

**DUE DILIGENCE & LAW OF AGENCY**  
**2.0 CREDIT HOURS**

**I. Introduction (20 MINUTES)**

Agency is an area of law which deals with contractual, quasi-contractual and non-contractual fiduciary relationships that typically involve three people or entities. There is an Agent that is authorized to act on behalf of another, called the Principal, to create legal relations with a Third Party.

A fiduciary relationship is a relationship of trust, either legal or ethical, with one or more person or parties.

All Agents are fiduciaries and maintain a fiduciary duty which requires the Agent to act honestly and loyally, and in the Principal's best interest. Other fiduciary duties may include reasonable care and diligence, confidentiality, and disclosure.

Acts by the Agent that are contrary to the Principal's best interest are considered a breach of the fiduciary duty.

In New York, a fiduciary relationship exists where one party is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relationship.

An Agent typically has knowledge and/or ability in a certain area and is employed by the Principal to exercise his or her judgment in dealing with property and/or money.

**II. Creation of Agency by Agreement (20 MINUTES)**

An agency created by contract is referred to as an agency by contract.

The contract will detail the type of agency created, general, specific, etc., and set forth the consideration which is anything of value promised to another when making a contract for services or products. An agency where the agent receives no compensation.

Not all agreements must be in writing. Specifically, New York General Obligations Law 5-701(10) exempts duly licensed real estate brokers from the requirements that such agreement be in writing.

A contract is void or voidable when one of the parties lacks capacity to make one. If both Principal and Agent lack capacity—for example, a minor appoints another minor to negotiate or sign an agreement—there can be no question of the contract's voidability. In the event that only one or the other lacks capacity. Generally, New York Law focuses on the principal. If the principal is a minor or otherwise lacks capacity, the contract can be avoided even if the agent is fully competent. There are, however, a few situations in which the capacity of the agent is important. Thus a mentally incompetent agent cannot bind a principal.

**III. Creation of Agency by Operation of Law (20 MINUTES)**

There are two scenarios where an agency may be created by law.

The first is an Implied Agency where courts have held an agency to exist in the absence of an agreement where an agency may be implied from the party's words and conduct as viewed in light of the surrounding circumstances, including the nature of the principal's business and the position of the agent within that business. The Agent is deemed to have permission from the principal to undertake certain acts.

The second type of agency that may be created by law is an Apparent Agency which exists when an Agent causes another party to believe he or she is authorized to conduct business on behalf of the Principal.

An example of Apparent Authority is when a company provides an individual, who has no authority to make decisions or to contract, such items as business cards or stationery, business forms with the company's logo, or a company truck with a logo. These items would lead any reasonable person to believe the individual had authority to act on behalf of the Principal. On the other hand, if the individual obtained or fabricated such items as business cards and letterhead with the company logo without the knowledge or permission of the company, it is likely the contract would not be legally binding.

The difference is that, for the company to be bound to a contract or agreement made by an individual with Apparent Authority, there must be an act or express omission on the part of the company. An individual acting alone to give the customer a false impression cannot bind the company to any agreement.

#### IV. Types of Agency (15 MINUTES)

##### a. General Agent

- i. A General Agent Someone authorized to transact every kind of business for the principal.
- ii. Possesses the authority to carry out a broad range of transactions in the name and on behalf of the principal. He or she may be the manager of a business or may have a more limited but ongoing role, and example of which is a purchasing agent or a life insurance agent authorized to sign up customers for the home office.
- iii. A General Agent has authority to alter the Principal's legal relationships with Third Parties, and has the authority to act in any way required by the Principal's business.
- iv. Since a General Agent has broad authority, the Principal must specifically limit and spell out the limitations, but even so, the Principal has been held liable for any of the Agent's acts in excess of his authority where the acts were in furtherance of the Principal's business.

##### b. Special Agent

- i. A Special Agent is one who has authority to act only for a specific purpose in a specifically designated instance.
- ii. For example, a real estate broker is usually a special agent hired to find a buyer for the Principal's real property.

##### c. Agency Coupled with an Interest

- i. An Agency Coupled with an Interest involves a situation where the Agent's reimbursement depends on his or her continuing to have the authority to act as an agent.
    - ii. For example, a literary or author's agent will typically agree to sell a literary work to a publisher in return for a percentage of all monies the author earns from the sale of the work. The literary agent also acts as a collection agent to ensure that his commission will be paid.
    - iii. In the example above, the agency is coupled with an interest.
  - d. Subagent
    - i. A Subagent is an agent who is appointed by the Agent to carry out his or her duties. Although these appointments may or may not be authorized by the Principal, Subagents are commonly appointed.
    - ii. For example, an insurance company may name an agent to open offices in cities throughout a certain state. In such a scenario, the agent will conduct his or her business through agents of his or her choosing. These agents are subagents of the principal if the agent had the express or implied authority of the principal to hire them.
    - iii. Legally, they are agents of both the Principal and the Agent, and both are liable for the Subagent's conduct, though liability is normally designated to the Agent in writing.
  - e. Servant
    - i. Although the word "Servant" may seem archaic, a Servant is an Agent and legally defined as, "an agent employed by a master [employer] to perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right to control by the master."

