Comments

Compensation for an Attorney Engaged in a Real Estate Transaction

Introduction

The American Bar Association's Code of Professional Responsibility contains no express prohibition against an attorney engaging in another business while at the same time practicing law. "Thus, no one would dispute the right of a lawyer to be a teacher, or a violinist or doctor or a farmer, or to sell rare postage stamps."[1] Potential violations of the canons do arise, however, when the other business is closely related to the practice of law.[2] One such occupation is that of a real estate broker.[3]

The American Bar Association's Committee on Professional Ethics has even declared that "[a] real estate brokerage business is so closely related to the practice of law that, when engaged in by a lawyer, it

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1. H. DRINKER, LEGAL ETHICS 221 (1953).

2. In Formal Opinion 57 (March 19, 1932), the American Bar Association's Committee on Professional Ethics declared that an attorney may not take part in a business that is inconsistent with his duties as a member of the bar. The Committee found that such an inconsistency will exist ". . . when the business is one that will readily lend itself as a means for procuring professional employment for him, is such that it can be used as a cloak for indirect solicitation on his behalf, or is of a nature that, if handled by a lawyer, would be regarded as the practice of law."

3. An example of a typical statutory definition of a broker is as follows:

> (a) "Real estate broker" means an individual, partnership, association, or corporation, who with intent to collect or receive a fee, compensation, or valuable consideration, sells or offers for sale, buys or offers to buy, appraises or offers to appraise, lists or offers or attempts to list, or negotiates the purchase or sale or exchange or mortgage of real estate, or negotiates for the construction of a building on real estate; who leases or offers or rents or offers for rent real estate or the improvements on the real estate for others, as a whole or partial vocation; who sells or offers for sale, buys or offers to buy, leases or offers to lease, or negotiates the purchase or sale or exchange of a business, business opportunity, or the goodwill of an existing business for others; or who, as owner or otherwise engages in the sale of real estate as a principal vocation.

MICH. COMP. LAWS § 339.2501 (1982-1983).

constitutes the practice of law."[4] This is not to say that the ABA finds this dual professionalism to be a per se ethical violation. In fact, in Informal Opinion 775 the Committee spelled out the conditions under which an attorney could carry on a separate business and stated its opinion "that the real estate brokerage business can qualify under these present criteria."[5] The Committee concluded the opinion, however, with a strong warning of the minefield of explosive ethical difficulties an attorney will have to tip-toe through if he decides to act as a broker.

Statutory Regulation of Real Estate Brokers

Despite this plethora of potential ethical violations, the context in which the problems of an attorney performing brokerage functions most often arise is one in which an attorney is suing in court to recover a brokerage fee. Often he will have trouble collecting his compensation because of a state statute that requires real estate brokers to receive a license.[6] The purpose of such a statute is "to protect dealers in real estate from unlicensed persons who acted as brokers, and to protect the public from inept, inexperienced or dishonest persons who might perpetrate or aid in the preparation of frauds upon it, and to establish protective or qualifying standards to that end."[7]

The state legislators realized when they drew up these licensing statutes that "[a]ttorneys at law are not in the class at which the statute was aimed, because they had not been the source of the mischief sought to be remedied."[8] Lawyers are typically expressly exempt, therefore, from the licensing requirements. This exemption, however, does not give attorneys free rein to do what they will in the real estate field. The Court of Civil Appeals of Texas declared that it does not believe the statutory exception "to mean that an attorney, solely by virtue of his license to practice law, is authorized to engage generally in the business of a real estate broker."[9] Indeed, most statutes are worded

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4. ABA Comm. on Professional Ethics, Informal Op. 709 (1964).

5. ABA Comm. on Professional Ethics, Informal Op. 775 (1965).

6. Comment, *Recovery of Commissions by Unlicensed Real Estate Brokers*, 80 DICK. L. REV. 500 (1976) ("Real estate brokerage is a licensed profession in every state.").

7. Meltzer v. Crescent Leaseholds, Ltd., 315 F. Supp. 142, 150-51 (S.D.N.Y. 1970) (quoting Dodge v. Richmond, 5 A.D.2d 593, 595, 173 N.Y.S.2d 786, 787-88 (1958)).

8. *In re* J.A. Young & Co., 105 Pa. Super. 153, 159, 160 A. 151, 153 (1932) (holding that act requiring a real estate broker to be licensed is not unconstitutional because of exemption of attorneys and justices of the peace).

