Module 2: Law of Agency

Glossary

**Accountability:** A fiduciary duty in which the real estate agent must provide timely updates to the principal regarding the principal's monies that are involved in the real estate transaction. Note: All real estate agents must provide timely accounting to all parties to a real estate transaction if that agent is handling those funds.

**Agency by Ratification:** An agency relationship created “after the fact” when a principal allows an agent to act on his or her behalf, benefits from that act, and profits from the act. The courts would not allow the principal to deny that the relationship existed because the principal “ratified” the agency when he or she allowed, benefited, and profited by it.

**Agency Disclosure Form:** A document that describes the roles of all agents involved in a real estate transaction and specifies in which roles each party will act: as the buyers' agent, sellers' agent, listing brokers' agent, or dual agent. Under New York law, every prospective buyer, seller, landlord, and tenant must be given this form.

**Agency Relationship:** A relationship created when one party designates another to represent his or her interests in dealings with a third party.

**Agent:** The individual authorized by a principal to make decisions on behalf of the principal and to represent the principal’s interest.

**Associate Broker:** A licensed real estate broker who chooses to work under the name and supervision of another individual broker, or another broker who is licensed under a partnership, limited liability company, corporation, or trade name.

**Authority:** An agent's power to act in the name of his or her principal. Different types of agency relationships have varying degrees of authority.

**Broker:** A person who conducts real estate activity in exchange for compensation or other valuable consideration.

**Broker's Agent:** An agent who cooperates or is engaged by a listing agent, buyer's agent, or tenant's agent (but does not work for the same firm as the listing agent, buyer's agent, or tenant's agent) to assist
the listing agent, buyer's agent, or tenant's agent in locating a property to sell, buy or lease respectively, for the listing agent's seller or landlord, the buyer agent's buyer or the tenant's agent tenant.

**Buyer Representation Agreement:** The written agreement that creates the agency and contractual relationship between a broker and a buyer.

**Buyer’s Agent:** An agent who contracts to locate residential real property for a buyer, or who contracts to find a buyer for a property, and then presents an offer to purchase to the seller (or the seller’s agent) and negotiates on the buyer's behalf.

**Client:** Also known as the *principal*, this is a person who employs a broker to act on his or her behalf.

**Closing Costs:** Various fees and expenses payable by the seller and buyer at the time of a real estate closing, as set out in the settlement statement. Also called *transaction costs*.

**Comparative Market Analysis (CMA):** An informal system for establishing the value of real property that works by comparing the prices of recently sold, pending, and currently for-sale homes that are similar in size and features to the property listed for sale. A CMA is prepared by a real estate professional before (or in conjunction with) obtaining a listing to help a seller determine an initial asking price for a property. Sometimes also called a *competitive market analysis*.

**Confidentiality:** A duty of the agent to not divulge any private information from or about a client, unless otherwise instructed by the client, or unless keeping the information private would violate any legal or ethical standards. (Confidential information includes any facts that could compromise the client's bargaining power in the transaction, such as telling a third party the client's financial goals, bargaining plan, or reason for moving.)

**Cooperating Agent:** An agent other than the listing agent who is involved in the real estate transaction.

**Customer:** A person (also known as the *third party* to a transaction) for whom an agent performs only limited brokerage services rather than full representation. As opposed to a *client*.

**Designated Sales Agent:** A licensed real estate salesperson or associate broker, working under the supervision of a real estate broker, who has been assigned to represent a client when a different client is also represented by such real estate broker in the same transaction.

**Disclosure:** The broker's duty to divulge to his or her principal any information the broker learns that might influence the principal's decisions in the real estate transaction. Also known as *notice*. The agent also owes "disclosure of material facts" (of any material facts the licensee either knows or should reasonably have known, and which would not be immediately apparent or easily discovered by the third
party to the transaction) if those facts might have a bearing on the value or desirability of the property or of the buyer's ability to complete the real estate transaction.

**Double Exposure:** An agent's breaching of fiduciary duties to one or both parties because of conflicting obligations of preexisting agency relationships with either party.

