

Real Estate Attorneys as Real Estate Brokers

By Andrew Lieb

While presenting a talk on the topic of the Top Real Estate Laws of 2014 to the Nassau County Bar Association Real Property Committee I was asked about the restrictions on attorneys acting in real estate brokerage in this state, and responded that attorneys are exempt from the real estate license law. The audience was astonished to learn that licensed New York State attorneys can engage in real estate brokerage without a real estate brokerage license pursuant to Real Property Law §442-f. The statute expressly excludes “attorneys at law” from “[t]he provisions of this article” in reference to Article 12-A, which is the real estate license law. Moreover, the Department of State, which regulates real estate brokers in this state, has held in an administrative decision that attorneys are “not required to meet any of the educational, experiential, or character standards imposed by the governing statutes.” See *In the Matter of Barry G. Bell*, 813 DOS 04. Still further, the Nassau County Supreme Court has echoed this decision in *Matter of Huber v. Shaffer* wherein it quoted the seminal Appellate Division case of *Matter of Cianelli v. Department of State* which held that “[i]t is true that as an attorney [a party] could act as a broker without a license.” See 160 Misc.2d 923 (1993) quoting 16 AD2d 352 (1st Dept., 1962).

So why do attorneys ever get real estate brokerage licenses if they don’t need them to function in the field?

Matter of Cianelli explains the start of this answer wherein the court held that “[a]s a broker [an attorney] was privileged to do things that he could not do as an attorney—for example, he could hire real estate salesmen and he could advertise.” It is noted that *Matter of Cianelli* predates *Bates v. State Bar of Arizona*, 433 US 350 (1977), where the court upheld the right of lawyers to advertise, and consequently a lawyer acting in brokerage could advertise to the extent permitted by the Rules of Professional Conduct; just not as a licensed real estate broker. Nonetheless, *Matter of Cianelli* remains accurate when it comes to hiring a real estate salesperson. Specifically, Real Property Law Article 12-A and 19 NYCRR 175.21 both make numerous requirements that a salesperson must be supervised by a licensed real estate broker and neither the statute nor the regulation make an exception for an exempt attorney-at-law to provide supervision. As a result, should an attorney wish to have a staff of real estate salespersons, that attorney is required to be licensed as a real estate broker.

Beyond the benefits of having a staff at one’s real estate brokerage office, the other advantage of an attorney obtaining licensing as a real estate broker involves real estate boards and cooperative brokerage agreements. To be a member of many real estate boards, the board may require a copy of your current real



Andrew Lieb

estate license in its application as a condition precedent to membership. The advantage of being a member of a local board is that many offer cooperative brokerage agreements for members. In real estate brokerage there are basically three types of transactions; to wit: (1) Direct Deals where one broker both represents the listing and procures the buyer or tenant; (2) In-House Deals where two or more brokers from the same brokerage cooperate wherein one or more represents the listing and one or more procures the buyer or tenant; and (3) Co-Broke Deals where different brokers cooperate to effectuate a deal where one has the listing and one or more procures the buyer or tenant. While an attorney can certainly earn a real estate brokerage commission in either a Direct Deal or an In-House Deal by way of Real Property Law §442-f (i.e., commission is paid directly from the client or customer to the attorney), earning a share of the commission from the listing agent (either the Seller’s Agent or Landlord’s Agent pursuant to RPL §443) by procuring a buyer or tenant on a Co-Broke Deal can be problematic when one is unlicensed in real estate brokerage. There is no statutory right that entitles a real estate broker to share a commission on a Co-Broke Deal and many real estate brokers will not share their commission with a broker or exempt-attorney who is a non-member of their local real estate board. Instead, such a

broker will have to charge their buyer a fee and therefore the buyer must pay more money to bid on the same property that another like buyer represented by a board member would have to bid. While this practice raises both antitrust issues and breach of fiduciary duty issues in the listing broker (i.e., both a Seller’s Agent and a Landlord’s Agent owes its seller or landlord the duties of accountability and obedience and its questionable as to why an informed seller/landlord would not offer the same co-broke split to a non-board member procuring cause broker as it would to a board member procuring cause broker), being legally correct is both costly to prove and not beneficial in getting the brokerage job done.

Regardless, the Department of State has opined that an attorney who obtains a real estate brokerage license is not only exempt from “the educational and examination requirements for admission,” but also from “the continuing education requirements.” See 1979 N.Y. Op. Atty. Gen. 69. So, an attorney who wants a license must merely pay a fee. Isn’t that the path of least resistance?

Note: Andrew M. Lieb is the Managing Attorney at Lieb at Law, P.C., a law firm with offices in Center Moriches and Manhasset. Mr. Lieb serves as a Co-Chair of the Real Property Committee of the Suffolk Bar Association and has been the Special Section Editor for Real Property in The Suffolk Lawyer for several years.