9. Sherman v. Bruton, 497 S.W.2d 321 (Tex. Civ. App. 1973).

in such a way that an attorney will escape the licensing requirement only if he is rendering services "in the performance of his duties as such attorney at law."[10] The generally agreed upon purpose of such an exception is "to authorize members of the exempt class to sell or rent real estate incidental to the normal practice of their profession or business."[11]

The key to successfully falling within this exception appears to be the presence of an attorney-client relationship involving duties other than those typically provided by brokers. Thus, the exception has been interpreted to cover only "services rendered by a licensed attorney whose engagement for legal services has created the relationship of attorney and client."[12] The Supreme Court of Florida stated that "[t]he narrow avenue through which the lawyer, not licensed as a real estate broker or salesman, may enter the ambit of the real estate broker or salesman is the one of duty owed by him in the relationship of client and attorney."[13]

When the relationship is a long-standing one, no problem seems to arise when an attorney performs services that fall within the statutory definition of a broker's activity. In *Queen of Angels Hospital v. Younger*,[14] J.J. Brandlin had served as the hospital's attorney for five or six years on a retainer basis before he was asked to arrange for the leasing of the hospital. Brandlin not only played a part in bringing together the parties, but he also "conducted the negotiations between the parties, prepared the documentation of the lease, and performed the legal services necessary in connection therewith."[15] Although he was also a director of the hospital and a "'frustrated entrepreneur'"[16] who had previously considered forming a corporation that would be engaged in leasing hospitals, the court found that Brandlin had properly handled this "legal and professional dynamite"[17] created by his multifaceted involvement in this leasing arrangement. The court determined

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10. MICH. COMP. LAWS § 451.202 (1967) (repealed 1980). Although this specific code section was repealed, MICH. COMP. LAWS § 339.2503 (1982-1983) provides virtually the same limitation on the attorney exception: "This article shall not include the services rendered by an attorney at law *as an attorney at law*." (emphasis added).

11. Spirito v. New Jersey Real Estate Comm'n, 180 N.J. Super. 180, _____, 434 A.2d 623, 628 (1981).

12. Sherman v. Bruton, 497 S.W.2d 316, 321 (Tex. Civ. App. 1983).

13. Tobin v. Courshon, 155 So. 2d 785 (Fla. 1963).

14. 66 Cal. App. 3d 359, 136 Cal. Rptr. 36 (1977).

15. *Id.* at 373, 136 Cal. Rptr. at 44 (quoting trial court's findings).

16. *Id.* at 374, 136 Cal. Rptr. at 45.

17. *Id.*

that Brandlin performed legal services for his client and thus fell within the exception even though a layman would have been compelled to acquire a real estate broker's license to render the same services.

On the other hand, when the purported attorney-client relationship is of relatively short duration and seems to have been entered into solely to effectuate a real estate transaction, a court is more likely to deny the attorney a fee. In *Haas v. Greenwald*[18] three individuals were employed by the defendant for the purpose of purchasing real estate and securing a loan. Although two of the three were licensed brokers, the third was not; instead, A.M. Johnson was an attorney at law. The court's analysis of Johnson's role in these transactions is as follows:

> If the part which these two associates took in the conduct of such negotiations was thus taken in the capacity of real estate brokers, and not otherwise, it is difficult to perceive why the precisely identical part which A.M. Johnson, united with his said two associates in undertaking in relation to these negotiations, was not also undertaken in the capacity of a real estate broker and not otherwise, notwithstanding he was also an attorney at law, especially in view of the fact that *the amended complaint is barren of any averment that his said part therein was undertaken or performed in his capacity as an attorney at law.* It would seem to follow irresistibly that in the equal part which A.M. Johnson took with his associates in the conduct of these negotiations he was acting in the capacity of a real estate broker and not of an attorney at law.[19]

Although the California Supreme Court found the agreement between Johnson and the defendant to be void due to his lack of a real estate broker's license, it suggested that the case might have had different results had Johnson been in a true attorney-client relationship with the defendant or any other party to the negotiations.[20]

Fee Splitting

Haas v. Greenwald is an example of the problems that can occur when attorneys and brokers work together to effectuate a real estate transaction. In that case the two brokers and the attorney's assignee

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18. 196 Cal. 236, 237 P. 38, *aff'd per curiam*, 275 U.S. 490 (1927).
19. *Id.* at _____, 237 P. at 40-41 (emphasis added).
20. *Id.* at _____, 237 P. at 40.

sued the real estate purchaser for their commission. The court determined "that the agreement for the joint and equal services of Haas, Johnson, and Stevens in the capacity of real estate brokers, being unenforceable as to Johnson under the terms of the Real Estate Brokers' Act, the entire agreement was void. . . ."[21] Thus, not only the attorney but also the two real estate brokers were denied any compensation for their services.[22] This decision turned on the California law that if any part of the consideration for an agreement is illegal, the entire contract is void.

