

Chapter 1

License Required to Provide Real Estate Brokerage Services

1-1 GENERAL

The New Jersey Real Estate License Act,¹ which also is known as the Real Estate Brokers and Salesmen's Act, makes clear that only a person licensed by the New Jersey Real Estate Commission (the "Commission") may engage in the activities of a real estate broker, broker-salesperson or salesperson:

No person shall engage either directly or indirectly in the business of a real estate broker, broker-salesperson or salesperson, temporarily or otherwise, and no person shall advertise or represent himself as being authorized to act as a real estate broker, broker-salesperson or salesperson, or to engage in any of the activities described in R.S. 45:15-3, without being licensed so to do as hereinafter provided.²

"The licensing act is a regulatory measure and represents the strong public policy of" New Jersey.³ As such, it makes clear that its application is broad, providing that "[a]ny single act, transaction

¹ N.J.S.A. 45:15-1, et seq.

² N.J.S.A. 45:15-1. The Real Estate License Act was amended in August 2018 to eliminate the category of licensees known as "referral agents," who now are salespersons (licensed with a real estate referral company). See § 1-5 for a discussion about this amendment.

³ *Tanenbaum v. Sylvan Builders, Inc.*, 29 N.J. 63, 71 (1959).

or sale shall constitute engaging in business within the meaning of this article.”⁴

Finally, the Commission may investigate and sanction “any person who assumes, advertises or represents himself as being authorized to act as a real estate broker, broker-salesperson or salesperson engages in any of the activities described in R.S. 45:15-3 without being licensed to do so.”⁵ For such a violation, the Commission may impose a “penalty of not more than \$5,000 for the first violation, and a penalty of not more than \$10,000 for any subsequent violation.”⁶

1-2 REAL ESTATE BROKERS

The Real Estate License Act defines a “real estate broker” as:

a person, firm or corporation who, for a fee, commission or other valuable consideration, or by reason of a promise or reasonable expectation thereof, lists for sale, sells, exchanges, buys or rents, or offers or attempts to negotiate a sale, exchange, purchase or rental of real estate or an interest therein, or collects or offers or attempts to collect rent for the use of real estate or solicits for prospective purchasers or assists or directs in the procuring of prospects or the negotiation or closing of any transaction which does or is contemplated to result in the sale, exchange, leasing, renting or auctioning of any real estate or negotiates, or offers or attempts or agrees to negotiate a loan secured or to be secured by mortgage or other encumbrance upon or transfer of any real estate for others, or any person who, for pecuniary gain or expectation of pecuniary gain conducts a public or private competitive sale

⁴ N.J.S.A. 45:15-2. Note that the Commission has taken the position that this broad application of brokerage activities that require licensure covers property management, including such activities as showing a property, having leases signed, collecting rent and the like. Unlicensed employees therefore cannot undertake such activities, which must be done by licensed agents affiliated with a broker.

⁵ N.J.S.A. 45:15-17.

⁶ N.J.S.A. 45:15-17. For a full discussion of the prohibited activities set forth in Section 17 of the New Jersey Real Estate License Act, *see* Chapter 18, § 18-1.

of lands or any interest in lands A real estate broker also shall include any person, firm, or corporation who supervises a real estate referral company.⁷

In connection with the sale of lots, the statute further provides that “the term ‘real estate broker’ includes any person, partnership, association or corporation employed or contracted by or on behalf of the owner or owners of lots or other parcels of real estate, at a stated salary, or upon a commission, or upon a salary and commission, or otherwise, to sell such real estate, or any parts thereof, in lots or other parcels, and who shall sell or exchange, or offer or attempt or agree to negotiate the sale or exchange, of any such lot or parcel of real estate.”⁸

No person may engage, either directly or indirectly, in any of these activities unless licensed as a real estate broker.⁹ In addition, in order to bring and maintain an action in a New Jersey court for collection of compensation for brokerage services, a plaintiff must allege and prove that he or she was a duly licensed real estate broker at the time the services were rendered.¹⁰

⁷ N.J.S.A. 45:15-3. The Commission has interpreted “offers or attempts or agrees to negotiate a loan secured or to be secured by mortgage” to allow real estate licensees to broker commercial mortgages.

⁸ N.J.S.A. 45:15-3; *see also Boise Cascade Home & Land Corp. v. Div. of the N.J. Real Estate Comm’n in the Dep’t of Ins.*, 121 N.J. Super. 228, 235 (Ch. Div. 1972) (“[T]he exception [to the license requirement for owners of property] does not apply, in the case of the sale of lots, to persons employed by the owner to sell such lots, and who sell or exchange them, or offer or attempt or agree to negotiate for their sale.”). Based upon N.J.S.A. 45:15-3 and the *Boise Cascade* decision, the Commission has taken the position that property management in New Jersey, including showing and leasing the property and similar activities to rent properties (but not including overseeing normal maintenance issues), must be done by real estate licensees acting under a licensed real estate broker. According to the Commission, such property management activities cannot be done in New Jersey by unlicensed entities or employees of the owner of the property.