**Dual Agent:** An agent who represents both parties (usually the buyer and the seller) in a transaction.

**Employee:** A person who works under the guidance, control, and supervision of another person (the employer) in exchange for a regular salary/payment. As opposed to an *independent contractor*.

**Estoppel:** A legal principle in which a person is prevented by his or her own previous actions, denials, or accusations from taking an opposing position if that position would cause harm to another party.

**Exclusive Agency Listing Agreement:** An employment contract that gives one broker the exclusive right to sell a particular property and earn a fee or commission when the seller accepts an offer. This kind of contract defines a specific period of time during which the agent has this exclusive right. Exclusive listings still allow the property owner to sell directly to a buyer and not pay a commission unless otherwise stipulated in the contract. In this situation, the seller would be obligated to pay only a fixed amount to compensate the broker for his or her efforts in providing services such as placing signage, running advertisements, producing brochures, and listing the property with an MLS.

**Exclusive Right-to-Sell Listing Agreement:** An employment contract giving one broker the exclusive right to collect a commission on the sale of a property if the owner, listing broker, or anyone else sells the property during the term stated in the listing agreement.

**Expiration of Listing Period:** The end of the time period covered by a listing agreement or the clause in a listing agreement that defines when the broker employment contract expires. All legally enforceable listing agreements must have a clause establishing the period during which the conditions of the agreement apply.

**Express Agency:** A form of agency that is specifically created and stated through a written or oral agreement (this agreement is known as "express agreement"). As opposed to *implied agency*.

**Express Agreement:** The method of creating an agency relationship in which the principal specifically appoints or hires an individual to serve as his or her agent, and the agent accepts the position. This can be an oral or a written agreement.

**Fiduciary Duties:** The duties an agent owes to the person (known as the agent's client or principal) on whose behalf she or he is working; includes care, confidentiality, loyalty, obedience, accounting, and disclosure.
**Fiduciary Relationship:** A relationship in which one person places trust and confidence in another to responsibly handle the obligations of the position as his or her representative. Such relationships carry fiduciary duties. Agency relationships are fiduciary in nature. Examples of other fiduciary relationships are lawyer to client or doctor to patient.

**Fiduciary:** A person who has been entrusted to act for another person’s benefit or who accepts responsibility for looking after another person’s interests. A fiduciary stands in a special relationship of trust with the person for whom he or she acts and often has the authority to make decisions for that person.

**First Substantive Contact:** The initial time a licensee exchanges and/or gives information about a property to an interested person, or the first time an interested person divulges personal, confidential information regarding his or her intentions, interest, or financial position in regard to a real estate transaction/property.

**General Agent:** A type of agent who has a great degree of authority in limited areas of the principal's affairs, such as a property manager. Typically, there is a general agency relationship between the sponsoring broker and the sponsored sales associate or broker associate.

**Gratuitous Agency:** An agency relationship in which the agent has waived any compensation. The relationship is still held to all agency duties. This could occur if an agent gives “free” advice and the principal acts on that advice. If the advice was wrong and the principal is damaged, then the agent could be liable for damages.

**Group Boycott:** This violation of the Sherman Antitrust Act is an agreement made by two or more members of a profession (in this case, the real estate profession) to refuse to deal with a certain firm/party unless that party agrees to stop doing business with the boycotting parties' competitors.

**Implied Agency:** When a party assumes consent to the relationship based solely upon inferences formed from communication with the other party. Implied agency is based on the agent’s actions, conduct, and words rather than on a written agreement (expressed agency).

**Independent Contractor:** As determined by the IRS for federal tax classification purposes (and with specific tax regulations and consequences), this is a person who performs work for another (known as the "employing party," which is not the same as an "employer") to achieve a specific end result, but who is not a direct employee of that person. Unlike an employee, who must undertake tasks in the exact manner dictated by the employer, an independent contractor is substantially in charge of the manner in which she or he achieves the end result for his or her employing party.
**Informed Consent:** Agreeing to something once all facts needed to make the decision have been received and reviewed.

**Landlord’s Agent:** A listing agent who acts alone, or an agent who acts in cooperation with a listing agent, acts as a landlord's subagent, or acts as a broker's agent to find or obtain a tenant for residential real property.