The far more common situation in which an attorney is found to have no right to his fee, however, is when an associated broker, rather than the client whom the attorney represents, has agreed to compensate the attorney. In *Krause v. Boraks*[23] the plaintiff and defendant entered into an oral agreement whereby the plaintiff, an attorney, would receive half of the defendant broker's commission if he could find a purchaser for an interest in a land contract. Krause told two of his clients about the interest and they ultimately agreed to purchase it. Boraks refused to live up to his part of the deal, however, thus precipitating Krause's suit to recover his fee. The court, in holding that Krause did not fall within the exception to the real estate licensing statute and thus could not collect any compensation for brokerage services performed without a license, stressed the fact that no attorney-client relationship existed between Krause and Boraks; therefore, "[u]nder no interpretation of the facts could Krause be said to have performed legal services for Boraks."[24] Although the court acknowledged the often overlapping provinces of the law and real estate brokerage, it also felt that "an attorney engaged *solely* in the function of obtaining a prospective purchaser for an interest in realty, in conjunction with a broker, is clearly invading another scope of activity which, in the absence of being licensed so to do, is prohibited by statute."[25]

A similar case is *Burchfield v. Markham*[26] in which Markham,

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21. *Id.* at _____, 237 P. at 42.

22. *Id. See also In re* Prieto, 243 Cal. App. 2d 79, 52 Cal. Rptr. 80 (1966).

23. 341 Mich. 149, 67 N.W.2d 202 (1954). *See also* Tobin v. Courshon, 155 So. 2d 785 (Fla. 1963) (in which the court denied an attorney part of the commission paid by the seller which the attorney's clients, the buyers, had authorized him to share with the seller's broker).

24. *Krause*, 341 Mich. at ____, 67 N.W.2d at 204.

25. *Id.* at _____, 67 N.W.2d at 204.

26. 156 Tex. 329, 294 S.W.2d 795, *cert. denied*, 353 U.S. 944 (1956).

an attorney, brought suit against Burchfield, a real estate broker, for half of the commission that Burchfield earned on the sale of land to one of Markham's clients. The client had asked Markham to locate a plant site, in return for which he could share the commission of the real estate broker who handled the sale. Markham then contacted Burchfield, who agreed to find a suitable site and to share the fee with him. Burchfield knew of Section 20 of the Real Estate Dealers License Act, however, which read as follows:

> Sec. 20. It shall be unlawful for any real estate dealer or real estate salesman to offer, promise, allow, give, or pay directly or indirectly any part or share of his commission or compensation arising or accruing from any real estate transaction to any person who is not a licensed dealer or salesman in consideration of service performed or to be performed by such unlicensed person.[27]

In an attempt to avoid this provision, Burchfield insisted that Markham name a licensed real estate broker to whom Burchfield could pay Markham's share of the commission. Markham performed his duties of supplying a purchaser and naming an individual to receive his fee in his stead, but Burchfield had a sudden fit of honesty. He refused to part with any of the commission, claiming that it was illegal to share it with an unlicensed individual.

The Supreme Court of Texas posed the issue as "whether under the Real Estate Dealers License Act . . . a real estate dealer licensed thereunder may lawfully contract to split his commission with an attorney at law who has procured a purchaser for a sale."[28] Markham's

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27. Real Estate Dealers License Act § 20, TEX. REV. CIV. STAT. ANN. art. 6573a (Vernon 1939), *amended by* TEX. REV. CIV. STAT. ANN. art. 6573a § 14, which reads as follows:

> It is unlawful for a licensed broker to employ or compensate directly or indirectly a person for performing an act enumerated in the definition of real estate broker in Section 2 of this Act if the person is not a licensed broker or licensed salesman in this state or an attorney at law licensed in this state or in any other state. However, a licensed broker may pay a commission to a licensed broker of another state if the foreign broker does not conduct in this state any of the negotiations for which the fee, compensation, or commission is paid.

