Approved: February 22, 2000
Date

MINUTES OF THE HOUSE COMMITTEE ON FEDERAL AND STATE AFFAIRS.

The meeting was called to order by Vice Chairperson Representative Becky Hutchins at 2:00 p.m. on February 2, 2000 in Room 313-S of the Capitol.

All members were present except: Representative Powell, Excused
Representative Freeborn, excused.

Committee staff present: Theresa Kiernan, Revisor of Statutes
Russell Mills, Legislative Research
Winnie Crapson, Secretary

Conferees appearing before the committee:

Proponents
Karen France, Kansas Association of Realtors
Rob Curtes, Kansas Association of Realtors
Dennis Snodgrass, McGrew Real Estate, Lawrence
Delores Dalke, Real Estate Center, Hillsboro
Jeanette Johnson, Prudential Real Estate, Topeka
Amelia Sumerell, Plaza Real Estate, Wichita

Others attending: See attached list.

Vice Chairman Hutchins opened the hearing on **HB 2687, Kansas real estate salespersons' and brokers' license act; inducements; after-the-fact referral fees.**

Karen France, Director of Governmental Relations, and Rob Curtis, Immediate Past President, presented testimony in support for the Kansas Association of Realtors (Attachment #1). They testified the bill has been approved by 140 members of KAR Board of Directors who requested this legislation. It addresses two problems: inducements and after-the-fact referral fees. Inducements Realtors would like to offer are not gifts but customer services directly related which are directly related to and would expedite the real estate transaction, e.g. pre-sale home inspection, pre-sale title search or homebuyer's warranty. Attorney General Opinion 58-3062 considers these to be prohibited under current Kansas law. Problems with after-the-fact referral fees occur when an employee being transferred makes arrangements individually with a broker for selling or buying a residence without realizing this is not acceptable within the relocation package provided by their employer. The agent learns of the agreement when the relocation management company contacts them and demands a referral fee. Refusal to pay the fee may jeopardize the employee's relocation package. Iowa and Tennessee have enacted to prohibit this practice.

Dennis Snodgrass of Coldwell Banker McGrew Real Estate, Lawrence, testified in support of the bill (Attachment #2). He stated and other brokers wholly support the intent the Act to prohibit the giving of prizes but requests clarification that offering customer services directly related tot he transaction are not illegal. He described problems relating to requests for after-the-fact referral fees.

Delores Dalke, owner of Real Estate Center, Inc., Hillsboro, testified in support of the bill (Attachment #3). Under current law packages cannot be offered which include items which are essential to move the transaction from start to finish, such as pre-closing title inspection, home inspection or a Home Warranty.

Jeannette Johnson, Prudential Greater Topeka Realtors, testified in support of the bill (Attachment #4). She described instances where after-the-fact referral fees had been demanded. She stated her company was prohibited from offering some services as a part of their fee because they were considered inducements.

Amelia Sumerell, a real estate associate with Plaza Real Estate, Inc., Wichita, testified in support of the bill (Attachment #5). She described customer services that could be provided to avoid problems that may arise in a real estate transaction. She said over half of her business has been corporation relocation and believes the customer should be able to choose a broker based on past performance. She believes it is extortion when the relocation company threatens loss of the employee's relocation benefits if an after-the-fact referral fee is not paid.

Sue Baxter, Director, presented testimony on behalf of the Kansas Real Estate Commission (Attachment #6).

Eric Sartorius presented testimony on behalf of the Johnson County Board of Realtors, Inc., (Attachment #7).

The Revisor presented a technical correction to clarify **HB 2687,** by adding at line 24, page 8, "or anyone on behalf of any such licensee or firm, whether licensed in this state or in another state." (Attachment #8).

The hearing on **HB 2687** was closed.

The meeting adjourned. The next scheduled meeting is February 7, 2000.

HOUSE FEDERAL & STATE AFFAIRS COMMITTEE

COMMITTEE GUEST LIST

DATE: Feb 2, 2000

NAME	REPRESENTING
Stan Parsons	KGC
Karen Peterson	KS Assn of Realtors
Rob Curtis	KS Assn of Realtors
Jacque Oakes	Ks. Auctioneers Assn.
Bob Lyd	KS Assn of Realtors
Jeanette Johnson	KS Assn of Realtors
Eileen Rabe	KS Assn of Realtors
Erika Sartorius	Johnson Co. Board of Realtors
Mark Tomb Jon Smelks	KMHA
Anne Spiess	Peterson Public Affairs Group
Angela S Beech	Washburn Law Journal
Jeff Austin	Rep. Troy Findley

Kansas Association of REALTORS®

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TELEPHONE 785/267-3610 • 1-800-366-0069
FAX 785/267-1867

TO: Federal and State Affairs Committee

FROM: Karen France, Director of Governmental Relations
Rob Curtis, 2000 Immediate Past President

Re: HB 2687, amending the Real Estate Brokers and Salespersons License Act

Date: February 2, 2000

Thank you for the opportunity to testify. On behalf of the Kansas Association of REALTORS® I ask for your support of this bill. This legislation is the product of months of work by our Governmental Affairs Committee, culminating in approval in September by the 140 members of the KAR Board of Directors who agreed to come before this legislature to request this legislation.

There are two parts of this bill, one is found in line 18 on page 4 of the bill, and deals with the inducement provision of our license law; and the second part is found in New Section 5 of the bill on page 8 and deals with the problem of demands for after-the-fact referral fees.

INDUCEMENTS
The Problem

As in all industries, the real estate industry is trying to meet the increased demand for customer service. Consumers involved in a real estate transaction are looking for the real estate professional who can offer them more services for their dollar. In response, many of our members are looking for ways to deliver that extra level of service.

For example, they have considered including a pre-sale home inspection, a pre-sale title search or a homebuyer's warranty in their service packages. Home inspections, title searches and homebuyer warranties are, for the most part, found in the typical real estate transaction. Our members are considering offering them, in order to expedite the transaction or, in the case of the pre-sale home inspection, pre-empt the discovery of a problem with the property just before closing.

However, in light of a 1998 Attorney General's interpretation of the law, a broker offering these services would be in violation of Kansas law. The current Kansas law provides:

58-3062. Prohibited acts
(a) No licensee, whether acting as an agent or a principal, shall:
(11) Offer or give prizes, gifts or gratuities which are contingent upon an agency agreement or the sale, purchase or lease of real estate.

Attorney General Opinion No. 98-53 concludes that "a real estate broker is prohibited from offering or giving anything of value, other than the broker's services as a broker, that is contingent upon an agency agreement with a client or the sale, purchase or lease of real estate". In defining broker's services, she opined, "a reasonable nexus must exist between the particular services and one or more of the primary broker activities specified in the statutory definition of broker." The underlying test then, is "Does an individual need a real estate license to offer these services or products?" If the answer is "no" then, a broker who offers them is in violation of the law. Under the examples given above, a real estate license is not required to sell a pre-sale home inspection, a pre-sale title search or a homebuyer's warranty. Therefore, if a broker pays for these services within their service package, they have violated the law.

