



## **REAL ESTATE BROKERS AND SALESPERSONS AND THE UNAUTHORIZED PRACTICE OF LAW**

Article 12-A of the Real Property Law provides for the licensure of real estate brokers and salespersons. A licensee is statutorily held to standards of competency and trustworthiness. Failure to abide by such standards can result in the suspension or revocation of the license. The New York State Department of State has long considered the unlawful practice of law by a real estate broker or salesperson as grounds for disciplinary action. Its interpretation of what constitutes unlawful practice has been guided by relevant provisions of the Judiciary Law and by the seminal case of Duncan & Hill Realty, Inc. v. Department of State, 62 A.D.2d 690, (4th Dept. 1976), app dismissed, 45 N.Y.2d 821, 381 N.E.2d 608, 409 N.Y.S.2d 210 (1978).

Judiciary Law §478 prohibits the practice of law by non-attorneys, the purpose of which is to protect the public from the dangers of legal representation and advice given by persons not trained, examined, and licensed for such work. Jemzura v. McCue, 45 A.D.2d 797, 357 N.Y.S.2d 167 (3rd Dept. 1974), app dismissed 37 N.Y.2d 750, 337 N.E.2d 135, 374 N.Y.S.2d 624 (1975). Section 484 of the Judiciary Law additionally provides 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 of these sections is a misdemeanor. See, Judiciary Law §485. It may be prosecuted by the attorney general, or, upon leave of the supreme court, by a bar association. See, Judiciary Law §476-a. Additionally, should a real estate broker or salesperson be found to have engaged in such unlawful practice, the Department will take independent action against such person's license.

In Duncan & Hill, the court upheld the Department of State's determination that a real estate broker who was not a licensed attorney demonstrated untrustworthiness and incompetence in violation of Real Property Law §441-c, finding that, when he prepared documents that included detailed mortgage terms he had devised, he engaged in the unauthorized practice of law.

The court recognized that brokers have long been permitted to draft "simple" contracts in the context of their brokerage activities. Duncan & Hill, supra, 62 A.D.2d at 696, 405 N.Y.S.2d at 342. However, the court cautioned as follows:

...the so-called "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 their 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 a 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, insofar as the contract entails legal advice and draftsmanship, only a lawyer or lawyers be permitted to prepare the document to ensure the

deliberate consideration and protection of the interests and rights of the parties. Duncan & Hill, supra, 62 AD2d at 697-98, 405 N.Y.S.2d at 343-44; footnote omitted.

Recognizing the intent to protect the public to ensure that real estate brokers and salespersons do not exceed the bound of their competence and prepare documents the execution of which requires a lawyer's scrutiny and expertise, the court went on to state:

It is for this reason that real estate brokers and agents must refrain from inserting in a real estate purchase offer or counteroffer any provision which requires the exercise of legal expertise. Thus it is not proper for such a broker to undertake to devise the detailed terms of a purchase-money mortgage or other legal terms beyond the general description of the subject property, the price and the mortgage to be assumed or given. A real estate broker may readily protect himself from a charge of unlawful practice of law by inserting in the document that it is subject to the approval of the respective attorneys for the parties. Moreover, a real estate broker or agent who uses one of the recommended purchase offer forms . . . or one recommended by a joint committee of the bar association and realtors association of his local county, who refrains from inserting provisions requiring legal expertise and who adheres to the guidelines agreed upon by the American Bar Association and the National Association of Real Estate Brokers, above noted, has no need to worry about the propriety of his conduct in such transactions. Duncan & Hill, supra, 62 AD2d at 701, 405 N.Y.S.2d at 345.

Under these circumstances, a real estate broker or salesperson who prepares a simple fill-in-the-blanks purchase and sale contract can avoid the unlawful practice of law by including in the contract a condition making it subject to approval by each party's attorney. Alternatively, brokers and salespersons can utilize a fill-in-the-blanks form that has been approved by a joint committee of the bar association and realtors association of his or her county. Such an approved form would only require that the real estate brokers and salespersons fill in non-legal provisions such as the names of the parties, the date and location of the closing, a description of the property, the consideration for sale and any other relevant facts. The brokers and salespersons would not be permitted to develop any "legal terms". Further, since the contract establishes significant legal rights and obligations, it 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.

Brokers and salespersons must refrain, even with respect to these approved contracts, from providing legal advice to their clients. Nor may they discourage the parties from seeking advice from their attorneys. Brokers and salespersons may not add provisions to the approved contracts unless they make the entire contract subject to and conditioned upon the review and approval of each party's attorney. In addition, brokers and salespersons may prepare purchase and sale contracts, subject to the above conditions, only as an incident of the purchase and sale of real estate and may not charge a separate fee for preparation of the contract or share in the fees of attorneys for preparation or review of these contracts. See, Opinion of N.Y.S. Attorney General 96-F11, dated November 14, 1996.