

**ETHICS: BEST PRACTICES FOR DUAL REPRESENTATION**  
**2.5 CREDIT HOURS**

- **License Requirements (15 MINUTES)**
  - Types
    - Real Estate Salesperson
      - Requirements
    - Associate Broker
      - Requirements
    - Real Estate Broker
      - Requirements
  - Renewals
    - Every two years
    - CE requirements
  - Cannot transact without license
    - Department of State has power to revoke license for reasons including:
      - Material misstatement on application
      - Found guilty of fraud or fraudulent practices, as well as other criminal convictions
      - Dishonest or misleading advertising
      - Demonstrated untrustworthiness or incompetency to act as a real estate broker or salesman
      - Failure to comply with order, subpoena, warrant relating to paternity or child support proceeding
    - Penalties
- **Duties and Responsibilities of Real Estate Brokers (10 MINUTES)**
- **Duties and Responsibilities of Real Estate Salespersons (10 MINUTES)**
- **Disclosure Requirements (15 MINUTES)**
- **When Disclosure is not Obligated (10 MINUTES)**
- **Examples of Unethical Business Practices: (45 MINUTES)**
  - Commission from person other than broker, and unlicensed activity
    - DOS v. Kenya Burns
      - Where the Respondent was a real estate salesperson working under the supervision of a Broker and, without the Broker's knowledge, directed a client to make payment of a \$3,500 commission to an LLC set up by Respondent, despite Respondent knowing that her LLC was not licensed as a real estate broker. In light of those facts, it was determined that Respondent had:
        - Violated Real Property Law (RPL) §442-a by receiving a rental commission of \$3,500 directly from a tenant and not a broker with whom she was licensed.
        - Violated RPL §440(3) and 19 NYCRR 175.21 by engaging real estate broker transaction without the supervision of the broker with whom she is associated.
        - For those reasons, it was determined that Respondent's actions demonstrated untrustworthiness and incompetency, and accordingly, pursuant to RPL §441-c, her license as a real estate salesperson was revoked.

- Further, where a broker or salesperson has received money to which he or she is not entitled, he or she may be required to return it, together with interest, as a condition of retention of his/her license. *Donati v Shaffer*, 83 NY2d 828, 611 NYS2d 495 (1994); *Kostika v Cuomo*, 41 N.Y.2d 673, 394 N.Y.S.2d 862 (1977); *Zelik v Secretary of State*, 168 AD2d 215, 562 NYS2d 101 (1990); *Edelstein v Department of State*, 16 A.D.2d 764, 227 N.Y.S.2d 987 (1962)
  - As such, Respondent was also required to show proof she has refunded \$3,500 plus interest of the before the department would ever consider any future application for a new license.
- Improper refund, failure to supervise, failure to comply with consent order
  - *DOS v. Jeffrey Golding and U2 Apartment LLC*
    - On July 20, 2017 Mr. Golding, acting on behalf of himself and U2, entered into a Consent Agreement with the complainant. He admitted that they had violated Real Property Law (RPL) §§440 (3) and 442-c and 19 NYCRR 175.21(a) by failing to adequately supervise salesperson Christopher Figueroa, agreed to pay a fine of \$250.00, and agreed to make restitution to Emily Shanahan in the sum of \$875.00 in monthly installments, with the final payment to be made on January 1, 2018. The Consent Agreement also provided that failure to comply fully and in a timely fashion with any provision of it would constitute a default which would result in an administrative hearing for the purpose of determining whether additional penalties should be imposed.
    - Where Respondents failed to make the agreed restitution payment it was determined such failure is a demonstration of untrustworthiness and warrants the imposition of an additional penalty. As such, Respondents were ordered to pay a \$500 fine and their licenses were suspended two months and not to reinstated thereafter without proof of payment of the agreed restitution.
- Failure to maintain signed agency disclosure forms, breach of fiduciary duties
  - *DOS v. Ricardo O. Gonzalez, DBA Patagonia Group LLC, DBA Patagonia Realty*
    - Where Respondents admitted to:
      - 1) failing to maintain signed disclosure forms for a minimum of three years, in violation of RPL §443(2)(d);
      - 2) conducting real estate business under the name Patagonia Realty and Patagonia Group LLC, despite both being unlicensed entities, in violation of RPL §440-a
      - 3) failing to maintain an escrow account for client funds, in violation of 19 NYCRR §175.1
      - 4) taking client money, comingling it with his own, and failing to return the money in a timely fashion when the transaction failed, all of which being a breach of the fiduciary duties owed to his clients of honesty, fair dealing, and loyalty.. and demonstrates gross incompetence and untrustworthiness pursuant to RPL §441-c...
    - ... for these actions, Respondent's license was revoked without the ability to reapply for one year.
- Failure to cooperate in DOS disciplinary investigation
  - *DOS v. Danielle Case, Abode Properties, LLC*