We feel that the consumer is benefited—whether they are sellers or buyers--if they receive these services as part of a broker's service. The amount of time it takes from sales contract to the buyer getting possession of a home is shortened. Buyers, sellers and real estate agents have more information available and all can make informed choices.

KAR Solution

Our Governmental Affairs committee met with the Attorney General regarding the subject, in an effort to more fully explain the modern real estate marketplace and the potential benefits to consumers. Her recommendation was for us to come to the legislature to clarify the law as to what products and services would be considered legal. Our proposal:

Amend K.S.A. 58-3062 (a)

(11) Offer or give prizes, gifts, or gratuities which are contingent upon an agency agreement or the sale, purchase or lease of real estate. **Products or services which are offered or given pursuant to a licensee carrying out the duties of a seller's agent pursuant to 58-30,106, a buyer's agent pursuant to 58-30,107, or a transaction broker, pursuant to 58-30,113 shall not be considered to be a prize, gift, or gratuity.**

This would allow licensees to offer products and services that are directly related to the successful completion of the real estate sale. It would not allow them to give away turkeys or cars. It would allow them to provide products or services needed by a buyer or seller to complete a transaction.

While some would like to remove the inducement prohibition completely, after lengthy discussions we feel this is the most reasonable approach to handling the problem. The current statute unnecessarily ties the hands of licensees who are trying to provide services to consumers in order to expedite or simplify the transaction. We believe that, if they choose to do so, licensees can make the business decision to offer these products and services as part of their service package or in order to bring a transaction to a successful completion for all parties. Clarifying this law lets brokers make a business decision based upon the needs of their buyers and sellers, and not because of artificial government constraints.

As it stands today, our members are probably violating the law in many transactions. This happens because the buyer and seller can negotiate and agree on everything and then, two days before closing, get into a disagreement over something small, for example, a garage door opener. Everyone knows that they want the transaction to close, but emotions get in the way and the deal stalls out over a garage door opener because both buyer and seller feel they have negotiated enough. The agents, in an effort to assist their clients, agree to pick up the cost of the garage door opener. They offer to do so, buyer and seller are relieved that they didn't have to come up with the extra cash, and low and behold they proceed to closing as planned. In the end, everyone gets what he or she wanted. **Except**, according to the definition crafted in the Attorney General's Opinion, they have just offered a gift that is contingent on the sale or purchase of property and for which they did not need a real estate license to offer. This kind of scenario happens in transactions across the state, probably every day.

We ask for your support of this amendment to take away the artificial constraints which only hurt, not help the consumer.

AFTER-THE-FACT REFERRAL FEES

The Problem

First, a definition: a referral fee, sometimes called a "cooperative broker referral fee" is the part of a commission one real estate broker pays to another, as a result of a sale consummated by the "paying" broker, on behalf of a client sent by the "receiving" broker.

Payment of referral fees has been an integral part of residential real estate practice for many years. Sometimes the relationship between the brokers is defined in a written contract, other times by a prior verbal agreement, and sometimes even by custom and practice of the area in which the brokers are located.

Whatever their form, referral fee agreements essentially are a contract between a real estate broker and an employer or relocation management company (both of which also must hold a real estate brokerage license) formalizing a referral fee arrangement.

When things go according to plan, generally there are no problems. The transferring employee chooses an agent from a broker with a referral agreement with his or her company, the sale takes place, and the referral fee is paid at or soon after the closing.

The problems generally arise when the transferring employee enters into an agreement with a real estate agent to list the home, or to find a home and the agent is unaware of a referral fee agreement between the employer and a broker in that area. This may occur because the transferring employee makes a mistake in choosing the agent or, perhaps, because the employee tries to get a "head start" on the relocation process. In any case, the agent with whom the agreement is entered into, is unaware of an existing referral agreement. Only later does the agent learn of the referral agreement.

In some cases, this happens early in the relationship, in others, it may occur much later, even after the closing. In both cases, brokers feel that they are being asked to give up a part of their commission, after-the-fact without prior arrangement with the employee. This demand for an after-fact referral fee interferes with contractual relations previously entered into with the transferring employee.

On its face, it would appear that the resolution would be easy. A listing agreement signed by a transferring employee with a brokerage firm is an enforceable contract. If it does not contain a provision for the payment of a referral fee, and if the broker does not have an independent agreement with the employer or relocation management company, then there exists no recognizable legal claim for payment of a referral fee. The employee is bound by the terms of the listing agreement, and the broker is not subject to suit for a referral fee.

In the real world, however, brokers are pressured to agree, after-the-fact, to pay a referral fee, because the relocation company threatens the agent by telling them the employee stands to lose some of his or her relocation benefits by virtue of failing to choose an approved broker. Additionally, the employer or relocation management company threatens to take any future relocation business to their competitor.

KAR Solution

Our members have no problems living up to contractual referral fee agreements. They struggle when having these entities interfere with legitimate contractual agreements. But the biggest frustration is when the employer or the relocation company informs the brokerage that the employee will be left out in the cold without their relocation package unless the broker agrees to pay this after-the-fact referral fee. Some of our members liken it to extortion.

This practice of demanding after-the-fact referral fees is not just a Kansas problem. While numerous states are looking at statutory solutions to the problems; Iowa and Tennessee have already acted. We looked at their statutes and took the best parts of both of them to develop our solution. That is the language you find in New Section 5 on page 8.

This amendment prohibits licensees either from Kansas, or other states, from demanding a referral fee unless they have a reasonable cause to do so. That reasonable cause is in one of three forms: an actual introduction of business has been made, a contractual referral fee agreement is in place, or through a cooperative agreement within the Multiple Listing Service.

The bill also prohibits the practice which is so frustrating whereby a relocation company threatens to withhold an employee's relocation package unless the broker pays the fee to which the relocation company has no reasonable cause to request.

SUMMARY

In summary, we respectfully request your support of this legislation. We believe the two amendments to the law will serve consumers across the state that look to the real estate professionals to guide them through the real estate transaction. These two provisions will give the tools to real estate professionals to deliver the service they need. I will be happy to answer any questions you may have.

State of Kansas
Office of the Attorney General
301 S.W. 10th Avenue, Topeka 66612-1597

CARLA J. STOVALL
ATTORNEY GENERAL

MAIN PHONE: (785) 296-2215
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October 7, 1998

ATTORNEY GENERAL OPINION NO. 98-53

Jean Duncan, Executive Director
Kansas Real Estate Commission
Three Townsite Plaza, Suite 200
120 S.E. 6th Ave.
Topeka, Kansas 66603-3511

Re: Personal and Real Property--Real Estate Brokers and Salespersons; Licensing--Prohibited Acts; Offering or Giving Prizes, Gifts or Gratuities

Synopsis: A real estate broker is prohibited from offering or giving anything of value, other than the broker's services as a broker, that is contingent upon an agency agreement with a client or the sale, purchase or lease of real estate. In the errors and omissions insurance program described, a real estate broker would be offering a seller-client something of value, other than services as a broker, that is contingent upon an agency agreement. Thus a real estate broker who participated in the AHS program as described would be in violation of K.S.A. 1997 Supp. 58-3062(a)(11). Cited herein: K.S.A. 1997 Supp. 58-3035; 58-3062, as amended by L. 1998, Ch. 93, § 74; 58-30,102.

