STATE OF FLORIDA
DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION
FLORIDA REAL ESTATE COMMISSION

IN RE: The Petition of NRT, Incorporated and Coldwell Banker Residential Real Estate, Inc. CASE NO. FREC DS-98-02

DS 99-004

FINAL ORDER

On January 20, 1999, in Orlando, Florida, this matter came before the Florida Real Estate Commission pursuant to s.120.565, Fla. Stat., and Chapter 28-105, Fla. Admin. Code, for the purpose of considering the Petition for a Declaratory Statement filed by NRT, Incorporated and Coldwell Banker Residential Real Estate, Inc.

The Petitioners, who are more fully described below, petitioned the Commission to issue a statement as to the application of s.475.42(1)(d), Fla. Stat., as it applies to the Petitioners’ particular set of circumstances.

Having considered the Petition and being otherwise fully advised in the premises, the Commission makes the following findings and conclusions:

FINDINGS OF FACT

1. The Petitioner NRT, Incorporated, is a California corporation. Petitioner Coldwell Banker Residential Real Estate, Inc. (Coldwell Banker) is a Florida corporation, registered as a real estate broker in Florida pursuant to Chapter 475, Part I, Fla Stat. NRT, Incorporated owns Coldwell Banker.
2. Coldwell Banker, as a registered real estate broker in Florida, is subject to Chapter 475, Part I, Fla. Stat., and the rules and orders of the Florida Real Estate Commission (Commission).

3. At each of its branch offices in Florida, Coldwell Banker has entered into independent contractor agreements with licensed real estate salespersons. Each salesperson is entitled to receive compensation from Coldwell Banker in return for a certain level of involvement in various real estate transactions, including purchases and sales of real property.

4. Currently, when a real estate transaction closes, the entire commission is disbursed to Coldwell Banker which then, following the authorization from the corporate office in Mission Viejo, California, has the local Florida office disburse the appropriate commission amount to the salesperson or salespersons. There is a delay in the salesperson receiving the commission from Coldwell Banker following the closing of the transaction.

5. The procedure followed by Coldwell Banker is in accordance with the Commission’s current interpretation of s.475.42(1)(d), Fla. Stat., which requires that the entire commission be paid to the broker who, in turn, disburses the commission to the salesperson(s).

6. The Commission had previously stated in December 1990 and again in February 1991, that the salesperson could not receive a commission directly from the closing agent even with the express consent of the broker. Therefore, the practice of Coldwell Banker is consistent with the Commission’s earlier interpretation of s.475.42(1)(d), Fla. Stat., that the entire commission be paid to the broker who, in turn, would make the disbursements.
7. Coldwell Banker is requesting that the Commission interpret s.475.42(1)(d), Fla. Stat., in such a way that will allow it to give written authorization to the closing agent so the closing agent can disburse commissions directly to its salespersons.

8. Specifically, Coldwell Banker, through its broker, would give written authorization to the office managers in each of Coldwell Banker’s 78 offices to authorize disbursement from the closing agents to the salespersons. The office manager, based upon the broker’s written authorization, would give written authorization to the closing agent to disburse commissions to the salespersons. The written authorization from the office manager to the closing agent would identify the transaction, the salespersons entitled to commissions, and the specific amount of commission to be paid to each salesperson. The written authorization would be signed by the office manager. Disbursement would not occur until after the transaction has closed.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter, pursuant to s.120.565, Fla. Stat., and Rule 28-105.003, Fla. Admin. Code.

2. Coldwell Banker has requested that a statement be issued finding under the facts set out above that s.475.42(1)(d), Fla. Stat., allows Coldwell Banker to give written authorization to a closing agent to disburse commissions directly to Coldwell Banker’s salespersons.
3. Section 475.42(1)(d), Fla. Stat., provides, in part:

(d) No salesperson shall collect any money in connection with any real estate brokerage transaction, whether as a commission, deposit, payment, rental, or otherwise, except in the name of the employer and with the express consent of the employer;...

(emphasis supplied)

4. The Commission has previously taken the position that commissions from a real estate transaction must be paid in its entirety to the broker. The broker, in turn, would then make the appropriate disbursements to the salespersons. Discussions which occurred at the December 1990 and February 1991 meetings addressed this issue and the Commission stated, in an informal manner, that a broker could not authorize a closing agent to disburse commissions directly to a salesperson. These discussions, however, were not in the nature of a Declaratory Statement nor were they final agency action.

