

Approved: 4-27-95
Date

MINUTES OF THE HOUSE COMMITTEE ON FEDERAL AND STATE AFFAIRS.

The meeting was called to order by Chairperson Garry Boston at 1:30 p.m. on March 30, 1995 in Room 526-S of the Capitol.

All members were present except: Representative Les Donovan, Excused
Representative Ruby Gilbert, Excused
Representative L. Candy Ruff, Excused
Representative Ellen Samuelson, Excused

Committee staff present: Mary Galligan, Legislative Research Department
Lynne Holt, Legislative Research Department
Mary Ann Torrence, Revisor of Statutes
June Evans, Committee Secretary

Conferees appearing before the committee: Terry Hamblin, General Counsel, Kansas Racing Commission
Karen France, Kansas Association of Realtors
Jean Duncan, Director, Kansas Real Estate Commission

Others attending: See attached list

The Chairperson stated there would be hearings on **SB 124** and **SB 110**.

SB 124 Amending the Kansas Parimutuel Racing Act.

Staff gave a briefing on **SB 124**, stating the bill would extend terms of the Racing Commissioners from the current three years to four years. The bill would require that the governor designate the chair of the Commission. The bill also requires that the Governor appoint the Executive Director to work at the direction of the Racing Commission. The bill eliminates the position of Director of Racing Operations. The bill makes mandatory the fingerprinting of persons applying for licensure under the Act. The bill would permit appointees and employees of the Racing Commission, other than the Executive Director, to participate directly or indirectly as an owner, owner-trainer, or trainer of a horse or greyhound, or as a jockey of a horse, entered in a race that is simulcast into Kansas. The bill would add son-in-law, and daughter-in-law to the list of persons related to members, employees, or appointees of the Commission who are prohibited from certain types of involvement with licensees under the Act. The bill would require the Commission to appoint a minimum of three stewards or racing judges at each horse or greyhound race meeting, and specify that no more than three of those stewards or judges could be on duty at any one time at any racing performance. The bill would add to the Racing Act a definition of "racing week" to be any seven-day period beginning and ending as prescribed in rules and regulations of the Racing Commission. The bill would require that organization licensees, other than fair associations, licensed to display simulcast races conduct at least eight live races each day that live races are conducted and an average of at least ten live races per day during each racing week that live racing is conducted. The bill also would provide that if simulcast races are displayed during a racing week when live horse races are also conducted, the licensee could conduct fewer than the average of ten races during that racing week if: at least 80 percent of races on which parimutuel wagers are taken during that week are live races, the recognized horsemen's group approves; or the commission approves upon a finding that the licensee was unable to meet the 80 percent requirement for reasons beyond the control of the licensee. The bill would also amend existing law to change the provision for live greyhound races on days when races are also simulcast.

Staff distributed a memorandum on the selection and appointment of Executive Director of the Racing Commission and evaluation of other positions. (See Attachment #1)

Terry Hamblin, General Counsel to the Kansas Racing Commission, supporting **SB 124**, reviewed the changes in the bill. (See Attachment #2)

It was asked how many members were on the Commission, their salary, who appointed them, terms of office,

if they were staggered, and if any had been appointed by Governor Graves?

Mr. Hamblin stated, there are 5 members on the Racing Commission, the salary is \$2,000 per month plus expenses, the appointments have been changed from time to time, some by the Governor and some by the Commission, the terms of office are staggered and this bill would change the time from 3 years to 4 years and Governor Graves has appointed one Commissioner and 2 positions will expire on June 30 so he will appoint those two members.

It was asked what the salary of the Executive Director was? \$58,000.

Representative Packer requested that staff furnish information as to the number of tracks in Iowa, Oklahoma and Kentucky and what the compensation is in those states and a budget request of the racing commission.

Senator Lana Oleen gave the background of **SB 124** and said it would be on General Orders in the Senate on March 31 and Senator Ramirez would bring forth a balloon which includes **SB 379** and is asking for that bill to be amended into **SB 124**

Senator Sherman Jones commented there are some real problems and need to support Kansans and save all the jobs possible.

The Chairperson closed the hearing.

SB 110 - Act concerning real estate transactions, regulating agency relationships and enacting the brokerage relationships in real estate transactions act.

The Chairperson opened and hearing on **SB 110**.

Karen France, Director, governmental Affairs, Kansas Association of Realtors, testified in support of **SB 110**, stating the law of agency, as it applies to real estate agents has been a very difficult area for many years. The law of agency, as developed in English common law does not really reflect the relationships which exist between principals and agents in the real estate industry. Nonetheless, those concepts have been artificially imposed upon the industry. The goal is to codify and clarify existing case law into one document to serve both licensees and the public. (See Attachment #3)

Jean Duncan, Director, Kansas Real Estate Commission, proponent for **SB 110** distributed testimony but was unable to give testimony due to the time. (See Attachment #4)

The Chairperson closed the hearing on **SB 110**.

