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No grey area when it comes to real estate license issues

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In the arena of commercial real estate, transactions are becoming increasingly complex and very often brokers find themselves faced with licensing issues because out-of-state properties present opportunities for commissions.

New York, like most states, zealously guards against out-of-state brokers, as well as unlicensed brokers, in order to protect the general public from unqualified or unscrupulous individuals seeking to become involved in real estate transactions.

As anyone even remotely involved in the real industry knows, in order to earn a commission from a client in New York, a person must be either a licensed real estate broker or a licensed salesperson. New York Real Property Law § 442-d carefully defines who is a real estate broker.

However, in large real estate transactions, brokers increasingly wish to get involved in transactions involving property outside of New York, or out-of-state brokers wish to become involved in properties located in New York. Such services provided by unlicensed individuals are not permitted unless specific guidelines are followed that permit the representation because the individual or company providing the service is not acting as a broker.

Finder's Fees

The concept of a finder's fee comes out of the banking industry, but has been accepted as having applicability in the real estate in-



dustry.

A finder does not have to be licensed and, therefore, gets around the real estate brokerage prohibition. However, in order to qualify as a finder, strict guidelines must be followed.

The finder must have a written agreement with the party who is paying the fee, identifying him as a finder and setting forth very limited duties that do not permit the finder to advertise the property, act as a fiduciary or be involved in the negotiations for the sale of the property in question. The finder's fee can only be earned when the transaction is closed.

This is very different from the rights and duties of a real estate broker. There is no requirement that a broker have a written agreement, and there is no restriction on their ability to advertise the property, negotiate terms and have their fee payable upon producing a ready, willing and able buyer, regardless of whether the transaction actually closes.

Consulting Agreement

Entering into a consulting agreement is another method for a broker not licensed in the state in which the property is located to avoid the prohibition imposed by every State on unlicensed brokers.

In this instance, the services rendered must clearly set forth that the fee basis is hourly and payable, regardless of whether the transaction closes. It can be capped at a certain percentage of the value of the transaction, but cannot be based solely on the purchase price.

This type of agreement, like the finder's fee agreement, is required to be in writing or it will be rendered unenforceable by the Statute of Frauds of the applicable State.

Changing Jurisdiction

Attempts have been made, generally unsuccessfully, to get around the licensing requirements to act as a real estate broker by inserting in the agreement that the applicable law is in a state in which the broker is licensed, although the property that is the subject of the transaction is in a different state.

New York, and any other state of which I am aware, would apply the law of the state in which the property is located. Attempts to shift jurisdiction in this manner have not been successful in most states, including New York, New Jersey and Connecticut.

Indirect Real Estate Sales

Another situation in which the issue of unlicensed brokerage comes up is where the sale does not directly involve real property. Examples of this would be an interest in a partnership whose sole asset is real property, or an interest in a business whose major asset is real estate.

In these instances, most courts have permitted the broker to enforce a written agreement for commissions so long as it did not violate any licensing requirements of business brokers or require another qualification, such as a securities license.

This area of the law is fraught with traps for the careless or uninformed broker. Before anyone ventures into the area of out-of-state transactions, it is essential that written agreements be carefully drafted by an attorney knowledgeable in the area and that the rules required for a finder, consultant or business broker be carefully adhered to by all parties.

The failure to do so, places the broker's right to his commission at risk and, in the State of New York and other jurisdictions, could result in criminal culpability because the statutes governing real estate brokerage contain criminal penalties.