5. It has long been recognized that the administrative construction of a statute by an agency charged with its administration is entitled to great weight and will not be overturned unless clearly erroneous. Fort Pierce Utility Authority v. Florida Public Service Commission, 388 So.2d 1031 (Fla. 1980); Pan American World Airways, Inc. v. Florida Public Service Commission, 427 So.2d 716 (Fla. 1983); PW Ventures, Inc. v. Nichols, 533 So.2d 281 (Fla. 1988); Tristate Systems, Inc. v. Department of Transportation, 491 So.2d 1192 (Fla. 1st DCA 1986); See also Humana, Inc. v. Department of Health and Rehabilitative Services, 492 So.2d 338 (Fla. 4th DCA 1986). An agency’s interpretation of a statute need not be the sole possible interpretation or even
the most desirable one; it need only be within the range of possible interpretations. *Board of Medical Examiners v. Durrani*, 455 So.2d 515 (Fla. 1st DCA 1984).

6. The phrase “except in the name of the employer and with the express consent of the employer” as found in s.475.42(1)(d), *Fla. Stat.*, is subject to various interpretations. So long as the Commission’s interpretation of the statute is within a range of possibilities, even though it may be viewed by some as not being the most desirable, it will be accorded great weight.

7. The Commission, therefore, concludes the following based upon its interpretation of s.475.42(1)(d), *Fla. Stat.:

a) That Coldwell Banker, through its broker, may give written authorization to its office managers in each of its offices statewide to have commissions disbursed by closing agents directly to its salespersons.

b) The office manager may then, upon the written authorization of the Coldwell Banker broker, give written authorization to the closing agent to disburse commissions to Coldwell Banker’s salespersons.

c) The written authorization from the office manager to the closing agent shall identify the specific transaction, identify the salespersons entitled to disbursement and identify the specific amount the closing agent is to disburse to each salesperson. The written authorization shall be signed by the office manager.

d) In the alternative to the office manager giving the specific written authorization, the broker may do so in the manner described in paragraph (7)(c) immediately above.

e) The disbursement will occur only after the transaction has closed.
8. There is competent substantial evidence to support the Commission’s Findings of Fact and Conclusions of Law.

WHEREFORE, the Florida Real Estate Commission approves the Petition for Declaratory Statement and, further, it is the opinion of the Florida Real Estate Commission that Coldwell Banker may by written authorization request that a closing agent disburse commissions directly to its salespersons following the closing of the transaction.

This Declaratory Statement constitutes final agency action. A party who is adversely affected by this Order may seek judicial review pursuant to s.120.68, Fla. Stat. Proceedings for judicial review may be initiated by filing a Notice of Appeal pursuant to Rule 9.110, Florida Rules of Appellate Procedure, with the Clerk of the Department of Business and Professional Regulation, and by filing a copy of the Notice of Appeal, accompanied by the applicable filing fees, with the appropriate District Court of Appeal. The Notice of Appeal must be filed within thirty (30) days of the date upon which this Declaratory Statement is filed with the Clerk of the Department of Business and Professional Regulation.

DONE AND ORDERED this 8th day of Feb. 1999 in Orlando, Florida.

[Signature]
Ana Tangel-Rodriguez
Chairperson, Florida Real Estate Commission
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was sent by U.S. Mail to: Peter M. Kramer, Esquire, Steel Hector & Davis, L.L.P., 200 South Biscayne Boulevard, Suite 4000, Miami, FL 33131-2310; Donna E. Blanton, Esquire, Steel Hector & Davis, L.L.P., 215 South Monroe, Suite 601, Tallahassee, FL 32301-1804; and a copy provided to James R. Mitchell, Assistant Attorney General, 400 West Robinson Street, Suite 107 South Tower, Orlando, FL 32801, this 17th day of Feb. 1999.

[Signature]

Brandon M. Nichols
Pursuant to section 120.565, Florida Statutes, and Rule 28-105.002, Florida Administrative Code, NRT, Incorporated and Coldwell Banker Residential Real Estate, Inc. file this Petition for a Declaratory Statement and state:

Name:

1. The Petitioners' names are NRT, Incorporated and Coldwell Banker Residential Real Estate, a California corporation. NRT, Incorporated owns Coldwell Banker Residential Real Estate, which operates in Florida as Coldwell Banker Residential Real Estate, Inc. and is a registered broker in Florida. Petitioners will be collectively referred to as "Coldwell Banker."