The meeting adjourned at 2:55 p.m. The Chairperson stated he did not know what the schedule would be so therefore did not know when hearings or final action would be taken, however, a meeting might be called at the Rail.

MEMORANDUM

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March 30, 1995

To: House Committee on Federal and State Affairs
From: Mary Galligan, Principal Analyst
Re: Selection and Appointment of Executive Director of the Racing Commission and Evaluation of Other Positions

This memorandum provides some historical background of appointments and positions at the Racing Commission.

Appointments of Executive Director

The following chronology of appointments of persons to be Executive Director of the Racing Commission was obtained from the Racing Commission:

November 3, 1989	Jim Grenz appointed by Governor Hayden
January 18, 1990	Dan Hamer appointed by Governor Hayden
February 25, 1991	Dana Nelson appointed by Commission
February 4, 1993	Janet Chubb appointed by Commission
January 3, 1995	Art Neuhedel appointed by Commission (resigned March 24, 1995)

Mr. Neuhedel was the only person who had served as acting Executive Director of the Commission.

History of Appointment Authority of Executive Director

The Parimutuel Task Force which was appointed by Governor Carlin to develop a draft act during the summer and fall of 1986 included draft language that would have had the Executive Director appointed by the Commission. According to the notes of the Task Force staff attorney, the genesis of that provision was the proposal submitted to the Task Force by Kansans for Parimutuel. Also according to the staff attorney's notes, that organization was a lobbying group composed of horse and dog owners and breeders, track developers, and existing track operators. The draft bill this group presented was prepared by attorney Jonathan P. Small.

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The Task Force presented its report to the Governor after the November 1986 election at which the voters approved the constitutional amendment authorizing parimutuel wagering. That draft also was presented to the Joint Committee on Federal and State Affairs prior to the start of the 1987 Legislative Session. The Joint Committee reviewed the draft and introduced a slightly modified version; however, the provision regarding appointment of the Executive Director remained as recommended by the Task Force.

During the 1987 Session, the Legislature worked on the bill (1987 H.B. 2044) and made significant changes to some portions. The House Committee on Federal and State Affairs amended the bill to require that the Governor (instead of the Commission) appoint the Executive Director of the Commission and that the appointment be subject to Senate confirmation (February 17 and 18, 1987). The minutes of committee meetings at which those amendments were offered do not reflect any discussion of the matter that might have transpired. Testimony presented to the House Committee prior to its amendment of the bill by representatives of Kansas Racing Charities, Inc. (according to written material, "a nonprofit corporation which was formed by former Congressman Larry Winn, Jr., for the purpose of becoming licensed to operate a racetrack facility in the State of Kansas . . .") advocated a full-time Commission paid \$75,000 annually with no Executive Director. The House Committee amendment to the introduced version of the bill was not subsequently changed as the bill went through the legislative process.

During the 1989 interim, the Special Committee on Federal and State Affairs held extensive hearings on the Parimutuel Racing Act and its implementation. However, neither the Committee report, nor the minority report, addressed the issue of appointment of the Executive Director.

In early February of the 1990 Session, Representative Deb Schauf introduced H.B. 2892 which would have required, among other things, that the Racing Commission nominate one or more persons from whom the Governor would make his or her choice for Executive Director of the Commission. The bill also would have required the Executive Director to "have experience in the horse and dog racing industries sufficient to fulfill the duties of the office . . ." That bill also would have made some other changes in staffing of the Commission.

Representative Schauf was a member of the House Committee on Federal and State Affairs during the 1990 Session and had experience in the racing industry. She was licensed by the Racing Commission as administrative support for the Greenwood Fair Association in 1989. She also was licensed as a horse owner/partner at the Greenwood Fair track and the Woodlands in 1990. Her involvement in the industry continued after she left the Legislature.

The 1990 Legislature had before it for consideration and action over 20 bills that would have amended the Racing Act. The House Committee assigned most of its bills to a subcommittee for consideration and amendment. That subcommittee recommended that the provision in H.B. 2892 regarding appointment of the Executive Director be amended to authorize the Commission to appoint that position and that the provision be amended into S.B. 428 which the Committee had before it. The Conference Committee on the bill did not make any changes to the appointment provision.

History of Appointments of Other Racing Commission Personnel

During the same legislative session, amendments to the Racing Act placed with the Executive Director authority to appoint the key enforcement personnel who had originally been appointed by the Commission. Each of the positions is unclassified and the 1990 amendments gave the Executive Director authority to establish the salary for those positions. Those positions are:

1-2

- Inspector of Parimutuels -- responsible for inspecting and auditing the conduct of parimutuel wagering by organization licensees, including the equipment and facilities used and procedures followed; and
- Director of Security -- responsible for conducting investigations relating to compliance with the provision of the Act and rules and regulations of the Commission; recommend proper security measures to organization licensees.

