents on the other side of a transaction. The proposed statute contains requirements on what information must remain confidential. In order to ensure that confidential information is protected, there are some steps that both the broker and the salesperson may need to take. A broker will need to institute controls on the type of information made accessible to all of the salespeople in the office and the type of information that is to be guarded by a client's designated agent.

MYTH vs. FACT: THE MAR AGENCY INITIATIVE

MYTH: MAR'S proposal is unnecessary as the common law currently defines agency practices and no changes are needed.

FACT: The current common law along with applicable statutes and regulations provide no guidelines for real estate professionals regarding the practice of agency. MAR's proposal provides new and improved tools to practitioners practicing dual agency along with defining all other relationships in real estate transactions. Further, the proposal defines what information licensees must keep confidential in a transaction and how to disclose all relationships available to consumers and when practitioners need to make these disclosures.

MYTH: MAR's proposed changes, specifically designated agency, will hurt small office's ability to compete in the marketplace while giving unfair advantage to large offices.

FACT: Currently 25 states have passed laws allowing for the practice of designated agency. There is **no** evidence that designated agency has caused any problems for small agencies in the marketplace. In fact REALTOR® membership has increased by 10% nationwide in the past year and NAR endorses the use of designated agency. Further, a recent NAR survey shows that 55% of REALTOR® members are affiliated with independent, non-franchised companies.

MYTH: Designated agency and facilitation are too complicated; REALTORS® won't be able to fully understand it. Further, it is so detailed that it will scare consumers and they will just ignore it and refuse to sign the new disclosure form.

FACT: MAR is committed to educating the real estate industry regarding these new concepts to ensure that any broker or salesperson who wants to practice these concepts is able to do it correctly. Further, the newly revised agency disclosure is designed to educate consumers regarding their options and explain the practitioner's role in the transaction. **25 states** have been practicing these concepts for years and MAR cannot find one lawsuit by a consumer as a result of designated agency or facilitation.

MYTH: The broker of record has no responsibility for a transaction under designated agency.

FACT: Under MAR's proposal while the broker becomes a dual agent in the transaction, they retain all legal and ethical responsibility for the transaction as well as all responsibilities under the Consumer Protection Act, Chapter 93A.

MYTH: Consumers, sellers in particular, will think that they are hiring an entire firm to represent them, when actually only their listing agent will advocate for them, therefore, the brokerage firm has duped them into listing their house with their firm.

FACT: Under MAR's proposal disclosure and consent to designated agency is required. Before practicing designated agency the real estate licensee must obtain informed consent from the consumer. MAR's proposal provides the required language needed to obtain informed consent from a consumer.

MYTH: Designated agency results in a conflict of interest as the client's confidential information will not be protected and therefore a designated agent will violate the fiduciary duty they promised to their client.

FACT: An office practicing designated agency will need to adopt an office policy to protect confidential information from other licensees within their firm who may become designated agents on the other side of a transaction. MAR's proposal contains requirements on what information must remain confidential. In order to ensure that confidential information is protected, there are some steps that both the broker and the salesperson will need to take. A broker will need to institute controls on the type of information made

accessible to all of the salespeople in the office and the type of information that is to be guarded by a client's designated agent. MAR will provide members optimal, sample office policies to accomplish the required protections.

ANTI-TRUST

Four Antitrust Traps to Avoid

Although the subject of avoiding possible antitrust violations covers many areas, a few of the most sensitive antitrust concerns include

1.)Price/term fixing. In most businesses, including real estate, many competitors may charge similar prices for the same services. This isn't illegal as long as each competitor sets prices independently. An antitrust violation occurs when you discuss and actually agree to charge the same prices or offer exactly the same terms as one or more of your competitors.

Avoid problems by: Establishing your company's fees, commission splits, and listing terms independently and without any discussion with competitors. Even informal conversations where you have no intention of actually setting prices could be misinterpreted as the basis of a price-fixing agreement.

