

Can a Real Estate Licensee Prepare Leases?

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A recent Legal Update for the Members of our Association reported a case decided by the Department of State in 2010 in which a real estate licensee, Marie A. Manfredi, had her license revoked for having engaged in the unauthorized practice of law in violation of Judiciary Law §478 (*Department of State Division of Licensing Services v. Manfredi et al*, 126 DOS 10). This case reiterated the longstanding position taken by the Department of State that only under specified conditions, can a non-lawyer, even a real estate licensee, prepare any legal document, without violating the law.

The Law that Governs

Section 478 of the Judiciary Law of the State of New York prohibits the practice of law by non-attorneys. This Section was enacted in 1965. It was subsequently determined by the Appellate Division in 1974 that the purpose of §478 is to “protect citizens against dangers of legal representation and advice given by persons not trained, examined and licensed for such work.” (*Jemzura v. McCue* (3rd Dept. 1974, 45 A.D.2d 797, 357 N.Y.S.2d 167, appeal dismissed 37 N.Y.2d 750, 374 N.Y.S.2d 624, 337 N.E.2d 135, appeal dismissed 37 N.Y.2d 786, 375 N.Y.S.2d 1031, 337 N.E.2d 621).

Another section of the Judiciary Law, §484, provides in part that:

“No natural person shall ask or receive, directly or indirectly, compensation for...preparing deeds, mortgages, assignments, discharges, leases or any other instruments affecting real estate...unless he has been regularly admitted to practice, as an attorney or counselor...”

A violation of either Judiciary Law §478 or Judiciary Law §484 is a misdemeanor punishable by up to 1 year imprisonment (§485 of the Judiciary Law).

Are Real Estate Licensees Exempt?

Many real estate licensees are under the misunderstanding that because they are licensed by the Department of State to act as a real estate broker they can prepare contracts, leases and related documents in connection with transactions. In general, this is not accurate. The exception is a very limited exception affirmed under the seminal case in the *Matter of Duncan & Hill Realty, Inc. v. Department of State of the State of New York*, (62 AD2d 690, 405 NYS2d 339 (4th Dept. 1978), appeal dismissed 45 NY2d 821, 409 NYS2d 210). In this decision, the Appellate Division set forth the conditions which a real estate licensee must follow in order to prepare contracts or leases in connection

with transactions in which the real estate licensee has functioned as an agent. There are a number of caveats which must be observed in order to prepare a contract or a lease:

1. The real estate licensee shall not ask for or receive, directly or indirectly any compensation for preparing any legal instrument (including a contract or lease) affecting real estate.
2. The real estate licensee must have acted as an agent on behalf of one of the parties in the transaction in order to prepare the contract or lease.
3. The real estate licensee may not provide legal advice.
4. The contract or lease form must be a "fill in the blank" form requiring no legal expertise (i.e. the real estate licensee may not craft the legal language which is not already in the form contract, but rather is limited to filling in the blanks).
5. The form contract or lease must either:
 - i. be jointly approved by the Bar Association and the Board of Realtors in the county in which the real property is located; or
 - ii. must contain an attorney approval clause giving either buyer's attorney or seller's attorney, or landlord's attorney or tenant's attorney, as the case may be, the right to terminate the contract after review.
6. The forms examined by the Court were "designed with bold face print at the top of the forms, to protect both parties to a real estate transaction and to alert them to the fact that when signed, the instrument becomes a binding contract and cautioning them that it is desirable for them to consult their respective attorneys before signing."

The Attorney Review Clause

The reference in item number 5 above to the review of a contract or lease by an attorney and the right to cancel same was confirmed by the New York State Court of Appeals on November 25, 2008 in the matter of *Moran v. Erk* (11 N.Y.3d 452, 901 N.E.2d 187 (2008)). It means that an attorney for any party in the transaction can disapprove a contract or lease for any reason or reasons which would not be subject to review. The court in *Moran v. Erk* stated:

"We therefore hold that where a real estate contract contains an attorney approval contingency providing that the contract is "subject to" or "contingent upon" attorney

approval within a specified time period and no further limitations on approval appear in the contract's language, an attorney for either party may timely disapprove the contract for any reason or for no stated reason".

