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The State of South Carolina  
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON  
ATTORNEY GENERAL

December 3, 1997

The Honorable Victoria T. Mullen  
Member, House of Representatives  
32 Harrogate Drive  
Hilton Head Island, South Carolina 29928

Dear Representative Mullen:

You have requested an opinion as to "whether South Carolina residents acting as intermediaries (brokers) in corporate acquisition transactions, where real estate is incidental to the transaction, must be a South Carolina licensed real estate broker in order to earn a fee." You further provide the following background information:

[i]n 1977 the South Carolina Attorney General issued Opinion No. 77-349 opining that a brokerage firm selling small businesses owning real property must obtain a real estate broker's license to earn a fee. Recently the South Carolina Court of Appeals held in the case of Roberts v. Gaskins, 486 S.E.2d 771 (Ct. App. 1997) that a business broker, unlicensed as a real estate broker, can claim a commission on the sale of a business even though the sale may include real estate.

In view of the Roberts v. Gaskins case I would like to urge you to consider withdrawing your previous opinion and issue a new opinion reflecting South Carolina law on the issue.

This issue is particularly important because your [1977] outstanding opinion is inhibiting business brokers from operating and doing business in South Carolina and advising businesses nationally and internationally. Under the outstand-

*Request Letter*

ing 1977 opinion, if a business broker has a domicile in South Carolina but has no South Carolina real estate license, but successfully advises clients on mergers or acquisitions in other states and nations, he is not entitled to a broker fee. There are instances where this issue has arisen and the business brokers have been denied by foreign courts the recovery of a fee because of the holding in Opinion 77-349.

Within the limits of the laws of South Carolina, the State should encourage commerce and Opinion 77-349 has had a chilling effect on the ability of South Carolina business brokers doing business in South Carolina and in other states.

#### 1977 Opinion

In Op. No. 77-349, this Office addressed the question of whether "a sole proprietorship acting as a brokerage firm for the purchase and sale of small businesses and publishing a listing of such businesses which are for sale [is] ... exempt from licensing requirements for real estate brokers under §§ 40-57-10, et seq., 1976 Code?" We quoted § 40-57-20 of the Code which makes it

... unlawful for any person to act as a real estate broker, counselor, real estate salesman, appraiser, property manager, or real estate auctioneer, or to advertise or assume to act as such without first having obtained a license issued by the Real Estate Commissioner.

We noted that § 40-57-10 (1) defines the word "broker" as meaning

... any person who for a fee, commission or other valuable consideration, or with the intent or expectation of receiving a fee, commission or consideration, negotiates or attempts to negotiate the listing sale, auction, purchase, exchange or lease of any real estate or of the improvements thereon, or collects rents or attempts to collect rents, or who advertises or holds himself out as engaged in any of the foregoing activities. The term also includes any person employed by or on behalf of the owner of real estate to conduct the sale, auction, leasing, or other disposition thereof at a salary or for a fee, commission

or any other consideration. It also includes any person who engages in the business of charging an advance fee or contracting for collection of a fee in connection with any contract whereby he undertakes primarily to promote the sale of real estate through its listing in a publication issued primarily for such purpose, or for referral of information concerning such real estate to brokers, or both.

Our 1977 Opinion viewed the South Carolina statute as "quite comprehensive in its terms and is intended to have a prophylactic effect by including within its requirements all manner of real estate sales carried out with a view toward receiving some type of compensation."

Furthermore, it was our view that "[t]he fact that an individual does not 'wish' to be known as a real estate broker is irrelevant if the effect of his actions brings him within the purview of the statute." In addition, we stated that

[s]imilarly, ineffectual as a bar to the requirement of obtaining a real estate license is the argument that an individual wishes to be only a 'business' broker, in the sense that he will be involved in the sale of small businesses 'lock, stock and barrel,' with the transfer of real property and fixtures thereto being only 'incidental' to the sale of the business. The statute includes the sale or listing of 'any real estate or of the improvements thereon.' ...

Thomas v. Jarvis, 213 Kan. 671, 518 P.2d 532, interpreted a provision similar to South Carolina's statute, and concluded that a business broker contracting to sell the assets of companies which included real property is a 'real estate broker' and must be licensed as such.