2.)Territorial assignments. Agreements between competitors to divide the market geographically, by price range, type of property, or some other segmentation are considered anticompetitive because they conspire to establish dominance in a particular market. This isn't the same as an individual company's practice of specializing in certain properties such as historic buildings or custom-built housing.

Avoid problems by: Documenting your decisions to focus on certain property types with marketing and demographic studies.

3.)Boycotts. Boycotts occur when a group of businesses agree not to do business with a particular party. A typical group boycott allegation in the real estate brokerage business involves a claim that two or more brokerages have agreed to refuse to cooperate, or to cooperate on less favorable terms, with a third brokerage company. The intent is to eliminate that company as a competitor or to force it to abandon certain practices. Another form of boycott would occur if several companies collectively determined not to use a particular service provider, such as a certain newspaper.

Avoid problems by: Making decisions on whether to do business with other real estate companies or service providers based on your company's own judgments, goals, and experiences

4.)Association meetings. Associations are groups of competitors who come together to promote their common business interests. As such, they are vulnerable to allegations that agreements by members to use identical business practices are illegal conspiracies.

Avoid problems by: Remaining alert to discussions at meetings relating to commission rates, pricing structures, listing policies, or marketing practices of other brokers.

TIP: Any business or marketing plan that's principal goal is to adversely affect a competitor could be considered a violation of antitrust law.

6 Simple Antitrust Prevention Tips

Compliance with antitrust laws doesn't involve a lot of expense and rigorous documentation. It does require that you and your company's salespeople have a clear understanding of the law, a sensitivity to potential problem areas, and a consistent commitment to avoiding circumstance that might imply violations.

1.)Analyze market conditions, transaction costs, and income to justify your company's prices or fees. Even if they happen to be the same as the competition's, you will be able to defend against inferences of conspiracy.

- 2.) Never preprint commission percentages or listing periods into your listing agreements.
- 3.) Develop a written antitrust compliance policy for your company. Brokers may be held liable if salespeople violate antitrust laws.
- 4.) Teach sales associates the proper way to differentiate themselves from competitors by emphasizing the quality and service the company provides rather than disparaging the competition.
- 5.) Instruct your sales associates on the meaning of antitrust law, and train them not to discuss your company's pricing and commission policies with competitors.
6. Never use the word "standard" or "prevailing" when describing your fees and services.

Dangerous Words and Phrases

The most fertile source of antitrust liability for a real estate broker is the way in which his salespeople interact with sellers, buyers and salespeople affiliated with other firms. Statements made by salespeople in the course of soliciting a listing, showing a listing, cooperating with another brokerage firm or simply in casual conversation with a colleague are the most frequent source of evidence that commission rates have been fixed or that a particular broker has been boycotted. The following are examples of words or phrases occasionally used by salespeople that would permit a judge or jury to infer that real estate brokers are engaged in an illegal conspiracy:

1. I'd like to lower the commission rate, but the Board has a rule...
2. This is the rate that everyone charges.
3. The MLS will not accept less than a 120-day listing.
4. Before you list with XYZ Realty, you should know that nobody works on their listings.
5. If John Doe was really professional (or ethical), he would have joined the Board.
6. The Board requires all REALTORS® to make their salespeople join.
7. The best way to deal with John Doe is to boycott him.
8. If you valued your services as a professional, you wouldn't cut your commissions.
9. No Board member will accept a listing for less than 90 days.
10. Let him stay in his own market. This is our territory.
11. If he was really a professional, he wouldn't use part-timers.

Salespeople using these phrases are "accidents waiting to happen." They are a danger to their broker and all other competitors in the market. The Antitrust laws have joined death and taxes as inevitability's for a modern real estate broker. As such, they must be accepted, the problems they pose recognized, and the solutions must be implemented.

ANTITRUST COMPLIANCE GUIDELINES

A REALTORS® ability to comply with the antitrust law is in direct proportion to his ability and willingness to educate himself. This commitment to education is imperative because, like it or not, the REALTOR® and his broker will be held liable for their actions and statements. Accepting this liability, especially on the part of a broker (for his associates), without any effort to limit it, is the economic equivalent of Russian Roulette.