The 1990 bill created a new regulatory/enforcement position, Director of Racing Operations, which was to be responsible for: supervising racing operations, including stewards and racing judges, training stewards and racing judges; and advising the Commission regarding desirable changes in rules and regulations relating to conduct of races. Like the two positions discussed above, the Director of Racing Operations was an unclassified position the salary of which was to be set by the Executive Director. That position would be eliminated by enactment of 1995 S.B. 124 as amended by the Senate Committee on Federal and State Affairs. According to testimony presented to the Senate Committee by the current Executive Director of the Racing Commission, that amendment was suggested by the past chairperson of the Commission (Mr. Peltzer). Also according to that testimony, the position has never been filled.

So, at the same time the appointment of the Executive Director was shifted to the Commission, the authority of the Executive Director over implementation of the Act was broadened.

Examples of Appointments by the Governor -- Other Boards/Commissions/Councils

- **Bank Commissioner and Banking Board.** Both the Commissioner and the Board have statutory powers and responsibilities for regulation of the banking industry.
- **Credit Union Administrator and Credit Union Council.** Generally, the Administrator is the chief regulator of state chartered credit unions. The Council shares certain of the supervisory and regulatory responsibilities of the Administrator and, in addition, hears appeals from any finding, ruling, order, decision, or final action of the Administrator.

In both of these instances the Commissioner's and Administrator's regulatory and enforcement authority in statute is much more explicit than that of the Executive Director of the Racing Commission. However, the Racing Commission may delegate to the Executive Director authority necessary to implement and enforce the Act. Such delegation may result in the director having a more significant role in implementation of the act than one would glean from a simple reading of statute. Also, as discussed above, the appointment authority of the Executive Director gives that position significant influence over enforcement and implementation of the Act.

- **Healing Arts Board and Executive Director.** The Board is appointed by the Governor, but not subject to Senate confirmation. The Executive Director is appointed by the Governor, subject to confirmation. The Executive Director's powers and duties are: "under the supervision of the board, the Executive Director shall be the chief administrative officer of the board and shall perform such duties as may be specified by the board and as may be required by law" (K.S.A. 65-2878).

- **Lottery Commission and Executive Director of the Lottery.** Both the Commission and the Executive Director are appointed by the Governor subject to confirmation by the Senate. Previous discussions of the Lottery and the Racing Commission have highlighted differences between them as such differences pertain to regulation and enforcement. The Lottery is not a regulatory entity and to that extent is very different from the Racing Commission and other state entities that license and regulate industries or professions. Primary statutory authority to administer the agency and conduct the Lottery is placed with the Director. To that extent, the Governor's appointment of the Lottery director may be analogous to appointment of the head of any other nonregulatory agency.
- **Wildlife and Parks Commission and Secretary of Wildlife and Parks.** The Governor appoints both the Commission and the Secretary. The Secretary is subject to confirmation by the Senate, the board is not. The Commissioners who serve four-year terms and can only be removed by the Governor for cause, are not subject to Senate confirmation, but have a significant role in the rule making process: "Other than rules and regulations pertaining to personnel matters of the department, the secretary shall submit to the commission all proposed rules and regulations. The commission shall either approve, modify and approve, or reject such proposed rules and regulations. The secretary shall adopt such rules and regulations so approved or so modified and approved. Fees established for licenses, permits, stamps, and other issues of the department shall be subject to the approval of the commission." The Commission is also charged in statute to advise the Governor and the Secretary in formulation of policies and plans for the Department (K.S.A. 32-805).

The Kansas Corporation Commission might be another example of a regulatory entity with broad authority over an industry. The Corporation Commission presents another organizational scheme -- that of a full-time regulatory body that has both quasi-legislative and quasi-judicial powers, as does the Racing Commission, and administrative responsibilities. The chief administrative officer of the Commission, if it chooses to appoint one, is the Executive Director who also serves as Secretary to the Commission, who exercises authority delegated by the Commission. The Corporation Commission also is authorized to appoint the major division officers whose positions are unclassified. For this discussion, one important distinction between the Racing Commission and the Corporation Commission is the fact that members of the latter serve full-time. Presumably, that status is a major justification for placing the chief administrative officer in a subordinate position.

