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ATTORNEY IN FACT—TO SELL, LIST OR OFFER TO SELL REAL ESTATE—DULY EXECUTED POWER OF ATTORNEY FROM OWNER—NOT A REAL ESTATE BROKER—SECTION 6373-25 GC—NOT REQUIRED TO BE LICENSED, SECTION 6373-26 GC—WHERE PERSON SOLICITS REAL ESTATE OWNERS TO EXECUTE POWER OF ATTORNEY—ACT OF SOLICITATION—REAL ESTATE BROKER—REQUIRED TO BE LICENSED.

SYLLABUS:

An attorney in fact who sells, lists or offers to sell, etc., real estate in pursuance of a duly executed power of attorney from the owner thereof is not thereby deemed to be a "real estate broker" as defined in Section 6373-25, General Code, and is not required to be licensed as provided in Section 6373-26, General Code; but where a person in the regular course of business solicits real estate owners to execute such powers of attorney for such listing or sale, such person, by such solicitation, is acting as a "real estate broker" and is required to be licensed as such.

Columbus, Ohio, July 21, 1953

Mr. L. F. Waldbauer, Secretary, Board of Real Estate Examiners
Columbus, Ohio

Dear Sir:

I am in receipt of your request for my opinion which reads in part as follows:

"It has come to the attention of the Board that throughout the State there is a growing practice of certain auctioneers who offer real property for sale without being licensed as real estate brokers or salesmen by securing powers of attorney.

"We respectfully ask your opinion as to whether such auctioneers are permitted to operate a regular real estate business in such manner under Section 6373-25, paragraph (b), G. C. Ohio."

We may first note that the statute prohibits any person to "act as a real estate broker" without a license as such. Section 6373-26, General Code. The term "real estate broker" is defined in Section 6373-25, General Code, in pertinent part as follows:

“The term ‘real estate broker’ shall include *any person, partnership, association, or corporation, foreign or domestic, who for another and for a fee, commission, or other valuable consideration, or who with the intention or in the expectation or upon the promise of receiving or collecting a fee, commission or other valuable consideration, sells, exchanges, purchases, rents or leases, or negotiates the sale, exchange, purchase, rental, or leasing of, or offers, or attempts, or agrees to negotiate the sale, exchange, purchase, rental, or leasing of, or lists or offers or attempts or agrees to list, or auctions, or offers or attempts or agrees to auction, any real estate, or the improvements thereon * * **”

“The term ‘real estate’ shall include leaseholds as well as any and every interest or estate in land, whether corporeal or incorporeal, whether freehold or non-freehold, and whether said land is situated in this state or elsewhere.

“The term ‘real estate salesman’ shall mean and include any person associated with a licensed real estate broker to do or to deal in any act, acts, or transactions set out or comprehended by the definition of a real estate broker as set forth in this act, for compensation or otherwise. * * *

“Neither of the terms ‘real estate broker’ or ‘real estate salesman’ hereinbefore defined includes a person, firm or corporation, or the regular salaried employes thereof, who performs any of the aforesaid acts: * * *

“(b) *In pursuance of a duly executed power of attorney from the owner of the real estate or any interest therein; * * **”
(Emphasis added.)

The provisions of the exception noted above in subparagraph (b) of this section are so plain and unambiguous as to leave no doubt that the Legislature did not intend that a license under the real estate licensing act should be required of persons who, acting in pursuance of a power of attorney from a real estate owner, performed any of the acts listed in such section. I must conclude, therefore, that such an attorney in fact may sell, list, offer to sell, etc., the real estate described in his power of appointment without a real estate broker’s license.

I note, however, that in your inquiry you refer to auctioneers who “operate a regular real estate business” by making sales at auction. From this language I think it is fair to assume that the persons concerned follow the practice of regular solicitation of business by soliciting owners of real estate to execute powers of attorney under authority of which the auction sale may be accomplished. Now it may be noted (1) that such solicitation

is an offer to sell, or an offer to list, or an offer to auction real estate, and (2) such solicitation, by its very nature, takes place *prior* to the execution of a power of attorney by the owner concerned. Such being the case it follows that a person who engages in such solicitation is a "real estate broker" and is required to be licensed as such.

Accordingly, in specific answer to your inquiry, it is my opinion that an attorney in fact who sells, lists or offers to sell, etc., real estate in pursuance of a duly executed power of attorney from the owner thereof is not thereby deemed to be a "real estate broker" as defined in Section 6373-25, General Code, and is not required to be licensed as provided in Section 6373-26, General Code; but where a person in the regular course of business solicits real estate owners to execute such powers of attorney for such listing or sale, such person, by such solicitation, is acting as a "real estate broker" and is required to be licensed as such.

Respectfully,

C. WILLIAM O'NEILL

Attorney General