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KENTUCKY REAL ESTATE COMMISSION
(KREC)

SPECIAL MEETING MINUTES

March 3, 2021

*** This meeting occurred via Zoom Teleconferencing, pursuant to KRS 61.826***

Commission Members Present

Commissioner Chair, Lois Ann Disponett
Commissioner Larry Disney
Commissioner James Simpson
Commissioner Steve Cline

Commissioner Raquel Carter
Commissioner James King
Commissioner Anthony Sickles

KREA Staff

Robert Laurence Astorino, Executive Director
John Hardesty, General Counsel
Hannah Carlin, Education Coordinator
Angie Reynolds, Administrative Specialist III

Guests Present

270-202-6491
Andy Williams
Brenda Dexter
Brenda Gooslin
Bryan Henderson
Carla Anderson
Cathy Corbett
Charles Hinckley
Chey Ann
Christina Morgan
Cindy Payne
CKAR
David
Dennis Stilger
Donna Gregorich
Donna Williams
Douglas Meyers
Earleene Woods
Elaine
Elizabeth Monar
Emily Grimes
Gabby Springs
Hannah Porter
Heather Babah
Jaclyn Graves
James Cook

Janie Wilson
Jeff Duff
Jeff Smith
Jennifer Allen
Jennifer Ann
Jim DeMaio
John Huggins
John Vince
Joyce Sterling
Justin Landon
Kelley
Kelly Mitchell
Kenny Cravens
Kim Whalen
Kirk Tinsley
Linda Flickinger
Linda Townzar
Lisa Stephenson
Lonnie Gann
Luke Williams
Lynn Caudill
Marcie Estep
Margie Harper
Mary Beth Stanisu
Meredith Price
Mike Parker

Pam Carroll
Pam Featherstone
Pauline O'Hara
Peggy Smith
Reggie parker
Richard Wilson
Rip Phillips
Robin
Rhonda Richardson
Ron Brossant
Ruth Ann Bowen
Sally
Sandy Newwell
Sarah May
Sha Fister
Shannon Collins
Sonya
Stacy Ferguson
Steve Lewis
Steve Stevenson
Steven Lewis
Sue Ann Collins
Tony Vance
Turkey Lurkey
Virginia Lawson

Call to Order and Guest Welcome

The Kentucky Real Estate Commission Special meeting was called to order through video teleconference by Commission Chair, Lois Ann Disponett, at 1:01 p.m. on March 3, 2021. Roll call was taken and a quorum was present. Guests in attendance were welcomed and introductions of guests, staff, and commissioners were made.

At this time Commissioner Simpson stated that based on advice of counsel and in an effort to protect the Commission he recused himself for today's discussion and any following vote regarding the topic of Written Consent v. Listing Agreement.

Written Consent v. Listing Agreement

General Counsel stated that there has been previous discussion and a proposal to add language to KREC Advertising regulation 201 KAR 11:105 as to require to a listing agreement to advertise real estate for sale or lease for a client. The Commission had recently received several public comments regarding concerns about the change to advertising regulation. General Counsel believes that there has been both misunderstanding and misstatements as to what the regulation use to say. The official regulation did not use to require a listing agreement to offer property for sale or lease nor did it require a listing agreement to place signage in a yard. The only thing that was in the regulation prior was a separate clause that required the ‘consent’ of the owner to advertise the property. It had to have the word ‘consent’.

The relevant change that occurred is the removal of the below language from the advertising regulation in 2019. Before the regulations 2019 changes, the below language appeared at 201 KAR 11:105 Section 1(1):

(1) If promoting or advertising the real estate to the general public, the broker shall have a written listing agreement signed by the owner.

The requirement for consent of the owner that currently appears in 201 KAR 11:105 was in place before the revision of this regulation in 2019. The only change in 2019 related to consent was to change “consent” to “written consent”.