**V. An Agent's Fiduciary Duties (20 MINUTES)**

- a. Loyalty
  - i. Loyalty is one of the most fundamental fiduciary duties an agent owes to the principal. The duty obligates the Agent to act solely in the best interests of the Principal at all times.
  - ii. An example of breach of loyalty is when an Agent purchases real property listed with his/her firm, and immediately resells it at a profit. Such conduct by the Agent as a fiduciary would be considered to have stolen an opportunity for profit that rightfully belongs to the principal.
- b. Obedience
  - i. The Agent is obligated to obey his or her Principal's instructions, with respect to the purpose of the agency relationship. However, the duty does not include an obligation to obey unlawful instructions, such as instructions to not market a property to minorities or to misrepresent the condition of a property.
- c. Disclosure
  - i. The Agent must disclose to the Principal all relevant and material information that is known by the Agent, which pertains to the scope of the agency.
  - ii. In addition, New York requires that the Agent disclose to the buyer (or seller) who the Agent is working for and the nature of the Agency relationship.
  - iii. In the event that the Agent desires to represent both the seller and buyer, the Agent must disclose to both that he or she is acting on behalf of the other party as well, and receive their consent in writing. In such a scenario, the Agent is

known as a Dual Agent, and would be well advised to also explain the effects of such duality, including but not limited to the fact that both buyer and seller are giving up their rights to absolute loyalty. (Copies of the Disclosure form are annexed herein.)

d. Confidentiality

- i. The Agent must safeguard his or her Principal's lawful confidences and secrets.
- ii. For example, a real estate broker must keep information confidential that may weaken a Principal's bargaining position.
- iii. The duty of confidentiality precludes a real estate broker who represents a seller from disclosing to a buyer that the seller can, or must, sell a property below the listed price. The same is true of the converse, a broker who represents a buyer is prohibited from disclosing to a seller that the buyer can, or will, pay more than what has been offered for a property.
- iv. However, the duty of confidentiality does not include an obligation by a real estate broker who represents a seller to withhold know material facts about the condition of the seller's property from the buyer, or to misrepresent the property's condition as it constitutes misrepresentation. Hence in such a scenario, liability may be imposed on the broker and the seller.

e. Reasonable Care and Diligence

- i. The agent must exercise reasonable care and diligence in the course of the Principal's affairs. Although the standard of reasonable care and diligence differs with respect to the specialization of the Agent, it is typically held that such standard is that of a competent professional.
- ii. For example, where a broker is considered to have skill and expertise in real estate matters superior to that of the average person, the real estate broker is held to the standard of care of a competent real estate professional.
- iii. However, real estate brokers are not expected to perform tasks or know information outside the scope of his or her real estate license such as services normally provided by lawyers, architects, accountants, contractors, or other professionals. In the event that real estate brokers are asked to perform such duties outside the scope of the Agency and their expertise, he or she should suggest that the Principal seek assistance from a reliable outside source.

f. Accounting

- i. The Agent is obligated to account for all money or property that belongs to his or her Principal which was entrusted to the Agent. This duty compels a real estate broker to safeguard any money, deeds, or other documents entrusted to them relative to their Principal's transactions and/or affairs.

## I. Coop Due Diligence (15 MINUTES)

- Financial Statements
  - Attorney must conduct due diligence on the financial condition of the Coop or Condo
  - Attorney's Opinion Letter
    - "We conducted our audit in accordance with auditing standards generally accepted in the United States."
    - "In our opinion, the financial statements present fairly, in all material respects, the assets and members' equity and its revenues, expenses and retained earnings."
  - Audited vs. Unaudited Financial Statements
    - Many smaller buildings do not have audited financials, however, loans are still available
    - Ask the lender or mortgage broker if their institution grants loans to buildings with unaudited financials
  - Watch out for:
    - Shares are not publicly traded
    - Building income before depreciation and amortization
      - The goal is not to maximize profit but to meet operating expense (Building can run at a loss)
    - Identify Amount of Reserve Fund
    - Compare latest accounting period with period immediately prior (three years)
      - Comparison of one year to the next will reflect noteworthy variations
      - The variations tell a story
    - Substantial maintenance arrears or substantial accounts payable increases
  - When Representing a Coop Buyer, the attorney and client must be satisfied that the building is easily handling its obligations to pay the underlying mortgage and real estate taxes
  - The smaller these obligations are as percentage of maintenance income, the more likely it is that the building will not have difficulty in refinancing
  - Encourage clients to seek a second opinion on the financials
- Board Minutes
  - It is critical that minutes are reviewed for both Coop and Condo purchases
  - Minutes may reflect:
    - Financial concerns
    - Building maintenance issues
    - Various problems (other unit owners)
    - Changes in building policy
    - Not all buildings permit inspection of minutes
- Coop Offering Plan
  - Review of the Offering Plan is especially important if there are still unsold shares
  - Provided sponsor complies with Article 23-A of the General Business Law, the Offering Plan will include up to date financial disclosures by the holder of unsold shares, including how many

## II. Condominium Due Diligence (10 MINUTES)

- Declaration & By-Laws
  - Verify current dates of declaration, by-laws rules and regulations, and amendments thereto.
  - Review declaration, bylaws and rules and regulations for unusual provisions and procedures governing sales of unit.
- Budgets
  - Determine if budget includes all proposed renovations and changes in services
  - Aging building – determine how or proposed alterations will be financed.
  - Many condominiums cannot borrow money for repairs; some may follow RPL §339-jj, which permits borrowing under certain circumstances; 5 years of operation, for repairs or replacement, approval of majority in common interest of association.
- Miscellaneous
  - Obtain a copy of power of attorney form used by the condominium and explain to client along with right of first refusal.
  - Check contract description against seller's title report.
  - Special issues
  - Roof rights
  - Proposed alterations
- Information to Confirm:
  - Common area charges
  - No claims or litigation pending
  - Payment of utilities
  - Special assessments (current, past, contemplated and pending)