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ATTORNEY GENERAL OPINION NO. 81- 272

Kansas Real Estate Commission
Room 1212
535 Kansas Avenue
Topeka, Kansas 66603

Re: Personal and Real Property - Real Estate Brokers and
Salesmen - Publication of Commission's Disciplinary Actions

Synopsis: Pursuant to K.S.A. 1980 Supp. 58-3048(c), the Real Estate Commission is vested with broad discretion concerning the text of information published by the Commission regarding its enforcement actions and the frequency of such publications, provided only that the Commission publish such information that it deems of interest to the public, that it publish such information at least annually in conjunction with its publication of a list of names and addresses of all licensees, and that the manner of publishing such information be calculated to reach the general public. Cited herein: K.S.A. 1980 Supp. 58-3048, 58-3050, 58-3058, 75-6101, 75-6104 (as amended by L. 1981, chs. 357, 358, 359).

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Dear Commissioners:

You have asked for an opinion concerning the Kansas Real Estate Commission's publication of its disciplinary actions. As you mentioned by way of introduction, state statute gives the Commission the power to hold a hearing and censure a licensee, or revoke, suspend or restrict

such licensee's license. K.S.A. 1980 Supp. 58-3050. However, K.S.A. 1980 Supp. 58-3058 provides for appeal of the Commission's order to the district court within 30 days, and also for appeal from the order or judgment of the district court. In light of these statutory requirements, you have asked the following specific questions:

- "1. May the Commission publish its order during the 30-day appeal period?
- "2. If the appeal time has run and no appeal has been filed, may the Commission publish its order?
- "3. If the appeal time has run and an appeal has been filed, may the Commission publish its order along with a statement that the licensee has filed an appeal with the district court?
- "4. If the Commission has published its order, would it be mandatory that it also publish the order or judgment of the district court? What if either party appealed from the order or judgment of the district court?
- "5. If a disciplinary action is published, is the following sufficient: licensee's name, real estate broker or salesperson, license suspended for 60 days, effective date. Would additional information, such as sections of license act violated, be at the discretion of the Commission?"

In addition to these enumerated questions, you also ask if the Commission could choose to have this information published in a regular newspaper rather than in a newsletter to licensees.

Your questions have obvious reference to the requirements of K.S.A. 1980 Supp. 58-3048(a), which states:

"The commission shall publish at least annually a list of the names and addresses of all persons licensed under the provisions of this act, together with such other information relative to the enforcement of the provisions of this act as it may deem of interest to the public." (Emphasis added.)

Although the Commission is directed by the foregoing provisions to publish information regarding its enforcement actions, the emphasized portion thereof clearly gives the Commission broad discretion as to the information to be published and the time and manner of publication. Such discretion is apparent from the statute's directive that the Commission publish at least annually such information "as it may deem of interest to the public." (Emphasis added.) While the rest of the language has a distinctly discretionary flavor, the word "may" is the key. It is a generally accepted rule of statutory construction that, absent any evident legislative intent to the contrary, "may" denotes discretion. Cunningham v. Blythe, 155 Kan. 689 (1942). We find nothing in these provisions to suggest a contrary interpretation. Thus, it is our opinion that the information to be published is a product of the Commission's discretion, provided only that the information is deemed by the Commission to be "of interest to the public."

The Kansas Supreme Court has stated that "[m]atters of administrative policy will generally be left to the discretion of the administrative agency if they fall within its field of expertise." Graves Truck Line, Inc. v. State Corporation Commission, 215 Kan. 565 (1974). Moreover, "[t]he general rule is that when powers are expressly conferred the power is implied to take such reasonable means as may be necessary for the effective exercise of the powers conferred and the discharge of the duties imposed." Edwards County Commissioners v. Simmons, 159 Kan. 41, 53 (1944), citing State, ex rel. v. Younkers, 108 Kan. 634 (1921).

While these cases do not deal directly with the statute in question, they buttress our interpretation of it. There should be no question that the subject of your inquiry falls within the Commission's field of expertise. Thus, absent any specific constraints, the Commission may take such reasonable means as may be necessary to carry out its duty to publish "disciplinary" information it deems of interest to the public.

However, notwithstanding the Commission's discretionary authority as to the information to be published, it is our further opinion that the legislature has specifically constrained the manner of publishing information relative to its enforcement actions. The Kansas Supreme Court has often held that "[a] primary rule for the construction of a statute is to find the legislative intent from its language, and where the language used is plain and unambiguous and also appropriate to the obvious purpose the court should follow the intent as expressed by the words used and is not warranted in looking beyond them in search of

some other legislative purpose or extending the meaning beyond the plain terms of the Act." City of Kiowa v. Central Telephone and Utilities Company, 213 Kan. 169, 176 (1973). See, also, Lakeview Gardens, Inc. v. State, ex rel. Schneider, 221 Kan. 211 (1976) and cases cited therein. In this instance, the language of the statute makes it clear that the Commission "shall publish at least annually a list of the names and addresses of all persons licensed under this act, together with" the information relative to its enforcement actions. So, the Commission is vested with discretion as to how often it publishes information concerning disciplinary actions, so long as it does so at least annually and such information is published in conjunction with the Commission's publication of the list of names and addresses of all licensees.

Your questions concerning what information should be published seem to indicate your desire to attempt to limit any possible civil liability. As pointed out above, K.S.A. 1980 Supp. 58-3048(a) gives the Commission broad discretion as to the information it publishes. In this context, K.S.A. 1980 Supp. 75-6104(d), a section of the Kansas Tort Claims Act, K.S.A. 1980 Supp. 75-6101 et seq., as amended by L. 1981, chs. 357, 358, 359, states:

"A governmental entity or an employee acting within the scope of the employee's employment shall not be liable for damages resulting from:

. . . .

"(d) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a governmental entity or employee, whether or not the discretion be abused. . . ."

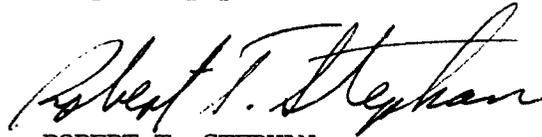
It is our opinion that under the above statute the Commission is immune from liability for damages resulting from the publication of disciplinary information it deems, in its discretion, to be of interest to the public. However, as a matter of public policy, we believe that all relevant information available at the time of publishing should be contained in the publication. Further, subsequent events regarding the disciplinary procedure of a licensee should be contained in the next publication. This, until the matter is finally determined and no additional appeals lie.

As for your last question regarding whether the Commission should publish information on disciplinary matters in a newspaper or its own newsletter, we must look to K.S.A. 58-3048(a) for guidance. Since the only information

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the Commission can publish is information it deems "of interest to the public" it is our opinion that the Commission must publish such information in a manner calculated to reach the public. Whether a newsletter to licensees is such a publication is in our view doubtful. However, this is a factual question within the Commission's expertise, and it is within the Commission's discretion to determine whether a particular publication containing the Commission's enforcement actions is calculated to inform the public.

Very truly yours,



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