It was General Counsel’s understanding, concerning this regulation and many others, is that there was an effort taken by his predecessors to consolidate the then current regulations to a fewer number. Somewhere during the process of this, the requirement for a listing agreement was removed. A review was conducted by KREC staff of the previous meeting minutes and multiple versions of the regulation submitted to the Commission for consideration. Sometime in mid-April, during the revision process, before the regulations were ever voted on or approved by the Commission and before they were ever presented to Legislation Research Commission (LRC), this requirement was removed. The remaining portion of the regulation along with others were finalized and submitted to the Commission, where they voted unanimously to approve them, prior to being sent to the LRC. While during the process at LRC, KREC received hundreds of public comments concerning the changes to the regulation, these are all documented with LRC. Upon reviewing the comments, there was not one public comment addressing the removal of the listing agreement requirement.

General Counsel has serious legal concerns about including in this regulation a specific requirement for a listing agreement. It is not advisable to go into detail at this time regarding those legal considerations, though General Counsel has spoken to each Commission member individually explaining in greater detail as to why he believes that the Commission would open themselves up for legal liability.

Under the current regulations as they read today, General Counsel believes that consumers are sufficiently protected. Regardless of the type of written agreement, or written consent - the consumer will be informed as to what their relationship is with the agent. This is in part because licensees under the clear language of the regulation are still required to provide a prospective client i.e. a consumer, with the Guide to Agency Relationships and obtain a signed agency consent agreement form before entering into an agreement with them or when preparing an offer to purchase for them.

201 KAR 11:121 Section 5(2) specifically requires that a licensee shall complete, time and date, and deliver to the appropriate prospective client the Guide to Agency Relationships at the earliest of the following times:

- (a) Prior to entering into a contemplated written agreement to provide real estate brokerage services for compensation with a prospective client;
- (b) Prior to entering into a contemplated oral agreement provide real estate brokerage services with a prospective client; or
- (c) Prior to signing an agency consent agreement.

Further, 201 KAR 11:121 Section 6(1) specifically requires that “prior to entering into a written agreement to provide real estate brokerage services or completing, or directing the completion of, a contract, offer, or lease for a real estate transaction: (a) the licensee shall complete and deliver the Agency Consent Agreement to the prospective client; and (b) seek and obtain written consent to the Agency Consent Agreement from the prospective client.”

Thus, regardless of the type of written consent obtained from a client to offer a property for sale or lease, or to advertise a property for sale or lease, a licensee must complete and deliver to the client the Guide to Agency Relationship before entering that agreement with a prospective client. This means the Guide must be complete and delivered to the client before the client gives written consent to advertise the property or offer the property for sale or lease.

The same applies to the Agency Consent Agreement. The licensee must complete and deliver the Agency Consent Agreement to the prospective client, and seek and obtain written consent to the Agency Consent Agreement from the prospective client, before entering into a written agreement (or obtaining written consent) to provide real estate brokerage services or completing a contract or offer to purchase.

KRS 324.360 requires a seller of property to “complete and sign the [Seller’s Disclosure of Property Condition Form] at the time he or she executes any listing agreement or similar agreement by which a licensee intends to market the property.”

In sum, the agency disclosure requirements and Seller’s Disclosure form obligations apply regardless of the type of written agreement entered into between the licensee and consumer. The

consumer is adequately protected because all of these disclosures will be provided, without exception. If not, the licensee is in violation of KREC's statutes and subject to discipline. Likewise, in enacting KRS 324.360 the General Assembly specifically contemplated agreements other than listing agreements under which a licensee will market property when it used the language "or similar agreements."

Going back to General Counsel's broader strokes as to why he does not feel that it appropriate to change the listing agreement. Licensees are still required to have written consent under the regulation. Not just oral consent, which some people have suggested. The plain language of the regulation requires written consent. Licensees are still required to comply with all advertising requirements regardless of what type of agreement. Some comments have suggested that licensees are claiming and/or believing that they do not have to comply with the requirement to list the brokerage or their principal broker on an advertisement if they do not have a listing agreement. General Counsel doesn't know why that would not apply. It is clearly stated in the regulations. Any advertisement has to include that, regardless of the type of agreement entered into. None of the agency disclosure requirements, the written agreement requirements, the seller's disclosure requirements or any other concerns that people have raised will be effected or lessen the protection to the consumer if left as written consent and it is not changed to listing agreement. General Counsel does not think it will be improved by changing it to listing agreement.

