

May 2019 Notes from the MAR Legal Hotline

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Q. My seller has a home security system in the property I have listed. Do I have to disclose this to potential buyers and their agents?

A. Yes, Massachusetts requires two-party consent for all audio recordings. Recording another individual without their consent may subject you and your seller to criminal and civil penalties. Home monitoring devices such as Google Home, Arlo, Nest, and Ring Doorbell, among others, have all become commonplace. It is extremely important to have a conversation regarding these devices with your sellers prior to listing a property. If a seller has a recording device on the property and intends to have the device active during showings and open houses, they must disclose this fact to any individual who enters the property and is thus subject to recording. Consent may be obtained in writing, or through proper notice which allows an individual to decline being recorded before they are subject to recording. Listing agents should place a notice in the MLS indicating that showings and open houses may be recorded. Additionally, a notice should be placed on the property indicating that there are recording devices. Unlike an agency disclosure sign at an open house, a placard on the countertop will not suffice as proper notice because the individuals are likely already being recorded.

To assist our members in navigating this issue, MAR has developed a new form, *Notice of Recording*, that may be included with the MLS listing. We have also updated the listing agreements to include a provision under the “Seller’s Duties and Responsibilities” for the seller to disclose whether they have any recording devices on the property and whether they record visual, audio, or both visual and audio. These updates will be added to our forms library soon!

Q. An unrepresented buyer came to an open house and wants me to help them submit an offer, but my seller will not consent to Dual Agency – how do I proceed?

A. As an agent of the seller, you owe the seller duties of obedience, loyalty, disclosure, confidentiality, accountability and reasonable care and due diligence. You do not have an agency relationship with the buyer *unless* the seller consents to dual agency. If your office practices designated agency, another agent in the office may be appointed as a designated agent with the consent of both the buyer and the seller. If one, or both, parties do not consent to dual or designated agency, you are limited to working with that buyer as a customer. In this scenario you must provide the unrepresented buyer with a Mandatory Agency Disclosure stating that you are a representative of the seller. You may assist the buyer with filling out a Contract to Purchase, but you may not provide the buyer with advice or recommendations pertaining to the terms of the offer.

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