

When a Sales Associate Changes Offices – 2009

Real Estate In-Depth May, 2009

By Edward I. Sumber, Board Counsel

Approximately 19 years ago, this column addressed the rights of salespersons and real estate brokers at the time that a salesperson changes offices. Marketplace circumstances and dramatic changes in the way that business is conducted necessitates an update of this information.

For several consecutive quarters, sales of homes in our area have declined sharply. In our most recent quarter, housing prices have also dropped. When the number of sales completed during the first quarter of 2009 is compared with our approximately 7,000 Realtor licensees it is apparent that there are many salespersons who are not making any sales at all. In this environment, some salespersons have elected to change offices with the hope that his or her new affiliation will be with an office which provides better support services, enhanced advertising or an "image" which will give the salesperson a new edge or competitive advantage. Whether or not such perceptions are illusory, the current environment can be readily perceived as one in which frustration and restlessness are present.

The Rights of the Broker and the Rights of the Salesperson

Salespersons can only conduct their business activities through an affiliation with a licensed real estate broker. Whenever a client relationship is created by a salesperson it is created on behalf of the principal broker. As such, when a salesperson changes offices, any contractual relationships with owners and landlords (listings) or buyer/tenant clients, are the property of the brokerage firm through which the salesperson has functioned.

Regulation §175.14 of the Rules and Regulations of the New York State Department of State under Article 12(A) of the Real Property Law states:

"Termination of Salesperson's association with broker. A real estate salesperson shall, upon termination of his association with a real estate broker, forthwith turn over to such broker any and all listing information obtained during his association whether such information was originally given to him by the broker or copied from the records of such broker or acquired by the salesperson during his association."

This particular Regulation was written many years ago when buyer brokerage was not prevalent. It has been interpreted to apply to any client based relationship between the firm and the owner/landlord or buyer/tenant who has agreed to a client level relationship. In residential transactions involving 1-4 family homes, this means that the

consumer has executed a Section 443 Real Property Agency Relationship Disclosure Form acknowledging the client relationship with the firm and the salesperson. As such, it is expected that the salesperson will forego any solicitation of the client after changing affiliations other than a simple communication indicating that the salesperson has changed affiliations and is now associated with a new office.

What are the Consequences of Soliciting Former Clients?

When a salesperson changes offices and under the banner of a new affiliation, solicits the listing or buyer client relationship created with the prior broker, the salesperson and the new office with which the salesperson has affiliated may be deemed to be acting to induce a breach of the exclusive client relationship. If the salesperson is successful in inducing an owner to change listing agents, the former principal broker can bring an action for "tortious interference." This means that the salesperson has acted wrongfully to induce a breach by the client of the listing or representation agreement previously entered into.

Buyer Clients

When this column addressed this issue almost 19 years ago, buyer agency was not prevalent. Moreover, the enactment of the Agency Relationship Disclosure Law under Section 443 of the Real Property Law had not occurred. A client relationship, unlike that of the relationship of a customer, belongs to the principal broker. Accordingly, a salesperson who changes affiliations is not in a position to induce a buyer client who has agreed to work with a salesperson, to now change loyalties to the new firm with which the salesperson has affiliated.

Customers

A customer is not a person with whom the listing agent has a contractual relationship to provide agency level services. As such, customers are not owned by the principal broker and may be solicited by a salesperson and invited to create either the same (a customer relationship) or a new relationship (a client relationship) with the new firm where the salesperson has affiliated.

What about Deals in Process?

When a salesperson changes affiliation, unless there is a written agreement specifying otherwise, the salesperson will lose the right to receive compensation from any transaction involving a former client (with the seller or buyer) unless the commission has accrued at the time that the salesperson changes affiliation. Commissions accrue under New York law when a meeting of the minds is reached with a ready, willing and able buyer/tenant even if the commission is payable at the time of closing or other specified date. If a commission has accrued, the salesperson may be entitled to a commission. At the same time, the principal broker need not use the services of the

salesperson who has changed affiliations in order to complete a transaction. When the principal broker assigns a new salesperson to complete the work on a transaction in process, the principal broker has the right to reduce the commission payable to a salesperson who has left, to adequately compensate another person for the necessary work in completing the transaction. While this may be a source of extreme frustration to a salesperson, the principal broker is within his or her rights.