**Listing Agent:** The agent who lists a seller’s property. Also called a *listing broker or listing salesperson*.

**Listing Agreement:** The written agreement that creates the special agency and contractual relationship between a broker and a seller.

**Listing Broker:** A broker who establishes a written listing agreement with a property owner or owners under which that property will be sold or leased. Listings often are obtained by a salesperson who works for the person who becomes the listing broker.

**Loyalty:** A fiduciary duty owed by an agent to the agent’s principal, in which the agent must always put his or her principal's needs and best interests above the needs of all other parties, including the agent’s.

**Market Allocation:** A violation of the Sherman Antitrust Act in which members of the same profession or trade agree to divide specific business areas among the parties so that each will practice without competition within those areas. For example, “You take the north half of town, and I'll take the south side.”

**Material Fact:** Facts about the condition of the property or a party's ability to complete a transaction that would affect another party’s decision in a transaction.

**Misrepresentation:** An unintentional distortion or withholding of the truth.

**Multiple Listing Service:** A marketing service that is usually run exclusively for members of a board of REALTORS® and sometimes owned by it as well. Through an MLS, all member-brokers pool their listings to share information among the membership and publish commissions that are offered to other agents who bring possible buyers for the property. Members generally establish the procedures for sharing commissions, the standards for required information, and other regulatory conventions. Multiple listing services usually require property owners to sign exclusive agency agreements or exclusive right-to-sell listing agreements with participating brokers before the owners can have their properties listed with the service.

**Mutual Agreement:** An agreement from both the agent and the principal to terminate an agency relationship.
**Net Listing Agreement:** An employment contract in which the seller pays any amount over the listing price set in the contract as commission. Net listings are illegal in some states and not recommended in many others because they tend to create tensions between a licensee’s own interests and his or her obligations to serve clients’ best interests.

**Obedience:** One of the fiduciary duties owed by an agent to his or her principal (client), in which the agent must obey all of the client's lawful and ethical instructions.

**Office Manager:** A licensed associate real estate broker who chooses to work as an office manager under the name and supervision of another broker (or another broker who is licensed under a partnership, limited liability company, corporation, or other legal entity). This person must retain an active real estate broker’s license, but according to New York real estate laws, when he or she practices real estate sales and brokerage as an associate broker, his or her actions and practice are governed exclusively by the requirements set forth for real estate salespersons, rather than the typical activities and roles of a broker.

**Open Listing Agreement:** A type of listing agreement in which more than one broker may be employed to sell the property but only the broker who is the procuring cause of the sale receives a commission. Additionally, the owner is not obligated to pay anyone a commission if the owner sells the property herself or himself; that is, if no broker is the procuring cause of the sale. Open listings often are used by builders and developers who agree to pay a sales commission to any broker who procures a buyer for a house or lot in a designated subdivision.

**Price Fixing:** Conspiring with other brokers or agents to establish fixed fees or prices for services or products, which is illegal, because all real estate commissions and fees are established only between the broker and the client on a case-by-case basis.

**Principal:** The parties involved in a contract or the individuals who are making an exchange in a transaction. For example, in a listing agreement, the seller is the principal who hires the broker (the other principal in the listing contract) to represent him or her in the sale or lease of his or her property. In a real estate transaction, the seller and buyer are the principals in the exchange. Though the examples just mentioned involve only two principals, multiple principals can be associated with a contract or a transaction.

**Procuring Cause:** The action that begins a chain of events that result in the completion of a transaction.

**Property Owner(s):** The generic term used to represent an individual, group of individuals (including married couples), or any other form of partnership, company, trust, or legal entity capable of owning title that does in fact own the title to real property.
Ratification: A principal’s agreement to an action that an agent has performed outside of the scope of the agent's authority. It is risky to assume that a principal will ratify an action after the fact.

Ready, Willing, and Able Buyer: An individual who has the desire to purchase a property on the seller’s terms and has the resources to do so.

Real Estate: All that is land plus all things attached by people, such as improvements (e.g., streets, utilities, houses, or buildings).