Although the code section under which *Burchfield v. Markham* was decided has been amended by one that expressly gives a broker the right to split his fee with an attorney, a discussion of the case is included to show the reasoning that might be followed by courts in states that operate under a code section comparable to Section 20 of the Real Estate Dealers License Act.

28. *Burchfield*, 156 Tex. at ____, 294 S.W.2d at 796.

contention that the agreement was valid rested on his assertion that he fell within the attorney exception to the licensing act. The court found, however, that even if Markham did escape the licensing requirement under Section 2 of the Act,[29] he was still precluded from recovering. The court read the language of Section 20 in a literal manner and found no permission therein for the splitting of fees with an attorney.

In *Provisor v. Haas Realty*,[30] a California case, the situation and outcome were comparable to that in *Burchfield v. Markham*. Provisor, the attorney for the buyer in a real estate transaction, had an agreement with Haas, the seller's real estate broker, that they would split the commission. In holding such an agreement to be illegal, the court stressed that "[a] lawyer cannot recover a share of a real estate broker's commission if the compensation is not paid to him solely for services rendered in his capacity as a lawyer."[31] The fact that Provisor might have actually been acting as an attorney for the buyer did not persuade the court to rule in his favor because the agreement for compensation was not with his client but with the broker and because no attorney-client relationship existed between Haas and Provisor. "That the legal services he rendered to his clients may have incidentally benefited the broker because the buyers would not have purchased the property without these services plaintiff rendered to the buyers does not convert the services rendered to his client into legal services rendered to the broker."[32]

The lesson from these cases is that an attorney should not agree to split a fee with a licensed real estate broker. Such arrangements are usually declared to be invalid pursuant to state statutes forbidding a broker from sharing any compensation he receives with anyone who is not a licensed broker or salesman. Attorneys also have an ethical duty, though, to refrain from splitting their fees with laymen.[33] Even

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29. Section 2(a)(1) of the old Real Estate Dealers License Act, *supra* note 27, sets forth a general definition of a "Real Estate Dealer" and includes an exemption for attorneys.

30. 256 Cal. App. 2d 850, 64 Cal. Rptr. 509 (1967).

31. *Id.* at 856, 64 Cal. Rptr. at 512.

32. *Id.* at 857, 64 Cal. Rptr. at 513.

33. ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 3-102:

(A) A lawyer or law firm shall not share legal fees with a non-lawyer, except that:

(1) An agreement by a lawyer with his firm, partner, or associate may provide for the payment of money, over a reasonable period of time after his death, to his estate or to one or more specified persons.

(2) A lawyer who undertakes to complete unfinished legal business of

if a lawyer is dividing the commission with someone other than a broker, he might have trouble receiving his commission. This prohibition on splitting fees with a layman could have proven to be the downfall of attorney John Brandlin in *Queen of Angels Hospital v. Younger*[34] when he joined with a stockbroker and "'a kind of hospital entrepreneur'"[35] to negotiate a lease for the hospital.

> The agreement presented to the Board covering the services of Thomason, Donovan and Brandlin states that the three "are entitled to reasonable compensation" for their "services," that such "reasonable compensation . . . shall be commensurate with the commission recommended by the Los Angeles Realty Board for negotiating a long-term lease, to wit, three percent (3%) of the rent for the first five (5) years, and two percent (2%) of the rent thereafter," the compensation to be "payable out of rents, as and when received," to be paid to Thomason and Donovan in specified proportions for the first four years and two months of the term and "the remainder to Brandlin as and when due . . . ."[36]

The court, however, did not view such an arrangement as fee splitting with laymen. In the court's opinion, Brandlin "simply was not to receive anything until, after four years and two months, Donovan and Thomason had been paid in full."[37] One must wonder, though, whether other courts would be so willing to make this fine distinction.

Automatic Right to a License

When an attorney engages in a real estate related transaction, his main obstacle to recovering a fee is often the state statutes regulating the brokerage profession. Some attorneys, recognizing the potential difficulties that such regulatory schemes present, have claimed an automatic right to a license by virtue of their status as an attorney exempted from the licensing statutes. Such was the case in *Spirito v.*

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a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer.

(3) A lawyer or law firm may include non-lawyer employees in a retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.