Adapted from [*Antitrust Pocket Guide for REALTORS® and REALTOR® Associates*](#). Available from NAR by calling 800/874-6500.

CONSUMER PROTECTION ACT

The threat to real estate brokers posed by the Consumer Protection Act, commonly known as Chapter 93A, has influenced the way many brokers sell homes. Often brokers say as little as possible for fear they will be sued if the information turns out to be incorrect.

Regulations of the Attorney General under C.93A require disclosure of "...any fact, the disclosure of which may have influenced the buyer or prospective buyer not to enter into the transaction." Practically any problem with a home may be the basis for a claim. The most common claims involve failure to disclose water problems in the basement, septic system inadequacy or general structural unsoundness. Other frequent topics are roofing problems, zoning and building code violations and claims seeking the return of a deposit.

Court decisions establish four types of situations which define C.93A "unfair" or "deceptive" acts or practices.

1. Where you make no representation, but have knowledge of a problem, you will be found liable for failure to disclose the problem, even if the buyer makes no inquiry.
2. Where you make no representation because you have no knowledge of a problem, you will not be found liable if the problem is one which a judge decides that a "reasonable" broker should not have known, i.e., there is no absolute obligation to discover, disclose and insure the buyer for every possible problem. What a "reasonable" broker should know depends upon the industry standard as well as the skill of any average qualified broker.
3. Where you make no representation because you have no knowledge, but the Court finds that the problem is one which a reasonable broker should have known, there has been no clear statement from the Courts whether a violation of C.93A will be found. For the time being, it is wise to err on the side of discovery and disclosure.
4. Where you make a representation which the buyer discovers to be erroneous, you risk being held liable unless other circumstances exonerate you. Generally a good faith belief in the truth of your representation is not a defense where the facts represented are capable of being ascertained with certainty.

Massachusetts Courts have not yet decided whether a broker can assert the defense that he innocently provided a buyer with information which the broker received from the seller without verification by the broker and without knowledge that it was incorrect. Many states protect the broker in such a situation. The safe approach is to disclose the information, indicating that it is a representation of the seller, not you, and stressing that it has not been verified by you.

Separate from the legal requirements of C.93A are the ethical obligations for disclosure imposed pursuant to Article 9 of the Code of Ethics. Observing the principles describe in Article 9 will reduce a broker's risks under C.93A.

FAIR HOUSING

Overview: The federal Fair Housing Act prohibits discrimination in housing because of race, color, national origin, religion, sex, familial status and handicap. The Massachusetts Fair Housing Act further extends the prohibition against discrimination against discrimination to sexual orientation, marital status, ancestry, veteran status, children and age. It also prohibits discrimination against families receiving public assistance or rental subsidies, or because any requirements of these programs. People who fall into any of these categories are considered members of "protected classes". The federal and state fair housing laws apply to brokers and salesmen. These laws do not require brokers or homeowners to show homes or sell to members of a protected class. Make sure that your performance and practice confirms your commitment to fair housing. The enclosed chart is a useful fair housing reference tool. However consult legal counsel to ensure complete and proper compliance with all applicable laws and regulations.

Relevant Law: Federal Civil Rights Act of 1866 (42 U.S.C. § 1982)
Federal Fair Housing Act, (Title VIII of the Civil Rights Act of 1968), as amended, 42 U.S.C. § 3601.
M.G.L. chapter 151B (Massachusetts Fair Housing Act)
M.G.L. chapter 93, § 102 (Massachusetts Equal Rights Act)
M.G.L. chapter 93, § 103 (Massachusetts Rights for Elderly and Handicapped Act)
M.G.L. CHAPTER 12, § 11h (Massachusetts Civil Rights Act)
M.G.L. chapter 184, §23B

Important Issues:

Advertising: Advertising may not contain anything that indicates a preference, limitation, or discrimination based on any protected class. In order to avoid this, advertisements should not include any statements regarding the type of buyer that may be interested in the property. An example of such a statement is describing a property a "Walking distance from the Catholic Church". While this statement seems neutral, it may be interpreted as giving a preference to a certain religious affiliation and to a person with no disabilities.