It is also important for the Commission to keep in mind that KREC sets the minimum standards of conduct for licensees. Not members of any groups or associations. Under KREC regulations and laws, such things as open listings, exclusive listings, pocket listings, so called advertising agreements and/or any other type of agreement or listing is permissible as long as they comply with the terms of KREC regulations and statutes. And yes, some people have raised concerns about potentially signing up with clients that may already have multiple agents. Things like open listings contemplate that. As Commissioners have available in your Board effect packets, excerpt from the Kentucky Practice Series, which is the authoritative set of treatises on Kentucky Law. It lays out the different type of agreements that you can have under Kentucky law. There is a variety of agreements that one can enter into. Some have feelings about those types of listings, but they are not illegal and it is not the Commission's place to say whether or not they are. It is well outside of what the Commission's is tasked to do by the General Assembly.

There have also been a lot of comments about licensees being harmed by the lack of a listing agreement requirement or that they are confused. If a licensee is concerned or hesitant to enter into a listing agreement or any type of agreement, then they should not do so. General Counsel presumes that the licensees are trained and they know what type of agreements that they are entering into. If they do not what to enter into an agreement then they simply should not do it.

As to any concern that licensees would somehow not be required to comply with or bound by KREC's statutes and regulations if they do not use a listing agreement, that is unfounded. There

is nothing in KRS Chapter 324 or 201 KAR Chapter 11 that requires a listing agreement, or anything normally contained within a listing agreement, in order for KREC's statutes and regulations to apply. 201 KAR 11:011(6) defines a "client" as "a person or entity for whom a licensee provides real estate brokerage services (1) who has entered into a written agreement with a principal broker for a provision of real estate brokerage services; (2) with whom or for whom a licensee completes an offer to purchase or lease for real estate; or (3) for whom a licensee otherwise by oral agreement performs acts of real estate brokerage." Thus, only a written agreement is required for an individual to be a licensee's client, and for the licensee to owe the individual all duties owed to a client.

In addition, KREC's regulations require brokers to set advertising standards for their brokerages. So if the agency wants to require their licensees to only use specific types of agreements stricter than what KREC requires they can do so. It just has to be within the confines of the current KREC statutes and regulations. The Commission has no role in regulating or setting rules for local or state associations or the MLS, nor does it have the ability to take action to protect them. Those are separate business entities. Many licensees are involved in both. But the Commission is a state agency, tasked with regulating and setting statute of conduct for licensees. There is a need to maintain that separation. KREC cannot assist in enforcing their rules.

Ms. Hannah Carlin provided a summary of the regulation review timeline. For those that have been on the Commission awhile or have attended the meetings you will know that there have been multiple meetings over the span of the past year and a half, many lasting all day long, regarding many discussions over various topics. While preparing for this meeting Ms. Carlin has gone through every Board effect package that staff has prepared for the Commission and all the Commission minutes, trying to figure out what happened and when. Of which is provided in the Memo. Instead of rehashing it she will leave it to the Commission to discuss.

It is worth noting that during the required public comment period, KREC did not receive any comments regarding the removal of the listing agreement requirement in the advertising regulation. The majority of feedback KREC received during this time concentrated on the new sizing requirements and the delayed effective dates of the sizing requirements. The final version of 201 KAR 11:105 was approved by the Interim Joint Committee on Licensing, Occupations, and Administrative Regulations (L&O) in December 2019.

There were no questions for General Counsel or Ms. Carlin at this time by the Commissioners. At this time Madam Chair opened the floor for public comments.

At this time the Commission recognized Cathy Corbett. Ms. Corbett stated that this has been a very hard difficult regulation since it was amended. She thanked General Counsel and stated that she respected his opinion. However she thinks that it may look good on paper but it is not being implemented correctly. Currently she sees a very strong seller's market. One where agents are going to multiple sellers and getting advertising what they consider to be the 'advertisement authority' to put signs in yards and advertise properties. It does undermine the value for

consumers. Consumers are not better protected in practice. Agents have no idea what is going on with a property when we ask to show it to our buyers. And if we are counting on the seller to better understand the rules, than we are counting on an uneducated participate in the process. The Consumer Guide and the Agency forms are great but they do nothing to protect the consumer from the seller those is competing is strong sellers' market already, from shopping their property to so many different people that they are not honest as to the current status of what the property may be in. She has seen horror stories in her market and she understands that the consumers gets angry but there is little that she can do about it. She stated that she has seen agents implementing this by putting forward facing public advertising out. Saying that it is allowed and their principal brokers are supporting that because there is so much confusion on this. She thinks that in a world where it is difficult to justify your value, as a professional real estate realtor or agent that this further undermines our authority to have solid knowledge about the status of a property that they are putting in front of a consumer.

