

## Opinion No. 54-6006

August 26, 1954

**BY:** RICHARD H. ROBINSON, Attorney General

**TO:** Mr. Theodore Benninghoven Executive Secretary New Mexico Real Estate Board  
105 Fourth Street, S.W. Albuquerque, New Mexico

{\*470} Your recent letter requests the opinion of this office with regard to whether or not individuals selling houses for the owners of building projects must be licensed under the provisions of the New Mexico Real Estate License Law.

Section 51-3212, N.M.S.A., 1941, provides:

"A real estate broker within the meaning of this act . . . is any person, firm, partnership, copartnership, association or corporation, who for a salary, fee, commission or valuable consideration lists, sells or offers for sale, buys or offers to buy, or negotiates the purchase or sale or exchange of real estate, or who leases or offers to lease, or rents or offers for rent, any real estate or the improvements thereon for others, as a whole or partial vocation . . .

"The provisions of this act shall not apply to any person, copartnership, association or corporation, who as owner or lessor shall perform any of the acts aforesaid with reference to property owned or leased by them, or to the regular employees thereof, with respect to the property so owned or leased, where such acts are performed in the regular course of, or as incident to, the management of such property and the investments therein, . . ."

It is our opinion that an employee of a building project concern, who sells houses, belonging exclusively to that concern, and no other houses, is not required to be licensed as a real estate broker or as a real estate salesman.

The purpose of statutes, like New Mexico's requiring real estate brokers and salesmen to be licensed, was, we believe, well expressed in the case of *Riley v. Chambers*, 181 Cal. 589, 185 P. 855, wherein it was said:

"Where the occupation is one of which it can be fairly said that those pursuing it should have certain particular qualifications it is within the power of the Legislature to exact reasonable assurances of those pursuing the occupation that they do possess these qualifications . . . Where the occupation is one wherein those following it act as the agents and representatives of others and in a more or less confidential and fiduciary capacity, it certainly can be fairly said that those pursuing it should have in a particular degree the qualifications of 'honesty, truthfulness and good reputation'. The occupation of real estate agent is of just that sort. He acts for others in a more or less confidential and fiduciary capacity. As a result there is particularly required of him for the proper

discharge of his duties honesty and truthfulness, and the Legislature has the right to require some assurance of their possession by everyone following the occupation."

{\*471} To fulfill this purpose, most states, including New Mexico, have enacted statutes requiring those who sell real estate for others to be licensed. Almost universally, however, such statutes exclude those individuals, partnerships and corporations which sell only their own real estate, and their employees.

"Although the definition of real estate broker . . . generally controls as to who is such a broker, the terms of the particular licensing statute or ordinance largely control as to who is such a broker within the meaning of its provisions. Such a license and tax, however, is required only of a person, association, corporation, for firm who, as a business or occupation, makes or negotiates sales, purchases, leases, etc., of real estate **for others.**" (Emphasis ours) 12 C. J. S., "Brokers", Sec. 8 (2), pages 14-15.

You will note that our statute, quoted above, defines a real estate broker as one who performs the acts specified therein **for others**, and that it excludes from its coverage those who perform such acts for themselves, and their employees.

We believe, therefore, that an employee of a project building concern, who sells only houses belonging to that concern, is excluded from the provisions of the act, and is not required to be licensed as a real estate broker or salesman. In this respect, it is immaterial whether such an employee is paid on a salary or commission basis. Cemetery Gardens, Inc. v. Blueweiss, 251 N.Y.S. 546; Howard v. Heinig, 191 Wis. 166, 210 N.W. 414.

In your letter, you call our attention to the fact that it is becoming a common practice for a purchaser of a new house to "trade-in" his old house to apply upon the purchase price of the new one. Where the title to such an old house is transferred to a project building concern, the house then becomes the property of such a concern, and it is our belief that an employee who undertakes to sell such a house subsequently is acting in the same capacity in which he acts in selling a new house for his employer, and that such an employee should not be required to be licensed.

On the other hand, you mention in your letter the possibility that an employee of a project building concern might undertake to find a buyer for an old house offered as a "trade-in" before the transaction transferring the title of the old house to his employer has been completed. In such a circumstance, we believe that the employee would be acting for the original owner, and not for his employer, and that he would be subject to the penalties provided by § 51-3226, N.M.S.A., 1941, if he were not duly licensed as a real estate broker or real estate salesman.

We trust that the foregoing will answer your questions fully.

By: Henry A. Kiker, Jr.

Assist. Attorney General