⁹ *See* N.J.S.A. 45:15-1.

¹⁰ N.J.S.A. 45:15-3 (“No person, firm, partnership, association or corporation shall bring or maintain any action in the courts of this State for the collection of compensation for the performance of any of the acts mentioned in this article without alleging and proving that he was a duly licensed real estate broker at the time the alleged cause of action arose.”). However, *see* Chapter 8, § 8-1:3, regarding a narrow exception to this licensure requirement created in *Sammarrone v. Bovino*, 395 N.J. Super. 132 (App. Div. 2007).

1-3 REAL ESTATE SALESPERSONS

The Real Estate License Act defines a “real estate salesperson” as follows:

Any person who, for compensation, valuable consideration or commission, or other thing of value, or by reason of a promise or reasonable expectation thereof, is employed or contracted by and operates under the supervision of a licensed real estate broker to sell or offer to sell, buy or offer to buy or negotiate the purchase, sale or exchange of real estate, or offers or attempts to negotiate a loan secured or to be secured by a mortgage or other encumbrance upon or transfer of real estate, or to lease or rent, or offer to lease or rent any real estate for others, or to collect rents for the use of real estate, or to solicit for prospective purchasers or lessees of real estate, or who is employed or contracted by a licensed real estate broker to sell or offer to sell lots or other parcels of real estate, at a stated salary, or upon a commission, or upon a salary and commission, or otherwise to sell real estate, or any parts thereof, in lots or other parcels, or in the case of a salesperson licensed with a real estate referral company refers prospective consumers of real estate brokerage services to a particular broker. For the purposes of R.S. 45:15-1 et seq., the definition of real estate salesperson shall include a salesperson licensed with a real estate referral company unless otherwise indicated.¹¹

A person is statutorily prohibited from engaging in these activities unless duly licensed as a real estate salesperson.¹²

¹¹ N.J.S.A. 45:15-3. The Commission has interpreted “offers or attempts or agrees to negotiate a loan secured or to be secured by mortgage” to allow real estate licensees to broker commercial mortgages. The Commission also adopted a regulation effective July 3, 2017 clarifying its position with regard to employment versus independent contract relationships as follows: “The Commission interprets ‘employment agreement,’ ‘employee,’ and ‘employing broker’ in N.J.S.A. 45:15-1, et seq., and this section to permit an employment relationship or an independent contractor relationship between a broker and a broker-salesperson salesperson, or referral agent.” N.J.A.C. 11:5-4.1(j).

¹² See N.J.S.A. 45:15-1.

Only a licensed broker, not a salesperson, may bring a claim for a commission.¹³ However, a salesperson may file suit for collection of compensation against “the licensed broker with whom the salesperson . . . was employed at the time the alleged cause of action arose.”¹⁴ No such lawsuit for compensation may be brought or maintained without “the claimant alleging and proving that he was a duly licensed real estate salesperson . . . at the time the alleged cause of action arose.”¹⁵

1-4 REAL ESTATE BROKER-SALESPERSONS

A real estate broker-salesperson as is defined in the Real Estate License Act as:

any person who is qualified to be licensed as a real estate broker but who, for compensation, valuable consideration or commission, or other thing of value, or by reason of a promise or reasonable expectation thereof, is employed or contracted by and operates under the supervision of a licensed real estate broker to perform the functions of a real estate salesperson as defined herein.¹⁶

A person is barred from acting as a broker-salesperson unless he or she is duly licensed.¹⁷ A broker-salesperson cannot file suit to seek compensation for real estate brokerage services but is entitled to file suit against “the licensed broker with whom the . . . broker-salesperson was employed at the time the alleged cause of action arose.”¹⁸ Similarly, a broker-salesperson may not bring and maintain a cause of action for compensation “without alleging and proving that he was a duly

^{13.} See N.J.S.A. 45:15-3.

^{14.} N.J.S.A. 45:15-3.

^{15.} N.J.S.A. 45:15-3.

^{16.} N.J.S.A. 45:15-3. The Commission adopted a regulation effective July 3, 2017 clarifying its position with regard to employment versus independent contract relationships as follows: “The Commission interprets ‘employment agreement,’ ‘employee,’ and ‘employing broker’ in N.J.S.A. 45:15-1, et seq., and this section to permit an employment relationship or an independent contractor relationship between a broker and a broker-salesperson, salesperson, or salesperson licensed with a real estate referral company.” N.J.A.C. 11:5-4.1(j).