34. 66 Cal. App. 3d 359, 136 Cal. Rptr. 36 (1977).
35. *Id.* at 373, 136 Cal. Rptr. at 44.
36. *Id.*
37. *Id.* at 375, 136 Cal. Rptr. at 45.

New Jersey Real Estate Commission[38] in which the defendant ruled that plaintiff, an attorney, did not have such a right. This decision was upheld by the New Jersey court which reasoned that "the Real Estate Commission cannot issue a license *pursuant to the act* to one who claims to be *wholly exempt from* the act . . . ."[39] The court believed that just because "appellant is outside the act for some purposes is not to say he can invoke the authority of the Commission pursuant to the act to grant him a license by waiving all licensing conditions."[40]

The opinion in *Spirito* includes a full reprint of Formal Opinion 13-1979 issued by the Attorney General in which a distinction is made between limited and unlimited statutory exemptions for attorneys. In analyzing the language of the New Jersey statute,[41] the Attorney General found that "the exemption for attorneys has been grouped with those persons or institutions who by their very nature would be circumscribed in carrying out general real estate activities."[42] The company kept by lawyers in this provision was a clear indication to the Attorney General that only when attorneys were "carrying out their professional responsibilities in the practice of law,"[43] would they be exempt from the licensing requirement. He then went on to examine the language of similar statutes in other states and found that "an unlimited exemption for attorneys has been found to exist only where the statutory language unequivocally demonstrates a legislative purpose to permit it."[44] He pointed to the New York statute[45] as an example of such an unlimited

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38. 180 N.J. Super. 180, 434 A.2d 623 (1981).
39. *Id.* at _____, 434 A.2d at 627 (emphasis in original).
40. *Id.*
41. N.J. STAT. ANN. § 45:15-4 (West 1978):

> The provisions of this article shall not apply to any person, firm, partnership, association or corporation who, as a bona fide owner, or lessor, shall perform any of the aforesaid acts with reference to property owned by him, nor shall they apply to or be construed to include attorneys at law, receivers, trustees in bankruptcy, executors, administrators or persons selling real estate under the order of any court or the terms of a deed of trust, state banks, federal banks, savings banks and trust companies located within the state, or to insurance companies incorporated under the insurance laws of this state.

42. Op. Att'y Gen. 13-1979, *reprinted in* Spirito v. New Jersey Real Estate Comm'n, 180 N.J. Super. 180, _____, 434 A.2d 623, 625 (1981).
43. *Id.*
44. *Id.*
45. N.Y. REAL PROPERTY LAW § 442-f (McKinney 1968):

> The provisions of this article shall not apply to receivers, referees, administrators, executors, guardians, or other persons appointed by or acting

exemption, since attorneys were the only ones among the named groups who had no express or inherent restrictions on their activities.

The New York statute excepting attorneys from the real estate licensing requirements was interpreted by the New York Supreme Court in 1930 in *Weinblatt v. Parkway-St. Johns Place Corp.*[46] In that case, plaintiff sued to recover the value of his services in obtaining a lease for the defendant. His complaint alleged that he was an attorney at law, but not that he was a licensed real estate broker. One must note that the plaintiff in this case was not claiming his absolute right to a broker's license on the basis of his status as an attorney, but in rejecting the defendant's contention that the exemption should apply to attorneys only when they are "performing their official duties,"[47] the court in essence held that he does not need such a license even when engaged solely in real estate activities. The court's justification for such a position is that "the honesty and competency of 'attorneys at law' are attested by a certificate of admission to practice their profession. Logically a lawyer must have passed a test at least equivalent to that required of an applicant to secure a license as a real estate broker."[48] The court did not even appear to require that an attorney-client relationship exist before the license requirement is waived.[49]

The Attorney General of New Jersey also cited *Kribbs v. Jackson*[50] as an example of a court holding an attorney to be exempt from the need to procure a broker's license. The Pennsylvania statute involved in that decision was similar to the New York one in that it "contains specific limiting language pertaining to all of its enumerated exempted persons and entities except those regarding attorneys."[51] Once again,

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under the judgment or order of any court; or public officers while performing their official duties, or attorneys at law.

46. 136 Misc. 743, 241 N.Y.S. 721, *aff'd*, 229 A.D. 865, 243 N.Y.S. 810 (1930).

47. *Id.*

48. *Id.* at 744, 241 N.Y.S. at 723.