- Where a broker's license was suspended for three months after failing to respond to inquiries made by an investigator for the DOS
- Failing to complete continuing education (unintentionally)
  - DOS v. Douglas Leone
    - Where the respondent was licensed as a real estate broker representing Claire D. Leone Associates Ltd. from June 11, 2013 to June 10, 2017, when his license expired. He had previously been licensed as an associate real estate broker associated with the same corporation. On his license renewal application for the 2015-2017 license term, submitted on or about May 21, 2015, the respondent affirmed that he had either taken the required continued education courses during the prior license term or was exempt from that requirement. The respondent was first licensed as a real estate broker in February 1994.
    - By letter dated March 15, 2016 the respondent was advised by the complainant that because he had failed to respond to a continuing education audit it proposed to recommend the revocation of his license. That letter gave him three options: submit proof of completion of the continuing education during the period of 6/11/13 to 6/10/13; plead no contest, complete the continuing education by April 14, 2016, and pay a fine of \$2,000.00; or surrender his license.
      - The respondent had not completed the 22.5 hours of approved real estate broker continuing education and requested a hearing. But argued he was exempt from the requirement under RPL § 443(3)(a), as amended in 2008, which states: a license as a real estate broker may not be renewed unless within the two year period immediately preceding the renewal the licensee attended and successfully completed at least 22 ½ hours of approved continuing education, unless the renewal applicant "is engaged full time in the real estate business" and "has been licensed...prior to July first, two thousand eight for at least fifteen consecutive years immediately preceding such renewal."
      - The administrative judge disagreed, finding: the wording of the 2008 amendment to the statute is awkward and not entirely clear. However, it is obvious that the intent of the amendment was to eliminate the previously enacted blanket exemption from the continuing education requirement for brokers who have been licensed for over fifteen years, while retaining that exemption for persons who were licensed for 15 years prior to the effective date of the amendment. The amendment is a classic "grandfather clause," and any other reading of it would be illogical.
      - However, the hearing judge found that respondent dismissed the false affirmation charge based on its belief that Respondent actually did believe in good faith he was exempt. However, it found Respondent did still violate RPL §441(3)(a) and there by demonstrated incompetence. However, Respondent was only reprimanded.