Address, Telephone and Facsimile Numbers:

2. NRT, Incorporated's address is 27271 Las Ramblas, Mission Viejo, California 92691. Its telephone number is 714-367-2636, and its facsimile number is 714-367-3887. Coldwell Banker Residential Real Estate, Inc.'s address is 3040 Universal Boulevard, Weston, Florida 33331. Its telephone number is 954-385-8100, and its facsimile number is 954-385-0287.

Attorney's Name, Address, and Telephone and Facsimile Numbers:

3. Coldwell Banker's attorneys are Peter M. Kramer and Donna E. Blanton of Steel Hector & Davis LLP. Steel Hector & Davis' address is 215 S. Monroe St., Suite 601, Tallahassee, Florida 32312. Its telephone number is 850-222-2300, and its facsimile number is 850-222-8410.
Statutory Provisions, Agency Rules, or Agency Orders on Which the Declaratory Statement is Sought.

4. The statutory provision at issue in this petition is section 475.42(1)(d), Florida Statutes (1997). This provision provides:

No salesperson shall collect any money in connection with any real estate brokerage transaction, whether as a commission, deposit, payment, rental, or otherwise, except in the name of the employer and with the express consent of the employer, and no real estate salesperson, whether the holder of a valid and current license or not, shall commence or maintain any action for a commission or compensation in connection with a real estate brokerage transaction against any person except a person registered as her or his employer at the time the salesperson performed the act or rendered the service for which the commission or compensation is due.

Description of How Statutes, Rules, or Orders May Substantially Affect the Petitioner in the Petitioner's Particular Set of Circumstances.

5. Coldwell Banker, as a registered broker in Florida, is subject to chapter 475, Florida Statutes, and the rules and orders of the Florida Real Estate Commission ("FREC"). Coldwell Banker has 78 branch offices in Florida. At each of these offices, Coldwell Banker has entered into independent contractor agreements with licensed real estate salespersons ("salespersons"). Each salesperson is entitled to receive compensation from Coldwell Banker in return for a certain level of involvement in various real estate transactions, including purchases and sales of real property. Currently, Coldwell Banker collects all commissions that it is entitled to receive at the closing of the transaction. Following the closing, Coldwell Banker disburses appropriate payments to salespersons in accordance with the independent contractor agreement between each salesperson and Coldwell Banker.
6. Coldwell Banker desires to change its method of compensating salespersons and seeks a declaratory statement from FREC that its proposal, as outlined below, is consistent with section 475.421(d), Florida Statutes.

7. Coldwell Banker proposes to direct the closing agent, following the closing of the transaction, to distribute a portion of Coldwell Banker’s commission directly to the salesperson who is entitled to receive such compensation in accordance with the independent contractor agreement between the salesperson and Coldwell Banker. The remainder of the commission would be distributed to Coldwell Banker. These directions to the closing agent, as well as the precise amount due the salesperson as calculated by Coldwell Banker, would be conveyed through a written document signed by a Coldwell Banker office manager. No distribution of commissions would occur until after the closing of the transaction.

8. Coldwell Banker believes this method of compensating its salespersons is consistent with section 475.421(d), which provides in relevant part:

No salesperson shall collect any money in connection with any real estate brokerage transaction, whether as a commission, deposit, payment, rental, or otherwise, except in the name of the employer and with the express consent of the employer.

(Emphasis supplied). The commission would be Coldwell Banker’s, but a portion of it would be distributed -- at Coldwell Banker’s direction -- to the salesperson following the closing. Nothing in section 475.421(d) prohibits Coldwell Banker from directing the closing agent to distribute all or a portion of Coldwell Banker’s commission to a salesperson; indeed, the language “with the express consent of the employer” specifically contemplates such instructions.
9. Florida case law construing section 475.42(1)(d) poses no obstacle to Coldwell Banker's proposal. Courts have made clear that a salesperson cannot enter into a contract directly with a customer to receive a commission in the salesperson's name, even if the salesperson's interest is subsequently assigned to a broker. *Campbell v. Romsh Bros. Inc.*, 132 So. 2d 466, 468 (Fla. 2d DCA 1961). A court also has held that a real estate salesperson is statutorily prohibited from maintaining any action to recover a commission against any person except a person registered as the salesperson's employer at the time the salesperson performed the act or rendered the service for which the commission is due. *Bargar v. Kicklighter*, 538 So. 2d 950, 951 (Fla. 2d DCA 1989). Neither case affects Coldwell Banker's proposal. Unlike in *Campbell*, Coldwell Banker proposes that it, as a broker, will have the only commission contract with the client. Further, Coldwell Banker does not seek an interpretation of the statute that would allow the salesperson to sue the client. Indeed, the plain language of section 475.42(1)(d), Florida Statutes, expressly prohibits such suit:

> ... [N]o real estate salesperson, whether the holder of a valid and current license or not, shall commence or maintain any action for a commission or compensation in connection with a real estate brokerage transaction against any person except a person registered as her or his employer at the time the salesperson performed the act or rendered the service for which the commission or compensation is due.