Rentals: A landlord will be able to find good tenants without resorting to illegal discrimination tactics. There are numerous criteria that a landlord may properly consider in determining whether to rent to a certain tenant. Landlords should carefully review each potential tenant to ensure that (1) they pay their rent on time (check with previous landlords); (2) they take good care of the apartment; (3) they are well-behaved tenants; and (4) they do not violate the lease provisions. Usually a conversation with the potential tenant or his/her previous landlord will provide the current landlord with all the necessary information.

Additional Information: If a broker participates in wrongful conduct, even though at the instruction of the owner, he/she may be charged with discrimination. Massachusetts law (M.G.L. chapter 184, § 23 B) renders void any provisions in a real estate contract or deed which is discriminatory. If faced with such a situation, it is advised that the broker inform the owner that discrimination is illegal.

What are some examples of discrimination by a real estate professional?

The following are some examples of behavior by a real estate broker that constitutes discrimination:

- Incorrectly telling a family that an apartment is leased because the owner does not want to lease the apartment to families with children.
- Telling a Latino family that they must pre-qualify for a mortgage before being shown certain properties while not requiring the same of a white family.
- A broker showing an Asian family homes in one section of town while showing a white family homes in a different section.
- Following a homeowner's instructions not to show or sell their homes to minorities.

Are there any exemptions from federal and state fair housing laws?

Yes. Both state and federal fair housing laws contain exceptions in certain situations. Federal and state fair housing laws are complex. Consult legal counsel and the enclosed chart to ensure compliance with all applicable laws and regulations.

Does a landlord have to rent to students?

No. The federal and Massachusetts anti-discrimination laws do not include students as a protected class.

Do I have to rent to families receiving public assistance?

Massachusetts's law prohibits housing discrimination against families in welfare or other public assistance. A family may not be discriminated against solely because they are receiving assistance.

For more information please contact the following:

Massachusetts Association of REALTORS® AT (800)370 Legal
Massachusetts Commission Against Discrimination (MCAD) (617)727-3990

Fair Housing—A Web of Legislation

Federal fair housing law consists of the Civil Rights Act of 1866 and Title VIII of the Civil Rights Act of 1968, otherwise known as the Fair Housing Act. The act, as amended in 1988, provides that no one can be discriminated against in the sale, rental, or financing of residential dwellings on the basis of these protected classes: Race, Color, Religion, Sex, Handicap, Familial status or National origin

In addition, the Civil Rights Act of 1966 provides that all U.S. citizens have the same rights as white citizens to "inherit, purchase, sell, hold, and convey real and personal property." The U.S. Supreme Court has interpreted this act to prohibit all forms of racial discrimination with regard to real estate—even discrimination by private individuals. Penalties can include punitive as well as actual damages.

TIP: Fair housing laws in some states and municipalities may include additional protected classes—such as sexual preference, age, or sources of income. For information on your state's fair housing laws, contact your state housing authority or visit the [U.S. Department of Housing and Urban Development](#) online. The site has a section for real estate brokers and a listing of state HUD offices.

TIP: The handicapped category under the Fair Housing Act includes not only obvious physical handicaps, but mental handicaps, alcoholism, and AIDS. Current abusers of controlled substances are not covered.

Exceptions From the Rules

- An owner who sells or rents a single-family home without the services of a real estate practitioner is exempt from coverage if he or she doesn't own or have an interest in more than three single-family houses and doesn't engage in [discriminatory advertising](#).
- Owners of buildings designed for occupancy by up to four families are exempt from the Fair Housing Act as long as they live in one of the rental units and do not use any discriminatory advertising.
- Owners or managers of qualified "housing for older person" may refuse to rent to families with children. To qualify, a property must have at least 80 percent of the units occupied by at least one person 55 years of age or older and be marketed only to those 55 or older.