* * *

Dear Ms. Duncan:

As Executive Director of the Kansas Real Estate Commission, you requested we review American Home Shield Corporation's plan to market an extension of brokers' errors and omissions insurance to the broker's seller-clients, and determine whether a real estate broker participating in the plan would violate the prohibition against gifts and gratuities found in the Kansas Real Estate Brokers and Salespersons Act.

Based on the information presented, we understand that American Home Shield Corporation (AHS) sells home warranty contracts to sellers through real estate brokers, frequently during the listing period. In this capacity, the real estate broker serves as an agent of AHS who is authorized to sell home warranty contracts to the broker's seller-clients. In addition, AHS acts as an insurance broker for Fireman's Fund and sells errors and omissions insurance to real estate brokers. This real estate broker insurance policy allows for an "extension" of coverage to the broker's seller-client, if the seller-client purchases an AHS home warranty.

This errors and omissions insurance program has two features that are automatically triggered when a real estate broker purchases an errors and omissions policy from AHS *and* subsequently sells an AHS home warranty to a seller-client: (1) that broker will receive a reduced deductible on his AHS errors and omissions policy if a claim is made against him in connection with the sale of the property; and (2) that seller-client will be entitled to be defended by the broker's insurance company (Fireman's Fund) for claims which are made against the seller, or against the broker and the seller, in connection with the sale of the property. AHS characterizes the inclusion of the real estate broker's seller-client within the broker's errors and omissions insurance coverage as an "extension" of the broker's coverage.

The issue presented is whether by participating in this AHS "program," a broker violates K.S.A. 1997 Supp. 58-3062(a)(11). That statute prohibits brokers from "offering or giving prizes, gifts or gratuities which are contingent upon an agency agreement or the sale, purchase or lease of real estate." A review of the legislative history of this statute demonstrates a clear expression of public policy by a Legislature committed to outlawing any form of prize, gift or gratuity by a real estate broker as an inducement to attract clients.[1] Clearly, the Kansas Legislature wishes to prohibit any connection between real estate transactions and free inducements.

We have previously opined that the "gifts and gratuities" provision should be construed to mean that a broker is prohibited from "offering or giving anything of value, other than the broker's services as a broker, which is contingent upon an agency agreement with a client or the sale, purchase or lease of real estate."[2] Thus, to determine whether this statute is violated, three factors must be considered:

- Whether anything of value is being offered or given by the broker to his seller-client.

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[1] *See* Attorney General Opinion No. 94-17 for a detailed presentation of the legislative history of K.S.A. 58-3062(a)(11).

[2] Attorney General Opinion No. 94-17.

- If so, whether the thing of value being offered or given is something beyond the broker's services as a broker.

- If so, whether the thing of value being offered or given is contingent upon an agency agreement, or the sale, purchase or lease of real estate.

We must first determine whether the "extension" of a real estate broker's errors and omissions insurance coverage is something of value to his seller-client. AHS states that the broker's errors and omissions coverage which may be extended to a broker's seller-client is an "added feature" beyond the home warranty itself. Specifically, according to AHS the seller-client would be "entitled to defense for E&O claims that would include or be made against the seller in connection with the sale of their property." (Describing its motivation for offering such an "extension" of a real estate broker's errors and omissions coverage, AHS explained, "From a practical point of view in terms of litigation, the insurance company is minimizing cross-claims between the seller and the seller's real estate broker which would normally arise when a buyer of real estate makes a claim against the seller in a real estate transaction.") In addition, according to AHS, the "availability of insurance coverage to the seller also provides additional liquidity in which to resolve legitimate disputes. . . ." The seller would thus presumably also receive a measure of insurance coverage without payment of any premium.

While the seller may choose to buy the AHS home warranty to begin with, the difficulty arises with the "added feature" of insurance coverage and entitlement to defense for any errors and omissions claims which might subsequently be made against the seller, or the seller and the broker, in connection with the sale of their property. In our opinion, this insurance coverage and promise of legal defense has value. Thus, in our opinion, the "extension" of a real estate broker's errors and omissions insurance coverage is something of value which a broker (acting as an AHS agent) would offer to his seller-client under the described AHS program.

We must next determine whether the thing of value being offered is something beyond the broker's services as a broker. The Kansas Supreme Court has described a broker as "an agent who for a commission or brokerage fee, carries on negotiations on behalf of his principal as an intermediary between the latter and third persons in transacting business relative to the sale or purchase of contractual rights or any form of property."[3] Additionally, a broker is statutorily defined as an individual who advertises or represents that he engages in the business of buying, selling, exchanging or leasing real estate or who, for compensation, engages in specified activities in relation to the buying, selling, exchanging or leasing of real estate on behalf of an owner, purchaser, lessor or lessee of real estate.[4]

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[3] *Henderson v. Hasser*, 225 Kan. 678, 683 (1979).

[4] K.S.A. 1997 Supp. 58-3035(e).

We have previously opined that "in order for a particular service to be considered a broker service, a reasonable nexus must exist between the particular service and one or more of the primary broker activities specified"[5] in the statutory definition of "broker." Since K.S.A. 1997 Supp. 58-3035(e) which defines "broker," is void of any mention of brokers providing a means of financial and legal assistance to sellers in relation to post-sale claims or litigation, in our opinion this "reasonable nexus" requirement is not satisfied.

Finally, we must determine whether the thing of value being offered is contingent upon an agency agreement, or the sale, purchase or lease of real estate. One of the automatic "triggers" for the extension of a real estate brokers insurance coverage to a seller-client is pulled when the seller-client purchases an AHS home warranty. According to AHS, "sellers frequently purchase a home warranty contract during the listing period. . . ." While not statutorily defined, "listing" is a commonly understood real estate industry term which implies an agency relationship has been created between the broker and seller.[6] In Kansas, this relationship is established when a broker and a seller-client enter an agency agreement.[7] Assuming a broker has previously purchased errors and omissions insurance through AHS (the other "trigger"), the broker may then offer the "added something of value" once a person has entered an agency agreement with the broker, i.e. "listed" with the broker, and has thus become the broker's seller-client. Clearly, the thing of value being offered is contingent upon an agency agreement between the broker and his seller-client.

In conclusion, a real estate broker is prohibited from offering or giving anything of value, other than the broker's services as a broker, that is contingent upon an agency agreement with a client or the sale, purchase or lease of real estate. In the errors and omissions insurance program described, a real estate broker would be offering a seller-client something of value, other than services as a broker, that is contingent upon an agency agreement. Thus a real estate broker who participated in the AHS program as described would be in violation of K.S.A. 1997 Supp. 58-3062(a)(11).

Very truly yours,

CARLA J. STOVALL
Attorney General of Kansas

Camille Nohe
Assistant Attorney General

CJS:JLM:CN:jm

[5]Attorney General Opinion No. 94-17.
[6]*State v. Rentex, Inc.*, 365 N.E. 2d 1274 (Ohio 1977).
[7]K.S.A. 1997 Supp. 58-30,102(b) and (c).