^{17.} See N.J.S.A. 45:15-1.

^{18.} N.J.S.A. 45:15-3.

licensed . . . broker-salesperson at the time the alleged cause of action arose.”¹⁹

1-5 REAL ESTATE SALESPERSONS LICENSED WITH A REAL ESTATE REFERRAL COMPANY

1-5:1 General

As part of a general revision of the Real Estate License Act that was enacted in January 2010, the Legislature created a licensing category known as “referral agents.” This legislation took effect July 1, 2011.²⁰ However, in August 2018, the Act was amended again to eliminate reference to “referral agents” and to make referral agents a type of salesperson known as a “salesperson licensed with a real estate referral company,” which is defined as:

any natural person employed or contracted by and operating under the supervision of a licensed real estate broker through a real estate referral company whose real estate brokerage-related activities are limited to referring prospects for the sale, purchase, exchange, leasing or rental or real estate or an interest therein.²¹

1-5:2 Lawsuits

Like salespersons and broker-salespersons, salespersons licensed with a real estate referral company only may file a lawsuit to recover compensation against “the licensed broker with whom the salesperson . . . was employed or contracted at the time the alleged cause of action arose.” Further, the salesperson licensed with a real estate referral company cannot bring such an action without “alleging and proving that he or

¹⁹ N.J.S.A. 45:15-3.

²⁰ See P.L. 2009 c. 238.

²¹ N.J.S.A. 45:15-3. The Commission adopted a regulation effective July 3, 2017 clarifying its position with regard to employment versus independent contract relationships as follows: “The Commission interprets ‘employment agreement,’ ‘employee,’ and ‘employing broker’ in N.J.S.A. 45:15-1, et seq., and this section to permit an employment relationship or an independent contractor relationship between a broker and a broker-salesperson, salesperson, or salesperson licensed with a real estate referral company.” N.J.A.C. 11:5-4.1(j).

she was a duly licensed real estate salesperson . . . at the time the alleged cause of action arose.”²²

1-5:3 General Restrictions

Not only is a salesperson licensed with a real estate referral company statutorily barred from performing any of the enumerated referral-agent activities unless he or she is duly licensed,²³ the statute also imposes other restrictions upon a salespersons licensed with a real estate referral company’s activities. For example, it provides that “[s]alespersons licensed with a real estate referral company shall only refer . . . prospects to the real estate broker who supervises the real estate referral company through whom they are licensed and shall only accept compensation for their activity from that broker.”²⁴

The Commission has further limited the real estate brokerage activities of referral agents, now known as salespersons licensed with a real estate referral company, to the following:

1. Directing prospects to websites and other sources of information on real estate matters generally available to the general public; and
2. Referring prospects for the sale, purchase, exchange, leasing or rental of real estate to the real estate broker through whom they are licensed as a referral agent or, should that broker authorize the referral agent to do so, to another real estate licensee. In all cases where referrals are made pursuant to such an authorization, the referral agent shall provide written or electronic notice to his or her broker or to that broker’s designee, who shall be a broker-salesperson or salesperson licensee, at the time the referral is made. In accordance with N.J.S.A. 45:15-16, all compensation payable to a referral agent for any referral shall be paid

²² N.J.S.A. 45:15-3.

²³ N.J.S.A. 45:15-1.

²⁴ N.J.S.A. 45:15-3. *See* N.J.A.C. 11:5-6.10(a).

by the broker through whom the referral agent is licensed.²⁵

Similarly, “[a] referral agent shall not be employed by or licensed with more than one real estate broker at any given time.”²⁶ Moreover, “[n]o person may simultaneously be licensed as a referral agent and a real estate broker, broker-salesperson or salesperson and no person licensed as a referral agent may engage in the business of a real estate broker, broker-salesperson or salesperson to an extent beyond that authorized by their status as a licensed real estate agent.”²⁷

The Commission therefore set forth the following nonexclusive list of activities that a referral agent is prohibited from undertaking:

1. Negotiating the purchase, sale, or exchange of an interest in real estate;
2. Leasing or renting or offering to lease or rent any interest in real estate;
3. Collecting rents for the use of real estate or any other monies;
4. Negotiating commissions or compensation rates and otherwise negotiating or signing listing or buyer-brokerage agreements;
5. Negotiating or signing contracts of sale or leases of real estate;
6. Accepting any funds of others to be held by a real estate broker acting in that capacity or as escrow agent or as the temporary custodian of the funds of others in a real estate transaction;
7. Conducting a public or private competitive sale of land or any interest in lands;
8. Negotiating, assisting in, or directing, the closing of any transaction which results or is contemplated to result in the sale, exchange, leasing, renting or auctioning of any real estate;

²⁵ N.J.A.C. 11:5-6.10(a).