Termination Agreements

Many firms now utilize a form of termination agreement which specifies the entitlement of a salesperson to compensation in connection with listings, sales in process, etc. when a salesperson changes affiliation. This form has been in use in Westchester County since March 1985. WCBR has continued to recommend to brokers, owners and managers, as well as to salespersons who change affiliation, to enter into a termination agreement in order to clearly delineate the obligations of the broker and the salesperson if the salesperson elects to change brokerage firms in the future. The negotiation of a termination agreement, under the pressure of an affiliation change, can often be difficult. Accordingly, it is best to deal with this issue when a salesperson first begins an affiliation with a broker. The form of termination agreement is available on the WCBR website without charge.

Retention of Records

When a salesperson changes affiliation the salesperson is required to deliver to the former principal broker all copies of all listings and other information regarding clients and transactions in which the salesperson has been involved. This is a requirement of the D.O.S. Regulations and supports the need of the real estate broker to ensure compliance with the record keeping requirements of the license law.

Salespersons have sometimes been frustrated by being terminated by a principal broker and then being "locked out" of a computer system which contains a database of contacts developed by the salesperson over a period of many years. If the computer is the computer of the brokerage firm, it may well be in the purview of the principal broker to preclude further access to the principal broker's computerized system. For this reason, salespersons often maintain their own contact database. An article which appeared in this column in September of 2005, addressed a salesperson's lawsuit against a principal broker under such circumstances. The court indicated that when the broker deprived the salesperson of access to electronic records, doing so may constitute "conversion" by the broker of the salesperson's property. The fact that the names, addresses and phone numbers in the computerized contact list may be retained by the salesperson does not grant to the salesperson the right to tortiously interfere or otherwise solicit clients of the former firm until the listing agreements have expired.

Brokers Duty to File Termination Notice

When a salesperson chooses to affiliate with another brokerage firm, the former broker must enter online a Termination of Association Notice with the Department of State. A fee of Ten (\$10.00) Dollars is payable by the principal broker and the license of the salesperson must be returned to the Department of State. In some instances, a principal broker may be upset about the loss of a particular salesperson and resist the filing of the Termination of Association Notice. The Department of State has taken notice during recent months of this anomaly and has indicated that it will prosecute principal brokers for incompetence as a result of such inaction.

An efficient response from the old firm can also cause unexpected consequences if the new firm fails to notify the Department of State of the Change of Association. This is accomplished on line and the fee for the new firm is Ten (\$10) Dollars. Until the Change of Association is filed, the salesperson is unlicensed and cannot hold himself or herself out as a licensee or receive compensation.

Ethical Considerations

The Realtor Code of Ethics attempts to address improper activity by salespersons as well. Standard of Practice 16-20 states:

“REALTORS®, prior to or after terminating their relationship with their current firm, shall not induce clients of their current firm to cancel exclusive contractual agreements between the client and that firm. This does not preclude REALTORS® (principals) from establishing agreements with their associated licensees governing assignability of exclusive agreements. (Adopted 1/98)”

The intent of this ethical constraint is to address circumstances in which a salesperson knows that he or she will be moving to another firm and then contacts each client who has entered into a client relationship. The object of the salesperson is to cause the owner or landlord to cancel a listing or induce the buyer client to cancel an exclusive right to represent agreement or a client-based agreement in order to create a new relationship with the salesperson’s new firm. Such activity would clearly run afoul of the Realtor Code of Ethics and place both the salesperson and the new firm in jeopardy.

* * * *

Legal Column authors Edward I. Sumber, Esq. and John Dolgetta, Esq. are partners in the law firm of Edward I. Sumber, P.C. The firm has been counsel to the Westchester County Board of Realtors, Inc. since 1975 and the firm was responsible for incorporating the Westchester-Putnam Multiple Listing Service, Inc. in 1976. For information about Edward I. Sumber, P.C. go to <http://www.sumberlawpc.com/>.