Kansas Attorney General Opinions

February 10, 1994

ATTORNEY GENERAL OPINION NO. 94- 17

Jean Duncan
Administrative Officer
Kansas Real Estate Commission
Three Townsite Plaza, Suite 200
120 SE 6th Avenue
Topeka, Kansas 66603-3511

Re: Personal and Real Property--Real Estate Brokers and Salespersons--Prohibited Acts: Offering or Giving Prizes, Gifts or Gratuities

Synopsis: A real estate broker is prohibited from offering or giving any type of gift or gratuity which is contingent upon an agency agreement or the sale, purchase or lease of real estate. The terms "gift" and "gratuity" refer to anything of value, whether an object or a service, other than a real estate broker's service as a broker. In order for a particular service to be considered a real estate broker service, a reasonable nexus must exist between the particular service and one or more of the primary real estate broker activities specified in K.S.A. 1993 Supp. 58-3035(f). Cited herein: K.S.A. 46-236; K.S.A. 1993 Supp. 58-3035; 58-3062.

Dear Ms Duncan:

As administrative officer for the Kansas real estate commissionyou ask whether participation in the below described program bya licensee under the Kansas real estatebrokers and salespersonsact would violate the prohibition against offering or givingprizes, gifts or gratuities contingent upon an agencyagreement.

We understand from information provided that the program inqueston is one developed by Homeowners Marketing Services(HMS), a company which sells errors and omissions insurancecoverage to real estate brokers. One of HMS's "affiliates" isHomeowners Association of America (HAA), a "consumer protectionmembership organization." Brokers who are insured through HMSwould market what HMS refers to as the "seller track consumerreach program." Under this program, at the time of listingwith an HMS insured broker, the broker would provide a seller-client with the opportunity to "enroll" as a member of HAA.

If the client agrees to become a "member," the broker wouldthen pay the client's $10.00 "enrollment fee for membership" toHAA. As a "member" of HAA the client would receive thefollowing: (1) a video tape and booklet valued at $7.50"explaining how to make their property more marketable andavoid some of the legal pitfalls faced by consumers in today'smarket", and (2) group errors and omissions insurance coveragein the amount of $25,000 with a $5,000 deductible for "after-sale claims arising out the transaction." The average cost ofthe insurance premium for this coverage is $2.50. For anadditional $200, the "enrolled member" could then purchasethrough HAA expanded coverage in the amount of $100,000 with a$1,000 deductible.

In addressing the instant question, we believe it would behelpful to review the legislative history of

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K.S.A. 1993 Supp.58-3062(a)(17), the statutory provision which prohibits personslicensed by the Kansas real estate commission from offering orgiving prizes, gifts or gratuities as inducements to attract ormaintain clients.

In 1947 when Kansas first enacted a real estate brokers'license act, the law, while not prohibiting gifts orgratuities, did prohibit real estate brokers from:

"soliciting, selling, or offering for sale,real property by offering 'free lots,' oreonducting lotteries, or contests, oroffering prizes for the purpose ofinfluencing a purchaser or prosepetivepurchaser of real property;" L. 1947, ch.411, sec. 21(a)(15).

The 1947 provision remained in effect until 1980 when theentire act was repealed and recodified as the Kansas realestate brokers and salespersons act. L. 1980, ch. 164. Theproposed recodification, 1980 senate bill no. 519, was theresult of a two year effort by the Kansas association ofrealtors and an interim study by the special committee onfederal and state affairs. Minutes, House Committee on Federaland State Affairs, March 31, 1980; 1980 Kansas Report onLegislative Interim Studies, Re: Proposal No. 17 - Real EstateLicense Law.

While the 1947 act prohibited nineteen specific types ofconduct by real estate brokers, 1980 senate bill no. 519expanded the number of prohibitions to thirty-seven, includinga prohibition against a real estate broker or salespersonoffering or giving:

". . . prizes, gifts or gratuities whichare contingent upon a client's listing,purchasing or leasing property." 1980 S.B.519, sec.29(a)(12).

After its introduction, the chair of the senate committee onfederal and state affairs appointed a subcommittee to reviewthe bill in relation to a number of specific provisions,including section 29(a)(12). Minutes, Senate Committee onFederal and State Affairs, February 5, 1980. Thesubcommittee's review resulted in two recommended languagechanges within secton 29; however neither pertained tosubsection (a)(12). Minutes, Senate Committee on Federal andState Affairs, March 7, 1980 and March 10, 1980. Senate billno. 519 was enacted into law with section 29(a)(12) intact asproposed, thus expanding the earlier prohibition against theuse of lotteries, contests or prizes as inducements, to anytype of prize, gift or gratuity. L. 1980, ch. 164, 29(a)(12).

In 1986 at the request of the Kansas real estate commission,the senate committee on federal and state affairs introducedsenate bill no. 539 which, among other proposals, deleted theprovision prohibiting real estate brokers and salespersons fromoffering or giving prizes, gifts or gratuities as clientinducements. 1980 S.B. 539, sec. 14(a)(12) as recommended bythe senate committee on federal and state affairs. However,the provision was reinstateded in the house and ultimately S.B.539 passed with only a minor change in language in section14(a)(12):

"No licensee shall offer or give prizes,gifts or gratuities which are contingentupon a client's listing, purchasing orleasing property real estate." L. 1986,ch. 209, sec. 14(a)(12).

In 1991 a final modification was enacted to extend theapplicability of the prohibition to sales of real estate (aswell as purchases and leases) and to broker or salespersonagreements with a buyer or lessee (as well as a seller orlessor). L. 1991, ch. 163, sec. 5(a)(17). The current form ofthe prohibition now found at K.S.A. 1993 Supp. 58-3062 reads:

"(a) No licensee shall:

. . .

"(17) Offer or give prizes, gifts orgratuities which are contingent upon anagency agreement or the sale, purchase orlease of real estate."

(Since real estate brokers, associate brokers and salespersonsare each authorized to engage in "broker"

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In conclusion, a real estate broker is prohibited from offeringor giving any type of gift or gratuity which is contingent uponan agency agreement or the sale, purchase or lease of realestate. The terms "gift" and "gratuity" refer to anything ofvalue, whether an object or a service, other than the broker'sservices as a broker. In order for a particular service to beconsidered a broker service, a reasonable nexus must existbetween the particular service and one or more of the primarybroker activities specified in K.S.A. 1993 Supp. 58-3035(f).

Very truly yours.

ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS

Camille Nohe
Assistant Attorney General

RTS:JLM:CN:bas

Kansas Attorney General Opinions

Tuesday, August 03, 1999 10:01:09 AM CST

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activities specifiedin K.S.A. 1993 Supp. 58-3035(f). for the sake of simplicity inthe remainder of this opinion we will refer only to "realestate brokers.")

