

Broker Compliance and Supervision (Starting Over)

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Just over three years ago, the article "Let the Broker Beware" (Supervision of Independent Contractors) appeared in Real Estate In-Depth. In this relatively short period of time, the regulatory scheme has changed dramatically. Agency relationship disclosure under Real Property Law Section 443 has been amended twice. On January 1, 2014 new advertising regulations encompassing real estate teams, the use of the internet, signs, business cards and similar matters will become effective. Recent opinions from the Department of State have eliminated the common practice by broker associates of using corporate titles. Other opinions stringently affirm Regulation Section 175.21 and the duty of the broker to comply with Section 441 of the Real Property Law by providing to salespersons "regular, frequent and consistent personal guidance, instruction, oversight and superintendence". Changes in the Realtor Code of Ethics have further defined what brokers can and cannot say about each other with restrictions on comments about other real estate professionals.

Compliance Manuals and Broker Policy Manuals

Most brokerage firms now have an office manual that sets forth the policies followed by the particular firm. All firms have been cautioned repeatedly to ensure compliance with New York State law and particularly the 1986 amendments to the Workers Compensation Law (Sections 2 and 201) and Labor Law (Section 511) which delineate limitations about direction and control of salespersons by their broker. It is hard to imagine that any office policy statement or compliance manual will be complete or up to date as 2013 ends.

The Broker's Duty to Supervise

Recent communications from the Department of State affirm the provisions of the Real Property Law rendering broker associates subject to supervision as if they were a "salesperson". Accordingly, Regulation Section 175.21 under Article 12(A) of the Real Property Law (19 NYCRR §175.21) reflects the obligation of the licensed real estate broker (usually the principal broker or at a minimum the manager of an office) to supervise sales personnel (salespersons and broker associates). This regulation states:

"Section 175.21(a) The supervision of a real estate salesperson by a licensed real estate broker, required by subdivision l(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.

(b) The broker and salesperson shall keep written records of all real estate listings obtained by the salesperson, and of all sales and other transactions effected by, and with the aid and assistance of, the salesperson, during the period of his association, which records shall be sufficient to clearly identify the transactions and shall indicate the dates thereof. Such records must be submitted by the salesperson to the Department of State with his application for a broker's license.

(c) ..."

Competency Required by New York Law and the Realtor Code of Ethics

Section 441 of the Real Property Law requires that each real estate licensee conduct himself competently and in a trustworthy manner. The specific language of the law states:

"§441-c. Revocation and suspension of licenses

1. Powers of department.

(a) The Department of State may revoke the license of a real estate broker or salesperson or suspend the same, for such period as the department may deem proper, or in lieu thereof may impose a fine not exceeding \$1,000 payable to the Department of State, or a reprimand upon conviction of the licensee of a violation of any provision of this article, or for a material misstatement in the application for such license, or if such licensee has been guilty of fraud or fraudulent practices, or for dishonest or misleading advertising, or has demonstrated untrustworthiness or incompetency to act as a real estate broker or salesperson, as the case may be."

In addition, the Realtor Code of Ethics under Article 11 states:

"Article 11: The services which REALTORS® provide to their clients and customers shall conform to the standards of practice and competence which are reasonably expected in the specific real estate disciplines in which they engage; specifically, residential real estate brokerage, real property management, commercial and industrial real estate brokerage, real estate appraisal, real estate counseling, real

estate syndication, real estate auction, and international real estate.

REALTORS® shall not undertake to provide specialized professional services concerning a type of property or service that is outside their field of competence unless they engage the assistance of one who is competent on such types of property or service, or unless the facts are fully disclosed to the client. Any persons engaged to provide such assistance shall be so identified to the client and their contribution to the assignment should be set forth. (Amended 1/95)“

Back to the Drawing Board

Given the dramatic changes in the industry, the large numbers of short sales which are part of our market, the continuing impact of foreclosures, REO's and transactions unique to the past decade, it is hard to imagine that every licensee is in tune with the broad range of activities facing them daily and their nuances.

In a marketplace in which only now are we beginning to see a resurgence of activity in traditional mortgage lending, FHA loans have become a major factor in the marketplace. These FHA loans have unique federal requirements under regulations promulgated by the Federal Housing Administration and a thorough knowledge of these regulations is an imperative.

It is therefore critical that every person in a supervisory role in a brokerage firm first reeducate themselves and then ascertain whether the salespersons affiliated with the firm have clear knowledge of current law, rules and regulations.

The Basics

Any policy statement developed by a brokerage office or a compliance manual should at a minimum cover the following topics:

I. Taking a Listing

a. Agency relationship disclosure under Section 443 of the Real Property Law; essential elements of a listing agreement; federal lead based paint requirements; MLS rules; and short sale nuances.

II. Marketing and Advertising

a. The new Regulations under Section 175.25 of the Rules and Regulations of the Department of State effective January 1, 2014; the Realtor Code of Ethics; Office Policies on Advertising and Office Policies on Social Media.

III. Record Keeping

- a. The brokers role through the closing; the Commission Protection Act; DOS record keeping requirements; and pre-requisites to receiving commission payments.
- IV. Principal Broker-Manager Supervision
 - a. DOS Regulations; how brokers separate themselves from a salesperson's misdeeds using the decision in the Roberts' case and RPL Section 442-c; matters for approval by the principal broker only; and independent contractor agreements.
- V. Working Together
 - a. Requirements relating to teams; cooperation required by the Realtor Code of Ethics; sexual harassment policies; and the use of licensed and unlicensed assistants.
- VI. Fair Housing
 - a. Review of federal and state laws; the office policies of each firm; advertising and record keeping required for fair housing compliance.
- VII. Licensing
 - a. Types of licenses, titles, designations, advertising and false advertising.
- VIII. Referrals and dealings with other professionals
 - a. Referral fees; Realtor Code of Ethics; antitrust laws; and referrals of other professionals.
- IX. Ethics and Conduct
 - a. The Realtor Code of Ethics; trustworthiness and competence required by New York State law; and dealings with regulatory agencies.
- X. The Mortgage Industry
 - a. RESPA compliance; Affiliated Business Relationships; policies with respect to mortgage brokers, mortgage bankers and lenders.

More to Come

The complexity of our industry has become such that just knowing how to order a business card requires a review of the law, as well as proposed Regulation Section 175.25 and recent opinions from the Department of State. This column will focus in the coming months on many of these basic topics to ensure that our Realtor community is prepared for the future.

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