



STATE OF NEW YORK
DEPARTMENT OF STATE
ONE COMMERCE PLAZA
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Neil Garfinkel, Esq.
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Dear Mr. Garfinkel:

I write in furtherance of our recent conversations regarding my April 26, 2013 correspondence to Matthew Meisel and your request for clarification regarding same. You have first asked if a mechanism exists whereby an associate broker can become an officer in a corporate brokerage, a manager or member of a limited liability company, or a member of a partnership. As explained in my correspondence to Mr. Meisel, because Real Property Law §440(2) requires that associate brokers be treated as real estate salespeople, the statutory prohibition against real estate salespeople being appointed as an officer in a corporate brokerage, a manager or member of a limited liability company, or a member of a partnership extends to associate brokers. Briefly, the statutory prohibition against subordinate licensees holding voting stock in or being appointed as an officer of a corporate brokerage stems from the vesting of responsibility for the conduct of the corporate brokerage in its broker or brokers. The statute and implementing regulations require brokers to guide, instruct, oversee, and supervise the actions of associated salespeople and associate brokers (19 NYCRR 175.21). Thus, a subordinate licensee is not permitted to run the daily operations of the brokerage or to hold shares of voting stock.

That being said, an associate real estate broker is a real estate broker who has chosen to work under another broker's name and supervision. (Real Property Law §440(2)). Insofar as an associate broker possesses the same education and experience as a real estate broker, the statute permits an associate broker to "upgrade" his or her license and become licensed as a real estate broker. The statute also does not limit the number of real estate brokers who may be licensed to represent a particular real estate brokerage. As a practical matter, an associate broker could become licensed as a real estate broker representing the brokerage and would then be permitted to hold voting stock in the brokerage and be appointed as an officer, manager, or member of the brokerage company.

You have next asked if an associate broker or real estate salesperson may be appointed as a director of a brokerage corporation. Although the term "director" is not specified in Real Property Law §441-b(2), the term "director" is well understood in corporate law. Corporate officers are elected or appointed to office by either the corporate board of directors or shareholders and have such authority as provided in the corporate by-laws or by the board of directors. (Business Corporation Law §715). A director is defined as "any member of the governing board of a corporation, whether designated as director, trustee, manager, governor, or by any other title." (Business Corporation Law §102(a)(5)). As a member of a corporate board of directors, a director assists in the business of managing the corporation. (Business Corporation Law §701; *In re Shupack's Will*, 1 AD 2d 841, (2nd Dept., 1956),

modified on other grounds, 1 NY2d 482). As discussed above, a subordinate licensee is not permitted to participate in the management of a corporate brokerage. Thus, a subordinate licensee may not serve as a director

You have also asked if an associate broker may hold a corporate officer position if he or she is an employee of the brokerage, as opposed to an independent contractor. I recognize that, as a matter of industry practice and for taxation purposes, many subordinate licensees are classified as “independent contractors.” However, Article 12-A of the Real Property Law does not recognize this distinction. As the Department of State has advised in a prior legal opinion, this industry practice does not alter or supersede the provisions of Article 12-A of the Real Property Law:

“While a salesperson [inclusive of associate brokers] may, for tax purposes only, have been labeled an ‘independent contractor’ rather than an ‘employee’ by a taxing authority the legal relationship between a broker and salesperson is that of principal and agent, and the broker has legal accountability for the acts of the salesperson that flow from that agency relationship regardless of whether those legal consequences were intended, understood or affirmatively disavowed. The legal accountability arising from the agency relationship under common law overlaps the legal accountability arising from duties imposed by statute upon holders of real estate licensees.” (Department of State Legal Opinion #88-7).

Accordingly and as noted above, an associate broker, irrespective of his or her status as an employee or independent contractor, may not hold a corporate officer position.

Your final question is whether Article 12-A of the Real Property Law prohibits the issuance of all titles to associate brokers and real estate salespeople. As explained in my correspondence to Mr. Meisel, Article 12-A of the Real Property Law prohibits false and misleading advertising. Article 12-A also prohibits subordinate licensees from holding voting stock in a corporate brokerage and from being appointed as an officer in a corporate brokerage, a manager or member of a limited liability company, or a member of a partnership. As such, a licensee cannot use any title that is false or misleading, such as one that would indicate falsely that the licensee is a corporate officer with the brokerage company. The statute and implementing regulations require brokers to guide, instruct, oversee and supervise the actions of associated salespeople and associate brokers (19 NYCRR 175.21). Consistent with this principle, any title which implies that an associate broker or real estate salesperson is involved in the management, supervision and control of the brokerage company would be prohibited.

Very truly yours,

Whitney A. Clark
Associate Attorney