This review of the history of K.S.A. 1993 Supp. 58-3062(a)(17)demonstrates a legislative expansion of the inducementprohibition in 1980, a legislative reinstatement of theprohibition following an attempt to remove it in 1986 and afurther legislative expansion of the prohibition in 1991. Itthus appears clear to us that the public policy of this stateas expressed by the Kansas legislature remains committed tooutlawing any form of prize, gift or gratuity by a real estatebroker as an inducement to attract clients, whether buyers,sellers, lessees or lessors. We thus reiterate the conclusionreached in Attorney General Opinion No. 81-163, with somemodification due to intervening statutory changes: In ourjudgment, the legislature intended, by the use of the terms'gift' and 'gratuity' in K.S.A. 1993 Supp. 58-3062(a)(17) toprohibit a real estate broker from offering or giving anythingof value, other than the broker's services as a broker, whichis contingent upon an agency agreement with a client or thesale, purchase or lease of real estate.

Having reached this conclusion, we now turn to its applicationand re-phrase the question at hand: By participating in the"seller track consumer reach program" as described above, woulda real estate broker be offering or giving anything of value,other than the broker's services, which is contingent upon anagency agreement with a seller-client?

By the terms of the program the broker would offer, and uponthe client's acceptance, would give the client "membership" inHAA by paying the client's $10.00 "enrollment fee." Membershipin HAA would then entitle the client to an informational videotape, a $25,000 group errors and omissions insurance policy andthe option (apparently not available absent membership in HAA)to purchase greater insurance coverage through HAA. The videotape is valued at $7.50 by HAA. More importantly the insurancecoverage, has value. Although the cost to the real estatebroker for the insurance benefit component would be only $2.50,the benefit to the client would be $25,000 in protectionagainst certain types of after-sale claims. The client wouldalso be provided with the additional HAA membership option toobtain greater insurance coverage. In our opinion "membership"in HAA would have value to the client which is, we assume, thereason a broker would want to make such membership available tothe client. Under this program the broker would be offeringand, upon the client's acceptance, giving something of value tothe client.

HMS presents the position that the only thing which arguablymight be considered given by a broker under the program is thesum of $2.50 attributable to the insurance component, and thatsuch amount is too trivial and insubstantial to invoke the giftprohibition of K.S.A. 1993 Supp. 58-3062(a)(17). We havefaith, however, that if nominal gifts were intended to beexcluded the legislature possesses the wherewithal to do so.E.g. "No state officer or employee or candidate for stateoffice shall accept, or agree to accept any economicopportunity, gift, loan, gratuity, special discount, favor,hospitality, or service having an aggregate value of $40 ormore in any calendar year from any one person known to have aspecial interest, . . ." K.S.A. 46-237. In the absence of suchlegislative exclusion, we decline to attempt the creation of ade minimus exception to the statutory prohibition. In anyevent, as discussed above, we do not agree that the $2.50premium payment is the only thing of value given in thissituation.

The second consideration is whether the "thing" of value("membership" in HAA) is something other than a broker'sservices as a broker. Clearly HAA membership benefits such asthe informational video tape, group insurance coverage and theoption to puchase greater insurance coverage may be classifiedmore as services than as objects. The issue is whether theservices available through HAA membership may legitmately beconsidered broker services. To answer the question, the natureof real estate brokerage and its attendant activities must beevaluated.

"As generally defined, a broker is an agentwho for a commission or brokerage fee,carries on negotiations in behalf of hisprincipal as an intermediary between thelatter and third persons in transactingbusiness relative to the sale or purchaseof contractual rights or any form ofproperty." Henderson v. Hasser, 225 Kan.678, 683 (1979).

That general case law definition parallels the more detailedmeaning of the term "broker" as found in the Kansas real estatebrokers and salespersons act at K.S.A. 1993 Supp. 58-3035(f):

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"'Broker' means an individual, other than asalesperson, who advertises or representsthat such individual engages in thebusiness of buying, selling, exchanging orleasing real estate or who, forcompensation, engages in any of thefollowing activities as an employee of, oron behalf of, the owner, purchaser, lessoror lessee or real estate:

"(1) Sells, exchanges, purchases or leasesreal estate.

"(2) Offers to sell, exchange, purchase orlease real estate.

"(3) negotiates or offers, attempts oragrees to negotiate the sale, exchange,purchase or leasing of real estate.

"(4) Lists or offers, attempts or agrees tolist real esate for sale, lease orexchange.

"(5) Auctions or offers, attempts or agreesto auction real estate or assists anauctioneer by procuring bids at a realestate auction.

"(6) Buys, sells, offers to buy or sell orotherwise deals in options on real estate.

"(7) Assists or directs in the procuring ofprospects calculated to result in the sale,exchange or lease of real estate.

"(8) Assists in or directs the negotiationof any transaction calculated or intendedto result in the sale, exchange or lease ofreal estate.

"(9) Engages in the business of charging anadvance listing fee.

"(10) Provides lists of real estate asbeing available for sale or lease, otherthan lists provided for the sole purpose ofpromoting the sale or lease of real estatewherein inquiries are directed to the ownerof the real estate or to real estatebrokers and not to unlicensed persons whopublish the list."

This statutory definition of "broker" within a real estatecontext establishes the parameters of real estate brokerservices while leaving open the specific manner, style andtechniques of providing such services. The latter arecircumscribed by the list of prohibited acts found at K.S.A.1993 Supp. 58-3062. Additionally, in our opinion in order fora particular service to be considered a broker service, areasonable nexus must exist between the particular service andone or more of the primary broker activities specified inK.S.A. 1993 Supp. 58-3035(f). In our opinion providing aseller-client with membership in HAA with accompanying benefitsis not a service which is reasonably related to any of thestatutorily established broker activities. As discussed, agift of membership in HAA may have value to the client (as wellas to the broker as a marketing tool), but then so would a giftof membership in a health club. While HAA membership isdesigned to provide the seller of real estate after-saleinsurance protection, we cannot say that the gift of eitherkind of membership would further the accomplishment of thebroker's primary responsibility to the client, whether that beto sell real estate on behalf of the client or any of the otherbroker activities enumerated in K.S.A. 1993 Supp. 58-3036(f).We therefore do not consider the gift of HAA membership by areal estate broker to be a broker service.

The third consideration is whether the offered or given "thing"of value is "contingent upon an agency agreement or the sale,purchase or lease of real estate." K.S.A. 1993 Supp. 58-3062(a)(17). From the information provided, such is clearlythe case. The program anticipates that an HMS insured brokerwill offer HAA membership "at the time of listing." While notstatutorily defined, "listing" is a real estate industry termof art which implies an agency relationship between the sellerand the broker. State v. Rentex, Inc., 365 N.E.2d 1274 (Ohio1977). Under Kansas law the "time of listing" refers to thetime of entering an agency agreement, i.e. "a written agreementbetween the principal and the licensee setting forth the termsand conditions of the relationship." K.S.A. 1993 Supp. 58-3035(b). Accordingly the gift of HAA membership is contingentupon an agency agreement.