1-4

STATE OF KANSAS



KANSAS RACING COMMISSION

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STATEMENT OF THE
KANSAS RACING COMMISSION
Before the Kansas House of Representatives
Committee on Federal and State Affairs
The Honorable Representative Garry Boston, Chair
In Support of
SENATE BILL NO. 124
As Amended by the Kansas Senate
Committee on federal & State Affairs
March 30, 1995

Chairman Boston and Members of the Committee:

I am Terry Hamblin, General Counsel to the Kansas Racing Commission. Thank you for permitting me this opportunity to present the Kansas Racing Commission's proposed amendments to the Kansas parimutuel racing act, K.S.A. 74-8801, et seq., now pending before you in Senate Bill 124 as Amended by Senate Committee. The commission has considered each of the amendments in the bill before you during the course of several public meetings since the legislature's last meeting, particularly during several meetings this past fall. Turning to the proposed bill, Senate Bill 124, the commission requested the following amendments to the racing act:

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On page 1 of the bill at line 11 KSA 74-8805 has been inserted as one of the statutes being amended by Senate Bill 124 to to reflect amendments added by the Senate Committee in Section 4 of the bill commencing on page 7 at line 43.

SECTION 1 of the bill commencing on page 4 at line 15 makes changes to K.S.A. 74-8802 by adding a new subsection (dd) defining the term "racing week".

This amendment was originally requested by the Eureka Horsemen's Association and the Greenwood County Fair Association to provide the commission with greater flexibility in setting the beginning and ending dates of fair association race meets by permitting the commission to determine a "racing week" by rules and regulations. Under the prior law a fair association would not be able to open in 1995 on the Saturday of the Kentucky Derby and race through the 4th of July holiday without exceeding the nine week limitation on fair association race meets. By redefining a "race week" as beginning on Saturday and ending on Friday instead of a calendar week as in the prior law it would be possible to include both the Kentucky Derby Day and the 4th of July within the nine weeks that the Eureka fair race meet is permitted to run.

2-2

The remainder of the changes to K.S.A. 74-8802 in Section 1 of Senate Bill 124 merely reflect the renumbering of existing statutory sub-paragraphs.

SECTION 2 of the bill commencing on page 5 at line 19 subsection (d) amends K.S.A. 74-8803 to extend the terms of racing commissioners from three to four years.

Over the course of time various commissioners have expressed the feeling that the three year term barely gave them time to get up to speed on the learning curve before their term expired and they either were faced with reappointment or for various reasons left the commission. The general feeling of the commission is that a four year term would better benefit the state by better utilizing the knowledge and experience gained by commissioners during their first year or two on the commission. A comparison of terms for racing commissioners in other states reveals that terms vary in length from three (3) years in Iowa to seven (7) years in Oklahoma. This amendment would put Kansas more in line with the majority of other racing jurisdictions. The Senate Committee added clarifying language to provide that the new four year terms applied only to commissioners appointed or reappointed after July 1, 1995.

On page 5 of the bill commencing at line 33 the Senate Committee inserted language in subsection (g) to provide that the governor shall designate one of the commissioners to act as chairman of the commission and striking the reference to terms of the chairman.

SECTION 3 of the bill commencing on page 8 at line 11 subsection (n) amends K.S.A 74-8804 to make fingerprinting of applicants for commission licenses mandatory as opposed to discretionary as the law now exists.

This amendment is necessary to comply with Federal Public Law 92-544 per notification received by former Attorney General Bob Stephan from the U.S. Department of Justice Federal Bureau of Investigation on June 22, 1994. Without this amendment the Feds have served us warning that they will eventually cut off our ability to run background investigations through the FBI fingerprint system.

SECTION 4 of the bill amends K.S.A. 74-8805 commencing at line 1 of page 9 to provide that the governor will appoint the executive director to serve at the pleasure of the governor and under the direction and supervision of the commission.

The racing commission expressed reservations about this provision fearing that the executive director

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might not be held accountable to the commission in a pure governor appointment scenario. The language providing for direction and supervision by the commission was a compromise by the Senate Committee in part to allay those concerns.

On Page 10 of the bill commencing at line 19 the Senate Committee struck out the provisions of K.S.A. 74-8805(d) relating to the director of racing.

This proposed amendment was made at the request of the chair of the Senate Committee. This position has never been filled at the racing commission and the House appropriations committee has deleted both the funding and the FTE for this position from the commission's budget. This was considered by the commission and at least one commissioner expressed disfavor with deleting this position from the statute. When the Senate Committee met to take final action on this bill there was some discussion about putting the position back into the statute. After one committee member opined that the legislature could put it back in whenever it wanted the committee moved the bill out without taking any further action on the position. Since the time that this bill passed the Senate, the Senate Ways & Means Sub-committee on the racing commission's budget has expressed concern over deleting this position. The commission has not had an opportunity to discuss this matter further but I believe that in light of recent

developments at the racing commission this committee as well as the Senate may want to revisit the matter of the director of racing position.

The reason that the position has never been filled is that the 10 years of experience in racing operations requirement is too great for the level of salary that the commission has been budgeted for the position. People within the industry with the number of years of racing operations experience that were required were already making several thousand dollars more per year than the commission could offer. When the commission recruited to fill the position the applicants were either unable to meet the ten year experience requirement or were uninterested in the job after finding out what the compensation range was.