²⁶ N.J.S.A. 45:15-3; N.J.A.C. 11:5-6.10(b).

²⁷ N.J.S.A. 45:15-3. *See* N.J.A.C. 11:5-6.10(c), (d).

9. Negotiating, offering, attempting to, or agreeing to negotiate a loan secured or to be secured by a mortgage or other encumbrance upon or transfer of any real estate;
10. Conducting showings or open house presentations of properties;
11. Participating in expositions, marketing shows or other presentations where information on specific properties or real estate interests marketed through a common promotional plan, including but not limited to planned unit developments, is provided to the public;
12. Providing information on listings, either in person, or through electronic communication including telephone and the internet, beyond the information which referral agents are permitted to provide with respect to websites and other sources of information as referenced in (a) above; and
13. Producing or presenting comparative market analyses or similar studies of real estate.²⁸

1-5:4 Real Estate Referral Companies

The Real Estate License Act was amended in August 2018 to provide for real estate referral companies. For purposes of the Act, a real estate referral company is:

a business entity established and supervised by a licensed real estate broker, separate and apart from any business entity maintained by the licensed real estate broker to conduct real estate brokerage-related activities other than the referral of prospective consumers of real estate brokerage services to that broker, or the purpose of employing or contracting licensed salespersons who strictly engage in the referral of prospects for the sale, purchase, exchange, leasing or rental of

²⁸ N.J.A.C. 11:5-6.10(d).

real estate or an interest therein solely on behalf of the supervising real estate broker.²⁹

1-5:5 Residential Rental Referral Agencies

Prior to the January 2010 amendment to the Real Estate License Act creating “referral agents” or the August 2018 amendment reclassifying referral agents as “salespersons licensed with a real estate referral company,” the Commission’s regulations already required that “[e]very person engaged in the business of referring, for a fee, prospective residential tenants to possible rental units shall be licensed in accordance with the New Jersey Real Estate License Act.”³⁰ The regulations further require that the referral agents licensee enter into a written contract with the prospective tenant that accurately states the services to be performed, the fee to be charged, the date and duration of the contract, the affirmative actions required of the prospective tenant, the refund policy, and a statement that the business is licensed by the Commission.³¹ The prospective tenant must receive a copy of that contract.³² The regulation further provides that “[o]ral consent of the lessor or his duly authorized agent to refer prospective tenants to a possible rental unit or location shall be confirmed by the licensee in writing within 24 hours of the licensee’s receipt of such consent.”³³

A referral agency licensee is prohibited from advertising or referring a prospective tenant to a non-existent address, a property not verified as available, as required by the regulation, or a possible rental unit or location for which the licensee does not have the lessor’s oral or written consent to refer prospective tenants.³⁴ Accordingly, referral agencies must verify the continuing availability of the rental unit with the lessor. In particular, “[a]ll units advertised in media shall be verified each day the advertisement appears.”³⁵

Furthermore, “[a]ll units to which prospective tenants are referred shall be verified as available every three working

²⁹ N.J.S.A. 45:15-3.

³⁰ N.J.A.C. 11:5-6.5(a).

³¹ N.J.A.C. 11:5-6.5(b).

³² N.J.A.C. 11:5-6.5(b).

³³ N.J.A.C. 11:5-6.5(d).

³⁴ N.J.A.C. 11:5-6.5(c).

³⁵ N.J.A.C. 11:5-6.5(e)(1).

days.”³⁶ “In the event a diligent effort by the licensee to verify availability of the rental unit is unsuccessful because of a failure of a lessor or agent to respond, the prospective tenant shall be specifically advised of the date and time the unit was last verified as available.”³⁷ Upon request, every prospective tenant must “be advised of the date and time any particular unit was last verified as available.”³⁸ No prospective tenant may be referred “to any rental unit not verified as available within the previous seven calendar days.”³⁹

The regulation also limits the agency’s fees. “Prior to the prospective tenant obtaining rental property through the services of the licensee, no licensee shall charge or accept a fee in excess of \$25.00” unless any fee charged, collected or received in excess of \$25.00 promptly is deposited into the broker’s escrow account until services are fully performed or the licensee posts cash security with an escrow agent approved by the Commission based on consideration of the rental referral fees, the volume of rental referral business of the licensee, the duration of the rental referral contract, and the prior performance of the licensee or its principals in the rental referral business.⁴⁰

The regulation also specifically mandates that every referral agency licensee “maintain sufficient telephone lines and staff to receive and answer inquiries from contract consumers.”⁴¹ In addition, referral agency licensees are required to maintain for one year records of the written consent or written confirmation of oral consent of the lessor to refer prospective tenants, records of the verification of availability of rental units, and copies of contracts with prospective tenants.⁴² Finally, every referral agency licensee must prominently post a copy of the regulation in its office for the information of its customers, and provide customers a copy of the regulation upon request.⁴³

³⁶ N.J.A.C. 11:5-6.5(e)(2).

