

Landmines in Real Estate Brokerage – Revisited

By Dennis C. Valet

Real estate brokerage is a highly regulated profession. This article is a follow-up to what appeared, under the same title, in the June edition of *The Suffolk Lawyer*, which was written by my colleague, Andrew M. Lieb, concerning the many rules and nuances that an attorney must consider when representing a real estate brokerage as opposed to an unregulated business. Specifically, Mr. Lieb pointed to RPL § 441-b(2), which prohibits real estate salespersons from serving as either a manager or member of a limited liability company licensed as a real estate broker. The prohibition against membership is just one of the many pitfalls that are inconspicuously sprinkled throughout the real estate license law, which legal practitioners must be mindful of when providing representation, whether transactional or litigation.

Mr. Lieb's prior article left off with questions that our firm had presented to the Department of State, including: (1) whether a real estate salesperson may own a membership interest in a LLC in the same vein that they may own non-voting stock in a corporation pursuant to 19 NYCRR 175.22, and (2) whether that non-voting requirement is blanket or instead if

it is only with respect to disallowing the salesperson from participating in brokerage related decisions. Taken together, we inquired whether a salesperson may own a membership interest in an LLC, which interest permitted the salesperson to vote on such items as incurring indebtedness to the LLC, but did restrict the salesperson from voting on brokerage management decisions to comply with the regulation.

I am happy to report that the Department of State has graciously and quickly answered these questions. According to a June 27, 2013 Opinion Letter, addressed to our law firm, pursuant to RPL § 441-b(2) a salesperson is not permitted to hold any membership, voting or non-voting, in any LLC licensed as a real estate broker. Further, the non-voting restriction is blanket and does not apply only to brokerage related issues with respect to a salesperson's permissible ownership of non-voting stock in a corporation pursuant to 19 NYCRR 175.22.

Where does this leave the entity structuring of brokerages and the participation of salespersons in this ownership into the future? While the availability of owner-



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ship in corporations and limited liability companies may differ drastically, at least they are now clear and unquestionable. On the one hand, 19 NYCRR 175.22 permits a salesperson to own non-voting shares of stock of any corporation licensed as a broker, even if she is associated with that corporation, but restricts salespersons from owning voting shares of stock of a brokerage corporation with which he/she is associated. On the other hand, pursuant to the recent Department of State Opinion letter and RPL § 441-b(2), a salesperson may not own any membership in any limited liability company licensed as a broker – voting or not voting. Finally, a salesperson must be clearly advised that they have no voting interest in anything incident to their ownership of shares in a corporation. According to the Department of State, “[t]his prohibition is absolute.”

Even with all of these answers and guidance provided by the Department of State, there are still a plethora of ambiguities to be found in the real estate license law. For instance, 19 NYCRR 175.22 restricts a salesperson from owning voting shares of stock in a brokerage corporation with which they are associated. Conspicuously missing from that section is language either prohibiting or permit-

ing ownership of voting shares of stock in brokerage corporations with which the salesperson is not associated. Based on the totality of similar statutes and Opinion Letters, this author will not jump to the conclusion that the lack of a prohibition equates to explicit permission; however, the argument certainly could be made. Rather, this ambiguity aptly represents the nuanced and often confusing nature of the real estate license law, and surely will be the basis of yet another request for an Opinion Letter written by our law firm to the Department of State to gain clarity for the profession.

When it comes to representing real estate brokerages, remember that real estate brokers and salespersons are professionals with licenses held and regulated by the Department of State. While a request to draft up a membership agreement for a brokerage may seem manageable at first, it is important to realize that such practice is best left to those who have taken the time to become intimately familiar with the real estate license law. Are you so familiar?

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FOCUS ON REAL PROPERTY SPECIAL EDITION

Buyer Agency

By Doreen J. Spagnuolo

Why would the purchaser of a home choose to enter into a buyer agency relationship with a real estate agent instead of simply dealing directly with the listing or selling agent?

