

VOLUME NO. 43

OPINION NO. 8

BUSINESS REGULATION - Advertisement of real estate; finder's fees;
LICENSES, PROFESSIONAL AND OCCUPATIONAL - Advertisement of real estate; finder's fees;
REAL ESTATE AGENTS, BROKERS, DEALERS, AND SALESMEN - Advertisement of real estate; finder's fees;
MONTANA CODE ANNOTATED - Sections 37-51-101 to 37-51-512, 37-51-102(3), 37-51-306, 37-51-321(16);
OPINIONS OF THE ATTORNEY GENERAL - 34 Op. Att'y Gen. No. 23 (1971);
MONTANA LAWS OF 1957 - Chapter 129, section 1.

- HELD: 1. A person is not required to be licensed as a real estate broker or salesman in order to obtain and organize information from potential sellers of real estate, and, for a fee charged to the seller only, to advertise that information to interested potential buyers.
2. A person is not required to be licensed as a real estate broker or salesman in order to receive a fee, commission, or compensation for referring the name of a potential buyer of real estate.

March 10, 1989

John Dudis, Chairman
Board of Realty Regulation
Department of Commerce
142½ Ninth Avenue
Helena MT 59620

Dear Mr. Dudis:

You have requested my opinion on the following questions:

1. Is it lawful for a person who is not licensed as a real estate broker or salesman to obtain and organize information from potential sellers of real estate, and, for a fee charged to the seller only, to make that information available by public display to interested potential buyers?
2. Is it lawful for a person who is not licensed as a real estate broker or salesman to pay a fee, commission, or compensation to another who is not licensed as a broker or salesperson for referring the name of a potential buyer of real estate?
3. Is it lawful for a person who is licensed as a real estate broker to pay a fee, commission, or compensation to another who is not licensed as a broker or salesman for referring the name of a potential buyer of real estate?

The answer depends upon an interpretation of the licensing act for real estate brokers and salesmen, §§ 37-51-101 to 512, MCA. The act provides in pertinent part:

It is unlawful for a person to engage in or conduct, directly or indirectly, or to advertise or hold himself out as engaging in or conducting the business or acting in the capacity of a real estate broker or a real estate salesman within this state without a license as a broker or salesman or otherwise complying with this chapter. [§ 37-51-301(1), MCA.]

....

A single act performed for a commission or compensation of any kind in the buying, selling, exchanging, leasing, or renting of real estate or in negotiating therefor for others, except as hereinafter specified, shall constitute the person performing any of such acts a real estate broker or real estate salesman. [§ 37-51-103, MCA.]

....

It is unlawful for a licensed broker to employ or compensate, directly or indirectly, a person for performing the acts regulated by this chapter who is not a licensed broker or licensed salesman. [§ 37-51-306, MCA.]

....

"Broker" includes an individual who for another or for a fee, commission, or other valuable consideration or who with the intent or expectation of receiving the same negotiates or attempts to negotiate the listing, sale, purchase, rental, exchange, or lease of real estate or of the improvements thereon or collect:

rents or attempts to collect rents or advertises or holds himself out as engaged in any of the foregoing activities. The term "broker" also includes an individual employed by or on behalf of the owner or lessor of real estate to conduct the sale, leasing, subleasing, or other disposition thereof at a salary or for a fee, commission, or any other consideration. The term "broker" also includes an individual who engages in the business of charging an advance fee or contracting for collection of a fee in connection with a contract by which he undertakes primarily to promote the sale, lease, or other disposition of real estate in this state through its listing in a publication issued primarily for this purpose or for referral of information concerning real estate to brokers, or both, and any person who aids, attempts, or offers to aid, for a fee, any person in locating or obtaining any real estate for purchase or lease. [§ 37-51-102(3), MCA.]

The activities called into question by your request do not fall within the enumerated exemptions in section 37-51-103, MCA. The question is thus whether the activities are included in the definition of broker, thereby subjecting the person performing the activities to the criminal penal penalties provided by section 37-51-323, MCA, and to regulation by the Board of Realty Regulation.

