

## **Innocence, Negligence and Avoidance**

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There is a fine line between innocence, negligence and avoidance. That is not true in every aspect of life but it is surely true in the context of being a licensee of the Department of State. This article will address situations in which brokers and their salespersons can find themselves in difficult circumstances because of matters overlooked, not addressed or not understood.

### **Dissolved By Proclamation**

The Department of State recently commenced an investigation against a brokerage firm in Brooklyn, New York. When the licensing investigator communicated with the firm, it received less than forthcoming responses. As the DOS investigation continued, the DOS determined that the uncooperative broker was utilizing extensive resources of the Department of State by frustrating the DOS investigator's attempt to obtain information. The investigator checked on the incorporated status of the licensed entity. It was determined that the corporate status of the brokerage firm had been terminated by virtue of a "Dissolution By Proclamation", whereby the Secretary of State's Division of Corporations terminates the corporate status of an entity for non-compliance.

Non-compliance can come about because certain forms are not timely filed with the Department of State, franchise taxes are not paid or other issues exist reflecting non-compliance by the entity. Rather than continue its attempts to secure the cooperation of the principal broker, the DOS simply notified the broker and all of its licensees that their licenses had been terminated by the Department of State because the brokerage firm was no longer in existence.

While it is not difficult to arrange for the reinstatement of an organization, the DOS used an aggressive approach to essentially punish a licensee it perceived to be uncooperative. To avoid a similar circumstance (and it can happen to any entity) every principal broker should visit the Department of State's website and perform a search on the DOS site entitled, "Search the Corporation and Business Entity Database". Simply typing in the name of the entity will allow the principal broker to search the database to confirm the current status of the entity's existence under New York law. The link to be followed is: [http://www.dos.ny.gov/corps/bus\\_entity\\_search.html](http://www.dos.ny.gov/corps/bus_entity_search.html).

### **We Paid a Salesperson Who Failed to Renew Her License!**

Our Association and the New York State Association's hotline receive many calls from Realtor® members who have failed to renew their licenses on a timely basis. Two (2) issues now arise when this occurs. Firstly, brokers and broker associates who have been licensed as salespersons and then as brokers for fifteen (15) years prior to July 1, 2008

are grandfathered for purposes of Continuing Education requirements. The law, however, requires “continuous” licensure. Once a broker or broker associate allows his or her license to lapse for any reason, the ability to retain the grandfathered status for Continuing Education purposes terminates. The neglect by the broker or broker associate who allows his or her license to lapse results in the loss of a significant privilege.

The second and more important issue is the failure by the supervising broker to confirm the continued licensure of a salesperson or broker associate. When the salesperson or broker associate allows a license to lapse and the principal broker pays a commission to the unlicensed individual (even if that period of lapse is subsequently cured) there is an automatic violation of Real Property Law §442. Real Property Law §442 states in part:

**“No real estate broker shall pay any part of a fee, commission or other compensation received by the broker to any person for any service...unless such a person be a duly licensed real estate salesman regularly associated with such broker or a duly licensed real estate broker or a person regularly engaged in the real estate brokerage business in a State outside of New York...”.**

Therefore, a principal broker, who unknowingly pays the commission to a salesperson or broker associate who was unlicensed at the time he or she performed his or her licensed activities during the course of a real estate transaction, is placed in the position of having violated the law and can be shown by the DOS to have been untrustworthy and incompetent. Further, the DOS can readily prove a failure to supervise by the principal broker.

The simple solution is for a principal broker to maintain a calendar of the license expiration dates of every salesperson and broker associate affiliated with the firm. A copy of a renewed license should be submitted to the principal broker at least thirty (30) days prior to the expiration date calendared by the broker. In the absence of proof that the license has been renewed, commission payments must be withheld.