49. Dictum in the last paragraph states, " 'Attorneys at law' are officers of the court. Their relationship with clients is one of trust and confidence, a breach of which subjects them to discipline and removal." *Id.* Nothing in the reported opinion, however, indicates that such a relationship actually existed in this case.

50. 387 Pa. 611, 129 A.2d 490 (1957).

51. Opp. Att'y Gen. 13-1979, *reprinted in* Spirito v. New Jersey Real Estate Comm'n, 180 N.J. Super, 180, _____, 434 A.2d 623, 626 (1981). The relevant statute provides as follows:

(c) Neither of the said terms "real estate broker" or "real estate salesman" shall be held to include within the meaning of this act any person, firm, association, partnership or corporation who, as owner, shall perform any

however, it should be noted that *Kribbs* was not a case in which an attorney demanded that he be issued a broker's license; in fact, this was an action against the attorney to recover fees paid to him. The court did say that "[a]ttorneys are specifically exempted from the requirements of the Real Estate Brokers License Act,"[52] but it continued by declaring that the attorney "had a right, *as an incident of his legal profession*, to engage in the leasing of real estate and could enter into a *proper* agreement concerning his fees for such services."[53] Unlike *Weinblatt*, in this case the court found an attorney-client relationship to exist. The facts of this case and the language of the opinion make it an odd one for the New Jersey Attorney General to cite in support of his limited/unlimited attorney exemption theory. It seems likely that if the Pennsylvania Supreme Court was faced with the issue in *Spirito*, it would probably hold that attorneys are not per se exempt from the licensure requirement merely because of their status as attorneys.

Finder's Fee

Attorneys may attempt to escape the strictures of the licensing

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of the acts with reference to property owned by them for or on behalf of the owner or owners thereof, nor any person holding in good faith a duly executed letter of attorney from the actual owner of any real estate, authorizing the sale, conveyance or leasing of such real estate for and in the name of such owner, or the negotiating of any loan thereon, where such letter of attorney is recorded in the office of the recorder of deeds, nor shall they be held to include, in any way, attorneys at law and justices of the peace, nor shall they be held to include any receiver, trustee in bankruptcy, administrator or executor, or any other person or corporation acting under the appointment or order of any court, or as trustee under the authority of a will or deed of trust where only the transactions pertaining thereto are involved, or the duly elected executive officer of any banking institution or trust company operating under the banking laws of Pennsylvania where real estate of the banking institution or trust company only is involved, nor shall they be held to include any officer or employee of a cemetery company who, as incidental to his principal duties and without remuneration therefore, shows lots in such company's cemetery to persons for their use as a family burial lot, and who accepts deposits on such lots for the representatives of the cemetery company, legally authorized to sell the same.

63 PA. STAT. § 432(c) (1968) (repealed 1980). 63 PA. STAT. § 455.304 (1983-1984) sets forth the new attorney exception, and the language of that section is substantially similar to the old one.

52. *Kribbs*, 387 Pa. at _____, 129 A.2d at 495.

53. *Id.* (first emphasis added).

statutes by claiming that they have not acted as a broker but merely as a finder, and, hence, are entitled to a finder's fee. "A finder . . . is one who finds, interests, introduces and brings the parties together for the deal which they themselves negotiate and consummate."[54] An attorney must be wary of playing any role at all in the negotiations if he is trying to claim a finder's fee, however, because to do so "will bring him within the definition of a broker and require him to be licensed."[55]

Only a few states have been receptive to establishing a finder's exception to the real estate brokers' licensing requirement. "In general . . . courts presented with situations in which a finder's exception could have been recognized have declined to so interpret their statutes."[56] Thus, while the courts of Rhode Island,[57] California,[58] and Missouri[59] have allowed a "finder" to collect a fee without a license, "states explicitly refusing to recognize a finder's exception include Colorado,[60] Florida,[61] New Jersey,[62] New York,[63] Texas,[64] Washington[65] and Wisconsin.[66]"[67]

Other Theories of Recovery

When all else fails in a suit to recover a fee for his part in a real estate transaction, an attorney might try to argue that the licensing requirements should not apply because he was not engaging in the brokerage business but was only taking part in a single transaction. Such a theory was advanced in *Haas v. Greenwald*,[68] but the court