³⁷ N.J.A.C. 11:5-6.5(f).

³⁸ N.J.A.C. 11:5-6.5(f)(1).

³⁹ N.J.A.C. 11:5-6.5(f)(2).

⁴⁰ N.J.A.C. 11:5-6.5(h).

⁴¹ N.J.A.C. 11:5-6.5(g).

⁴² N.J.A.C. 11:5-6.5(i).

⁴³ N.J.A.C. 11:5-6.5(j).

1-6 NON-RESIDENT LICENSEES

1-6:1 Licensure in New Jersey

“A nonresident may become a real estate broker, broker-salesperson, or salesperson by conforming to all of the provisions of” the Real Estate License Act.⁴⁴ A non-resident’s license may be renewed by payment of the renewal fees in the same manner as a resident, except that, if a non-resident fails to renew a license or obtain a new license for a period of two or more consecutive years, he or she must again fulfill the requirements for initial licensure before he or she may receive any further license.⁴⁵

A licensed broker whose main office is not located in New Jersey who provides brokerage services concerning real estate located in New Jersey only may do so personally or through persons employed or contracted by the broker who are licensed in New Jersey.⁴⁶ If a broker maintains one or more branch offices in New Jersey, “no person shall engage in the business of a real estate broker, broker-salesperson or salesperson at those offices unless the person is a holder of a license issued by the commission authorizing him to do so.”⁴⁷

The Act also requires that “[e]very applicant for a license whose business address is outside” of New Jersey must file an irrevocable consent to service upon the secretary of the Commission of any process or pleading in actions filed against the applicant by the Commission or by any person in the courts of New Jersey.⁴⁸ An applicant’s consent must be “duly authorized” and, if made by a corporation, be authenticated by its seal and accompanied by “a duly certified copy of the resolution of the board of directors,

⁴⁴ N.J.S.A. 45:15-20.

⁴⁵ N.J.S.A. 45:15-20.

⁴⁶ See N.J.S.A. 45:15-20.

⁴⁷ N.J.S.A. 45:15-20.

⁴⁸ N.J.S.A. 45:15-21 (“Every applicant for a license whose business address is outside this State shall file an irrevocable consent that suits and actions may be commenced against such applicant by the commission or by any person in any of the courts of record of this State, in any county in which the plaintiff may reside, by serving the same on the secretary of the commission, said consent stipulating and agreeing that such service of such process or pleadings on said secretary shall be taken and held in all courts to be as valid and binding as if due service had been made personally upon the applicant in this State.”). The Commission has interpreted this statute as including applicants who are in foreign countries.

authorizing the proper officers to execute it.”⁴⁹ When an action is commenced and process is served upon the secretary of the Commission, the process must be served in duplicate, “one of which shall be filed in the office of the commission and the other shall be forwarded immediately by the secretary of the commission, by registered mail, to the last known business address of the licensee against which such process or pleadings are directed.”⁵⁰

Furthermore, “[e]very licensee whose business address is outside this State shall, by acceptance of a license for that out-of-state address, automatically and irrevocably consent to the commission’s jurisdiction over and investigative authority regarding the licensed business premises, and all records and conduct of the licensee both within and outside of the State.”⁵¹ Similarly, “[t]he licensee shall also automatically and irrevocably consent that service of any pleading or subpoena issued by the secretary of the commission pursuant to R.S. 45:15-17 or R.S. 45:15-18 which is delivered by certified mail to the licensee’s last known address, shall constitute valid and binding service of the subpoena or pleading upon the licensee as if service had been made personally upon the licensee in this State.”⁵² In addition, licensure by a nonresident of New Jersey constitutes the licensee’s “irrevocable consent that service of process upon him as a licensee in any action or proceeding may be made upon him by service upon the secretary of the commission or the person in charge of the office of the commission.”⁵³

A broker whose main office is in another state must maintain a valid real estate broker’s license in good standing in that state.⁵⁴

1-6:2 Payment of Referral Fees to Out-of-State Brokers

A broker who is duly licensed in New Jersey “may pay a referral fee or referral commission to a person not licensed if the person is a licensed real estate broker of another jurisdiction in which the

⁴⁹ N.J.S.A. 45:15-21.

⁵⁰ N.J.S.A. 45:15-21.

⁵¹ N.J.S.A. 45:15-21.

⁵² N.J.S.A. 45:15-21.

⁵³ N.J.S.A. 45:15-9.