### **Can a Salesperson be Directly Compensated By a Consumer for Preparing a Broker Price Opinion or For the Management of Real Property on Behalf of an Owner?**

The New York State Association of Realtors® in-house counsel, S. Anthony Gatto, Esq., reports that there have been many inquiries from salespersons about whether they are permitted to prepare Broker Price Opinions and be compensated for same and whether they are permitted to provide property management services and be directly compensated by the owner of the property. Such questions have been particularly frequent in an environment in which traditional real estate brokerage commissions have been hard to generate. NYSAR’s in-house counsel prepared a white paper indicating clearly that only a principal broker can be paid for services which require licensure. A

licensed salesperson or broker associate must be regularly “associated with such broker or a duly licensed real estate broker”. If the activity is a licensed activity, i.e., the brokering of real property, the management of real estate or the providing of a Broker Price Opinion, no salesperson or broker associate can be directly compensated by the owner or the person ordering the BPO or requiring such other services without paying same directly to the brokerage firm or broker. It is up to the salesperson to make arrangements with the principal broker as to the sharing of that compensation. Payment for the Broker Price Opinion or payment for property management services must be first paid to the licensed real estate brokerage firm and then distributed by the principal broker in whatever manner the firm and the salesperson have agreed upon. To do otherwise would be an act of untrustworthiness and incompetence on the part of the salesperson and probably will result in the loss of such person’s license. NYSAR has received from the Department of State confirmation of the opinion of S. Anthony Gatto. On May 11, 2012 Whitney A. Clark, DOS Associate Attorney, issued an opinion stating in part, "...salespersons and associate brokers may not receive or demand compensation from anyone other than their representative broker for preparing a BPO."

### **Consent Orders are Searchable and Become Public Information**

It has been a long-standing practice of attorneys who represent real estate licensees before the Department of State to seek a speedy resolution and to avoid a full hearing. Administrative Law Judges preside over hearings when a licensee is charged with improper conduct under Article 12-A of the Real Property Law. Expedited resolutions are often completed through the execution of Consent Orders which are negotiated by the licensee or the licensee’s counsel with the prosecuting attorney for the Department of State. Once agreement is reached and a Consent Order is prepared, the Consent Order is signed by the licensee and then submitted to the Office of General Counsel of the Division of Licensing Services. When General Counsel (currently Susan L. Watson, Esq.) countersigns the Consent Order, the matter is deemed closed.

What many licensees are unaware of is that Consent Orders are now fully searchable and available online. Whatever appears in the Consent Order is easily ascertainable by the public.

For the principal broker, there may be unanticipated consequences to entry into a Consent Order by a salesperson. If there are a series of Consent Orders executed in favor of a single firm, even if the principal broker is not involved in the alleged violation of Article 12-A, there remains on the part of the principal broker a duty to supervise the sales staff. The failure to supervise is in itself a separate violation of Article 12-A of the Real Property Law and is addressed particularly by Regulation §175.21. This Regulation states in part:

#### **“Supervision of Salesperson by Broker.**

**[A] The supervision of a real estate salesperson by a licensed real estate broker, required by subdivision 1(d) of §441 of the Real Property Law, shall consist of regular, frequent and consistent personal guidance, instruction, oversight and superintendence by the real estate broker with respect to the general real estate brokerage business conducted by the broker and all matters relating thereto."**

A series of Consent Orders may well expose the principal broker to a charge by the DOS of a failure to supervise.

**"Do Your Homework!"**

Attorneys who regularly handle matters before the Department of State usually encourage licensees to carefully and fully respond to any investigation by the Department of State. Most matters that are fully documented by the salesperson when charged with a misdeed by a consumer are not prosecuted by the Department of State once the licensee's side of the story has been told and fully documented. Living in the naïve hope that the matter will just "go away" or that DOS will not prosecute, has led many licensees to not carefully and fully document their responses to a DOS investigator. They subsequently find themselves facing a full hearing before an Administrative Law Judge. A hearing can result in the revocation or suspension of a salesperson's license or the potential payment of a significant fine. The bottom line is, "Do your homework!" Provide a full, complete and well documented response to any inquiry made by an investigator of the Department of State.

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