10. Coldwell Banker acknowledges that FREC has previously considered issues relating to payment of commissions to salespersons. At a meeting of FREC on December 5, 1990, commissioners *appeared* to informally agree that (1) a closing agent may not make a commission check payable to a salesperson even with the consent and knowledge of the broker; (2) a closing agent may not make a check payable to both the broker and the salesperson, even if the salesperson believes the broker will not pay him or her; and (3) even if a title company acting
as closing agent is owned by the broker, the title company may not make a commission check payable to a salesperson of the broker. Thus, FREC's position seemed to require that commissions are payable in all cases only to the broker, and commission checks must be solely in the broker's name. An informal discussion at the FREC meeting on February 20, 1991, appears to confirm this position.

11. Various memoranda and letters from FREC's counsel, James R. Mitchell, briefly outline these FREC positions. See Memorandum from James R. Mitchell to Fred H. Wilsen, Jack King, and Darlene Keller, "FREC's position on various issues," December 6, 1990 (attached as Exhibit 1); Letter from James R. Mitchell to Randy Schwartz, December 6, 1990 (attached as Exhibit 2); Memorandum from James R. Mitchell to Fred Wilsen, Darlene Keller, and Jack King, "FREC's position on various issues," February 21, 1991 (attached as Exhibit 3).

In order to understand FREC's reasoning on issues relating to payment of commissions to salespersons, undersigned counsel obtained all fifteen audiotapes of FREC's meetings on December 5 and 6, 1990, and February 19 and 20, 1991. All of the discussion on the issues outlined above that was found on these tapes is attached as Exhibit 4.

12. The transcript at Exhibit 4 demonstrates that FREC took no testimony, heard from no witnesses, and took no formal vote on any of the commission payment issues. FREC members did not discuss the language of section 475.42(1)(d) and how it affected the issues under discussion. FREC's discussion is extremely informal, with only two or three commissioners even participating in the decision-making process. The members involved in the discussion do not even outline any reasons for the positions they take or explain why the results they reach are appropriate or consistent with the express language of section 475.42(1)(d).
13. Coldwell Banker respectfully suggests that FREC's positions on payment of commissions as outlined in Mr. Mitchell's correspondence of December 5, 1990, and February 21, 1991, should be reconsidered. Section 475.42(1)(d), Florida Statutes, does not require that commission checks be made payable only to brokers. Indeed, the language in the statute referring to "express consent of the employer" contemplates that a broker may direct someone else to pay a commission to a salesperson.

14. Section 475.001, Florida Statutes, states that the legislative intent of chapter 475 is to "protect the public from potential economic loss." Further the Florida Supreme Court found that the Legislature intended to protect the public from the "unethical or substandard conduct" of persons in the real estate profession through the language of chapter 475. Florida Real Estate Comm'n v. McGregor, 336 So. 2d 1156, 1158-59 (Fla. 1976); see also Central Fla. Invs., Inc. v. Kott, 579 So. 2d 750, 752-53 (5th DCA 1991) (noting that chapter 475's intent is to protect the public from economic loss as well as to prevent real estate personnel from "fraudulently or improperly dealing with the property of others"). Nothing in Coldwell Banker's proposal undermines chapter 475's explicit intent to protect the public, and nothing in the proposal presents any risk to the consumer.

15. Similarly, nothing in Coldwell Banker's proposal undermines the presumptive intent of section 475.42(1)(d), Florida Statutes, which is to prevent unscrupulous salespersons from obtaining and keeping commissions intended for the broker and to prevent salespersons from filing claims in their own names against the principals of a transaction. Coldwell Banker proposes that instructions to the person conducting the closing concerning the commission payment be in writing and signed by a Coldwell Banker office manager. The only risk involved
is to Coldwell Banker, which as the broker entitled to the commission, chooses to direct that a portion of it be distributed to someone else. Coldwell Banker is comfortable that, through its contractual agreements with closing agents, adequate safeguards are in place to ensure that all commissions will be properly distributed as Coldwell Banker directs.

