

Subject

FILE
Licensure - Real Estate Brokers



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STATE OF KANSAS

Office of the Attorney General

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VERN MILLER
Attorney General

August 19, 1974

Opinion No. 74- 292

John Ball, Director
Kansas Real Estate Commission
Room 1212
535 Kansas Avenue
Topeka, Kansas 66603

Dear Mr. Ball:

K.S.A. 58-3003, of the Real Estate Brokers' License Act, provides in pertinent part thus:

"The provisions of this act shall not apply to the following:

* * *

(d) any attorney-at-law in the performance of the duties of any attorney-at-law." [Emphasis supplied.]

You inquire as to those conditions under which an attorney must obtain a license as a real estate broker and to what extent an attorney may engage in the sale of real estate before a license is required.

Attorneys enjoy no absolute exemption from licensure under the act. An attorney who acts as a real estate broker or real estate salesman as those terms are defined by K.S.A. 58-3002(a) and (b) is exempt from licensure under the act when and only when he so acts "in the performance of the duties of any attorney-at-law."

The difference between an absolute exemption and a limited exemption such as that afforded by the cited statute was noted in *Weinblatt v. Parkway-St. Johns Place Corp.*, 136 Misc. Rep. 743, 241 N.Y.S. 721 (1930), where the court spoke of the rationale underlying the total exemption provided by New York law, quoting from the opinion of Chief Judge Cardozo in *Roman v. Lobe*, 243 N.Y. 51, 152 N.E. 461, 50 A.L.R. 1329:

"Callings, it is said, there are so inveterate and basic, so elementary and innocent, that they must be left open to all alike, whether virtuous or vicious. If this be assumed, that of broker is not one of them. The intrinsic nature of the business combines with practice and tradition to attest the need of regulation. The real estate broker is brought by his calling into a relation of trust and confidence. Constant are the opportunities by concealment and collusion to extract illicit gains. We know from our judicial records that the opportunities have not been lost. With temptation so aggressive, the dishonest or untrustworthy may not reasonably complain if they are told to stand aside. Less obtrusive, but not negligible, are the perils of incompetence."

The court continued thus:

"Presumptively, at any rate, the honesty and competency of 'attorneys at law' are attested by a certificate of admission to practice their profession. Logically a lawyer must have passed a test at least equivalent to that required of an applicant to secure a license as a real estate broker."

The Kansas Legislature chose, apparently, not to indue this presumption. An attorney may act as a real estate broker or salesman without a license therefor only when he does so in the "performance of the duties of any attorney-at-law." The example cited in your letter is appropriate: "it would be perfectly proper for an attorney, who did not hold a real estate license, to dispose of property belonging to others if he were settling an estate." When the sale of real estate is undertaken by an attorney in the course of providing legal counsel and representation to a client, he is not required to be licensed as a real estate broker or salesman therefor. On the other hand, when one who is admitted to practice before the courts of the State of Kansas as an attorney opens a real estate office, advertises and solicits listings, seeks out buyers and negotiates real estate transactions for persons from the general public for whom he performs no services other than acting as a real estate broker or salesman, he does not perform these services in the course of "performance of the duties of any attorney-at-law."

It would not be possible to enumerate conclusively the circumstances under which an attorney at law may undertake the sale of real property without a license under the act. In *Haas v. Greenwald*, 196 Cal. 236, 59 A.L.R. 1493, aff'd, 275 U.S. 490, 72 L. Ed. 389, 48 S.Ct. 33, the court considered a case where

an attorney, not licensed to act as a real estate broker or agent, and two licensed real estate brokers, negotiated a mortgage on behalf of a prospective purchaser for the purchase of realty, who refused thereafter to purchase the property. The court held that the attorney, and in turn his assignee, was not entitled to any part of the commission where the purchaser, allegedly without cause, refused to purchase the property. The complaint upon which the claim was based contained no allegation that the attorney had acted for the purchaser in the capacity of his attorney:

"If the amended complaint herein had alleged that any services rendered by said A. M. Johnson to the defendant in the course of the negotiations, which are fully detailed in said complaint, [were rendered] in his capacity as an attorney at law or in the performance of his duties as such attorney at law, or had even alleged that said A. M. Johnson, during the course of said negotiations, represented either said Greenwald or any other person, who was a party to such negotiations, as or in the capacity of an attorney at law, a different question would be presented. But the amended complaint herein is barren of any such allegation"

In *In re Guardianship of Estate of Prieto*, 52 Cal. Rptr. 80 (1966), the agreement upon which the claim was based rebutted any suggestion that the attorney acted in the capacity of an attorney in the transaction upon which the claim was based:

"To avoid the claim of illegality respondents, although admitting Therieau was not a licensed broker, contend his services in effecting the lease were rendered as an attorney rather than a broker as defined by the licensing statute. . . . This contention is not supported by the evidence. The order of January 2, 1962, upon which respondents rely to establish their claim, authorized execution of a lease to the corporation and, upon its approval, payment to them of a 'real estate commission.' Their petition for instructions was directed to the payment of 'Broker's Fee Senci Lease.' The order appealed from refers to this petition as requesting an 'order directing the payment of a Real Estate Broker's fee.' These circumstances dictate the conclusion respondents were seeking recovery of a broker's fee."

Tobin v. Courshon, 155 So.2d 785, 99 A.L.R.2d 1147 (1963), is a case squarely in point to your inquiry, the Florida statute being virtually identical to our own. That case was begun by two attorneys against a real estate broker, to recover one-third of a

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real estate commission. They had been retained by one Siegel, acting for himself and two associates, to locate property for sale in the vicinity of Miami Beach. The attorneys were to report to Siegel any property for consideration which met the latter's requirements, and they were to be compensated by a commission paid by the seller or by sharing in any commission paid a cooperating real estate broker. A broker informed the attorneys of certain property, and agreed with the attorneys that if he, the broker, furnished them information about the property and a sale resulted, the attorneys would be paid one-third of the commission. A sale resulted, and the broker refused to honor the agreement. The Florida Supreme Court refused recovery:

"We are not advised by the complaint that there was any connection whatever between the activity undertaken by the respondents and any professional services they were furnishing as attorneys to the purchaser of the property, who was not even obligated to pay for whatever work they performed"

The court specifically held that an attorney at law was not authorized to act as a real estate broker in an isolated case when there was no relationship to his duties as an attorney, and that an attorney could not collect compensation for work performed as a real estate broker or salesman for a person who was not his client merely on the theory that "because he as an attorney was familiar with the law of conveyancing he could enter the realtor field on an independent venture."

The court stated squarely:

"The narrow avenue through which the lawyer, not licensed as a real estate broker or salesman, may enter the ambit of the real estate broker or salesman is the one of duty owed by him in the relationship of client and attorney."

We adopt this statement as descriptive of the power of an attorney at law to act as a real estate broker or salesman without a license to do so, under the exemption stated in K.S.A. 58-3003(d).

Yours very truly,



VERN MILLER
Attorney General

VM:JRM:jsm