At this time the Commission recognized Jim DeMaio. Mr. DeMaio introduced himself as the CEO of the REALTOR® Association of Southern Kentucky and stated that this isn't an Association or an MLS issue, it is clearly a consumer issue. The biggest reason that you are hearing from the Realtor Associations is because 75-80% of their members are KREC licensees. The licensees contact the Associations first. When the mandate for a listing agreement was in place, there was a very clear line. With the change, the line has become very blurry. He would very much like to encourage the Commission to start some classes to make sure that the licensees understand if and when they are going to go into a more vague relationship or contract with a consumer that the other requirements do not go away. He believes that there has been a misinterpretation "If you give them an inch, they take a mile" kind of thing going on in the market right now.

We are not saying that the licensees think that they do need something in writing, we are saying that the licenses are not taking the time themselves and to get it right. We need as much education as possible to make sure that they understand that when they go into an advertising agreement that there are still agency requirements and laws to adhere to. A licensee cannot get a text from a seller and start advertising property.

He loves the working relationship that the licensees have with the Commission and its Counsel, but he worries about the ability of KREC to enforce a vague regulation. In all due respect he does believe this to be something that KREC needs to reconsidered. With that, he hopes for as much transparency as to why the Commission has come to its decision. He has explained where he stands and he feels that he has made it pretty clear. He thanked the Commission for letting him voice his opinion.

At this time the Commission recognized Mike Parker. Mr. Parker stated he is going through this very thing as of right now with an agent. He has a seller that has gone into marketing agreements with other agents and has a contract accepted that he wants to kick it out and replace it with a

new one because they are paying more. This is one of the problems that you have when you do not have a signed listing agreement in place. This agent states that he can sell to anyone despite being under a purchase contract. There needs to be a listing agreement in there to protect the consumer, without the listing agreement in place, you can say all day long that you have to do the property disclosure forms – though many of the ‘for sale by owners’ or anyone selling a house without a marketing agreement would not know. There is nothing in place that tells them that they have to do that.

At this time the Commission recognized Rhonda Richardson. Ms. Richardson stated that a written agreement or written authorization to advertise a property is, to her, the same thing as a listing agreement, except that a listing agreement provides for an agency relationship between the parties. Usually that listing agreement is an ‘exclusive’ agency agreement. Which states that only that agent can market that property. Having just the consent of the property owner to market the property could be under taken in a non-exclusive arrangement, if wanted by the property owner. Her concern is limiting or restricting it to just a listing agreement, and would this take away from some of the options that the seller would have for services. She believed that they need to address the issue and put into place something that strictly states that you can advertise my property. An agent’s sign in the yard makes it appear that there is an exclusive agreement already in place with that agent. She finds that to be problem. She feels that both side of that coin needs to be addressed.

Ms. Corbett commented that Ms. Richardson makes a very good point. The issue comes into play with what an agent can do publicly promote one of these properties via text and email or with any sort of written consent from the owner. That has been the issue.

At this time the Commission recognized Tony Vance. Mr. Vance stated that another concern is that if we just allow people to advertise these properties without a listing agreement, what if they market the property on social media – maybe two or three agents are marketing the same property, who does the buyer’s agent send the contract to? Those who have an advertising agreement think they should get the contract. He feels that a well-defined listing agreement would help to establish the rules, the requirements and who to work with. He feels that this is creating a nightmare for buyers and their agencies.

At this time the Commission recognized Janie Wilson. Ms. Wilson stated that the agents are really confused as to the difference between an advertising agreement vs that of a listing agreement. Some agents that have advertising agreements are picking and choosing who gets to view the property without the seller’s knowledge or consent. They are eliminating potential buyers, therefore opening the seller’s up to a discrimination lawsuit because an agent decided that someone in a protected class could not buy the property. Others in the gallery agreed.