16. The interpretation of section 475.42(1)(d) that Coldwell Banker seeks would promote the interests of both Coldwell Banker and its salespersons. Coldwell Banker will save substantial unnecessary expense if salespersons can receive checks directly from the closing agent following a closing. Salespersons also would benefit as they would not incur the delay in payment inherent in the current system. These benefits easily can be accomplished without adversely affecting the policies behind the statute.

17. Coldwell Banker believes issuance of a declaratory statement in response to this petition is appropriate. As recently noted by the First District Court of Appeal, the purpose of a declaratory statement is to address the applicability of a statutory provision or an order or rule of the agency in particular circumstances. Chiles v. Department of State, Division of Elections, 711 So. 2d 151, 154 (Fla. 1st DCA 1998). The issues raised in a declaratory statement petition no longer need be unique to the petitioner, as changes to section 120.565, Florida Statutes, in 1996 now allow agencies to issue declaratory statements even if those statements apply to persons other than the petitioner. Id. An agency’s response to a declaratory statement petition “may offer useful guidance to others who are likely to interact with the agency in similar circumstances.” Id. at 155. Thus, issuance of a declaratory statement petition is appropriate even if FREC’s response to Coldwell Banker’s petition affects other similarly situated brokers.
For the reasons expressed, Coldwell Banker respectfully requests that FREC issue a declaratory statement in response to this petition finding that section 475.42(1)(d), Florida Statutes, does not prohibit a salesperson from (1) receiving his or her commission payment directly from the closing agent, (2) following the closing of a transaction, (3) upon written instructions from Coldwell Banker to the closing agent.

Respectfully submitted this 9th day of October, 1998.

[Signature]

Peter M. Kramer, P.A.
Donna E. Blanton, Esq.
Steel Hector & Davis LLP
215 S. Monroe Street
Suite 601
Tallahassee, Florida 32301
850-222-2300 (phone)
850-222-8410 (fax)
December 6, 1990

MEMORANDUM

TO: Fred H. Wilsen, Jack King, Darlene Keller
FROM: James R. Mitchell, Assistant Attorney General
RE: FREC’s position on various issues

As a result of various issues coming before the Commission at its December 5, 1990 meeting, please be advised of the following positions being taken by the Commission:

1. The Commission reaffirmed the position that a broker may pay directly to an inactive salesman or a salesman registered with a new broker, the salesman’s share of a commission when same was earned with the first broker. The payment need not go through the salesman’s new broker.

2. A closing agent may not make a commission check payable to a salesman even with the consent and knowledge of the broker. The check must be payable to the broker.

3. A closing agent may not make a commission check payable to both the broker and salesman, even if the salesman believes the broker will not pay him. The check must be in the broker’s name only.

4. Two salesmen, who work for the same broker, may not pay or share a commission between them. All commissions must be paid by the broker to each salesman.

5. Even if the title company is owned by the broker, the title company may not make the commission check payable to a salesman of the broker. As with numbers 2 and 3 above, the check must go to the broker.

6. A first name only on a yard sign or in an ad is not acceptable. The licensee’s first and last name must appear.
7. If an "after hours" or "home phone" number is used in the ad or on the yard sign, the number must be identified as such.

Please see that the appropriate individuals, i.e. DRE attorneys, investigators and complaint analysts, are advised of the FREC's position on these various issues. Appropriate investigation and disciplinary action should be pursued in conformity to the above.

If you have any questions or require clarification, please see me.

cc: Manny Oliver
    Joselyn Price
    Mary Bizzini
December 6, 1990

Randy Schwartz
Vice President of Legal Services
Florida Association of Realtors
Post Office Box 725025
Orlando, Florida 32872-5025

Dear Randy:

At the December 5, 1990, FREC meeting, several issues came up which I think you will find interesting and helpful:

1. The Commission reaffirmed the position that a broker may pay directly to an inactive salesman or a salesman registered with a new broker, the salesman’s share of a commission when same was earned with the first broker. The payment need not go through the salesman’s new broker.

2. A closing agent may not make a commission check payable to a salesman even with the consent and knowledge of the broker. The check must be payable to the broker.

3. A closing agent may not make a commission check payable to both the broker and salesman, even if the salesman believes the broker will not pay him. The check must be in the broker’s name only.