⁵⁴ N.J.S.A. 45:15-12; N.J.S.A. 45:15-15; N.J.S.A. 45:15-20. For a full discussion of a broker who maintains a main or branch office in another state doing business in New Jersey, see Chapter 11, § 11-2:4.4.

licensed broker maintains a bona fide office.”⁵⁵ Concomitantly, “[a] licensed real estate broker of another jurisdiction may make a referral, receive a referral fee or referral commission, and bring or maintain an action in the courts of this State against a duly licensed broker of this State for the collection of the fee or commission.”⁵⁶ The statute defines “referral” for purposes of this section as “the introduction, assisting, or directing of a person by one broker to another for real estate brokerage services, aid, or information,” and defines “referral fee” or “referral commission” as “the compensation paid or received for the referral.”⁵⁷

1-7 EXCEPTIONS TO LICENSE REQUIREMENT

1-7:1 General

The Real Estate License Act provides an exception to the license requirement for owners, attorneys and certain others who perform broker-type activities:

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.⁵⁸

Consistent with New Jersey’s strong public policy “not to lend unlicensed brokers the aid of the courts to enforce their brokerage agreements,”⁵⁹ this exception has been construed narrowly by New Jersey courts.

⁵⁵ N.J.S.A. 45:15-3.1.

⁵⁶ N.J.S.A. 45:15-3.1.

⁵⁷ N.J.S.A. 45:15-3.1.

⁵⁸ N.J.S.A. 45:15-4.

⁵⁹ *Palkoski v. Garcia*, 32 N.J. Super. 343, 347 (App. Div. 1954), *aff’d*, 19 N.J. 175 (1955) (quoting *Solomon v. Goldberg*, 11 N.J. Super. 69, 75 (App. Div. 1950)).

1-7:2 Property Owners and their Employees

While the Real Estate License Act codifies the common sense proposition that an owner need not be licensed in order to market his or her own property, the owner exception has been applied narrowly to require that only the actual owner may engage in broker-type activities. For example, since a condominium association does not actually own any property, it may not recover a commission for efforts in assisting unit owners to sell their units.⁶⁰ Similarly, in a case where a corporate owner's employee sought a commission for procuring tenants for the employer's property, the Appellate Division held that his claim was barred by his lack of a real estate brokerage license.⁶¹ Another court also has held that employees hired by the corporate owner of real estate for the purpose of making telephone calls to solicit prospective purchasers are engaged in the real estate brokerage business and therefore must be licensed.⁶²

1-7:3 Attorneys

The exception for attorneys has been narrowly interpreted. For example, it is limited to only New Jersey, not out-of-state, attorneys.⁶³ Furthermore, the attorney exception does not provide attorneys with the functional equivalent of a broker's license. It merely authorizes them to perform real estate brokerage services "incidental to the normal practice of the[ir] profession or business."⁶⁴ Since an attorney "may perform brokerage services

^{60.} *Zaid v. Island House Condo. Ass'n*, 170 N.J. Super. 206, 209-10 (Ch. Div. 1979).

^{61.} *Palkoski v. Garcia*, 32 N.J. Super. 343, 349 (App. Div. 1954), *aff'd*, 19 N.J. 175 (1955) ("Since it so plainly appears that the procurement of tenants was no part of the regular employment or incidental to it, the situation is the same in legal effect as if he were a complete stranger to the corporate owner.").

^{62.} *Boise Cascade Home & Land Corp. v. Div. of the N.J. Real Estate Comm'n in the Dep't of Ins.*, 121 N.J. Super. 228, 235 (Ch. Div. 1972) ("In other words, although [N.J.S.A. 45:15-4] exempts from the statute a *bona fide* owner who performs any of the acts which otherwise would require licensing . . . the exception does not apply, in the case of the sale of lots, to persons employed by the owner to sell such lots, and who sell or exchange them, or offer or attempt or agree to negotiate for their sale.").

^{63.} *Minot v. Hoyt Bros., Inc.*, 53 N.J. Super. 332, 334 (Law Div. 1958).

^{64.} *Spirito v. State of N.J.*, 180 N.J. Super. 180, 189 (App. Div. 1981); *see also In re Roth*, 120 N.J. 665, 672-73 (1990) ("[A]n attorney who does not hold a license under [the Real Estate License Act] but seeks to act as both a broker and a lawyer for the same client in the same transaction, must confine any broker's services to those that are obviously minor, incidental, ancillary, and subordinate to the legal services entailed in the client's representations."); *Lovett v. Estate of Lovett*, 250 N.J. Super. 79, 96-97 (Ch. Div. 1991) ("An attorney may perform

that are only incidental to the normal practice of law,” those services “cannot be the basis for a claim of compensation as a broker.”⁶⁵