SECTION 5 (formerly 4) of the bill commencing on page 11 at line 25 and continuing in subsection (c) commencing at line 33 amends K.S.A. 74-8810(b)(2) and (c) to make clear the prohibition against commissioners or the executive director of the commission participating in racing in-state or out-of-state. The insertion of the word "live" on line 25 of subsection (b)(2) would permit certain employees and appointees of the commission to own racing animals that might participate in races conducted outside the state but simulcast back into the state. These

persons are permitted to own and race such animals under current law but could be in technical violation of the existing law if a race in which one of their animals happened to be simulcast into Kansas. The amended language would clarify that the prohibition applies only to races run live in this state.

Continuing on with Section 5 of the bill commencing at line 38 on page 11 at subsection (d) you will find a technical amendment to K.S.A. 74-8810 on lines 40 and 41 which the commission believes corrects an oversight in the original legislation which prohibited a number of categories of in-laws from holding commission issued licenses but apparently left out sons-in-law and daughters-in-law.

The remainder of the amendments in Section 5 of the bill commencing on page 12 at line 4 through the end of Section 5 on page 15 at line 1 merely reflect the renumbering of subparagraphs to reflect the foregoing amendments.

SECTION 6 (formerly 5) of the bill commencing on page 15 at line 3 amends K.S.A. 74-8818 (a) to clarify the number of racing stewards or judges that the commission is required to employ for each racing facility and provides the commission with greater flexibility in scheduling working times for stewards and judges.

2-7

Recent adverse fair labor standards act rulings in the area of employee over-time make this change necessary to avoid excessive over-time problems and to ensure that alternate judges have sufficient time available for training.

The language inserted at line 10 on page 15 clarifies the chain of command. It has been the actual practice of the commission more or less since its inception to delegate direct supervision of the stewards and racing judges to the executive director. This language merely codifies and grants specific statutory authority for what is presently being done.

Moving down now on page 15 to line 29 subsection (b) amends K.S.A. 74-8818(b) to permit commission employees who are qualified to do so to serve as a racing judge or steward on a temporary basis without the necessity of obtaining a judges or stewards occupation license. Commission employees are generally prohibited from holding occupation licenses issued by the commission. The only exception to this prohibition is for racing judges and stewards who must be so licensed. Present law places otherwise qualified employees of the commission who may be needed to fill in on an emergency basis as a judge or steward in a catch 22 situation. They can't act as a judge or steward because the don't have a license and they can't

2-8

get a license because they are an employee of the commission.

SECTION 7 (formerly 6) of the bill commencing on page 17 at line 7 through line 20 amends K.S.A. 77-8836(b)(1) to permit a "full card" of simulcasting when less than the minimum of ten (10) scheduled live horse races or thirteen (13) scheduled live greyhound races per day are unable to be conducted due to circumstances outside the control of an organization licensee.

This amendment was requested by Woodlands' management and discussed at length with representatives of the effected owner's organizations. The language submitted here is the result of those discussion resulting in a compromise reached at a meeting between Woodlands' management, horsemen's group representatives and commission staff held at the Woodlands on October 19, 1994.

The remainder of the amendments in Section 7 commencing on page 17 at line 27 subsection (2) reflect changes necessitated by the addition of a definition of "racing week" to K.S.A. 74-8802 as previously discussed.

SECTION 8 (formerly 7) commencing on page 21 at line 32 amending K.S.A. 21-3612(a)(2); SECTION 9 (formerly 8) commencing on page 22 at line 29 amending K.S.A. 38-1502(a)(7); and SECTION 10 (formerly 9)

2-9

commencing on page 25 at line 22 amending K.S.A. 38-1602(b) all reflect changes in statutory cross references necessitated by the renumbering of K.S.A. 74-8804 subsection (j) to subsection (k) as discussed previously when reviewing the amendments in SECTION 5 (formerly 4) of this bill.

SECTION 11 (formerly 10) repeals the existing statutes being amended by this bill.

SECTION 12 (formerly 11) establishes the effective date for these amendments if enacted.

Mr. Chairman:

On behalf of the Kansas racing commission I want to thank you for this opportunity to present the commission's legislative proposals and would respectfully request that this committee report this bill favorably for passage to the Kansas House of Representative.

If there any questions, I would be happy to take them at this time.



TO: THE HOUSE FEDERAL AND STATE AFFAIRS COMMITTEE
FROM: KAREN FRANCE, DIRECTOR, GOVERNMENTAL AFFAIRS
DATE: MARCH 30, 1995
SUBJECT: SB 110

Thank you for the opportunity to testify. The Kansas Association of REALTORS® strongly supports the legislation requested by the Kansas Real Estate Commission.

