D.O.S. Opinion Ends Use of Corporate Titles by Real Estate Salespersons

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Historically, it has been common practice for real estate licensees in Manhattan and often in other areas of New York State, to be granted by their principal broker, the right for marketing purposes, to refer to themselves as "President, Vice President, Senior Vice President, Executive Vice President, Managing Director" or similar titles. This is a practice also employed by banks and other enterprises in which the use of such titles enhance the apparent stature of the person dealing with a member of the public.

When real estate salespersons, particularly in New York City, change offices, a salesperson with a significant history of success is often in the position to negotiate a title as part of the new affiliation. Rarely are such individuals in fact employee-corporate officers of the entity. Rather, such persons continue to function as licensed associate real estate brokers or as salespersons.

On March 12, 2013 counsel for the Real Estate Board of New York (a non-Realtor trade association whose membership includes approximately 9,000 residential sales agents in New York City) requested an Opinion from the Department of State as to whether the use of such titles is permissible. On April 26, 2013, an Opinion was issued by Whitney A. Clark, Associate Attorney for the Department of State-Division of Licensing Services, stating that in Ms. Clark's opinion "brokerages may not provide corporate titles to agents for marketing or other purposes. Agents would similarly be prohibited from falsely advertising that they hold such a position within the brokerage."

But, But, But…

For as long as anyone can remember the practice of using corporate titles by real estate agents has been acceptable. It was often thought that once a salesperson became an associate broker, the higher status of licensure enabled the individual to be assigned a corporate title. The D.O.S. Opinion provides an interesting analysis of the Real Property Law (Section 440(2)) which defines an associate real estate broker as a "licensed real estate broker who shall by choice elect to work under the name and supervision of another broker…"

Because of this verbiage, Ms. Clark concludes that the associate real estate broker functions within the meaning of a "salesperson" under the Real Property Law. As such, a real estate salesperson is precluded from holding "voting stock or being appointed as an officer in corporate brokerage, a manager or membership of a limited liability company or a member of a partnership."

Why are such titles prohibited?

The Department of State Opinion indicates that Section 441-c(1)(a) of the Real Property Law prohibits dishonest or misleading advertising. The analysis in the Opinion concludes that the appointment of an officer by a corporation is a product of the Business Corporation Law and specifically, Section 715, which authorizes a Board of Directors to elect Officers who function as employees and agents of the entity. The Opinion concludes that "a corporate title indicates that the entity has taken such action. If an agent advertises falsely that he or she holds a corporate title, it would be considered "dishonest" and "misleading" because doing so would lead the public to believe that the brokerage entity has appointed or elected the agent as an officer or to a comparable management position."

It is well known that broker associates who have been granted the right by their brokerage firms to utilize titles do so for marketing purposes and not because the individual has been given any power to act on behalf of the corporate entity. Such persons do not act as coporate agents nor do they sign contracts, leases or other corporate instruments. The issue is whether the practice is so commonplace that the public actually knows that such titles do not reflect corporate action but rather, are used for marketing purposes.

Real Estate Marketing Is Now International

Particularly in New York City, many sales agents deal with buyers and sellers who reside in other countries for whom corporate titles, designation as "managing director" or similar nomenclature is commonplace. Without such titles, many salespersons believe that they will be hampered, particularly in marketing property to foreign nationals.

Is This The Final Word?

The Opinion issued by the Department of State is carefully drafted, logical and hard to refute from a legal perspective. Whether or not it constitutes an unfortunate incursion by the Department of State into marketing practices that have become commonplace in the industry, is another issue. If salespersons and persons who hold a broker associate's license need to hold themselves out as officers, they will be required to become licensed real estate brokers under New York Law, be appointed to a true corporate position by their employing brokerage firm and assume personal liability for the brokerage firm's compliance with Article 12-A of the Real Property Law. Alternatively, the industry may be forced to seek action by the legislature to authorize the use of titles or other designations for marketing purposes with some caveat that the designation or title is "non-corporate" or a "sales" title.

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