Approved: March 28, 2000
Date

MINUTES OF THE SENATE FEDERAL AND STATE AFFAIRS.

The meeting was called to order by Chairperson Senator Lana Oleen at 11:10 a.m. on March 22, 2000 in Room 245-N of the Capitol and announced she would not be able to stay for the hearing.

All members were present.

Committee staff present: Mary Galligan, Legislative Research Department
Russell Mills, Legislative Research Department
Theresa Kiernan, Revisor of Statutes
Judy Glasgow, Committee Secretary

Conferees appearing before the committee: Karen France, Kansas Assoc. of Realtors
John McKenzie, President Ks. Assoc. of Realtors
Ann Christian, Manhattan
Tom Krattli, Overland Park

Others attending: See Attached Sheet

Senator Jones, Ranking Minority Member opened the hearing on

SB 2687 – Kansas real estate salespersons' and brokers' license act

Senator Jones noted the arrival of Vice-Chairperson Senator Harrington and she assumed the chair and recognized Karen France, a proponent, representing Kansas Association of Realtors. Ms. France gave a brief explanation of the bill, stating that there are two parts, the first dealing with inducement provisions of the license law and the second dealing with demands for after-the-fact referral fees. (Attachment 1) She stated that the real estate industry, in trying to meet the increased demand for consumer services has been offering an extra level of services. She stated that some of these services include pre-sale title search, pre-sale home inspection and homebuyer's warranty. Ms. France stated that an Attorney General's interpretation found that these would be in violation of Kansas law because these services do not require a real estate license. The second part addresses the after-the-fact referral fees which would prohibit licensees either from Kansas or other states from demanding a referral fee unless they have a reasonable cause to do so.

Vice-Chair Senator Harrington recognized John McKenzie, 2000 President Kansas Association of Realtors, a proponent on **SB 2687** . Mr. McKenzie stated that both of these issues are important to people in the real estate services and to their customers. Mr. McKenzie explained that this bill would allow different priced service packages to be offered to customers depending on the kind of services they desire. He stated that the sales commission charged would be dependent upon the service package selected.

Vice-Chair Senator Harrington recognized Ann Christian, Manhattan, Kansas, a licensed broker and owner of a real estate company, as a proponent to **HB 2687.** Ms. Christian cited a personal example that she had experienced in an after-the-fact referral fee which had affected both the sellers and herself. (Attachment 2). Ms. Christian replied to questions from the committee concerning how the fee for after-the fact referral fee was figured.

Vice-Chair Senator Harrington recognized Tom Krattli, J. C. Nichols Residential, a proponent to **HB 2687.** Mr. Krattli stated that the Attorney General's interpretation of the inducement provisions is preventing the industry from providing products or services which would benefit the consumer. (Attachment 3). Mr. Krattli told the committee that identifying and rectifying problems before the contract is much easier than trying to do it at the time of signing the contract.

The Vice Chair noted that written testimony had been provided to committee members from Erik Sartorius, Johnson County Board of Realtors (Attachment 4) and Delores Dalke, Hillsboro (Attachment 5) as proponents of **HB 2687.**

Vice Chair Harrington closed the hearing on **HB 2687.**

The meeting adjourned at 11:50 a.m. The next meeting will be held March 23, 2000, 11:00 a.m.

SENATE FEDERAL AND STATE AFFAIRS COMMITTEE
GUEST LIST
DATE: MARCH 22, 2000

NAME	REPRESENTING
Erik Sartorius	Johnson Co. Board of Realtors
Tom KRATTLI	J.C. Nichols Residential, Inc.
BILL VANEK	KS Assn of Realtors
KAREN FRANCE	" "
Ann Christian	KS Assn of Realtors
John McKenzie	KS Assn of Realtors
[illegible]	KCC
Jacque Oakes	KS Auctioneers

Kansas Association of REALTORS®

3644 S.W. BURLINGAME ROAD • TOPEKA, KANSAS 66611-2098
TELEPHONE 785/267-3610 • 1-800-366-0069
FAX 785/267-1867

TO: Senate Federal and State Affairs Committee

FROM: Karen France, Director of Governmental Relations
John McKenzie, 2000 KAR President

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

Date: March 22, 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 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.

PRIZES, GIFTS, GRATUITIES
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.

Sen. Federal & State Affairs Comm
Date: 3-22-00
Attachment: # 1-1

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, when the agreement is entered into, is unaware of an existing referral agreement. Only later does the agent learn of such an 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
FAX: 296-6296
TTY: 291-3767

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

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[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).