TIP: Get a statement that a property meets these requirements from the current owner before you begin marketing it to seniors.

- Religious organizations may discriminate in the sale, rental, or occupancy of their noncommercial property.

- Private clubs may limit the rental or occupancy of their noncommercial lodgings to members.

8 Real-Life Fair Housing Violations

Training your sales associates in the practical applications of the Fair Housing Act will help ensure that they do not inadvertently violate the Fair Housing Act by:

1. Refusing to sell or rent a property or discouraging a potential buyer or tenant because of a person's protected class status.

Don't say: "This two-bedroom condominium is just too small for you and your three children. Plus, there's no playground nearby."

2. Using different provisions in leases or sale contracts, such as those relating to rental charges, security deposits, lease terms, downpayment, and closing requirements because of a person's protected class status.

Don't say: "Because you only moved to this country from Japan a little while ago, the sellers may be uneasy about your ability to secure a mortgage. I suggest you make a larger earnest money deposit to help convince them of your interest and ability to close."

3. Urging residents to sell or rent their properties, often at bargain prices, by suggesting that members of a protected class are likely to move into the area and have a negative impact on property values. This violation is called blockbusting.

Don't say: "You know, the people who live in this neighborhood aren't the same Polish immigrants who lived here when you bought this house 30 years ago. It's just not safe for you to walk around alone any more. Maybe you should consider selling now while you can still get a good price for your house."

4. Restricting a person's choices to perpetuate segregated housing patterns based on membership in a protected class—taking African-American families, for example, only to predominantly African American neighborhoods.

Don't say: "I know how important it is for you to find a church congregation you can belong to. Let me show you two houses near the African American Baptist Church on Second. I think that church would suit you."

5. Providing false information on the availability of a property for sale or rental based on a person's protected class status—even if that information is based on the owner's desires.

Don't say: "There's no point in your showing the Smith's house to that Hispanic couple; the Smiths will never sell to them."

6. Refusing to provide information on the availability of loans or other financial assistance or providing information that is inaccurate or different because of a person's membership in a protected class.

Don't say: "Mr. Hernandez, I think your best bet is to go to a mortgage broker for a loan. It'll be more expensive, but they're more likely to accept your application."

7. Using an appraisal that improperly takes into consideration the protected classes in estimating property value.

Don't say: "See if you can get the value of the property as high as you can. She's an old lady, and this house is her only asset, so I want to get her a really good price."

8. Relying on illegal covenants or provisions that preclude the sale or rental of a dwelling to a person because of membership in a protected class.

Don't say: "I'd love to show you the house in this development, but the restrictive covenants wouldn't allow you to build the entry ramp you need for your wheelchair."

TIP: You never know when your fair housing practices are being tested. Testers from government or private groups can pose as home seekers, and their evidence is fully admissible in court.

TIP: The courts have determined that a violation of the Fair Housing Act may be proven even if there was no intent to discriminate, if there is evidence of a discriminatory effect.

Do Any of These Sound Familiar?

- Your sales associate shows the parents of a blind toddler a house for sale at the end of a quiet cul de sac. A block away, on a busy corner, they notice another house for sale that meets their specifications and ask why he didn't show them that one.
- A property manager shows a young, single woman a top-floor apartment when there is a first-floor unit available. A perfectly sincere concern for this woman's safety may have led the manager to steer the tenant to the top-floor unit he perceives as safer.
- A customer asks your sales associate where one of your listings is located. "It's on Division Street," he says, "across the street from a little bodega and a block away from Roberto Clemente High School." The choice of the word "bodega" instead of the more generic store might be seen as a way to indicate that the many of the neighborhood's residents were Hispanic.

Although well-intentioned, these common practices constitute steering. This effort to influence a person's housing choices based on race and other protected factors violates federal fair housing laws and places you, the broker, at risk of a discrimination complaint.