Your first question concerns a hypothetical unlicensed person who obtains and organizes information for potential sellers, and, for a fee charged to the sellers, makes the information available by advertisement or by public display. Your facts indicate that no agency relationship is created by which the person undertakes to attempt to negotiate a sale or disposition of property. According to the facts presented, the unlicensed person does not show the property, set up closings, assist in the preparation of a buy-sell agreement, or hold earnest money. Essentially, your question describes the advertising of real estate. The first two sentences of section 37-51-102(3), MCA, do not apply to this situation, since no negotiations take place under the facts presented by your question and no sale or other disposition of property is actually conducted. The last clause of the third sentence does not apply to your question, because the fee is not charged to the buyer. Thus, the controlling language is the first part of the third sentence:

The term "broker" also includes an individual who engages in the business of charging an advance fee or contracting for collection of a fee in connection with a contract by which he undertakes primarily to promote the sale, lease, or other disposition of real estate in this state through its listing in a publication issued primarily for this purpose or for referral of information concerning real estate to brokers, or both[.]

§ 37-51-102(3), MCA.

An ambiguity exists in the quoted sentence, which may be construed to mean:

1. engaging in the business in connection with a contract by which he undertakes primarily to promote the sale ... of real estate through its listing in a publication issued primarily (a) for the purpose of promoting the sale of real estate, or (b) for the purpose of referring information concerning real estate to brokers, or (c) both; or
2. engaging in the business in connection with a contract (a) by which he undertakes primarily to promote the sale ... of real estate through its listing in a publication issued for the purpose of promoting the sale of real estate, or (b) for the purpose of referral of information concerning real estate to brokers, or (c) both.

The first interpretation is a plain, grammatically correct reading of the sentence. The second interpretation is the one relied upon in 34 Op. Att'y Gen. No. 23 at 156, 157 (1971) as follows:

The question then becomes whether the "referral of information" clause refers to a person who "undertakes primarily to promote" through "listing in a publication".

....

It would appear, then, that subsection (b) of section 66-1925 [R.C.M. 1947] providing "through its listings in a publication issued primarily for such purpose, or for referral of information concerning such real estate to brokers, or both", refers to two distinct situations. The use of the word "both" at the end of the provision serves to substantiate this proposition.

....

The object sought to be achieved by the Montana legislature in enacting subsection (b) of section 66-1925, R.C.M. 1947, was to regulate, by licensing, those operations which charge an advance fee and/or collect a fee in connection with a contract negotiated primarily for the purposes of promoting the sale, lease or disposition of real estate within this state, whether it be done by listing such information in a publication or by the referral of information to brokers, or both.

Upon examination of the legislative history of the statute, *infra*, I am convinced that the reasoning in 34 Op. Att'y Gen. No. 23 (1971) is not sound. However, the conclusion reached in that opinion, that a corporation operating a computer referral service for the purpose of promoting the sale of real estate is a "broker," remains correct because the facts therein indicated the existence of a publication, via computer bank, for referral of information to brokers.

The critical language of section 37-51-102(3), MCA, derives from an amendment in 1957:

A "real estate broker," within the meaning of this act, is a person who for a compensation, or promise thereof, sells or offers for sale, buys or offers to buy, lists or solicits for prospective purchasers, receives or demands an advance fee, negotiates, or offers to negotiate, either directly or indirectly, whether as the employee of another or otherwise, the purchase, sale, exchange of real estate, or any interest therein, for others, as a whole or partial vocation. The word "person" as used in this act, shall be construed to mean and include a corporation. The term "advance fee" as used in this act is a fee contracted for, claimed, demanded, charged, received or collected for a listing, advertisement or offer to sell or lease property in a publication issued primarily for the purpose of promoting the sale or lease of business opportunities or real estate or for referral to real estate brokers or salesmen, other than a newspaper of general circulation, prior to the printing thereof. [Emphasis in original.]

1957 Mont. Laws, ch. 129, § 1.

It is apparent that when the language "in a publication issued primarily for the purpose of promoting the sale ... or for referral to real estate brokers" was enacted, it was intended that "referral to real estate brokers" was to be read in conjunction with "publication." When the statute was rewritten in the 1963 Montana Laws, chapter 250, section 2, the word "advertisement" and the exception for newspapers were deleted.