4. Two salesmen, who work for the same broker, may not pay or share a commission between them. All commissions must be paid by the broker to each salesman.

5. Even if the title company is owned by the broker, the title company may not make the commission check payable to a salesman of the broker. As with numbers 2 and 3 above, the check must go to the broker.

6. A first name only on a yard sign or in an ad is not acceptable. The licensee’s first and last name must appear.

7. If an “after hours” or “home phone” number is used in the ad or on the yard sign, the number must be identified as such.
8. The Commission has asked for a draft of the previously rejected rule change whereby the salesman's commission must be placed in and paid out of the escrow account. This will probably be considered by them in January, at least for discussion purposes.

9. The Commission has asked for a rule draft prohibiting brokers from receiving the interest on interest bearing escrow accounts.

10. Finally, questions arose regarding some new rules or interpretations by the FDIC regarding funds in an escrow account and the $100,000 insurable amount. I am going to research this. If you know of any changes, please contact me.

As you can see, we had a very busy day. Feel free to circulate the Commission's positions on the above issues to your attorneys. If you want to discuss or clarify anything, give me a call.

Yours truly,

James R. Mitchell
Assistant Attorney General
Counsel for Florida Real Estate Commission

JRM: pb
February 21, 1991

MEMORANDUM

TO: Fred Wilsen, Darlene Keller, Jack King
FROM: James R. Mitchell, Assistant Attorney General
RE: FREC's Position on various issues

At its meeting of February 21, 1991, the Commission made the following rulings or clarifications of previous rulings:

1. The Commission reaffirmed the position taken at the December 5, 1990, meeting wherein it was stated that a commission check may only be payable to the broker, not the salesman. See items 2, 3 and 5 of my December 6, 1990 memo.

2. The Commission reaffirmed the position taken on after hours or evening telephone numbers. As stated in the December 6, 1990 memo, such numbers, when used in an ad or on a yard sign, must be identified as being "after hours", "evening", "weekend" or some other identifying word or phrase.

3. The Commission ruled that while a first name only in an ad is not acceptable i.e. last name must be used, the use of an initial in place of the first name is acceptable.

The Commission appears to be against the use of nicknames but will be revisiting this in March, 1991. Stay tuned.

4. In interpreting Rule 21V-14.012, Florida Administrative Code, the Commission ruled that if a computer is used to perform the monthly reconciliation, a hard copy must be printed and then reviewed, signed and dated as required in paragraph (2) of the cited rule.

If you have any questions or comments, see me.

cc: Manny Oliver
    Joselyn Price
    Mary Bizzini
FLORIDA REAL ESTATE COMMISSION HEARING DECEMBER 5, 1990
(TAPE 12)

Female
Voice: Twenty three B The question is if a salesman or a broker salesman is working together with another salesman in the office or maybe even employs that salesman and pays him a portion of the commission, does that go back to the broker?

Voice 2: My way of thinking, just in quick response, is that the employing entity brokerage, technically, could be an individual with a builder. Always has to be the person paying to the licensee. Does anyone disagree with that?

Voice 1: I have a serious problem with it being done any other way.

Voice: Specifically though it would be an agreement within the office on what that would be.

Voice 2: If they can't reach an agreement than they have to go on without it.

Voice 1: You can take that one step further. Let's say the broker is holding this arrangement. Can he simply give his consent now that he has knowledge of it and say 'okay, it no big deal, it is okay with me if you give 10% of your . . .'

Voice 2: As long as the broker is doing the 10%.

Voice 3: [unintelligible]

Voice 1: That is what I am asking. I don't know if you will want that done.

Voice 2: [unintelligible]

Female
Voice: For IRS purposes, you know reporting 1099s . . .

Voice 2: Otherwise, the salesman is operating as a broker.

Voice 3: Can we take another angle on this? What about a closing agent cutting a check directly to its salesman, in the salesman's name with, again, the consent and knowledge of the broker?
Voice 2: No.

Voice 1: No.

Voice 3: What about in a situation where a salesman believes that the brokers are not going to pay him, the closing agent cutting a check in the name of the broker and the salesman? I have actually had that asked of me by an attorney. I didn't have an answer for him.

Voice 2: Yeah. I think it has been done at one time.

Voice 1: Well, I don't like that.

Voice 2: Well, no because that would assume that it is a 50/50 split, then.

Voice 3: Well, what he is trying to do is avoid litigation.

Voice 2: The check is not negotiable by either one.

Voice 1: I still have a problem with that.