One reason is because some buyers want more than just customer services from a broker. A buyer's agent can give the buyer advice which is something the seller's agent cannot provide to a buyer. A selling agent is an agent hired by the seller and represents the seller's interests. Although a selling agent must deal honestly, fairly, and in good faith with a buyer, a selling agent's fiduciary duty and undivided loyalty is to the seller, not the buyer.

In a buyer broker agency relationship, the broker represents the buyer as a client, not as a customer. A buyer's agent is hired by the buyer to represent the buyer's interests. The buyer's agent has fiduciary duties to the buyer which include the duty of reasonable care, undivided loyalty, confidentiality, full disclosure, obedience and duty to account.

This means that neither a seller's agent nor a buyer's agent can disclose confidential information of their client to the other party, unless the information either materially affects the value of the property or the

buyer's ability to purchase the property. For example, a seller's agent cannot disclose to the buyer the fact that the seller is going through a divorce and is looking for a quick sale. A seller's agent, however, would be required to disclose to the buyer a material defect in the property such as a leaking roof. Similarly, a buyer's agent cannot disclose to the seller the fact that the buyer just received a large inheritance, but must disclose that the buyer had previously filed for bankruptcy which could affect his/her ability to obtain financing.

Compensation does not establish agency relationships. As such, buyer's agents may be paid by the buyer, the seller, or both (only with full disclosure to all parties involved in the transaction). As long as the buyer agency relationship is clear it does not matter whether the buyer or seller pays the commission.

Although the buyer's agent's commission can be paid by either the buyer or the seller, in either case the commission is actually coming out of the proceeds of the sale just like other closing expenses of the buyers and sellers. In other words, the commission is coming out of the purchase price of the home and is ultimately borne by the buyer.

As between brokers, commission splits are set forth as offers of compensation

made by a listing broker to a cooperating broker through the Multiple Listing Service of Long Island, Inc. (MLSIL). On MLSIL, listing brokers choose the type of agency (i.e. seller's agent, broker's agent, or buyer's agent) to whom they will offer the cooperative compensation and the amount of that compensation. In contrast to the past, a significant number of listings in MLSIL now offer cooperative compensation to buyer's brokers. Today, nationally one-half of the cooperative sales involve buyer's agents.

When a commission amount is offered on MLSIL to a buyer's broker, the buyer's broker is entitled to that amount from the listing broker when the buyer broker procures a buyer who purchases the property.

There can be situations, however, where no offer of compensation is made to a buyer's broker on MLSIL. In those circumstances, a buyer's broker can still make an offer on behalf of a buyer (and the listing broker is obligated to present that offer) but will have to negotiate directly with the listing broker for a commission. If the listing broker refuses to pay the buyer broker commission, the buyer would be responsible to pay

the commission fee as it is agreed upon in the buyer broker agency agreement.

When the buyer broker commission fee is paid by the buyer, it is permissible for the buyer broker to advise the listing broker that the commission fee has been incorporated into the offering price and will be payable out of the proceeds of the sale. In this situation, the seller will know the amount of the “net” sale of the home once the listing broker determines his/her commission fee and factors in the buyer broker fee. Again, in this circumstance

the total commission fees for both agents would be obtained from the proceeds of the sale.

In conclusion, buyer agency is ideal for buyers who want to ensure that their interests are fully represented by a broker who is obligated under the law to act as an advocate and fiduciary for that buyer in the purchase of a home. Sellers and buyers alike should be made to understand that commission fees, whether for the listing broker or buyer's broker, are factored into the sale.

Note: Doreen J. Spagnuolo is Corporate Counsel for the Long Island Board of Realtors, Inc. and the Multiple Listing Service of Long Island, Inc.

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The Suffolk Lawyer wishes to thank Real Property Law Special Section Editor Andrew M. Lieb for contributing his time, effort and expertise to our September issue.



Andrew M. Lieb