We appreciate this committee holding hearings on the bill. The bill was introduced the third week of session and assigned to the the Senate Judiciary Committee. The Chairman of that committee appointed two different subcommittees to study the bill in detail. They requested and received input from the Real Estate Section of the Bar Association, the Consumer Fraud Division of the Attorney General's Office and two Washburn Law Professors. They took those recommendations into consideration and amended the bill accordingly. While this process took quite a bit of time, the bill, as amended did pass out of the committee on a unanimous vote and passed the Senate last Thursday on a 39-0 vote.

The law of agency, as it applies to real estate agents has been a very difficult area for many years. The law of agency, as developed in English common law does not really reflect the relationships which exist between principals and agents in the real estate industry. Nonetheless, those concepts have been artificially imposed upon the industry over the years and the industry has tried to adapt accordingly.

However, new developments in the marketplace in the past 10 years, such as buyer's agency, have stretched the agency concepts to new limits, creating a lot of uncertainty for licensees who are trying to conduct their business in a professional manner and for members of the public who do not know what they can legally expect from a real estate licensee. Our existing license law is, for the most part, silent as to guidance in this very difficult area. This leaves the Real Estate Commission in a precarious position, because they have little or no statutory authority for sanctioning a licensee who failed to represent their client. The public is forced into the court system for relief.

This is not just a Kansas phenomenon, but a nationwide one. In speaking to REALTORS® across the country, as well as their legal counsel it became clear that some clearcut clarifications of the real estate agency relationship were needed. Our NATIONAL ASSOCIATION OF REALTORS® appointed a Presidential Task Force to study the problem, and in 1993 that task force made up of both large and small brokerages from across the

country developed a nine point recommendation list for the individual state associations to examine.

In 1994, our state association appointed a task force made up of brokers from Liberal, Colby, Johnson County, Wichita and many other towns in between to study the issue. We also included members of the Kansas Real Estate Commission and its staff. After many very heated sessions that Task Force finally arrived at a compromise version which the members felt workable. Our full board of directors approved those recommendations in September and the Kansas Real Estate Commission approved them in October of 1994. The bill before you embodies those recommendations.

The goal is to codify and clarify existing case law into one document in order to serve both licensees and the public. In many ways, it does create additional duties on our membership, something we do not do lightly. However, we believe that the trade off for these additional duties will be the establishment of clear guidelines under which our members can conduct their business.

This appears to be a very lengthy bill, however, the second half of the bill is primarily technical cleanup language, making way for the statutory changes of the first half.

NEW SECTION 1 Title of Act

NEW SECTION 2 Definitions

This section provides several definitions of terms which are used in the industry, but are largely undefined, except on a case by case basis. This method of definition has created a hodge podge of meanings and understandings leaving many uncertainties for licensees and the public alike.

NEW SECTION 3 Written Agency Agreements

This section lays out the minimum requirements for agency agreements are for buyers agents, sellers agents and dual agents. Specifically, the section lays out:

1. When agency agreements must be drawn
2. The minimum terms the agreement must contain
3. Requirements for providing copies of the agreements to the principal
4. Disclosure requirements if there is a potential for dual agency
5. Prohibitions against licensees including a power of attorney within an agency agreement.
6. Prohibitions against interfering with existing agency agreements, where the customer or client is already represented.

NEW SECTION 4 Termination of Relationships

This has been a gray area for licensees. Licensees who were trying to handle the termination of relationships properly were unclear what had to be kept confidential. For example, a common dilemma was what a licensee was to do when they represent a seller in one transaction, then that same seller becomes a buyer of a house listed by the same agent. If confidential financial information had been garnered during the first sale, was an agent

legally obligated to disclose that information to the seller in the second transaction? This section clarifies that if the seller in the first transaction told the agent the information was confidential, then that agent would be prohibited from disclosing it in the second transaction. Without language to this effect, agents were put in a legal bind as to how to best serve their principal.

NEW SECTION 5 Compensation

This section clarifies that the compensation is not the determining factor in creating agency relationships, it is the written agency agreement which is the determining factor. With the growth of buyer agency in the marketplace, questions have arisen as to who represents whom if the commission is technically paid by the seller. However, in truth the commission is generated from the transaction itself. There would be no commission paid if a willing buyer and seller never got together. This clarifies that licensees should not merely rely on who is paying the commission, but are legally obligated to carry out their agency duties as outlined in their agency agreements.

The section also provides a list of whom a broker may pay a commission to, in the event of a sale.

NEW SECTION 6 Minimum requirements of a seller's agent

This section, along with the next two sections, lay out the specific statutory duties which agents must adhere to for both customers and clients in the real estate transaction. This list comes from existing case law, not only from Kansas, but also other states. The existing license law is silent as to what those duties are and we spend many many hours advising both the public and our members as to what the proper methods of representation are under the law.