At this time the Commission again recognized Ms. Richardson. Ms. Richardson noted that they are not the listing agent if they only have the right to advertise. They cannot stop anyone from

showing that property. If they have an advertising agreement than you have a 'for sale by owner' situation. Making the owner the one who should provide access to that property. The agent would not have the exclusivity to do that. So if the property owner has given permission for the agent to show the property than they should have a listing agreement. If they have failed to get that listing agreement in writing, than that should be a violation if they are doing more than what they have been authorized by the property owner to do. If they have an exclusive agreement in place to do that than the need to let the world know that. This is when you put a sign in someone's yard showing that. The way around this is to not allow them to put a sign in someone's yard if they do not have a listing agreement. Because the only sign in the yard should be the 'for sale by owner' sign and the owner should be making the decision about access. She would urge to distinguish the two different relationships and the service obligation.

She went on to note that she is licensed in both Ohio and Indiana, and their laws are identical to what is in Kentucky, stating that you have to have a written agreement to advertise property.

At this time the Commission recognized Earleene Woods. Ms. Woods stated that she did not really understand all of this. That everyone keeps saying protecting the seller protecting the seller, while this does not protect the buyer in any way shape or form. If we are a Public Protection Agency shouldn't we be protecting both sides? Which she doesn't see this as being best for both.

At this time the Commission recognized Charles Hinckley. Mr. Hinckley stated that his concern is that even if one agent has the marketing agreement with a seller and if you are contact that agent to show the property then that implies more than just a marketing agreement as stated by Ms. Richardson.

At this time the Commission again recognized Mr. DeMaio. Mr. DeMaio noted that this dialog within the last few minutes really hammers home as to why this change to require a listing agreement as to a written advertisement agreement is important. Ms. Corbett and Mr. Vance reiterated the same concern.

At this time the Commission recognized Jaclyn Graves. Ms. Graves introduced herself as CEO of the Greater Owensboro REALTOR® Association. The KREC exists to protect the public interest. However, the current state of 201 KAR 11:105 is doing the opposite. Not only is the consumer at risk, but the public optic of the entire real estate community is damaged by this confusion. For a consumer to utilize the expertise of a licensed real estate professional, they should be required to have a signed listing agreement. The property owner has every right to sell their property as they wish, but allowing certain benefits with licensees, while not requiring an agreement of services, should not be permitted.

Public Comments was closed at this time. General Counsel thanked everyone for their healthy and helpful discussion. It is helpful to have input from the industry. He wanted to touch on the

issues that were discussed. Certain of the situations mentioned are violations under the current regulations. So if these people are doing these things, you need to or the people being affected need to file complaints against these individuals. Our regulations do permit a licensee to prohibit someone from viewing a property with the written consent of the owner, but it does not permit otherwise illegal discrimination. So if there is a belief that a licensee is discriminating against a protected class that is very concerning and a complaint needs to be filed– it is a violation. If licensees are advertising without proper consent then that is a violation and a complaint needs to be filed on that.

The Director has been working particular hard to enter into reciprocity agreements with our other states. We go to great lengths to research other states laws, education requirements and their compatibility to Kentucky's own prior to approaching them regarding a reciprocity agreement. We currently have a reciprocity agreement with Ohio and are currently working on one with Indiana. If the Commission were to make those changes it could potentially undo the current progress already made.

Things happen and people feel that they have been wronged. That is why the courts exist, they can file a lawsuit. Again KREC regulates the licensees and sets the minimum standards of conduct for them. It is not proper for the Commission to eliminate types of competitive practices just because we believe that there is some kind of confusion among the licensees. KREC has no role in managing, jurisdiction to regulate, or duty to protect associations or MLSs. As part of the Public Protection Cabinet, KREC licenses, regulates, and disciplines real estate sales associates and brokers, and protects consumers and the general public.

Commissioner King thanked everyone for the letter that had been sent and the open discussion. He noted that from what he had heard during the discussion are regarding situations that could arise at any time. Many of these situations would be a breach of contract that you would take to court and sue over. No matter how we try to changed thing this will still occur. If it is an education issue than let's focus on this and add to the education portion. Before we start changing rules lets educate these folks. Make it a CE course, which he finds to be a much better option to changing the regulations.