The Montana Supreme Court in Union Interchange, Inc. v. Parker, 138 Mont. 348, 357 P.2d 339 (1960), examined the question of whether advertising for the purpose of bringing buyer and seller together was an activity regulated by section 66-1903, R.C.M. 1947, as it read prior to 1957, in pertinent part:

A "real estate broker," ... is a person who for a compensation, or promise thereof, sells or offers for sale, buys, or offers to buy, negotiates, or offers to negotiate, either directly or indirectly ... the purchase, sale, exchange of real estate[.]

The Court held that advertising was not encompassed by the definition of "broker." The Court noted that, subsequently, the 1957 amendment broadened the definition to cover a business conducting the advertisement of property.

Subsequent to the 1963 amendment which deleted "advertisement" and the exception for newspapers, the statute was construed by the federal district court to exclude from regulation the distribution of catalogs, confidential

listings, and the like, on a nationwide scale. Bradt v. Strout Realty, Inc., 478 F. Supp. 1259 (D.C. Mont. 1979). The opinion contains *dicta* to the effect that the act of collecting a fee for the advertisement of real estate for sale is forbidden. *Id.* at 1261. However, I am persuaded by the interpretation of the Montana Supreme Court and by the affirmative act of the Legislature in 1963, removing the word "advertisement" from the list of regulated activities, that the mere advertisement of a seller's property for a fee charged to the seller does not constitute an act regulated by the real estate broker licensing statutes. While a business which performs solely an advertising function is not required to be licensed, the Board of Realty Regulation has the authority to determine whether such business is also conducting other activities which do require a license.

Turning to your second and third questions, which concern payment to an unlicensed person for the referral of the name of a potential buyer, an examination of section 37-51-102(3), MCA, is again necessary. With respect to the third sentence of that section, my rejection of the interpretation followed in 34 Op. Att'y Gen. No. 23, *supra*, negates application of the section to a contract entered into "for referral of information concerning real estate to brokers." Nor does the third sentence, as I interpret it, cover the collection of a so-called "finder's fee." As previously mentioned, the second sentence does not apply to the facts presented, since no sale is conducted. The question thus becomes whether the language of the first sentence, "negotiates or attempts to negotiate," includes the collection of a finder's fee for the referral of the name of a potential buyer. It is my opinion that it does not.

Traditionally, in real estate, there has existed a distinction between a broker and a finder, as explained by one court:

[S]uch distinction as exists between these two terms is more a matter of trade usage than legal definition. In general, a finder is an independent actor whose role is that of a middleman who introduces the parties, supplies the information to one or both about the other and is required to do little else, whereas a broker negotiates on behalf of one of the parties or performs, with the interests of one party and against the interests of the other. ... The finder is a person whose employment is limited to bringing the parties together so that they may negotiate their own contract.

Amerofina, Inc. v. U.S. Industries, 335 A.2d 448, 451 (Pa. Super. Ct. 1975). See also Tyrone v. Kelley, 507 P.2d 65, 70 (Cal. 1973). The distinction turns upon whether the middleman has been invested with any authority to advise or to negotiate the sale or purchase of property and whether either party has relied upon him for his skill or judgment. Property House, Inc. v. Kelley, 715 P.2d 805, 811 (Haw. 1986). The finder's obligation ends upon the

introduction of the parties to one another. See Burke, Law of Real Estate Brokers (Little, Brown & Co. 1982), § 4.5.2. at 212, § 5.5 at 261.

The majority of jurisdictions have rejected the finder/broker distinction for regulatory purposes. Generally, these opinions rest upon a broad interpretation of the term "negotiate," for example, the following construction:

A broker "negotiates" just as much when he brings the parties together in such a frame of mind that they can by themselves evolve a plan of procedure, as when he himself carries on the discussion and personally induces an agreement to accept a specific provision.

