

**OPINION
62-191**

November 7, 1962 (OPINION)

REAL ESTATE COMMISSION

RE: Exemptions from License - Attorneys

This is in response to your letter of October 31, 1962, in which you advise that you were recently appointed to the Real Estate Commission. In this letter you also discussed the provisions of Chapter 43-23. The view of the Commission is set forth in your letter and appears to be as follows:

The commission has taken the view that if an attorney accepts property openly for sale, on a commission, and advertises the sale of this property, holding himself out as the agent who has authority to sell, that he comes within the scope of the Real Estate Commission law and should be licensed. It is possible that any sale by an attorney, if done for a commission, would bring him within the scope of the law."

You then ask for our interpretation of Chapter 43-23 as to whether or not attorneys are completely exempt from the provisions of said chapter.

Section 43-23-05 of the North Dakota Century Code, as is material here, provides that "* * *No person shall act as a real estate broker or real estate salesman, or advertise or assume to act as such real estate broker or real estate salesman, without a license issued by the real estate commission. No person shall be entitled to collect any fees, compensation or commission as a real estate broker or real estate salesman without having first complied with the provisions of this chapter.* * *."

Section 43-23-07, and subsection 2 thereof, of the North Dakota Century Code, provides as follows:

REAL ESTATE BROKERS OR SALESMEN - EXCEPTIONS. The term 'real estate broker' or 'real estate salesman' shall not be held to include any person, partnership, association or corporation, who as a bona fide owner or lessor, shall perform any of the aforesaid acts:* * *;

2. Nor shall this chapter be construed to include an attorney at law, admitted to practice in North Dakota,* * *."

An attorney admitted to practice in North Dakota is one who has secured a certificate of admission to the bar of this state from the North Dakota Supreme Court and has secured his annual license from the State Bar Board. To qualify for this, he must have met the requirements of either Sections 27-11-03 or 27-11-25 of the North Dakota Century Code. A licensed attorney, as such, is considered an officer of the courts.

The underlying purpose for such licensing act or any similar licensing act must be predicated on the police powers of the State and must, out of necessity, be of a regulatory nature and for the protection of the general public. The revenue produced from such licenses and any benefit or protection flowing to the licensees (agents or brokers) would be incidental rather than primary. The principal purpose must be for the general protection of the public and any other results would be merely a byproduct of such act.

As a general rule of law, exemptions or exceptions must be strictly construed. By this, it is meant that the person or facts must come fully within the exemptions or exceptions before they become applicable.

In examining the exceptions, we note that in addition to subsection 3, there are four other subsections providing for and making exceptions to the general provisions of the act. In examining subsections 1, 3, and 4, it would seem that an attorney or lawyer under the provisions set forth therein could do and perform those acts without a license. In other words, without the exception of subsection 2, which specifically exempts attorneys at law admitted to practice in this state, such attorneys would be able to sell certain realty or perform certain acts as set out in subsections 1, 3, and 4 without first securing a license. If the specific exemption for licensed attorneys in subsection 2 were given the limited application suggested in your letter, it would, in effect, render and treat this exception as surplusage or of no significance. It is also a general rule of law that the Legislature does not perform an idle act. We cannot treat subsection 2 as surplusage.

The practice of exempting licensed attorneys at law from acts requiring a license to sell realty is not uncommon. In *YOUNG v. DEPARTMENT OF PUBLIC INSTRUCTION*, 160 A151 (39A.L.R.2d., pg. 616), where the act was challenged as being discriminatory because it exempted attorneys, the court said that the exemption was valid and there was sufficient basis for exempting attorneys; that attorneys at law were not a class at which the statute was aimed. The court also observed that attorneys carried on real estate transactions as part of their profession and have been held responsible to the court for their fidelity to their clients and have been admitted to the bar only after they had established their good moral character, and that any abuse or breach of fidelity subjected the attorney to removal from office (disbarment).

From this case, it can be observed that the qualifications and requirements of an attorney to be licensed and to be permitted to practice are for the general protection and welfare of the public. Therefore, the evils which Chapter 43-23 wish to avoid and the protection, welfare and security which said chapter affords to the general public are satisfied in meeting the requirements to become a licensed attorney and practice law in this state.

The specific language found in subsection 2 of Section 43-23-07, which provides as follows: "* * *Nor shall this chapter be construed to include an attorney at law, admitted to practice in North Dakota.* * *", is clear in its meaning and is therefore not subject

to construction. We are unable to find any language in Chapter 43-23 which modifies the foregoing phrase.

It is, therefore, our opinion that attorneys at law admitted to practice in North Dakota are exempt from the provisions of Chapter 43-23, and that such exemption is valid so long as such person remains a licensed attorney admitted to practice in North Dakota. The fact that the attorney might or might not receive a commission would not modify this conclusion.

LESLIE BURGUM

Attorney General