New Real Estate Brokerage Advertising Regulations

By Andrew Lieb

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Pursuant to the statutory authority of the Department of State, in conjunction with the New York State Real Estate Board, to promulgate regulations, as set forth at Real Property Law §442-k, the real estate brokerage advertising regulations, at 19 NYCRR 175.25, have been amended effective Nov. 2, 2020.

According to the New York State Register, the purpose of the amendment is to require "licensees to advertise listings in a more transparent and consistent manner" by using "specific text in advertising, across a broad range of media platforms, to promote transparency." Specifically, the amendment's purpose is to address the situation where "a licensee references property in an advertisement that is subject to an exclusive listing of another broker" whether such advertisement be on "buyer lead generation websites" or a brokerage's website. Stated otherwise, the purpose of the regulation is to "adequately disclose to the consumer who the exclusive agent is."

In the amendments, subsection (d)(3)(ii) was expanded to now include the italicized terms:

> Every page of such a website, *including any page that displays multiple properties or property search results*, shall include the information required by these rules and regulations. In addition, a link to the broker or brokerage website with whom the associate broker, salesperson or team is associated is required on the homepage of the associate broker, salesperson or team website unless the broker or brokerage does not have a website.

Additionally, subsection (d)(6) was modified, whereas it previously provided:

> Advertisements referencing property not listed with broker. [Any advertisement that references or includes information about a property that is not listed with the advertising broker or was not sold by the advertising broker shall prominently display the following disclaimer: "This advertisement does not suggest that the broker has a listing in this property or properties or that any property is currently available." Such advertisement: (i) shall not suggest, directly or indirectly, that the advertising broker was involved in the transaction; and (ii) shall not refer to property currently listed with another broker absent consent provided pursuant to subparagraph (b)(2)(ii) of this section.]

Now, subsection (d)(6) provides:

> Advertisements referencing property not listed with broker. (i) No real estate broker, associate real estate broker or real estate salesperson shall advertise in any manner or make reference to in any advertisement property that is subject to an exclusive listing agreement of another broker, without authorization from the exclusive listing broker. Such advertisements must clearly and conspicuously disclose the name of the exclusive listing broker immediately after one of the following phrases: "Listing Provided by [insert name of the exclusive listing broker]," "Listing by [insert name of exclusive listing broker]," "Listing Broker Contact [insert name of exclusive listing broker]," "Listing of [insert name of exclusive listing broker]," "Listing Provided Courtesy of [insert name of exclusive listing broker]," "Listing Courtesy of [insert name of exclusive listing broker]," or "Listing Agent Contact [insert name of exclusive listing broker]." (ii) Any real estate broker, associate real estate broker, or real estate salesperson that pays a third-party for advertising involving a property that is subject to an exclusive listing agreement of another broker must, in addition to the requirements in subparagraph (i), include in any advertisement that provides the advertising broker's name words to disclose that the advertisement is a paid advertisement, using at a minimum the word "advertisement"

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immediately following the real estate broker, associate real estate broker, or real estate salesperson's name.

The New York State Register explained that there were 700 comments since the regulation was proposed on Oct. 16, 2019. In response to the comments, the Department of State made clear that "[t]he proposed rule made no changes to the requirement that a licensee obtain the consent of another broker before advertising property that is subject to an exclusive listing. 19 NYCRR § 175.25(b)(2)." Further, the Department of State clarified that "[i]f a licensee uses a social media website (e.g., Twitter, Facebook) to advertise services, whether it mentions a specific property or not, such advertisement must still comply with Section 175.25. Social media websites are considered by the department to be including within "web-based advertising" pursuant to paragraph (d)(3) of this section. Accordingly, if an agent uses social media to refer to another property, such post must comply with all applicable parts of the section, including disclosure of the listing broker in a conspicuous manner."

There is no private right of action available for violations of the advertising regulations. However, the public can make complaints of violations to the Department of State and each is reviewed and investigated by the Department's Division of Licensing Services to assess whether the licensee complained of should be disciplined pursuant to the Department of State's authority pursuant to Real Property law §441-c. Such discipline can include license revocation, license suspension, a fine not exceeding $1,000, or a reprimand. To avoid such discipline, licensees who are noticed of a complaint should immediately obtain representation by competent counsel as is their right, which is afforded by the State Administrative Procedure Act §501. To ascertain whether counsel is competent, referring counsel should inquire about counsel's knowledge concerning Article 12-A of the Real Property Law, 19 NYCRR 175, Department of State decisional precedent, interpretive comments to the New York State Register, the State Administrative Procedure Act, and the hearing rules of procedure as set forth at 19 NYCRR 400.

Note: Andrew M. Lieb is the managing attorney at Lieb at Law, P.C., a law firm with offices in Smithtown and Manhasset. He is a past co-chair of the Real Property Committee of the Suffolk Bar Association and has been the Special Section Editor for Real Property for The Suffolk Lawyer for years.

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dent occurs and liability is in question. How, the transactional attorney counsels his client on drafting so as to minimize the liability exposure is sometimes an after the fact exercise, but nonetheless an exercise worth the effort.

Such an exercise focuses the transactional attorney on that portion of the SPA (or other document) wherein the SOW is defined. Carefully reviewing and defining the scope of work will prevent "headaches" when things go awry. Case in point is where the client has been hired to provide an "onsite safety representative" for a given project. No doubt the bidding instructions or work proposal mentions contract drawings, specifications and other referenced materials, which should be reviewed and are incorporated by reference.

As part and parcel of this review, the "work area" should be narrowly defined. If a specific diagram is available, then same should be used in the client's documents. Further defining the work area to exclude those locations on site where tools are stored or other common storage areas can be in the client's best interest, particularly when a given work area is being used by multiple subcontractors and both tools and materials are stored in the work area.