Voice 2: I do too. I don't like that.

Voice 1: Finally, the scenario where you have, you know, we have no problem with the broker paying to an inactive salesman directly, wherever he may be.

Voice 2: Right.

Voice 3: Right.

Voice 1: Assuming he earned it under proper conditions.

Voice 2: Yeah, yeah, he's earned it.

Voice 1: Exactly.

Voice 2: Whatever conditions were agreed upon between the salesmen and the broker.

Voice 3: Exactly.

Voice 2: And he was active at that time when the conditions were agreed upon.

Voice 1: Right. Yes.
Voice 2: Okay, I am understanding what you are saying.

Voice 1: What about the situation where you got salesmen earning commission from Broker A, but before the payment of the commission he moves over under Broker B. Pay it directly to the salesman or let it go through _________.

Voice 2: Yes. Just as if he had gone inactive, that doesn't change what was earned.

Voice 3: I have always gone on the basis of what was the status at the time earned.

Voice 1: That person pays him, that is what we thought.

Voice 2: The other questions is that if actually that must be paid by the broker, and the salesman sharing with the salesmen.

Voice 3: You are encroaching on her time, you know. [laughter]

Voice 3: Well, Manny.

Voice 4: Mr. Sherman.

Voice 3: Yes sir.

Voice 4: In this last case, I think we had Jenny call the broker and file for ________ commissions being due to the office. Now if the commission is paid to the office, what about the salesman that was involved with that, is he entitled to a commission, well, in that specific case, can the broker allow the payment of checks so that the salesman can get his share and what the broker was supposed always is what __________ the bankruptcy case.

Voice 2: You realize what he is talking about. Oh, yeah.

Voice 1: Wouldn't that be in the position of the Judge in the Bankruptcy Court to decide that.

Voice 3: I was going to say that the bankruptcy court who would go against that would make the salesman a preferred creditor.

Voice 2: Let me interject a thought here.

Voice 3: I can't remember. I discussed it with Darlene and I can't remember where we left it. One of the things we might want to consider is that, and this has been brought up before, Bill Watson objected to it heavily I understand. I think in light of the
Statler situation it adds credence to the fact that maybe all salesman, as well as co-
brokers should be paid out of escrow so that funds are under the protection of 
escrow entitled for other parties and only the company dollar goes from escrow to 
the company. And, again as I said I understand that there was a rule drafted in the 
past, and it was defeated because of the cry from at least one broker I am aware of 
and I don’t know of others who complained, but, I tell you, if the Statler situation 
doesn’t open everyone eyes to those potential problems, I don’t know what will.

Voice 2: By the way on the Statler situation in review of my handbook it seems that the 
bankruptcy situation does in fact affect listing and brokers. It terminates a listing.

Voice 1: You have the chapter verse on that?

Voice 2: No. That is an attorney who wrote that. It is his interpretation, which by the way, 
is endorsed by most of the attorneys I talked to around the state.

Voice 3: So, I mean there was some confusion here in regards to this, because that was a 
very important part, because now all of a sudden our interpretation was before that 
listings went with the brokerages office and after reviewing the handbook I looked 
at it and thought holy mackerel, bankruptcy terminates listings.

Voice 1: Yes, I know. I was one of their proverbial fans. But back to you and to hear 
clear. What are you saying.

Voice 2: What I am saying is that it appears to be a good interpretation of the outside 
looking in. The Trustee for bankruptcy Statler has taken the opposite position. 
That these are assets of a corporation and thus far we have not had the bankruptcy 
court rule on it. We are hoping that it comes to a head and is forced to that. We 
have never had a court say that.

Voice 1: And it is not our position to decide that.

Voice 3: No, it is our position to decide that. This is civil law and/or bankruptcy law and 
needs to decide the issues.

Voice 1: But for the purposes of education, it is.

Voice 3: Well, as soon as the court decides ... we can do something about that.
Voice 1: This is one issue that most attorneys in the outside will agree on, that yeah they terminated upon bankruptcy, there are more attorneys across the state that are crying that right now. The trustees are saying the opposite and until somebody challenges them and they try to mount that challenge...

Voice 2: So, what are we going to do?

Voice 3: I still stand by the comment that is prudent, because he works for the bankruptcy court.

Voice 1: That is true.

Voice 2: Before we leave that drafting of a rule about a salesman being paid out of a broker's escrow account, if in fact we are asking for that, keep in mind the brokers that don't maintain escrow accounts and then allowing the closing agent that flexibility per direction of the employer of cutting two checks at closing.