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After-the-fact referral fees

Our business is built on establishing long term relationships with our customers. A relationship that is built on trust. In the past, as long as we had taken good care of our customers, we were always afforded the opportunity to do direct, uninhibited business with them. Today, more and more, we are faced with the prospect of having a third party, which neither ourselves nor the customer knows, come into the middle of our business and demand a referral fee from us because the customer's company has contracted with this third party to handle the customer's relocation. When the agent tries to denounce the payment of a referral, the third party threatens that they will withhold the customer's relocation benefits from them; or will force the customer to use someone they are unfamiliar with; thus taking an already strenuous time and making it much worse.

We have had cases where our agents have had long standing relationships with a family. The agent may have sold the parents, as well as their children homes. One day, one of the family members calls to list their home for sale. The home is placed on the market, then a fax comes from a relocation party demanding a referral fee be paid. If they had introduced us to the customer, or had told us something we did not already know, we would have no problem paying the referral fee. However, when we already have a relationship with that Seller, have already signed the paper work, and placed the home on the market, the third party in no way deserves compensation. Not only is the agent expected to pay a referral fee, but the third party, by their marketing requirements, doubles the paper work required in order to market that home due to their reporting requirements. The end result, if we agree to pay in order to save the customer's benefits, is double the work load, less money earned, and a party being paid for having brought absolutely nothing to the table. If we refuse to pay, the customer loses. A choice we would be reluctant to make, because our concern is for the well being of the people who mean more to us than the money.

Similar situations have occurred when a buyer is involved and a buyer agency agreement has been signed and is in place.

We have even had the situation where the property is listed, marketed, sold and closed, just to have a third party relocation company show up and demand a referral fee.

In closing, the situations I have described, are only likely to increase. Many different non-realty organizations are starting to look to the real estate transaction as a revenue source. We are not asking you to protect us from competition. We are, however, asking that people who would make after-the-fact monetary demands for services never rendered not be allowed to threaten our customers and hold us hostage for payment of services they did not deliver.

Dennis Snodgrass
Coldwell Banker McGrew Real Estate
Lawrence, KS
(785) 843-2055

Inducements

Kansas Real Estate Brokers' and Salespersons' Act. Section 58-3062. Prohibited Acts. Subsection 11 states: No licensee, whether acting as an agent or a principal, shall offer prizes, gifts or gratuities which are contingent upon an agency agreement or the sale, purchase or lease of real estate.

The intent of this legislation in no way is to circumvent the intent or spirit of the stated prohibited acts of the above stated regulation. We agree that we are not looking for a way to start giving away cars in the garages of new homes or airline tickets to anywhere if an individual purchases the home I have listed.

What we are asking for is the ability to participate in, or pay the cost of, items that are directly related to the real estate transaction. Such items would include:

1. Home inspection
2. Home warranty
3. Title search
4. Termite inspection
5. Property boundary survey

The obvious question is 'Why would a real estate agent want to increase their expenses and open themselves up to the loss of additional revenue'?

The answer is quite simple. If the real estate agent were given the ability to participate in, or pay the cost of these services, our lives and the lives of the consumer would benefit greatly.

As you are probably aware, early last year, Representative Tom Sloan had looked at length at the possibility of introducing legislation to require some licensing standard for home inspectors. For a multitude of reasons, this has not yet come about. I spoke with Representative Sloan at that time regarding the real estate transaction and where in the process of the home sale that problems usually occur. The biggest problem comes as a result of the home inspection. The home inspection comes after the property has been placed under contract. The Seller has already made plans to move to a new home which they may have already purchased or at least placed under contract. The Buyer, who is already nervous because this is one of the largest purchases they will make, tends to over react when deficiencies are found during the inspection. It is quite a feat to get both parties to react rationally when there is so much emotion involved at this point of the process. Our solution, which Representative Sloan was agreeable with, was to be able to offer the Seller a pre-sale inspection of the property before the property is offered on the open market. This would allow the Seller to either correct problems found prior to them becoming an issue after the sale, or allowing the Seller to make the decision not to move forward with attempting to sell the property, thus saving not only the Seller and

prospective Buyer a lot of time and money, but ourselves a lot of time and money, also. This pre-inspection would in no way preclude the Buyer from the ability to have their own inspections done; they would certainly be encouraged to do so.

The second largest problem we encounter pertains to items that break in the home shortly after the deal is closed and the Buyer's take possession of the property. It is not uncommon to have a Buyer call several days to even months after they have closed on the property, complaining about a dishwasher that has broken. If we were able to offer a home warranty as part of our listing package, we would be able to alleviate a lot of these problems. The Buyer no longer would have to be told, 'Sorry, it's your house now'. The warranty would give the Buyer some confidence and provide relief to the Seller as well.

The third problem we can identify in the transaction stems from clouds on the title. This could be alleviated easily by having a pre-sale title search done. As with the home inspection, any problems could be identified up front and dealt with prior to the emotions of the 'deal' entering into the mix.

To a lesser degree, other problems we confront involve termite and land boundary issues. Most of the termite problems we encounter are a result of termites being discovered after the sale that the termite inspector had missed during his inspection. The land boundary disputes are lesser in degree because they generally only come into play on rural land sales. Either of these items, performed at a pre-sale time, could help to identify possible problems and allow their correction prior to them becoming a point of contingency in the middle of the sale.

In closing, we are not contesting the validity nor necessity for section 58-3062 of the Kansas Real Estate Broker's and Salespersons' Act. In fact, we wholly support it's intent and meaning. We do believe that what we are requesting very much keeps with the spirit and intent of all the laws that govern us, and is in no way contradictory to this section. By allowing us to offer more complete services to our buyers and sellers, we will be able to alleviate a majority of the problems that plague the real estate transaction.

Dennis Snodgrass
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Real Estate Center, Inc.

116 NORTH MAIN ST. • HILLSBORO, KANSAS 67063 316/947-2321 • FAX 316/947-5616

Please let me introduce myself. My name is Delores Dalke, and I am from Hillsboro. I am a Real Estate Owner/Broker of one of the smallest firms in the state of Kansas. I have been serving in this capacity for the last 21 years. I am here to speak as a proponent of clarifying the inducements section of the Real Estate Brokerage Act.

This section of the Act has been interpreted to read that we cannot offer to our clients many of the services that are part of the everday real estate transaction. Until someone is directly involved in buying or selling a home, they do not recognize the complexity of the transaction. My goal as a broker is to help streamline the process and make it smoother for the client. I can do this by offering a complete package of services that are a part of the selling or buying process.

I have always understood that the Real Estate Brokerage Act was passed to protect the consumer, not to make sure that one broker cannot offer additional services to their clients, while another chooses not to. I know that most consumers are hoping for simpler transactions rather than more complicated ones.

In addition, I was part of the group from the Kansas Association of REALTORS(r) Government Affairs Committee who met the Attorney General last Summer. We attempted to clarify what is and is not allowed under our current statute.

I came from that meeting rather confused. It is OK to negotiate the rate we charge for our services, to pay for advertising in newspapers, radio, TV and other media. Some of us offer to place properties in MLS , on the Internet, and do virtual tours all at the broker's expense. However, we cannot offer a package which includes essential items such as a pre-closing title inspection, home inspection, or a Home Warranty for the buyer or seller. These items are essential to move the transaction from start to finish.

