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SEMINAR OUTLINE JOSEPH HILTON & ASSOCIATES, INC. July 12, 1993

- I. How to Get Employed!: Landlord always modifies with written agreement the prevailing rates, due on signing and subject premises.
- II. How to Really Get Employed - Exclusives: Keep short for quick action and execution by Tenant.
- III. Need to Show Space? Or just register the client.
- IV. Nature of the Employment
 - A. Employment contract without condition - To procure a purchaser ready, willing and able to buy on terms specified by the seller. Broker performs his contract when he procures such a buyer; contract need not be signed and title need not be closed; even if purchaser defaults, broker entitled to commission.

Illustration: Hecht vs. Meller (Property destroyed by fire; vendee cancels contract. Held: Broker entitled to commission.)
 - B. Employment agreement with conditions - Seller's liability may be conditioned upon the closing of title.

Illustration: Levy vs. Lacey (Agreement provided that commission not to be paid until sale's actual consummation; title did not close. Held: Broker not entitled to commission.)
 - a. But if the failure to close is due to seller's default, the broker will be found to have earned the commission because the seller rendered full performance impossible.

- b. Nevertheless, the seller may avoid liability if he includes a provision stating that no commission will be due if title does not close for any reason whatsoever "including Seller's (Lessor's) acts".

Illustration: Douglas Elliman Co., Inc. v. Sterling Garage Inc. (Agreement provided that no commission would be earned until lease actually closed; in absence of fraud on part of lessor, broker not entitled to commission.)

- c. Where exculpatory language is included as part of scheme to deprive broker commission, seller will be liable.

Illustration: Langfan v. Walzer (After procuring purchaser ready, willing and able to buy property, seller requested broker to sign an agreement providing that no commission would be paid until contract of sale was executed; seller thereafter changed terms of offer and deal was aborted. Held: There must be a trial to determine whether seller had preconceived plan to deprive broker of commission.)

c. Employment by purchaser -

- a. If purchaser employs a broker and agrees to pay a commission for performance, purchaser is liable for payment. However, there must be an express undertaking by the purchaser to pay the commission.

Illustration: Brabazon Agency Inc. v. Donahue (Broker hired by purchaser but no express agreement that purchaser would pay commission. Held: Broker not entitled to commission.)

- b. If purchaser hires a broker with the understanding that the seller will pay the commission, the purchaser may be liable for the commission if he reneges on the deal.

Illustration: Duross Company v. Evans (Broker employed by purchaser located property on which purchaser made offer; seller accepted offer and

agreed to pay broker's commissions; purchaser refused to proceed with transaction. Held: Purchaser liable for commission.)

V. Performance by Broker

A. Procuring cause (where deal ultimately consummated)

- a. Broker must prove that he generated a chain of circumstances or established a favorable climate which resulted in the deal.

Illustration: Eugene J. Busher Co., Inc. vs. Galbreath-Ruffin Realty Co. (Broker brought the parties together and instigated a proper attitude toward a possible lease. Held: Broker entitled to commission notwithstanding the lack of participation in negotiations of the terms of the lease.)

- b. In certain circumstances merely bringing property to the attention of ultimate purchaser is sufficient to entitle broker to commission.

Illustration: Salzano vs. Pellillo (Facts justify conclusion that broker entitled to commission without doing more than introducing purchaser to owner.)

- c. In other circumstances, brokers found not entitled to commission by merely bringing property to attention of ultimate buyer.

Illustrations: Greene vs. Hellman (Broker not able to show he was procuring cause of ultimate sale, which was consummated directly between owner and purchaser approximately one year after broker informed purchaser that property was for sale.)

Briggs vs. Rector (Purchaser shown property by broker; no further contract until purchaser called broker who instructed purchaser to deal directly with seller; broker did not participate in the negotiations and did not know the

terms of the sale. Held: Broker not entitled to commission.)

B. Agreement on essential terms (where deal not consummated)

a. Customary terms of transaction.

Illustration: Tanenbaum vs. Boehm (Broker employed by lessor and procured tenant who orally agreed to conditions imposed by lessor; thereafter, lessor's attorney insisted upon reasonable condition in lease and deal aborted. Held: Broker entitled to commission.)

b. Where customary or essential terms have not been agreed to, commission not earned.

Illustrations: Freling vs. Restivo (No agreement as to financing terms.)

C.A. Frank & Company Inc. vs. Corland Corporation (No agreement as to financing terms.)

Kaelin vs. Warner (Broker required to procure purchaser for fixed price with terms to be arranged; until terms arranged no commission earned.)

C. If financial ability of purchaser is undertaken - Broker must prove that purchaser was financially able to close the deal.

Illustration: Globerman vs. Lederer (Personal finances of purchaser not revealed; no bank commitments produced. Held: No proof of financial ability.)

V. Entitlement To Commission Under Exclusive Agency And Exclusive Right to Sell

A. If an exclusive agency, seller cannot employ a broker but can sell property himself, in which event seller not liable for commission. If an exclusive right to sell (or lease) is granted, broker earns a commission even if the principal sells property himself.

Illustrations: Levy vs. Isaacs (Broker employed exclusive agent; broker did not procure purchaser or participate in any negotiations. Held: Broker not entitled to commission.)

Bashant vs. Spinnella (Ultimate purchaser introduced during exclusive listing period; deal consummated after expiration of listing period at lower than offering price. Held: Broker not entitled to commission.) But watch out.

VII. Enforcing Right To Collect Commission - New Statutory Amendments

A. Mechanic's lien may now be filed by brokers.

- a. Pertains only to leases of more than three years for all or any part of real property used for other than residential purposes.
- b. There must be a written brokerage agreement either of employment or compensation (with signatures notarized preferably).
- c. Lien should be filed within four months of the conclusion of performance of the brokerage services.

B. Brokers recording act.

- a. Real Property Law amended by adding Section 294-b which applies to any purchase or lease of real property.
- b. Permits recordation where there is a written or oral contract of brokerage employment.
- c. Requires that there be a contract of purchase or lease or an actual purchase or lease.
- d. Recordation does not invalidate any transfer of property or lease.
- e. Recordation does not create a lien

and shall be discharged one year
after filing.

f. Fairly worthless.