In addition, an attorney who is dually licensed by the Commission as a real estate broker, broker-salesperson, salesperson or salesperson licensed with a real estate referral company is prohibited under the Real Estate License Act and attorney ethics opinions from representing a buyer or seller as an attorney while also representing that buyer or seller in the same transaction as a real estate licensee. More specifically, the Real Estate License Act prohibits any real estate licensee from “collecting a commission as a real estate broker in a transaction, when at the same time representing either party in a transaction in a different capacity for a consideration.”⁶⁶

Similarly, under the Rules of Profession Conduct, such dual representation by an attorney as a real estate license in the same transaction “will be materially limited by . . . a personal interest of the lawyer.”⁶⁷ This conflict arises because a real estate agent receives a commission only if the transaction is consummated but the attorney has an obligation to provide independent legal advice to the client and may need to advise the client that the sale should not be consummated. This inherent conflict of interest “is so overwhelming that, even with full disclosure, an attorney should never participate simultaneously as a broker and a lawyer for either buyer or seller in a real estate transaction.”⁶⁸

An attorney’s law firm also may not represent clients in real estate transactions when those clients are clients of any salesperson in the brokerage entity with which the attorney is affiliated as a real estate licensee. The conflict that the dually licensed attorney has is imputed to the attorney’s firm under the Rules of Professional Conduct, which provide as follows: “When lawyers are associated

some brokerage services even if unlicensed as a broker, but only those that are incidental or ancillary to the legal services to be performed in a given transaction.”)

^{65.} *In re Roth*, 120 N.J. 665, 674 (1990); see also *Lovett v. Estate of Lovett*, 250 N.J. Super. 79, 97 (Ch. Div. 1991) (“[A]n attorney may not be separately compensated for brokerage services.”).

^{66.} N.J.S.A. 45:15-17(i).

^{67.} Rules of Professional Conduct 1.7(a)(2).

^{68.} Advisory Committee on Professional Ethics Opinion 514 (April 1983).

in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by RPC 1.7”⁶⁹

1-7:4 Comprehensive Employment and Training Act

The Real Estate License Act provides an exemption from licensure as a real estate broker, broker-salesperson or salesperson for any person who is employed in a participant position as a housing referral aide under any program that is established and funded under the Comprehensive Employment and Training Act of 1973,⁷⁰ while the person is performing his or her duties in that position.⁷¹

1-7:5 Equitable Exception

In *Sammarone v. Bovino*,⁷² the Appellate Division carved out a narrow exception to the requirement that a person must be licensed in order to be paid a commission for real estate brokerage activities under the specific facts of that case, which included that the buyer promised to pay the commission to the unlicensed person even though the buyer knew the person was not licensed and that a person has to be licensed to be paid a commission for real estate brokerage activities. Of course, the buyer then refused to pay the commission because the person was not licensed.⁷³

1-8 LOCATING RENTAL HOUSING

Unless a person is licensed under the Real Estate License Act, the person is prohibited from charging or accepting any

⁶⁹ Rules of Professional Conduct 1.10(a). *See also* Advisory Committee on Professional Ethics Opinion 411 (Nov. 1978).

⁷⁰ 29 U.S.C. §§ 801, et seq.

⁷¹ N.J.S.A. 45:15-1.1. However, the Comprehensive Employment and Training Act of 1973 (29 U.S.C. §§ 801, et seq.) was repealed in 1982 and replaced with the Job Training Partnership Act (29 U.S.C. §§ 1501, et seq.), which, in 1998, was repealed and replaced by the Workforce Investment Act (29 U.S.C. § 2801). As a result, although it is accurate to say that the Real Estate License Act provides an exemption for persons employed as housing referral aides under Comprehensive Employment and Training Act programs since N.J.S.A. 45:15-1.1 has not been repealed, this statute appears to be vestigial, since it cross-references to a federal statute that no longer exists. The federal statute currently in effect—the Workforce Investment Act—contains no reference to “housing referral aides.” Thus, although New Jersey’s statutory exemption still technically exists, the exemption now is essentially meaningless.

⁷² *Sammarone v. Bovino*, 395 N.J. Super. 132 (App. Div. 2007).