Real Property: All that is land, real estate, plus the bundle of legal rights inherent to the ownership of real estate, such as the rights of control, possession, exclusion, disposition, and enjoyment. When a buyer purchases real estate, she or he buys the legal rights previously held by the seller.

Reasonable Care: The broker's or agent's duty to perform professional duties properly, knowledgably, and in a timely manner, with regard to applicable laws, financial matters, property valuation and pricing, and all other aspects of a real estate transaction in which an agent should be reasonably informed on behalf of the client/principal. Reasonable care also means the agent must advise his or her client to seek expert advice (lawyers, etc.) for matters outside his or her areas of expertise.

Renunciation: An agent’s termination of an agency relationship with a principal.

Revocation: A principal’s termination of an agency relationship with an agent. In more general terms, the act of removing a power one has given to another, as in the revocation for specified license law violations.

Salesperson: An individual who conducts real estate business and is associated with a licensed broker.

Self-Dealing: The actions of a broker who lists and purchases a property, and then earns the agreed-upon commission from the transaction; self-dealing is not illegal, but neither is it recommended, because the broker ends up being both his or her own agent, and that of the sellers.

Seller’s Disclosure Notice: A notice that provides information about a property’s condition. This information, usually in the form of a disclosure statement, outlines the general facts regarding a property and any of its known latent defects. The disclosure notice also describes any personal property that is to transfer with the sale of real estate, such as refrigerators or stoves. State and federal laws govern the specific content that is required in a disclosure notice.

Seller’s Agent: A broker or agent who acts on behalf of the seller, offering advice on the listing price and how to market the house, and shows the property to prospective buyers. A seller's agent can be a listing agent who acts alone; or the seller’s agent could be an agent acting in cooperation with a listing agent, acting as the seller’s subagent, or acting as the broker's agent to find a buyer for a residential property.
**Special Agent:** A type of agent who has very limited authority in one specific transaction. Real estate agents are special agents.

**Subagent:** A licensee who represents a principal through the principal's broker, whom the principal has designated as his or her agent.

**Substantive Dialogue:** A meeting or written communication that involves a substantial discussion about a real estate transaction.

**Tenant relocator:** A person or other legal entity (including a firm, corporation, partnership, limited liability company, or other such entity) that, for another and for a fee or other valuable consideration, arranges and otherwise handles the relocation of commercial or residential tenants from buildings that are going to be structurally altered, demolished, rehabbed, or remodeled.

**Tenant's agent:** An agent who contracts to locate residential real property for a tenant or who finds a tenant for a property and presents an offer to lease to the landlord or landlord's agent and negotiates on behalf of the tenant.

**Third Party:** A party who negotiates with the principal through the agent. Often called a *customer*.

**Tie-in Arrangement:** A situation that occurs when one party requires the purchase of an unrelated item or service as a condition of the sale. (For example, requiring the buyer to contract with the same landscaping company or other service as a condition of the sale.)

**Undisclosed Dual Agency:** A relationship that occurs when an agent behaves in a fiduciary manner toward both parties in a transaction (the buyer and the seller, or tenant and landlord) without presenting a disclosure for all parties to consent to such an arrangement.

**Undivided Loyalty:** A fiduciary duty owed by the agent to the agent's principal, in which the agent is loyal only to the principal.

**Universal Agent:** A type of agent who has a great deal of authority in his or her principal's affairs and can do anything on behalf of the principal that is allowed by law. A universal agent can do anything the principal can do.

**Variable Rate Commission:** An agreement in which the listing broker charges the seller less if the property is sold in-house rather than in a co-brokered transaction.

**Vicarious Liability:** A risk created for one person (who hasn't done anything wrong) by another party, in which the first party can still be held accountable for the actions of the second. (For example, a seller whose house is seriously water-damaged from a flood after it's been contracted and inspected, who does
not divulge this fact to the buyer, can, along with the seller’s agent, get trouble for not disclosing the damages.

**Warranty of Authority:** A rule that states that an agent only represents the principal and is not responsible if the principal is unable to follow through on the transaction, unless the agent knew that the principal was unable or unwilling to complete the transaction and misled the third party.