### Focusing on Best Practices in Dual Representation (45 MINUTES)

- New York's dual agency disclosure requirements were made effective on January 1, 2011 with the amendment of Section 443 of New York State Real Property Law.
  - Specifically it requires real estate licensees who are acting as agents of buyers or sellers of property to advise the potential buyers or sellers with whom they work of the nature of their agency relationship and the rights and obligations it creates.
  - NOTE – The law applies only to transactions involving only **residential real property**.
- Here are some other key terms it defines:
  - **Buyer's Agent** means an agent who contracts to locate residential real property for a buyer or who finds a buyer for a property and presents an offer to purchase to the seller or seller's agent and negotiates on behalf of the buyer.
  - **Listing Agent** means a person who has entered into a listing agreement to act as an agent of the seller or landlord for compensation.
  - **Listing Agreement** means a contract between an owner or owners of residential real property and an agent, by which the agent has been authorized to sell or lease the residential real property or to find or obtain a buyer or lessee therefor.
  - **Seller's Agent** means a listing agent who acts alone, or an agent who acts in cooperation with a listing agent, acts as a seller's subagent or acts as a broker's agent to find or obtain a buyer for residential real property.
  - **Dual Agent** means an agent who is acting as a buyer's agent and a seller's agent or a tenant's agent and a landlord's agent in the same transaction.
  - **Designated Sales Agent** means a licensed real estate salesman 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.
  - **Broker's Agent** means an agent that 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. The broker's agent does not have a direct relationship with the seller, buyer, landlord or tenant and the seller, buyer, landlord or tenant cannot provide instructions or direction directly to the broker's agent. Therefore, the seller, buyer, landlord or tenant do not have vicarious liability for the acts of the broker's agent. The listing agent, buyer's agent or tenant's agent do provide direction and instruction to the broker's agent and therefore the listing agent, buyer's agent or tenant's agent will have liability for the broker's agent.
  - **Advance Consent to Dual Agency** means **written informed consent signed** by the seller/landlord or buyer/tenant that the listing agent and/or buyer's agent may act as a dual agent for that seller/landlord and a buyer/tenant for residential real property which is the subject of a listing agreement.
  - **Advance Consent to Dual Agency with Designated Sales** agents means **written informed consent signed** by the seller/landlord or buyer/tenant that indicates the name of the agent appointed to represent the seller/landlord or buyer/tenant as a designated sales agent for residential real property which is the subject of a listing agreement
- **Subsection 3 of RPL §443 requires:**
  - (a) A listing agent shall provide the disclosure form to a seller or landlord **prior to entering into a listing agreement with** the seller or landlord and shall obtain a signed acknowledgment from the seller or landlord, except as provided in paragraph (e) below.

- (b) A seller's agent or landlord's agent shall provide the disclosure form to a buyer, buyer's agent, tenant or tenant's agent **at the time of the first substantive contact** with the buyer or tenant and shall obtain a signed acknowledgement from the buyer or tenant, except as provided in paragraph e of this subdivision.
- (c) A buyer's agent or tenant's agent shall provide the disclosure form to the buyer or tenant **prior to entering into an agreement** to act as the buyer's agent or tenant's agent and shall obtain a signed acknowledgement from the buyer or tenant, except as provided in paragraph e of this subdivision. A buyer's agent or tenant's agent shall provide the form to the seller, seller's agent, landlord or landlord's agent **at the time of the first substantive contact** with the seller or landlord and shall obtain a signed acknowledgment from the seller, landlord or the listing agent, except as provided in paragraph e of this subdivision.
- (d) The agent shall provide to the buyer, seller, tenant or landlord a copy of the signed acknowledgment and shall maintain a copy of the signed acknowledgment for not less than three years.
- (e) If the seller, buyer, landlord or tenant refuses to sign an acknowledgment of receipt pursuant to this subdivision, the agent shall set forth under oath or affirmation a written declaration of the facts of the refusal and shall maintain a copy of the declaration for not less than three years.
- (f) **A seller/landlord or buyer/tenant may provide advance informed consent to dual agency and dual agency with designated sales agents by indicating the same on the form set forth in subdivision four of this section.**
- When Does "First Substantive Contact" Occur?
  - Since it's still a relatively new and rarely litigated issue, it is not entirely clear when the "first substantive contact" is deemed to occur. However, here are two rules to follow:
    - First: As soon as a broker is directed, engaged or retained in any way by either a seller or buyer to act for that party, the agency relationship has been created and the appropriate disclosure form should be signed
    - Thereafter: At the first *material* communication with the other party (whether by email-, telephone or open house interaction) the broker's relationship with his or her principal should be disclosed
  - Remember that just getting consent is not enough. It must be *informed consent*.

**The best way to ensure the parties understand the agency relationship is to use the disclosure relationship form provided by DOS.**