Fair Housing in the Trenches

Bruce Aydt, senior vice president and general counsel with Prudential Alliance, REALTORS[®], in St. Louis, and a *REALTOR[®] Magazine* columnist, shares advice on how to handle some common fair housing situations.

Q: What should I do if I'm representing sellers who express an intent to discriminate in violation of the Fair Housing Act—someone who refuses to sell to an African American, for example?

Aydt: This is not the time to be diplomatic. Remind the sellers that they pledged in the listing contract not to discriminate. Review the law, and explain that you cannot honor their request. If the sellers are unwilling to abide by fair housing laws, terminate the relationship and confirm your decision in a letter to the sellers and with a copy in your transaction file.

If the sellers express their feelings in front of a potential buyer, follow the same course of action, plus take an additional step of sending the buyer a letter confirming your commitment to equal housing and indicating that you terminated your relationship with the sellers.

Q: What about buyer discrimination? Is that illegal?

Aydt: The Fair Housing Act doesn't expressly forbid discrimination by buyers or renters who prefer certain locations. However, the U.S. Department of Housing and Urban Development has stated that buyers' representatives could be held liable for violating the Fair Housing Act if they followed the discriminatory instructions of their clients.

Q: Are there any particularly troublesome compliance issues for brokers and sales associates?

Aydt: Some brokers aren't aware of the two additional protected classes that were added in 1989—people with disabilities and families with children. There's a need for more education in dealing fairly with these clients and customers.

Q: Is it a good idea to establish a relationship with local fair housing agencies, or is it best to keep them at arm's length?

Aydt: It makes sense to establish a good relationship with fair housing groups in your area. Many of them have strong educational programs that you can tap into for your training needs. My company invited representatives from a fair housing group to attend a sales associates meeting to explain what the group

does and how we can work with it. Your openness to these organizations signals a commitment to fair housing.

TIPS::

- Remind the sellers of their fair housing laws and get them to agree in writing to comply with the fair housing obligation as part of the listing agreement.
- The appropriate response to a discriminatory statement by a client depends in part on whether the discriminatory behavior was intentional, whether anyone was harmed by the behavior, and the extent to which others are aware of the behavior. If a seller makes a remark to you alone, you can first try to educate the seller about the implications of fair housing. If the remark is made in front of clients in a protected class, more serious measures, such as sending a letter of apology to the buyers and possibly resigning the account may be necessary.
- When buyers ask to be shown properties in a particular ethnic or religious community, turn the request around and ask them what geographic areas they're interested in. Explain that you'll present them with housing opportunities in a few different areas. Direct them to public sources of demographic information, and ask them to find out what areas fit their criteria. Remind them that the Fair Housing Act prohibits you from showing them properties based on discriminatory preferences.

Suggested Fair Housing Policy Statement

Your policy statement should say unequivocally that you support all applicable laws, and state specifically what the provisions of those laws are.

"This company conducts business in accordance with all federal, state, and local fair housing laws. It is our policy to provide housing opportunities to all persons regardless of race, color, religion, sex, familial status, handicap, or national origin. The company's fair housing procedures are not recommendations. They must be followed by everyone associated with the company."

TIP: Give every prospective seller and buyer a copy of your company's fair housing policy statement.

MASSACHUSETTS

The Massachusetts House of Representatives has passed a bill introduced by the Massachusetts Association of REALTORS® to help clarify the disclosure requirements for brokers. Bill H. 2099 proposes that certain information, including knowledge about diseases, homicides, felonies, suicides, and the presence of ghosts, need not be disclosed in a transaction. The bill would eliminate the existing conflict between the federal fair housing laws and the state's chapter 93A statute. The federal fair housing laws make it illegal to discriminate against people with HIV and AIDS, and the state law exposes real estate professionals to liability for refusing to answer questions from buyers about whether or not the seller has the virus or disease. The bill now moves to the state Senate for further consideration.