The Reasoning in Duncan & Hill

Even though the Duncan & Hill decision decided in 1978 acknowledged that brokers had long been permitted to draft "simple contracts" the court went on to state that "the "simple" contract is in reality not simple. It is often the most important legal transaction that the average person will ever undertake - the purchase of a home, and it involves very substantial legal rights which deserve the advice and guidance of a lawyer. The argument that the need for expediting such transactions justifies the consummation without reference to an attorney is specious. The protection of the interests of the parties to such contracts is sufficiently important to justify a little delay for reflection and legal advice, so as to guard against the thoughtless drafting of a hastily conceived contract. The personal interest of the broker in the transaction and the fact that he is employed by one of the opposing parties are further reasons to require that, in so far as the contract entails legal advice and draftsmanship, only a lawyer or lawyers be permitted to prepare the document to insure the deliberate consideration and protection of the interests and rights of the parties (Duncan & Hill, *supra*. 62 A.D. at 697-98, 405 NYS 2d at 343-44; footnote omitted.)

What is the Position of the Department of State?

The position of the Department of State is set forth clearly in Legal Memorandum L104 which is published at the DOS website at www.dos.state.ny.us/cnsl/practice.html. In its Legal Memorandum, DOS affirms that it has "long considered the unlawful practice of law by a real estate broker or salesperson as grounds for disciplinary action." The Memorandum indicates that DOS bases its interpretation on the provisions of the Judiciary Law and the Matter of Duncan & Hill Realty, Inc.

The DOS Memorandum also indicates that real estate brokers and salespersons are permitted to fill in "non-legal provisions such as the names of the parties, the date and location of the closing, the description of the property, the consideration for sale and any other relevant facts." Brokers and salespersons would not be and are not permitted to develop any "legal terms". The Administrative Law Judge in the Manfredi decision found, among other things, that the mere omission of including reference to a pet in a lease where a tenant in fact had a pet was deemed to be an act which constituted the unlawful practice of law.

DOS by its Memorandum also refines item number 6 above to the unique circumstances in which a real estate licensee may prepare a contract or lease. The Memorandum indicates that the contract (or lease), "should clearly and prominently indicate on its face that it is a legally binding document and clearly and prominently recommend that

the parties seek advice and counsel from their lawyers prior to affixing their signature to the document.”

Is it Really So Hard?

It is clear that filling in a simple form contract is not simple. More importantly, the caveat that the real estate licensee refrain from providing legal advice is such a difficult line to walk that most brokers, even those with the ability to use a form contract, do not do so. The Westchester County Bar Association and the Westchester Putnam Association of Realtors entered into an agreement for a form real estate contract beginning in 1999. Through its last expiration on June 30, 2010 not a single licensee in Westchester County utilized the form. The form is not simple, there is significant concern from the legal community about the use of the form by real estate brokers, most brokers would not feel comfortable in doing so, and, most importantly, it is a very difficult process for a real estate licensee to engage in without being asked legal questions to which the real estate licensee may not respond.

A real estate licensee who completes a fill-in form approved by the local bar association and local Realtor board, with all of the issues surrounding real estate transactions, such as property condition disclosure issues, well water issues, radon issues, flood zone issues, short sale issues, etc. (and the list can go on and on), runs the risk of inadvertently practicing law without a license. In addition, when the extent of the work involved is evaluated, a real estate licensee may want to seek compensation for preparing the contract or lease. DOS Legal Memorandum L104 and the Judiciary Law make clear that a real estate licensee can only prepare a contract or lease subject to the stringent conditions set forth in this article only as an incident of the purchase and sale of real estate and may not charge a separate fee for preparation of a contract or share in the fees of attorneys for preparation or review of these contracts.

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