Our business has evolved, and more is expected from the broker by the consumer. We want to be able to give that service so that buying or selling a home is a more satisfying experience. We are a service business: We are asking to be allowed to give that service to our clients.

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Prudential

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Bus 785 271-2888 Fax 785 271-7127

Testimony given by Jeanette Johnson, Prudential Greater Topeka REALTORS
President-Elect, Kansas Association of REALTORS

AFTER THE FACT REFERRAL FEES

An agent in my office had lived next door to a family for three years, establishing a friendship in which the two families participated in many activities together. The neighbor was transferred and Dan listed the property. At least a week later, the transferee (neighbor) came to Dan saying that a relocation company had become involved and that he would lose his relocation benefits unless Dan agreed to pay a referral fee.

I just recently sold a home to a couple who I had known for over 20 years. My husband and I had sold their home when they moved from Topeka 3 years ago and helped three children buy and sell. I knew I would be asked to pay a referral fee in order for this couple to Maintain their relocation benefits due to past experience with the company. We are not Against paying referral fees. But when a Relocation company presents a bill at closing or Comes into the picture after a relationship has been established and a property is already being marketed, this is After-the Fact.

INDUCEMENTS

The Attorney General's opinion suggests that pre-inspections, title searches, home warranties, or other real-estate related products and services are not part of licensable activities. Although we may not need a license to provide the service, inspections, title commitments, and home warranties are all an integral part of the transaction., and they have become more important to the consumer and to our liability.

Our company has been suggesting pre-listing inspections and home warranties, at the seller's expense, for some time and if the situation warrants, ordering preliminary title at listing time. In fact they make the choice on the listing agreement. These are activities that we may not need a license to do, but are necessary for a quicker sale, a smoother transaction or as some say a "seamless" transaction. It's doing good business and it's best for the consumer.

The problem is that if a Broker decides to offer some of these services and includes them as part of the fee, they are seen as inducements, even if the Seller is paying for the services. If a company chooses to offer services on a menu basis, the Seller is paying for services he wants. Broker make business decisions every day that effect their services and the bottom dollar of the company, such as advertising, a web site, how to charge agents for E&O Insurance; this is just one more area for the Broker to make a busine.ss decision.

E-empowered consumers are expecting more from their agents, more for their dollars. In addition, the majority of the transactions are already discounted in some fashion. Many relocation companies require inspections and title work prior to listing. These are trends we follow and For which we try to be prepared.

We need to include in the license law activities which are part of the natural evolution of the transaction. allow Brokers to offer them. and change the definition of inducements.

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My name is Amelia Sumerell. I am a licensed real estate associate in Wichita, Kansas, employed with Plaza Real Estate, Inc. I have been licensed for 13 years.

Inducements:

The demand placed upon me by the buying and selling public have put me in a position to offer more and more services related to the real estate transaction over and above some of my standard service offerings. The residential real estate transaction has become a very complicated process. After finding a ready, willing, and able buyer for a ready, willing, and able seller, the uncertainties of the transaction begin to unfold. Will the house appraise? Are there any unforeseen problems with the plumbing? Does the furnace have a cracked heat exchanger? Are there any title flaws that need to be corrected before closing?

To better serve the public, I would like the opportunity to offer added services such as a pre-listing house inspection, a pre-listing appraisal of the property, a title search, etc. I feel it would help the transactions run more smoothly and would save the consumers time, money, and aggravation. I want to be able to offer a program similar to the attached "5-Star Program". This would be a service that all real estate professionals would be able to offer if the public demanded it. I want to be able to choose whether or not to offer these services. If another real estate professional chooses not to offer these services, that would be their choice. Please give me the option so that I can better serve the consumer.

After-The-Fact Referral Fees:

Over the past 13 years over half of my real estate business has been corporation relocation. The consumer should be able to choose a broker based on the broker's past performance.

I have experienced numerous situations where I was already working with either a buyer or a seller and then a relocation company then demanded a referral fee. The relocation company then threatens that if I do not pay the referral fee, the buyer or seller would lose their relocation benefits. This sounds like extortion to me.

The consumer should be able to choose regardless of a referral fee.

HOME BUYING PROBLEM #17:

"The inspection revealed active termites..."

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KANSAS REAL ESTATE COMMISSION

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BILL GRAVES, GOVERNOR

SUE BAXTER, DIRECTOR

Testimony of Sue Baxter, Director
The Kansas Real Estate Commission
Before the
House Federal and State Affairs Committee
Regarding **HB 2687**
Kansas Real Estate Salespersons' and Brokers' License Act,
Inducements, After-The-Fact Referral Fees

The Kansas Real Estate Commission at its November 19, 1999 commission meeting unanimously voted to support the "after-the-fact referral fee" legislation proposed by the Kansas Association of REALTORS. This legislation would greatly benefit the consumers and real estate licensees of the state of Kansas and we ask for your support of this portion of the legislation.

The Kansas Real Estate Commission did not reach a consensus on the "inducement" legislation proposed by the Kansas Association of REALTORS and, therefore, relies on the discretion of the Legislature for clarification and an interpretation of the inducement statute.

Thank you for your consideration and opportunity to testify.

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Testimony of Erik Sartorius
Governmental Affairs Director
Before the
House Federal & State Affairs Committee
Regarding
House Bill 2687 Amending the Real Estate Brokers & Salespersons Act
February 2, 2000

The Johnson County Board of REALTORS® encourages passage of House Bill 2687. The bill will offer protection for Kansas real estate licensees from after-the-fact referral fees, as well as address an overly narrow interpretation of the inducement prohibition in our license law.

After-the-Fact Referral Fees

After-the-fact referral fees are a growing problem, particularly in urban areas. We are supportive of the provision that would prohibit a broker from soliciting a referral fee without reasonable cause.

In many instances in our profession, a colleague will refer a client, particularly when the client is moving to Kansas from another state. As a professional courtesy, a fee often is negotiated for the individual who referred the client. Generally, this system works very well. When dealing with some brokers from relocation companies, however, some of our members have had difficulties.

Here is where problems have occurred. After the sale, sometimes months later, the Realtor receives a call from the relocation company hired by the employer. The relocation company demands a referral fee, saying that the Realtor's client was to have gone through the relocation company. If the agent or broker does not have an agreement with the relocation company, no referral legally needs to be paid. Some Realtors have made a business decision to pay after-the-fact referral fees.

In other instances, though, Realtors are being bullied into paying referral fees. Recognizing that the Realtor is not required to pay the fee, the relocation company threatens to withhold relocation benefits from the Realtor's client. The Realtor is left with the choice to either pay the fee, or not pay the fee and risk having clients lose their relocation benefits and speak ill of the Realtor. We oppose such actions that attempt to undermine Realtors' relationships with their clients.

Inducements

The narrow interpretation of the inducement prohibition in our license law by the Attorney General is preventing some of our members from providing real estate-related services that would benefit both buyers and sellers. The amendment to the law contained in House Bill 2687 would address the current interpretation of the law.