54. Augustine & Fass, *Finder's Fees in Security and Real Estate Transactions*, 35 BUS. LAW 486 (1980).

55. *Id.*

56. Weiner, *Broker/Finder: Can You Collect?* 59 MICH. B.J. 330, 332 (1980).

57. Bottomley v. Coffin, _____ R.I. _____, 399 A.2d 485 (1979).

58. Tyrone v. Kelley, 9 Cal. 3d 1, 507 P.2d 65, 106 Cal. Rptr. 761 (1973).

59. White v. Myriam Realty Co., 547 S.W.2d 184 (Mo. App. 1977).

60. Brakhape v. Georgetown Assocs., Inc., _____ Colo. App. _____, 523 P.2d 145 (1974).

61. First Equity Corp. v. Riverside Real Estate Inv. Trust, 307 So. 2d 866 (Fla. Dist. Ct. App.), *cert. denied*, 316 So. 2d 287 (Fla. 1975).

62. Carson v. Keane, 4 N.J. 221, 72 A.2d 314 (1950).

63. Sorice v. DuBois, 25 A.D.2d 521, 267 N.Y.S.2d 227 (1966).

64. Gregory v. Roedenbeck, 141 Tex. 543, 174 S.W.2d 585 (1943).

65. Grammer v. Skagit Valley Lumber Co., 162 Wash. 677, 299 P. 276 (1931).

66. George Nangen & Co. v. Kenosha Auto Transport Corp., 238 F. Supp. 157 (E.D. Wis. 1965).

67. Weiner, *supra* note 56 (footnotes have been condensed and renumbered).

68. 196 Cal. 236, 237 P. 38, *aff'd per curiam*, 275 U.S. 490 (1927).

refused to accept it. Actually, the court had little choice but to act as it did in light of the following statutory provision:

> One act, for a compensation, of buying or selling real estate of or for another, or offering for another to buy or sell or exchange real estate, or negotiating a loan on or leasing or renting or placing for rent real estate, or collecting rent therefrom shall constitute the person, copartnership or corporation making such offer, sale or purchase, exchange or lease, or negotiating said loan, or so renting or placing for rent or collecting said rent a real estate broker within the meaning of this act.[69]

Pointing to this language, the court said that the clause "render[s] a single act of the character defined, for a compensation, sufficient to constitute the person performing it a real estate broker."[70] In rejecting the appellant's contention that this provision was unconstitutional in that it restricted freedom of contract, the court said,

> [s]ince the lawmakers have seen fit to embrace the participants in each single transaction within the purview, requirements, and inhibitions of the act in question, we can see no adequate reason for holding that in so doing they have violated the constitutional right of freedom to contract any more than they would have done by confining the scope of the statute to those carrying on such transactions in the course of a business or vocation.[71]

This single transction theory was also advanced in *Krause v. Boraks*[72] only to be rejected by the Supreme Court of Michigan. Once again, the court easily dismissed this argument because of the following statutory provision: "The commission of a single act prohibited hereunder shall constitute a violation."[73] One can speculate as to the outcome of an argument under the single transaction theory in the absence of such an explicit statutory provision, but the likelihood of a court agreeing to exempt one engaged in an isolated transaction from the licensing requirement is slim. As stated by the Supreme Court of California:

> No particular or convincing reason can be urged why the participants in a single negotiation of the sort defined in said act should

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69. Real Estate Brokers' Act § 2, Stats. 1919, 1252.

70. Haas v. Greenwald, 196 Cal. 236, _____, 237 P. 38, 41, *aff'd per curiam*, 275 U.S. 490 (1927).

71. *Id.* at _____, 237 P. at 42.

72. 341 Mich. 149, 67 N.W.2d 202 (1954).

73. MICH. COMP. LAWS § 451.203 (1967) (repealed 1980).

> not be subjected to the same supervision as those engaging in a series of similar transactions, since at the last analysis every transaction of the kind coming within the purview of the statute is an isolated transaction whether conducted singly or as a series of transactions carried on in the course of a business or vocation . . . .[74]

Having failed to recover his fee under the single transaction theory, the plaintiff in *Krause v. Boraks* next relied on his count in quantum meruit. The court summarily rejected this basis of recovery by quoting its own words in a previous opinion:

> But it is urged by the plaintiff that, even if the statute does render the contract void, he may recover upon the *quantum meruit*, upon the theory that performance takes the case out of the statute. This question is foreclosed by the recent case of Paul v. Graham, [193 Mich. 447] 160 N.W. 616, where we had this statute under consideration and held that no recovery could be had upon the *quantum meruit* for services performed under an agreement that was within the provisions of this statute and therefore void.[75]