### **Roberts v. Gaskins**

In Gaskins, the South Carolina Court of Appeals reviewed an action brought by a broker against the seller of a business to collect the unpaid portion of the broker's commission. The business included certain real property. The broker was not licensed as a real estate broker at the time of the transaction. The seller asserted that the "activities Roberts performed in the sale of his business required a real estate broker's license and

thus he should not received a commission." However, the special master ruled that the parties has modified their original agreement so that the real estate did not form a part of the sales contract or a part of the calculated commission.

The Court of Appeals affirmed. Noting that while a "business broker" may often negotiate the sale of real estate as part of the business, typically, the business broker "'concentrates on the transfer of the entire business,'" 486 S.E.2d at 775, quoting Kazmer-Standish Consultants, Inc. v. Schoeffel Instruments Corp., 89 N.J. 286, 445 A.2d 1149, 1151. Concluding that the fact that buyer and seller negotiated the real estate portion of the transaction directly, the Court framed the issue this way:

[i]f Roberts was required to have a real estate broker's license to earn a commission on the sale of the personal property of the business because the business also included real property then the fact of the direct negotiation of the agreement to lease the real property by the parties did not obviate the necessity of a license.

The Court observed that no South Carolina case resolved the issue, but "[t]he applicability and effect of real estate broker licensing requirements to mixed transactions, especially in the context of business sales, has been the subject of many decisions from other jurisdictions and is a matter of statutory construction." Cognizant of the fact that "[s]ome jurisdictions interpret their statutory licensing scheme to specifically preclude the enforcement of a commission in such instances ...", at the same time, "[o]ther courts have recognized their real estate broker licensing statutes as penal in nature, to be strictly construed." Among the courts which view the law in the latter fashion, the so-called "New York rule" uses the approach that the "commission is enforceable as long as the sale of real estate is not the 'predominant' factor." Another approach used in certain jurisdictions has modified "the New York rule to enforce the brokerage fee contract if the sale of real estate is not the predominant factor, but limited to the value of the personal assets. These courts have found such contracts to be severable, allowing recovery of that portion of the sales commission attributable to the value of the business, exclusive of real estate."

The Court found that the South Carolina real estate broker statute "does not specifically include a business broker or a 'mixed' sale of property and business assets. Also significant was the fact that the real estate broker law is "unquestionably a penal statute, and it must be strictly construed." Thus, the Court concluded that

... to prevent a business broker from enforcing a legal claim to a commission earned from the sale of business assets simply because the business includes real estate would extend the real estate broker licensing provisions beyond their stated definitions and purposes. Although there may be good reasons to broaden this regulatory scheme to include business brokers, there are also credible reasons not to do so. For example, as noted in Kazmer- Standish Consultants, Inc. v. Schoeffel Instruments Corp., 445 A.2d at 1152, business brokers deal with sophisticated businessmen in complex transactions, whereas real estate brokers and salesmen deal in large measure with unsophisticated homeowners. Suffice it to say it is not our prerogative to legislate.

We are also convinced there is no purpose to be served by superimposing a "predominant purpose" test on the transaction, whereby a business broker is precluded from maintaining an action for a commission if the business sale involves "predominantly real estate." Applying such a test serves no legitimate purpose if the business broker is limited to a commission based on the value of the personal property sold, since the "personalty of an ongoing business, even when it is less valuable than the real property, may be substantial and provide a basis for a significant commission." *Id.* at 1153.

We, therefore, conclude that a business broker unlicensed as a real estate broker may enforce a commission contractually earned on the sale of the personal property of a business, irrespective of the form of sale, even though the sale may include real estate; provided, of course, no commission can be based either directly or indirectly on the value of the real property involved.

Of course, this Office does not withdraw or overrule a prior opinion unless it is clearly erroneous or unless intervening circumstances warrant such. The Gaskins case would indeed constitute intervening circumstances. Accordingly, based upon the foregoing, this Office herein withdraws Op. No. 77-349 and substitutes therefor the last paragraph of Gaskins referenced above in its stead.

Representative Mullen  
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With kind regards, I am

Very truly yours,



Robert D. Cook  
Assistant Deputy Attorney General

RDC/ph

REVIEWED AND APPROVED BY:

  
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