⁷³ For a full discussion of the *Sammarone* case, *see* Chapter 8, § 8-1:3.2.

fee, commission or compensation in exchange for providing assistance in locating rental housing, including providing any written list or telephone information on purportedly available rental units, at any time before a lease has been fully executed or, when no lease is drawn, before possession is taken by the tenant.⁷⁴ Any person who violates this prohibition is deemed to be a disorderly person and subject to a fine not less than \$200 or to imprisonment for not more than thirty days, or both.⁷⁵

This statutory prohibition is not to be construed to prohibit “a licensed real estate broker, or an owner of rental properties or his or her agents and employees, from requiring the payment of a deposit to reserve a particular unit or from charging and accepting a fee for processing an application to rent an apartment or for performing a credit check or other investigation upon prospective tenants prior to the execution of a lease or the taking of possession of a rental unit by a prospective tenant.”⁷⁶

1-9 MOBILE AND MANUFACTURED HOMES

Real estate licensees are permitted to engage in brokerage activities in transactions that involve the resale of mobile and manufactured homes as provided in N.J.S.A. 39:10-19.⁷⁷ The Commission’s regulations specify that licensees who provide those services must be familiar with all laws applicable to such transactions, including the following: (1) N.J.S.A. 39:10-1, et seq., as it applies to the resale and transfer of the title to such motor vehicle units;⁷⁸ (2) N.J.S.A. 46:8C-1, et seq., as it applies

⁷⁴ N.J.S.A. 45:15-1.2.

⁷⁵ N.J.S.A. 45:15-1.2.

⁷⁶ N.J.S.A. 45:15-1.2.

⁷⁷ N.J.A.C. 11:5-6.4(l).

⁷⁸ Although N.J.A.C. 11:5-6.4(l) refers to N.J.S.A. 39:1-1, et seq., this undoubtedly is a typographical error since N.J.S.A. 39:10-1, et seq., which is the “motor vehicle certificate of ownership law,” N.J.S.A. 39:10-1, deals with the resale and transfer of title to such motor vehicle units. N.J.S.A. 39:10-19 provides in relevant part:

No person shall engage in the business of buying, selling or dealing in motor vehicles in this State, nor shall a person engage in activity that would qualify the person as a leasing dealer, as defined in section 2 of P.L. 1994, c. 190 (C. 56:12-61), unless: a. the person is a licensed real estate broker acting as an agent or broker in the sale of mobile homes without their own motor power other than recreation vehicles as defined in section 3 of P.L. 1990, c. 103 (C. 39:3-10.11), or manufactured homes as defined in section 3 of P.L. 1983, c. 400 (C. 54:4-1.4); or b. the person is authorized to do so under the provisions of this chapter. The

to the resale of such units when they are located in Mobile Home Parks; (3) N.J.S.A. 17:16C-1, et seq., as it applies to the financing of the purchase of personal property; and (4) New Jersey's Truth In Renting Act, N.J.S.A. 46:8-43, et seq.⁷⁹ When a licensee who is involved in a transaction of this type evidences a "lack of familiarity with these laws either through acts of omission or commission" the licensee will "be subject to sanctions by the Commission for having engaged in conduct demonstrating incompetency, in violation of N.J.S.A. 45:15-17(e)." ⁸⁰

Real estate licensees also should be aware that there is a prohibition against "buying, selling or exchanging" mobile and manufactured homes on a Sunday.⁸¹ Such conduct constitutes a disorderly persons offense.⁸² The Commission also would consider such activity to be a violation of its regulations.⁸³

chief administrator may, upon application in such form as the chief administrator prescribes, license any proper person as such dealer or leasing dealer. A licensed real estate broker shall be entitled to act as an agent or broker in the sale of a mobile or manufactured home as defined in subsection a. of this section without obtaining a license from the chief administrator. For the purposes of this chapter, a "licensed real estate broker" means a real estate broker licensed by the New Jersey Real Estate Commission pursuant to the provisions of chapter 15 of Title 45 of the Revised Statutes. Any sale or transfer of a mobile or manufactured home, in which a licensed real estate broker acts as a broker or agent pursuant to this section, which sale or transfer is subject to any other requirements of R.S. 39:10-1 et seq., shall comply with all of those requirements.

⁷⁹. N.J.A.C. 11:5-6.4(l). In 1995, the Commission also issued certain guidelines for brokering the sale of mobile or manufactured homes. New Jersey Real Estate Commission, Memorandum, "*Advisory on Brokering Sales of Mobile or Manufactured Homes*" (April 13, 1995).

⁸⁰. N.J.A.C. 11:5-6.4(l). For a discussion concerning violations of N.J.S.A. 45:15-17, see Chapter 18, § 18-1. See also N.J.S.A. 45:15-17.3, which provides as follows:

A real estate licensee who acts as an agent or broker in the sale of a mobile or manufactured home, as defined in subsection a. of R.S. 39:10-19, in a manner which does not comply with all requirements of R.S. 39:10-1 et seq. applicable to the sale of any such mobile or manufactured home, shall, pursuant to R.S. 45:15-17, be subject to sanctions by the New Jersey Real Estate Commission for engaging in conduct which demonstrates incompetency.

⁸¹. N.J.S.A. 2C:33-26.

⁸². N.J.S.A. 2C:33-26.

⁸³. N.J.A.C. 11:5-6.4(l).