Ethical Considerations

A state statutory scheme that exempts attorneys from the real estate brokers licensing requirements "does not relieve them from their ethical obligations."[76] Nor can an attorney who is also licensed as a broker escape those obligations. "[A] practicing lawyer who also engaged in the business of a real estate broker must use the most scrupulous care to so conduct the real estate business as to avoid offending the ethics of our profession and to keep his legal and real estate activities segregated and separate."[77] The ABA Committee on Professional Ethics believes that in order to keep these two professions distinct, "the lawyer would be required, without exception, to refuse to act as a lawyer in connection with a transaction initiated by him as a broker, and he should be most hesitant to act as a lawyer for a person he first had contact with while acting as a broker."[78]

That the ABA Committee would expressly forbid any attorney who is also a licensed real estate broker from accepting anything label-

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74. *Haas*, 196 Cal. at ____, 237 P. at 41-42.

75. *Krause*, 341 Mich. at _____, 67 N.W.2d 205-06 (quoting Smith v. Storke, 196 Mich. 311, _____, 162 N.W. 998, at 999 (1917)).

76. ABA Comm. on Professional Ethics, Informal Op. 688 (1964).

77. ABA Comm. on Professional Ethics, Informal Op. 775 (1965).

78. *Id.* This mandate to maintain a wall between legal and brokerage activities arises from the concern that the real estate business will be used as a feeder operation for the law practice.

ed a broker's "fee" or "commission" in a transaction that arises solely from his real estate business seems unlikely. If this attorney/broker originally entered into this transaction in his legal capacity, however, the Committee would only allow him to accept a legal fee for his services.[79] The logical extension of this position would be that an attorney who is not also a licensed broker but who falls within the attorney exception to the licensing requirements for a particular transaction would also only be entitled to legal fees in the eyes of the Committee. This stance is logical since the language of most exemption provisions makes it clear that the exception is available only for attorneys who are performing duties as attorneys at law.

If such is indeed its position, the Committee would probably have disagreed with the outcome of *Queen of Angels Hospital v. Younger*[80] in which the attorney received compensation that was described in the contract for services as "commensurate with the commission recommended by the Los Angeles Realty Board for negotiating a long-term lease . . . ."[81] The Committee also might have a hard time accepting the California Court of Appeals' ruling that Brandlin's agreement was not one to split a fee with laymen in violation of DR 3-102. In the Committee's opinion, "[s]ince the real estate business is so close to the practice of law in many respects, we do not believe that *under any circumstances* would it be ethical for a lawyer to divide real estate commissions earned as a result of his efforts with a non-lawyer."[82]

Conclusion

In order to avoid running afoul of either the ABA Code of Professional Responsibility or the applicable state law, an attorney who is contemplating taking an active part in a real estate transaction would

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79. In its Informal Opinion 775 the ABA Committee on Professional Ethics summarized its Informal Opinion 709 in the following manner:

> In its Informal Decision 709, August 24, 1964, the Committee stated that in its opinion a lawyer who was also a licensed real estate broker in Maryland should not collect both legal fees and a broker's commission in connection with a transaction which had its origins in a purely legal matter. The basis for the opinion was that the services rendered were essentially legal services and only incidentally involved functions as a broker and in addition, the conclusion that
>
> "A real estate brokerage business is so closely related to the practice of law that, when engaged in by a lawyer, it constitutes the practice of law."

80. 66 Cal. App. 3d 359, 136 Cal. Rptr. 36 (1977).

81. *Id.* at _____, 136 Cal. Rptr. at 44.

82. ABA Comm. on Professional Ethics, Informal Op. 775 (1975).

be wise to simply collect a legal fee for the services he provides and to avoid any type of fee-splitting agreement with a broker or layman. To most accurately determine the permitted scope of this role and his right to a fee, however, he first needs to consult his state's statutes on the brokerage profession. Some state legislatures appear to have become more sympathetic to the problem faced by an attorney in this area, because new licensing acts sometimes eliminate previous impediments to an attorney collecting a broker's fee.[83] Despite this more favorable statutory environment, however, an attorney is still subject to his ethical duties, which will probably prevent him from collecting anything except a legal fee unless he is also a licensed real estate broker and is acting solely in that capacity.

Mary C. Bickley

83. *See supra* note 27.