Baird v. Granger, 246 N.Y.S. 85, 88 (N.Y. Sup. Ct. 1930). See also Corson v. Keane, 72 A.2d 314 (N.J. 1950); Brakhage v. Georgetown Associates, Inc., 523 P.2d 145 (Colo. Ct. App. 1974); Watts v. Andrews, 649 P.2d 472 (N.M. 1982).

In contrast, it has been stated:

[T]o constitute negotiation the efforts of a broker must, at a minimum, include bringing together a prospective purchaser and a prospective seller in an attempt to facilitate the sale, and these efforts must have proceeded to the point where the prospect would be reasonably considered a realistic prospect for the purchase of the property.

Garafano v. Wells, 458 A.2d 1122 (Vt. 1983). In accord, see Loyd v. Saffa, 719 P.2d 844 (Okla. Ct. App. 1986); Bottomly v. Coffin, 399 A.2d 485 (R.I. 1979).

Other states have provided for the regulation of finders as brokers through statutory language which more directly encompasses the activity of soliciting for purchasers. See, e.g., Diversified Gen. Corp. v. White Barn Golf Course, 584 P.2d 848 (Utah 1978) ("assists or directs in the procuring of prospects"); Property House, Inc. v. Kelley, 715 P.2d 805 (Haw. 1986) ("solicits for prospective purchasers"); King v. Clifton, 648 S.W.2d 193 (Mo. Ct. App. 1983) ("assists or directs in the procuring of prospects calculated to result in sale of real estate").

The Montana Supreme Court has not addressed the question of whether one who performs a traditional "finder" role must be licensed in order to collect a commission or fee. In Diehl & Associates, Inc. v. Houtchens, 173 Mont. 372, 567 P.2d 930, 935 (1977), the Court noted a distinction between

a brokerage contract which requires a broker to merely find a purchaser and a brokerage contract which requires a broker to

sell, make or effect a sale. In the first case the broker earns his commission when he procures a buyer able, ready and willing to purchase on the seller's terms. A broker employed to sell or effect a sale does not earn his commission until he completes the sale.

In Diehl, the contract required completion of a sale, and therefore no further elucidation of a contract to find a purchaser was given by the Court. It has been held that a broker is entitled to his commission if the broker was the "procuring force" in bringing the buyer and seller together. Barrett v. Ballard, 37 St. Rptr. 2038, 622 P.2d 180 (1980); Adams v. Cheney, 203 Mont. 187, 661 P.2d 434 (1983). However, there is a distinction between merely referring the name of a prospective purchaser to a broker or to the seller and producing a buyer ready, willing, and able to purchase at the terms set out by the seller. Since none of the Montana case law has addressed the point, and since the Montana statute does not expressly encompass a finder's activities, I will not declare that the mere referral of a name constitutes an act regulated by the licensing statutes, which are penal in nature and thus strictly construed.

Your third question requires interpretation of section 37-51-321(16), MCA, which provides for revocation or suspension of the license of a broker for

paying a commission in connection with a real estate sale or transaction to a person who is not licensed as a real estate broker or real estate salesman under this chapter.

This section must be construed harmoniously with sections 37-51-306 and 37-51-102(3), MCA, and any ambiguity must be resolved by the interpretation which furthers the intent of the Legislature. Section 37-51-306, MCA, prohibits a licensed broker from compensating a person for performing any of the regulated acts. The regulated acts are listed in the definition of broker, § 37-51-102(3), MCA, which I have interpreted, *supra*, to exclude the collection of a finder's fee for the referral of the name of a potential buyer. A broker's license should therefore not be revoked or suspended for paying a finder's fee, where the payee does not perform any negotiation or other services regulated by the act. Section 37-51-321(16), MCA, is penal in nature and accordingly should be strictly construed.

THEREFORE, IT IS MY OPINION:

1. A person is not required to be licensed as a real estate broker or salesman in order to obtain and organize information from potential sellers of real estate, and, for a fee charged to the seller only, to advertise that information to interested potential buyers.

2. A person is not required to be licensed as a real estate broker or salesman in order to receive a fee, commission, or compensation for referring the name of a potential buyer of real estate.

Sincerely,

MARC RACICOT
Attorney General