Voice 3: That is a good point. I don't know how that would be probable...

Voice 2: He is cutting two checks. One to the broker and one to the salesman out of the trust account.

Voice 3: Out of the closing agent's trust account.

Voice 2: Well that is the question that I ask.

Voice 1: No, no, but I am saying though that if we are to go prior to someone telling about a rule...

Voice 2: Oh, in other words, saying that is okay.

Voice 1: Well, maybe not okay. But I'm saying that we would have to consider...

Voice 3: We would have to consider what happens when the broker does not have an escrow account.

Voice 2: We would reconsider how we answered your question earlier.

Voice 3: Maybe we have to draft it in such a way that that makes sense.

Voice 2: Larry, I'm sorry, you had your hand up.
Larry: Many brokers are heading in the direction of diversifying and adding the latest services to their businesses. This initially made reference to final company issues. If I may ask what if? What if the broker owns a title company and is authorized in writing that the title company can disperse that person a commission check to the agent with ________ coming back to the broker?

Voice 3: Well, based on what we just answered you, the answer is 'no.'

Voice 2: Yeah, we would like to believe that that would be okay, but, they have indicated otherwise.

Voice 1: Not even if the broker owns the title company.

Voice 3: Let me do this so that we don't get bogged down in this because it is a lengthy debate and it has a lot of ramifications. Does everyone feel that we ought to revisit the issue of brokers paying salesmen out of escrow because of these circumstances? Is there anybody who disagrees with that concept?

Voice 1: I'd just like to see staff possibly, or whoever the proper authority is, maybe give us some...

Voice 3: Yeah, we are not approving it right away anyhow. We'd have to go through a long process, so then if there is no objections, I will ask both Jim and Darlene and Gregg and whoever else needs to work on this...

Voice 1: Either that or mandating the escrow accounts for all brokers.

Voice 3: I think that they can come up under that conversation. Let's take a look at what you have drafted or whoever drafted in the past. There is a long ways to go before we hammer out all the details rather than give into it now. And, maybe we will come up with another alternative for paying sales people.

Voice 1: Good.

(TAPE 14)

Voice 1: Something that came up in probable cause yesterday. Mr. Wilson made the comment that he was not going to pursue the claims against individuals who were being paid, where a title company, for example, made the check out directly to the salesman and the broker sat there and said make the check out that way. Do you remember that yesterday?

Voice 2: I didn't hear that.
Voice 1: If you remember, in December, you ruled that the commission checks had to be payable to the broker, period, end of story. You even brought the scenario of what if the broker owned the title company. Could he instruct himself to make the check out to the salesman? No. It had to be made out to him as broker. That's the extreme to which it was brought. I don't know what happened yesterday in PC. _____________. Mr. Wilson has stated that he's just simply not going to—he does not have the authority for that—he is not going to follow it. In so many words. Now, do we send a directive to Mr. Wilson? Does he mean business or do we reconsider what we're talking about so that the broker sitting there says to the title agent you've got my consent and my authorization to make the check payable to the salesman, is that really wrong or do you want to stick by your guns?

Voice 2: I'll take a firm stand as one on that one that compensation must be paid through the employer. That's my back up on that one.

Voice 3: Is the broker an employer?

Voice 2: Well, they have to, and the law is 475, states employee/employer, regardless of the independent contractor status.

Voice 3: That is only, though, for tax purposes. And the only way you're ever going to track it is by a paper trail.

Voice 2: Right.

Voice 3: If you start allowing this verbal, oh, yes, we gave permission, then one minute they'll be sitting there at the closing table, the next minute they're in Colorado skiing, and there's a convenience by phone call.

Voice 1: I'll refresh your memory. The Polatka case, where the title company hasn't been reimbursed yet for having to pay off the broker who instructed the title company to pay.

Voice 3: Forget it. Write a letter. The consensus of the commission is that we want it done that way.

Voice 1: How about a promissory note?

Voice 2: A promissory note, if it is given, must be given, I would say, through the employer because it's compensation. It may be signed or obligated by somebody else, but it needs to be—
Voice 4: ... commission in the name of the broker?

Voice 2: Oh, yes, ma'am. Yes, ma'am.

Voice 4: ... salesman...

Voice 2: Salesman... he's still entitled to it.

Voice 3: ... to pay for the estate.

Voice 1: It's not that difficult. I don't know why you're making it out--