Possible products and services include home inspections, home warranties, title searches, termite inspections, and surveys. In providing these products or services prior to the listing of a property, licensees can better ensure that sellers and buyers understand the potential problems with a property prior to the signing of a contract on the property.

Discovering and rectifying problems is much easier before a contract is signed; after a contract is signed, neither party wants to delay the closing of the transaction, which can often breed animosity between the parties as problems are addressed. When such animosity prevents a transaction from being completed, a licensee has nothing to show for his or her efforts. Understandably, some licensees would like to offer services that would make shortcomings in a property known as early as possible.

No one would be forced to provide new services. However, we feel the current inducement prohibition unduly prevents actions which can benefit both consumers and real estate licensees.

We respectfully seek your support of this important legislation.

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Session of 2000

HOUSE BILL No. 2687

By Committee on Federal and State Affairs

1-20

AN ACT concerning the real estate brokers' and salespersons' license act; relating to certain prohibited acts; relating to compensation for services; amending K.S.A. 58-3038 and K.S.A. 1999 Supp. 58-3034, 58-3035 and 58-3062 and repealing the existing sections.

Be it enacted by the Legislature of the State of Kansas:

Section 1. K.S.A. 1999 Supp. 58-3034 is hereby amended to read as follows: 58-3034. ~~This act~~ *K.S.A. 58-3034 through 58-3075 and section 5, and amendments thereto,* shall be known and may be cited as the real estate brokers' and salespersons' license act.

Sec. 2. K.S.A. 1999 Supp. 58-3035 is hereby amended to read as follows: 58-3035. As used in this act, unless the context otherwise requires:

(a) "Act" means the real estate brokers' and salespersons' license act.

~~(a)~~ *(b)* "Advance listing fee" means any fee charged for services related to promoting the sale or lease of real estate and paid in advance of the rendering of such services, including any fees charged for listing, advertising or offering for sale or lease any real estate, but excluding any fees paid solely for advertisement or for listing in a publication issued for the sole purpose of promoting the sale or lease of real estate wherein inquiries are directed to the owner of the real estate or to real estate brokers and not to unlicensed persons who publish the listing.

~~(b)~~ *(c)* "Associate broker" means an individual who has a broker's license and who is employed by another broker or is associated with another broker as an independent contractor and participates in any activity described in subsection ~~(c)~~ *(f)*.

~~(c)~~ *(d)* "Branch broker" means an individual who has a broker's license and who has been designated to supervise a branch office and the activities of salespersons and associate brokers assigned to the branch office.

~~(d)~~ *(e)* "Branch office" means a place of business other than the principal place of business of a broker.

~~(e)~~ *(f)* "Broker" means an individual, other than a salesperson, who advertises or represents that such individual engages in the business of buying, selling, exchanging or leasing real estate or who, for compensa-

independent contractor and participates in any activity described in subsection ~~(c)~~ *(f)*.

~~(m)~~ *(n)* "Supervising broker" means an individual, other than a branch broker, who has a broker's license and who has been designated as the broker who is responsible for the supervision of the primary office of a broker and the activities of salespersons and associate brokers who are assigned to such office and all of whom are licensed pursuant to subsection (b) of K.S.A. 58-3042 and amendments thereto. "Supervising broker" also means a broker who operates a sole proprietorship and with whom associate brokers or salespersons are affiliated as employees or independent contractors.

Sec. 3. K.S.A. 58-3038 is hereby amended to read as follows: 58-3038. (a) Except as provided by ~~subsection (b)~~ *this section and section 5, and amendments thereto*, no action shall be instituted or recovery be had in any court of this state by any person for compensation for any act or service, the performance of which requires a license under this act, unless such person was duly licensed under this act at the time of offering to perform any such act or service or procuring any promise to contract for the payment of compensation for any such contemplated act or service.

(b) Subsection (a) shall not apply to partnerships, associations or corporations whose partners, members, officers and employees are licensed as provided by subsection (b) of K.S.A. 58-3042, and amendments thereto.

(c) ~~Nothing~~ Except as provided by section 5, and amendments thereto, nothing herein shall preclude a person who is properly licensed as a broker or salesperson in another jurisdiction from collecting a referral fee.

Sec. 4. K.S.A. 1999 Supp. 58-3062 is hereby amended to read as follows: 58-3062. (a) No licensee, whether acting as an agent or a principal, shall:

(1) Intentionally use advertising that is misleading or inaccurate in any material particular or that in any way misrepresents any property, terms, values, policies or services of the business conducted, or uses the trade name, collective membership mark, service mark or logo of any organization owning such name, mark or logo without being authorized to do so.

(2) Fail to account for and remit any money which comes into the licensee's possession and which belongs to others.

(3) Misappropriate moneys required to be deposited in a trust account pursuant to K.S.A. 58-3061, and amendments thereto, convert such moneys to the licensee's personal use or commingle the money or other property of the licensee's principals with the licensee's own money or property, except that nothing herein shall prohibit a broker from having

by an escrow agent other than a real estate broker and neither the seller nor buyer is represented by a broker, no transaction broker shall:

(A) Fail to deliver the purchase agreement and earnest money deposit to the escrow agent named in the purchase agreement within five business days after the purchase agreement is signed by all parties unless otherwise specifically provided by written agreement of all parties to the purchase agreement, in which case the broker shall deliver the purchase agreement and earnest money deposit to the escrow agent named in the purchase agreement on the date provided by such written agreement; or

(B) fail to obtain and keep in the transaction file a receipt from the escrow agent showing date of delivery of the purchase agreement and earnest money deposit.

The commission may adopt rules and regulations to require that such purchase agreement which provides that the earnest money be held by an escrow agent other than a real estate broker include: (1) notification of whether or not the escrow agent named in the purchase agreement maintains a surety bond, and (2) notification that statutes governing the disbursement of earnest money held in trust accounts of real estate brokers do not apply to earnest money deposited with the escrow agent named in the purchase agreement.

(e) Nothing in this section shall be construed to grant any person a private right of action for damages or to eliminate any right of action pursuant to other statutes or common law.

New Sec. 5. (a) A licensee shall not solicit a referral fee without reasonable cause. Reasonable cause shall not exist unless one of the following conditions exists:

(1) An actual introduction of business has been made;

(2) a contractual referral fee relationship exists; or

(3) a contractual cooperative brokerage relationship exists.

(b) A licensee or anyone on behalf of any such licensee or firm, whether licensed in this state or in another shall not:

(1) Threaten to reduce or withhold employee relocation benefits or take other action adverse to the interest of a client or customer of a real estate licensee; or

(2) counsel a client or customer of another real estate licensee on how to terminate or amend an existing agency agreement or sales contract. Communicating corporate relocation policy or benefits to a transferring employee shall not be considered a violation of this paragraph, as long as the communication does not involve advice or encouragement on how to terminate or amend an existing agency contract.

Sec. 6. K.S.A. 58-3038 and K.S.A. 1999 Supp. 58-3034, 58-3035 and 58-3062 are hereby repealed.

or anyone on behalf of any such licensee or firm, whether licensed in this state or in another state