

Opinion No. 81-25

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OPINION OF: Jeff Bingaman, Attorney General

BY: Jill Z. Cooper, Deputy Attorney General

TO: Representative Max Coll, Box EE, Santa Fe, New Mexico 87501

LICENSES AND LICENSING

Synopsis: Section 61-29-12(C) NMSA 1978 precludes a licensed salesman or broker from paying any portion of his commission to a buyer who is not his principal in a transaction.

QUESTIONS

May a person licensed as a salesman or broker by the New Mexico Real Estate Commission remit or rebate to a buyer any portion of the real estate commission paid him by the seller if he gives notice to all parties involved?

CONCLUSIONS

No.

ANALYSIS

A real estate salesman or broker, acting on behalf of the seller owes a fiduciary duty toward the seller, his principal, and is required to exercise fidelity and good faith in all matters within the scope of the relationship. **Iriart v. Johnson**, 75 N.M. 745, 411 P.2d 226 (1965). Virtually every court has adopted the rule that where a salesman or broker, without the knowledge or consent of his principal, secretly agrees to remit a portion of his commission to the buyer, he is in violation of his fiduciary duty and is not entitled to recover his commission from his principal. See, e.g., 63 A.L.R.3d 1211 and cases cited therein.

OPINION

Although this rule would not ordinarily apply where there has been full disclosure to the principal of an arrangement to remit part of the salesman's or broker's commission to the buyer, such an arrangement would be precluded, regardless of disclosure, under New Mexico law.

Section 61-29-12 NMSA 1978 provides that the New Mexico Real Estate Commission shall have the power to suspend or revoke the license of any salesman or broker who is deemed guilty of

". . . C. paying or receiving any rebate, profit, compensation or commission from any person other than his principal."

The reference to "paying" in Section 61-29-12(C) is, however, somewhat ambiguous because the statute does not clearly prohibit payment **to** any person other than his principal.

Statutes must be construed so that no word is rendered surplusage, **Cromer v. J.W. Jones Construction Co.**, 79 N.M. 179, 441 P.2d 219 (Ct. App. 1968) and effect is given to every provision, **State ex rel. Bird v. Apodaca**, 91 N.M. 279, 573 P.2d 213 (1977). Thus, although unclear from the wording of Section 61-29-12(C), the reference to "paying" cannot be disregarded.

The proscription against "paying" commissions would be clearer if Section 61-29-12(C) were to read

{*267} ". . . paying or receiving any rebate, profit, compensation or commission **to or** from any person other than his principal."

As a rule, language will not be read into a statute which makes sense as written. **Burroughs v. Board of County Commissioners of Bernalillo County**, 88 N.M. 303, 540 P.2d 233 (1975). Accordingly, in order to properly make sense of the reference to "paying" and give effect to the legislative intent indicated by that reference, the words "to or" may be read into Section 61-29-12(C) as suggested.

In short, the ambiguity of Section 61-29-12(C) may be corrected by resort to the rules of construction which require that effect be given to the word "paying" and which permit language to be read into the statute to clarify legislative intent. Section 61-29-12(C) thus precludes a licensed salesman or broker from paying any portion of his commission to a buyer who is not his principal in a transaction.

ATTORNEY GENERAL

Jeff Bingaman, Attorney General