Under this section, a seller's agent, in representing a client, must:

1. Perform the terms of the written agreement made with the client;
2. Exercise reasonable skill and care for the client;
3. promote the interest of the client with the utmost good faith, loyalty and fidelity--the bill goes on to list the ways in which this duty is carried out

Additionally, this section lays out what a licensee's responsibilities are to customers, another piece of information which has been made available only in a hodge podge method. Under these provisions, a seller's agent must disclose any known defects to the potential purchasers but is not required to disclose unknown material defects, i.e. ones that cannot be seen or ones which the seller does not disclose to the agent.

If a professional inspector is hired to inspect the property and does not discover a defect which the agent is aware of, then the agent must disclose that defect to the purchaser. If, on the other hand, if a professional inspector is hired and fails to find a defect which neither the seller has informed the agent about, nor is it something the agent knows, then the agent would not be held responsible for the failure of the professional, trained in their field, to

discover and disclose that defect. Real estate licensees are not plumbers, electricians or engineers and cannot be held to that standard. However, the section clearly states that they will be held to exercise the degree of care expected to be exercised by a reasonably prudent person who has the knowledge, skills and training required for the licensure as a broker or salesperson.

The last paragraph of the section is very important in that it clearly lays out that a seller cannot be liable for punitive or exemplary damage for the licensee's failure to perform any of the duties delineated in this section, unless they have engaged in fraudulent or malicious conduct themselves. In many court cases sellers have been charged with punitive damages for the wrongful acts of their agents, over which they had not control. We feel this is a severe inequity.

NEW SECTION 7 Minimum requirements of a buyer's agent

This section mirrors the previous section by providing the "do's and don'ts" for buyers agents. The concept of buyers agency has been a very large change in the real estate marketplace. Whereas in the past, most agents represented sellers and buyers were treated as customers who went unrepresented, a growing number of buyers are demanding representation at the same level as the sellers. This evolution has caused many of the gray areas in the agency law as it relates to the real estate industry. This section creates a list of what licensees must do if they take on the responsibility of providing buyer representation. This list lets the buyer, the agent and the seller and their agent know exactly what a buyer's agent can and cannot do.

NEW SECTION 8 Minimum requirements of a dual agent

While the practice of dual agency is discouraged, many buyers and sellers are content to have that sort of relationship with agents in a real estate transaction. The advent of buyer's agency has increased the utilization of dual agency, but with that process numerous gray areas have arisen as to what the limitations are on agents acting in a dual agency capacity. This section lays these out in a very clear cut manner, putting everyone in the transaction on notice of what the agent can and cannot do for them, so that they can make an informed choice about accepting that kind of agency relationship. By laying this out to the buyers and sellers who are considering this type of relationship, it should provide the information they need to decide that, in fact, they are better served by seeking representation elsewhere. On the other hand they can make an informed choice that they are sophisticated enough to not need the detailed assistance single agency would provide and are willing to, essentially, go it alone.

NEW SECTION 9 Separate representation in one firm

Under existing case law, if one agent in a brokerage firm is performing as a buyer's agent for any buyer, and that buyer becomes interested in a listing of another agent of the firm, the buyer's agent, the listing agent and the broker of that firm are all considered dual agents. This is the case, even though the buyer's agent has never had any previous contact with that

seller. A dual agency relationship kicks in the very limited list of possibilities which have been laid out in the previous section, thus severely limiting the ability of the listing agent to really go to bat for the seller, or the ability of the buyer's agent to really go to bat for the buyer. Not to mention the position of the broker, who in all likelihood has never met the buyer or the seller, but is now considered the agent of both of them.

The Illinois legislature addressed this problem by creating another level of agency relationships called the Designated Agent. Six other states have followed suit and this section embodies that idea. Under this concept, if a broker designates a particular agent in the firm to be a buyer's agent as to a particular buyer, then, as to any listings of the firm, other than the buyer's agent's own listing, that buyer's agent is considered to be a designated agent, rather than a dual agent. The broker is not considered to be a dual agent unless the broker becomes involved in the transaction, for example, by showing an in-house listing to the buyer or by becoming involved in the negotiation process. At that point the broker and the buyer's agent will be considered dual agents and the previous section kicks in. Additionally, if a designated agent's buyer indicates interest into one of the designated agent's listings, then the designated agent will once again be treated as a dual agent. The rules for utilizing the designated agent are laid out in this section.

NEW SECTION 10 Disclosure of agency relationships

This section will go a long way towards providing solid information to the buying and selling public as to what they can expect when they enter into a real estate transaction. Under this section the Kansas Real Estate Commission will develop a document which will lay out, in straightforward language, what alternative agency relationships are available to the buying and selling public. This document must be presented by licensees to buyers and sellers at the beginning of the buying and selling process.

This section also requires agents to disclose to other agents what the capacity of their agency relationship is, i.e. whether they are acting as a seller's agent or a dual agent. This disclosure is crucial so that each licensee knows what sorts of information they can or cannot disclose to the other agent they are dealing with in the transaction.