... *The Information Network of Kansas*

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

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"

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

STATE OF KANSAS

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. Ithus 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 anageney 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):

"'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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Ann Christian
Broker / Owner

To: Senate Federal and State Affairs Committee

From: Ann Christian, Partner/Owner
ERA Ann Christian Linda Conderman Real Estate,
Manhattan, Kansas

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

Date: March 22, 2000

My name is Ann Christian. I was licensed in the State of Kansas in 1980 and have owned my own real estate company since 1988. Since 1980, I have been involved in over 120 million in real estate sales or approximately 100 transactions a year, personally.

I have been asked to share a personal experience that I was directly involved with in the past year. This situation is an example of how an after the fact referral can harm but the consumer and the small business practitioner.

I was called to a residence to list the property. The interview progressed and I left the home with a contract. Several days later, I received a call asking for a 30% referral fee. I told the relocation representative that I had a contractual agreement with the owner and that it did not include a referral fee. I called the owner. The owner had received a call and was chastised for signing a contract. The owner was not aware that the relocation company would be involved in the selling of his property. He was in empathy with my position and said he would pursue it with his new boss. There were a number of phone exchanges between all parties. The owner was able through his employer's aid to not involve the relocation company on the listing side. In the meantime, the house went under contract-sold. By this time, the relocation company was back in the picture. At this time, I agreed to pay a fee, but the relocation's involvement at this time would have delayed the closing and cost the sale. Relocation companies in some situations, actually become the owner and need to be on all documents. In this case, the timing was such that we could not let the relocation company redo all the documents, the house was to close in two days.

The relocation company told the owners that if they did not participate in the entire relocation process, buying and selling their homes, that they would lose over $3000 in tax benefits. When I visited with the relocation company and asked them to put this statement in writing, they refused. At the beginning, I had a strong, positive relationship with the owners. At the end, the fact that they might lose $3000, definitely caused consternation for all parties. The position that both the owner and myself were placed in was very unfair.

Referral fees are paid by real estate companies on a regular basis. These fees are either contracted or agreed upon before there is a contract with the client or customer, this is normal practice of business. After the fact referral fees are not acceptable in our industry.

Sen. Federal & State Affairs Com
Date: 3-22-00
Attachment: # 2-1

J.C. NICHOLS
RESIDENTIAL

www.jcnichols.com

J.THOMAS KRATTLI
SENIOR VICE PRESIDENT
CHIEF FINANCIAL OFFICER

March 22, 2000

Testimony of Tom Krattli
Senior Vice President and CFO
J.C. Nichols Residential, Inc.

Regarding House Bill 2687

I am a member of the Johnson County Board of Realtors which also includes Realtors from both Miami and Wyandotte counties. 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. This narrow interpretation, in our opinion, is not in the best interest of Kansas consumers. While we support the legislation against after-the-fact referral fees, my testimony will focus on the overly narrow interpretation of the inducement prohibition and how it negatively affects the consumer.

Within the current law governing real estate licensees, a section exists which says licensees shall not "offer or give prizes, gifts, or gratuities which are contingent upon an agency agreement or the sale, purchase, or lease of real estate." The Attorney General has consistently interpreted this prohibition very tightly. Opinions from both 1994 and 1998 stated that a "reasonable nexus" must exist between a product or service being offered and one or more of the primary real estate brokers activities specified in the law for the product or service to not be considered a gift. This narrow interpretation is preventing us from providing products or services which would benefit the consumer. Possible products and services could include home warranties, errors and omission insurance, home inspections, preliminary title searches, termite inspections, and boundary surveys. By providing these services prior to or at the time of listing, licensees can better serve the public by identifying potential problems with a property prior to the signing of a contract. Rectifying problems is much easier before the contract because the normal emotion of both buyers and sellers is not yet present. In the case of errors and omission coverage, this affords the consumer protection from the liability that exists in each and every real estate transaction. If the license law is for protecting the consumer, what can be wrong with providing items that help insure the sale of their property and also reduce the potential liability which exists after the sale closes?

This proposed change does not open the door to licensees giving away trips, toasters, cars or other items not directly related to a licensee's duties to a client according to the real estate license law. It also would not force licensees to provide these new services. However, it would allow us the opportunity to provide products and services that, in our opinion, would be beneficial to consumers.

We respectively seek your support of this important legislation.

RESIDENTIAL SALES
EXECUTIVE OFFICE
7500 College Boulevard

Testimony of Erik Sartorius
Governmental Affairs Director,
Johnson County Board of REALTORS®
Before the
Senate Federal & State Affairs Committee
Regarding
House Bill 2687 Amending the Real Estate Brokers & Salespersons Act
March 22, 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.

n. Sen. Federal & State Affairs Comm.
Date: 3-22-00
Attachment: # 4-1

Real Estate Center, Inc.

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

Senate Federal and State Affairs Committee
March 22, 2000

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 everyday 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.

Sen. Federal & State Affairs Comm.
Date: 3-22-00
Attachment: # 5-1