

Unlicensed Advisor Costs Broker Its Commission

By Alan Mark

?By former Associate Jack Blum

In April of this year, Jones Lang LaSalle Americas, Inc. ("JLL"), one of the world's largest commercial real estate brokerages, learned the hard way that one employee's lack of a real estate broker's or salesperson's license can cost millions of dollars. JLL's fate presents a cautionary tale for brokerages that use the services of unlicensed professionals in connection with leasing and sales transactions.

JLL had represented two Northern Virginia property owners in winning a fifteen-year, \$330 million lease to rent office space in Alexandria, Virginia to the National Science Foundation ("NSF"). Shortly afterwards, a dispute arose between JLL and the owners over JLL's commission for the deal. JLL asserted that it was entitled to 2% of the lease's base rent under an exclusive leasing agreement, while the owners claimed that JLL had orally agreed to reduce its commission to \$1 million.

After JLL filed a lawsuit to recover its commission, the owners discovered that some of JLL's employees, particularly a senior vice president named Arthur M. Turowski, were not licensed as real estate salespersons. Mr. Turowski was a longtime General Services Administration official who had joined JLL in 2007 to support JLL's Government Investor Services practice. JLL represented that Mr. Turowski's duties involved advising other JLL employees about the federal procurement process. Although Mr. Turowski's contract with JLL required him to obtain a Virginia real estate license, he had never done so.

Mr. Turowski's non-licensure proved costly for JLL. After discovering that Mr. Turowski was unlicensed, the owners argued that JLL's recovery of a commission would be contrary to public policy because Mr. Turowski acted as a real estate salesperson. In Virginia, a "real estate salesperson" is defined as anyone who for compensation or consideration sells or offers to sell, buys or offers to buy, rents or offers to rent, or negotiates the purchase, sale, exchange, or lease of real estate. Even though JLL itself was a licensed broker, Virginia law required each of JLL's employees or contractors who acted as a salesperson to also hold a license.

JLL defended on the ground that because the owners themselves, and not JLL or Mr. Turowski, had made the actual offers to lease and negotiated and executed the lease, no license was required. The court quickly rejected this argument. It noted that JLL's agreement with the owners described JLL as their broker and assigned to JLL the duties and responsibilities of a licensed broker. The court also observed that Mr. Turowski had been "centrally involved" in the transaction at issue and that he had acted as JLL's relationship manager for the owners, signed and delivered the owners' expression of interest for the NSF lease, designated himself as the owners' contact person for government communications about the lease, and negotiated the government's broker's commission. The court ruled that the words "lease," "offer," and "negotiate" were intended to reflect the practical realities of the leasing process and not merely the formal events that legally create the transaction. Because JLL's and Mr. Turowski's activities required at least a real estate salesperson's license, the court ruled that JLL could not receive a commission for the NSF lease as a matter of Virginia public policy. The owners were not even required to pay JLL the \$1 million that they had previously argued that JLL was entitled to!

JLL's fate illustrates the potential pitfalls in using non-licensed professionals as consultants in connection with brokerage transactions. Many brokers use such professionals to provide advice on technical issues that the broker may view as being outside the scope of typical brokerage services. The involvement of such professionals, however, may allow clients to evade paying commissions by making after-the-fact characterizations about the unlicensed professional's role in the transaction. While the facts of Mr. Turowski's involvement in the NSF transaction were particularly negative - particularly his status as JLL's relationship manager for the owners and his designation as the owners' contact person for government communications - a key employee's non-licensure creates the uncertainty that is inherent in any case-by-case analysis.

For brokers operating in the greater Washington, D.C. metropolitan area, it does not appear that the result in JLL's case would be different had the property been located in either Maryland or the District of Columbia:

In Maryland, the definition of brokerage services requiring a license includes not only typical activities like buying, selling, leasing, collecting rent, and subdividing land for sale, but also "serving as a consultant regarding" any of those activities. This could sweep in professionals who provide advice on real estate transactions without performing what are commonly thought of as a broker's or salesperson's responsibilities. In Maryland, a broker may not retain or allow an unlicensed person to provide brokerage services and is prohibited from compensating an unlicensed person for performing such services. A 2001 Maryland federal bankruptcy court decision, *Binswanger Cos. v. Merry-Go-Round Enterprises, Inc.*, interpreted these prohibitions to preclude a broker from collecting a commission where unlicensed employees had worked on the deal.

The District of Columbia defines the brokerage activities requiring licensure similarly to Virginia, and includes listing for sale, selling, exchange, purchasing, renting, or leasing real property. In order for a firm or other corporate entity to obtain a broker's license, each employee performing brokerage activities must be licensed. The only explicit exception to this requirement is for employees in stenographic or clerical capacities. Finally, brokers in D.C. are prohibited from paying any fee or compensation to an unlicensed person for brokerage services. To date, there have been no D.C. cases specifically addressing a commission clause where an unlicensed broker employee was involved in the transaction.