Commission Disney shared that he agrees with the need for additional education and as well as enforcement. The basic laws are in place and if someone does not understand this than we need to make sure the education is there for them to follow. If they go through the educational process and they are still violating the laws, than we have a problem. That is when we need to readily enforce the regulation and protect the consumer. In his honest opinion, he believes that no matter what the Commission puts in place there will always be an issue.

Commissioner Cline asked General Counsel to define a written agreement – written consent is the proper term, which is an agreement signed by the licensee and the property owner as to how the licensee is going to advertise (only) the owner's property.

Commissioner Cline stated that if the licensees are confused by the difference of a listing vs an advertising agreement, could you imagine the consumer confusion. He is not sure if education would be enough. Unless you can also educate the consumer. If you have more than one person telling the consumer various different things then who should they listen to? How can we get the consumer to understand what we cannot get the licensees to understand? What good can come from this rule as written? He doesn't understand it. If we don't understand it as licensees how can we expect the consumer to? He doesn't feel that we should base any of the KREC rules on what other states do. The consumer is in danger of paying multiple commissions. He has been an agent for over 34 years and just listening to this discussion is confusing to him.

Commissioner Carter stated that like Commissioner Cline she is still a practicing realtor. There are many agents and transactions that go on in her office on a daily bases. She prefers a listing agreement over the advertising consent form. But once you have a written consent with the consumer you still have a duty to represent the consumer to the best of your abilities. You are still required to do your disclosure, to establish agency, to do your duty and follow the rules that are in place. Part of that is to educate the consumer as to that you have an 'agreement to advertise' vs a 'listing agreement'. You still have to follow the regulations & statutes and do your duties. This does not change.

Chairperson Disponett thanked everyone for their time and the discussion. She want to let them know that their letters and emails were all read and taken into consideration. That KREC appreciates their time and assistance.

The Commission took no action related to this issue.

Revision of Disclosure Forms

There was a task force formed which included General Counsel, Chairperson Disponett, Commissioner Disney, Virginia Lawson and Dennis Stilger.

General Counsel presented the following disclosure forms for revision discussion.

Revisions to Agency Forms

- 400 – A Guide to Agency Relationships (current version)



400- A Guide to
Agency Relationship

- 400 – Consumer Guide to Agency Relationships (proposed revision)



400 - Consumer
Guide To Agency Re

- 401 – Agency Disclosure Statement Buyer (current version)



401 - Agency
Disclosure Statemen

- 401 – Agency Disclosure Statement Buyer (proposed revision)



401 - Agency
Disclosure Statemen

- 401 – Agency Disclosure Statement Seller (current version)



401 - Agency
Disclosure Statemen

- 401 – Agency Disclosure Statement Seller (proposed revision)



401 - Agency
Disclosure Statemen

- Agency Consent Agreement Part A (proposed per 201 KAR 11:121 Section 6(1))



Agency Consent
Agreement Part A.pc

Revisions to Seller's Disclosure of Property Condition Form

- 402 – Seller's Disclosure of Property Condition (current version)



402- Seller's
Disclosure of Proper

- 402 – Seller’s Disclosure of Property Condition (proposed revision)



402- Seller's
Disclosure of Proper

Nothing was voted on at this time.

Meeting Adjournment

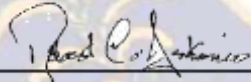
The next KREC meeting will be March 18, 2021 at 9:00 a.m. for the regular meeting. Watch for a zoom link.

Commissioner Disney made a motion to adjourn the meeting. Commissioner Simpson seconded.

I, Robert Astorino, Executive Director of the Kentucky Real Estate Authority, have reviewed and pursuant to KRS 324B.060, have Approved or Disapproved the expenditures of the Kentucky Real Estate Commission (Insert name of Board) as described in these attached minutes.

Meeting Date May 3, 2021.

I have not reviewed, nor did I participate in discussions, deliberations, or decisions regarding, the actions of the Board as it relates to individual disciplinary matters, investigations, or applicant reviews.


Robert Astorino, KREA Executive Director

Date May 21, 2021