NEW SECTION 11 Imputed knowledge

This section clarifies that a seller or buyer cannot be held liable for any representations made by their agent unless they knew of the misrepresentation. At the same time agents are not liable for the misrepresentations of their buyer or seller, unless they knew of them and did not properly disclose them.

NEW SECTION 12 Rules and regulations

Merely gives the authority to the Kansas Real Estate Commission to generate the rules and regulations necessary to carry out the provisions of the bill.

SECTIONS 13-23

The Revisor's Office felt this legislation was best handled by creating a new chapter in the law, separate from the existing license law. Accordingly, some parts in the existing license law would be redundant or unnecessary if left in place. The balance of the bill deletes the overlapping parts and correlates the conflicting sections with the provisions in the new chapter, with some minor alterations and updates mixed in.

Many of the amendments made by the Senate Committee were technical in nature. There were two substantive amendments, one dealt with the award of punitive damages. The new language mirrors the language in the Kansas Code of Civil Procedure regarding punitive damages. The other amendment dealt with the issue of whether this legislation would override common law as it stands. It was the general conclusion that it would have that effect without having a section in the bill stating it did and so such a provision was unnecessary.

We know this is a comprehensive bill but it addresses so many issues which have arisen for consumers and licensees, it is long overdue. We ask you for your support in cleaning up a lot of uncertainty for everyone by recommending the bill favorable for passage.



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JEAN DUNCAN, DIRECTOR

TO: THE HOUSE FEDERAL AND STATE AFFAIRS COMMITTEE
FROM: JEAN DUNCAN, DIRECTOR
DATE: MARCH 30, 1995
SUBJECT: SB 110

Thank you for the opportunity to testify.

Senate Bill 110 provides for a new act on brokerage relationships in real estate transactions. The intent of the act is to take the principles of agency and define their relationship to real estate brokerage without changing the fundamental way that real estate brokerage is conducted, giving due consideration to the needs and expectations of consumers.

While wanting to abide by the law, licensees have no clear definition of what their legal duties and obligations are. This legislation lays out specific minimum duties for each type of relationship between consumers and licensees, thereby providing a road map for broker behavior. We believe this will promote a better understanding of agency relationships and result in higher levels of client satisfaction.

NEW SECTION 2

Contains definitions of terms used in the act.

NEW SECTION 3

Sets forth requirements and prohibitions relating to agency agreements, including a time frame for obtaining written agreements.

NEW SECTION 4

Covers termination of client relationships. The new language also delineates legal obligations of licensees upon termination, with specific guidelines in such areas as confidential information.

NEW SECTION 5

Payment of compensation, by itself, does not establish an agency between the party who pays the compensation and the broker. This section clarifies that compensation is presumed to come from the transaction and is to be determined by agency agreements.

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NEW SECTION 6 sets forth the minimum duties and obligations of a seller's or landlord's agent. **NEW SECTION 7** sets forth the minimum duties and obligations of a buyer's or tenant's agent.

The list of duties and obligations comes from existing case law. Since these duties have not been a part of the license act, the commission has had no regulatory authority in such areas. With the passage of this bill, the commission will be able to respond to consumer complaints and discipline licensees for violation of any of the provisions.

The duties and obligations set forth in Sections 6 and 7 must be contained in the agency agreement with the seller or buyer. We believe it will be a tremendous benefit to all concerned to have the brokerage relationship clearly defined and thereby reducing the possibility of misunderstandings.

Responsibilities of licensees to their customers are also specified in both sections.

NEW SECTION 8

This section places the dual agency question as a matter of free choice in the marketplace. A client has the right to reject the dual agency. The informed consent of the parties must be evidenced by a dual agency consent agreement, which must include the duties and obligations set forth in this section.

NEW SECTION 9

This section permits appointment of designated agents as an alternative to disclosed dual agency for in-house transactions. A broker may appoint an affiliated licensee as a designated agent to represent a buyer client to the exclusion of all other affiliated licensees. This allows the designated agent to sell another agent's (in-house) listing to the buyer client without becoming a dual agent.

NEW SECTION 10

Requires the Real Estate Commission to develop a form which all licensees must use to disclose alternative agency relationships to consumers before any agency agreement is signed. Consumers will be able to make informed choices before working with a real estate agent as a client or customer.

NEW SECTION 11

Provides protection for sellers and buyers by stating that clients are not liable for the misrepresentation of their agent unless the client actually knows of the misrepresentation. Likewise, the licensee is not liable for a misrepresentation of the client unless the licensee knew of the misrepresentation.

NEW SECTION 12

Requires the Real Estate Commission to provide suggested forms of agency agreements and authorizes the adoption of regulations.

SECTIONS 13-24

Amend the current license act to delete provisions that are covered by the new act; to provide for appropriate cross references to the new act; and to amend statutory references where renumbering has occurred.

We ask for your support in passing the bill out favorably.