STATE OF KANSAS

Office of the Attorney General

1st Floor, State Capitol Bldg. (913) 296-2215 Topeka, Kansas 66612

Curt T. Schneider
Attorney General

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ATTORNEY GENERAL OPINION NO. 76- 291

Mr. John Ball
Director
Kansas Real Estate Commission
535 Kansas Avenue
Topeka, Kansas 66603

Re: Real Estate Brokers--Advertising--Regulation

Synopsis: K.A.R. 86-3-37 serves a legitimate governmental interest, save except a portion of subsection (b) thereof. Approval is hereby withdrawn from the words "in front of said name or trade name of such franchisor" in subsection (b) thereof. The remainder of the regulation constitutes a permissible exercise of the power of the state in the service of legitimate stated interests.

* * *

Dear Mr. Ball:

You inquire concerning the validity of Kansas Administrative Regulation 86-3-7.

In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.* 48 L. Ed. 2d 346 (1976), the Court considered the validity of a Virginia statute which provided that any pharmacist licensed by that state who should advertise prices for prescription drugs was guilty of unprofessional conduct. The Court clearly rejected the argument that so-called "commercial speech" was not entitled to First Amendment protection. However, the fact that commercial speech is thus constitutionally protected does not mean the end of all state regulation. The Virginia statute considered in that case was, indeed, an instance of total prohibition, and not one of regulation. The Court cautioned thus:

> "In concluding that commercial speech, like other varieties, is protected, we of course do not hold that it can never be regulated in any way. Some forms of commercial speech regulation are surely permissible. We mention only a few to make clear that they are not before us and therefore are not foreclosed by this case.
>
> There is no claim, for example, that the prohibition on prescription drug price advertising is a mere time, place, and manner restriction. We have often approved restrictions of that kind provided that they are justified without reference to the content of the regulated speech, that they serve a significant governmental interest, and that in so doing they leave open ample alternative channels for communication of the information." 48 L. Ed. 2d at 363-364.

The court further emphasized that differences between commercial speech and noncommercial speech may justify differentials in state regulation, including greater regulation of purely commercial speech than would otherwise be tolerated. Of particular pertinence here, the Court pointed out, by way of a footnote:

> "Attributes such as these, the greater objectivity and hardiness of commercial speech, may make it less necessary to tolerate inaccurate statements for fear of silencing the speaker . . . . They may also make it appropriate to require that a commercial message appear in such a form, or include such additional information, warnings and disclaimers, as are necessary to prevent its being deceptive."

The regulation in question here is not prohibitory, but merely regulatory. Subparagraph (a) thereof states thus:

> "All advertising, except on property personally owned by the licensee or in which he or she may have an interest, shall be done in the name of the broker by using his or her trade or business name under which he or she

> is licensed and such other information as the broker considers necessary. The use of only a post office box number, telephone number or street address shall be deemed a violation of section 3015(a)(9) of the law."
>
> All advertising caused by a licensee, on property personally owned by such licensee, or on property in which he or she may have an interest, shall be done in such a manner as to clearly inform the public that he or she is licensed as a real estate broker or salesman."

This subparagraph does not inhibit the flow of any information whatever. Indeed, it merely requires full disclosure of the identity of the broker in advertising, and of ordinarily necessary commercial information.

Subparagraph (b) states thus:

> "If any name or trade name of a franchisor is used in any advertising or on any signs displayed by such broker, the broker shall cause his or her name, or the trade or business name under which he or she is licensed, to be placed in front of said name or trade name of such francisor [*sic*] in such a way that both the broker and the franchisor's name shall be clearly identifiable. Failure to so include as set forth herein shall be deemed a violation of section 3015(a)(9) of the law."

This provision does not prohibit the communication of any information whatever. It is largely a "time, place and manner" restriction. In any advertising in which a broker uses the name of a franchisor, the broker must use both his personal, business or trade name, as well as that of the franchisor; the former must precede the latter; and both must be clearly identifiable.

The Commission does not license franchisors, but brokers and salesmen. It has an obvious interest in assuring that the names of its licensees are fully and clearly disclosed to the public in advertising which holds out real estate brokers' services to the public in the name of a franchisor. Certainly, I cannot conclude as a matter of law that this interest is insignificant or insubstantial.