A detailed discussion of the SOW should involve the client and should tap all the "industry" references, customs and standards in order to further define the anticipated SOW. Where the industry standard is codified or otherwise recognized, reference to abiding by same may prove enough for purposes of the SOW. For example, construction of the single family dwelling as per the applicable building code or monitor the workplace in compliance with OSHA standards can easily provide a framework to be further "memorialized" in the SOW or at worst a minimum standard of performance.

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However, haste makes waste and business proceeds at a quick pace. Absent a set of clearly defined contractual obligations and performance standards, these determinations are the subject of legal posturing and biased interpretation. The transactional attorney is left dealing with incomplete terms and the consequences thereof while counseling the client on how to avoid future pitfalls of such behavior.

Fast forward to our site safety representative being hired pursuant to a simple purchase order. Of course, during the representative's watch, an accident occurs and litigation follows. Unfortunately, the client was operating under a purchase order at a price per day for a safety representative. The injured worker was traversing a hallway where tools were stored and tripped over some materials left in the hallway.

In discussing the fact pattern with the client's insurance carrier, it comes down to reviewing the contract (PO or whatever memorandum exists), the SOW, performance and what "duty" or other services were to be provided and where was the "work area" that was to be monitored.

Providing a site safety representative as defined in the job specifications; to implement and or oversee the Health and Safety Plan (HASP) would have been a minimum standard for reference and easily added to any PO. Additionally, reviewing the harsh standards under Labor Law sections 240 & 241 might aid in further defining the scope of work or in negotiating a shift of the risk for oversight to a third party when the daily work log calls for "gravity related work or when construction, excavation or demolition work" is to be performed. A more affirmative duty on behalf of the general contractor to inform the safety representative of such work might be negotiated along with a disclaimer if not informed.

As with any premises liability issue, control and maintenance of the area is likely to determine liability. Along these lines identifying the "work area" as narrowly as possible can afford additional protection in the event of an accident. Annexing drawings and other illustrative documents to a SPA outlining the work area and disclaiming the client's responsibility for oversight in areas not included within said area can bolster defense counsel's argument.

Lastly, negotiating any SPA to limit any "third party" beneficiaries with language such as "nothing in this agreement, express or implied, is intended, or shall be construed to confer upon any third party other than the parties hereto any right, remedy or claim under or by reason of this Agreement" is suggested.

While not an absolute defense, providing a client with suggestions (and perhaps even a custom tailored SPA at a fee) on limiting exposure by clearly defining the scope of work, the work area and for whose benefit the work is to be performed is your much appreciated Action in the TransAction.

Note: Irwin S. Izen, is a solo practitioner, concentrating on real estate, business and transactional law. He is the former co-chairman of the Transactional & Corporate Law Committee and is the past co-chairman of the Suffolk County Bar Association Real Property Committee. He represents both individuals and small businesses in purchase and sales, real estate matters and other transactions facing the entrepreneur and maintains his office at 357 Veterans Memorial Highway, Commack, New York 11725 and can be reached via email at Izenlaw@aol.com.

Commercial Law (continued from page 10)

In opposition, the city claims that any impairment caused by the Guaranty Law is limited because it "only prevents landlords from pursing the personal assets of a natural person who guaranteed a commercial tenant's performance under a lease during the worst crisis that has affected this county and the world in many years." The city also claims that the Guaranty Law is necessary to protect the small businesses that "are the lifeblood of the city's and the nation's economy." It also argues that the Guaranty Law is reasonable because it has a temporal limitation.

In reply, among other things, the plaintiffs pointed out that they too are small businesses that are part of the city's lifeblood and that the temporal limitation argument is misleading because while the time period to qualify for the protections of the Guaranty Law is limited, the vacation of personal liability for defaults during that time period are permanent. As a result, the plaintiff's claim that the Guaranty Law completely abrogates the ability to collect from a separate and distinct contract between a landlord and a guarantor, which is a clear violation of the Contracts Clause.

Procedurally, the plaintiffs' moved for a preliminary injunction and the city cross-moved to dismiss. Oral argument was heard on both motions before the Honorable Ronnie Abrams, U.S.D.J. on Sept. 11, 2020 and as of the date of this article, no decision has been rendered.

This case, and the appeal that will surely follow, has wide-reaching implication because, as noted by the plaintiffs, the use of personal guaranties to secure a commercial tenant's leasehold obligations is a frequently used device to ensure payment. In the event that the Guaranty Law is upheld, many tenants that defaulted during the pandemic will have little-to-no incentive to make up rental arrearages to landlords, who will still have mortgage, real estate tax and other financial obligations associated with the ownership of commercial real property. By attempting to avoid the enforcement of personal guaranties and the potential personal bankruptcy of these individuals, the city may ultimately be trading that problem for the problem of commercial foreclosures and the ultimate bankruptcies of small commercial property owners that likely personally guaranteed their own commercial mortgages. In addition, the enforceability of the Guaranty Law may also ultimately influence what other municipalities do in an attempt to mitigate the effects of the COVID-19 pandemic on businesses and their owners.

Note: Jarrett M. Behar, a partner of the firm Certilman Balin Adler & Hyman, LLP, practices in the areas of commercial litigation, real estate development and construction law. He is a director of the Suffolk County Bar Association, the co-chair of the Suffolk County Bar Association Transactional and Corporate Law Committee, an Officer and Associate Dean of the Suffolk Academy of Law and the Vice-President of the Commack Union Free School District Board of Education. For additional information concerning this article, please feel free to contact Mr. Behar at jbehar@certilmanbalin.com.