One portion of this regulation, the requirement that the name of the broker appear "in front of" the trade or business name of the franchisor, may be subject to question. As indicated, the state has a legitimate interest, in my judgment, in requiring that the names of both be clearly identifiable. However, it is difficult to conceive what state interest is served by a requirement that the name of the broker appear in front of rather than below or beside that of the trade or business name of the franchisor. If it is the purpose of this particular requirement to assure that the name of the broker appears in a prominent position in the advertisement, it appears to be somewhat arbitrary, for the name may be equally prominent when appearing in other juxtapositions to the name of the franchisor. It is entirely possible that this requirement inhibits, interferes with or impedes the advertising programs of national or regional franchisors, who plan their marketing and advertising material for use by their local franchises. Such speech is indeed commercial speech, and must be free from unreasonable state regulation. Certainly, this portion of the regulation cannot be deemed to regulate the content of commercial communication. Its effect, however, may be to impose additional burdens upon advertisers who are entitled to exercise their constitutionally protected rights of commercial speech free from unreasonable state conditions. Given the manifest lack of any discernible state interest whatever in this particular requirement concerning the juxtaposition of names, it is my opinion that this portion of the regulation is unenforceable and hence beyond the power of the Commission.

Subsection (c) states thus:

> "Any and all advertising conducted by a real estate broker, which contains a name or trade name of a franchisor shall include one or the following statements: 'an independent real estate broker' or 'an independently owned real estate company,' whichever is applicable. When spoken, such statement shall be clearly made in such advertising and when printed or written in any manner, such statement shall appear in print of a bold and conspicuous nature in such advertising. Failure to so include shall be deemed a violation of section 3015(a)(9) of the law."

This section appears merely supplementary to the preceding portion of the regulation. In *Virginia Pharmacy Board, supra*, the Court

expressly pointed out that it may be appropriate that a "commercial message appear in such a form, or include such additional information . . . as . . . necessary to prevent its being deceptive." Again, a regulation which requires, as a protective measure, the communication of certain commercial information stands on a much different footing than one which prohibits the communication of lawful commercial information. The latter obviously must be scrutinized as a potential inhibition upon a First Amendment right. Here, it appears only that the entirely correct fact, the status of the advertising licensee as an independent broker, is required to be advertised, to assure that the identity of the advertiser as a Kansas licensed broker is not obscured by the use of a franchisor's business or trade name. Obviously, the Commission is entitled to reevaluate the necessity of this additional protective measure from time to time. However, in my judgment, there is certainly no basis for a conclusion, purely as a matter of law, that this additional mandated information, slight as it is, infringes upon the First Amendment rights of either the public, the broker who places the advertisement, or of the franchisor whose name is used therein.

K.A.R. 86-3-7(d) clearly serves the Real Estate Commission's legitimate governmental interest in protecting the public from false representations about the extent of a real estate broker's business operation. It provides as follows:

> "It shall be deemed a violation of section 3015(a)(9) of the law for any broker using any name or trade name of a franchisor to foster or permit advertising which indicates or attempts to convey to the public the impression that the broker's individual firm is national or countrywide in nature and scope if, in fact it is not."

A broker's privilege of commercial speech is not infringed upon in any way by this provision. The sole purpose of this subsection is to protect the public from false or misleading advertising and potential fraud by a franchisor of a trade name. It attempts to ensure that the claims of a national franchising firm will not be fraudulent. It represents a legitimate concern of the Real Estate Commission and is valid under the law.

With the exception noted above, it is my opinion that the regulation is a lawful exercise of the power of the Commission. The requirement concerning the juxtaposition of the name of the broker and

franchisor when used together in advertising material may serve to impede or interfere with the advertising and marketing programs of regional or national franchisors and their franchisees, with no apparent likelihood that such a requirement will serve to reduce deception or promote any other significant state interest. Indeed, the position requirement serves no apparent state interest whatever. So regarded, even a minimal interference with commercial speech, in this instance franchisors' and franchisees' advertising programs, is difficult to justify. The remainder of the regulation is entirely proper, however. Our approval of the words "in front of said name or trade name of such franchisor" as found in K.A.R. 86-3-7(b) is hereby withdrawn. We reiterate our approval of the balance of the regulation.

Yours very truly,

CURT T. SCHNEIDER
Attorney General

CTS:JRM:kj