

Kansas Association of REALTORS® Presents

Required Broker Core: Salesperson Supervision, RESPA & Common Violations

REALTOR® Continuing Education

By Vernon L. Jarboe © Copyright 2010



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OF

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Salesperson Supervision RESPA Violations Common Violations

This course has been approved by the Kansas Real Estate Commission for 4 hours of continuing education credit. This course also meets the mandatory Broker Core requirements for Brokers that began on January 1, 2000. It also has been approved for 4 hours of elective continuing education credit for Salespersons.

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This course counts as required class for Brokers and elective credit for Salespersons under Kansas law and elective credit in Missouri for both Brokers and Salespersons.

The Author – Vernon L. Jarboe has over 30 years experience in real estate matters handling development issues, land use, zoning and financing of small and major projects. Vernon also represents many local boards of REALTORS® through form review, advising on legal issues, including antitrust and ethics issues. Litigation experience includes representing landowners and condemning authorities in eminent domain matters, real estate brokers and salespersons in liability matters and collecting commissions. Vernon has continually manned the Real Estate Legal Hotline since its inception in 1998. The Legal Hotline is a subscription service through Real Estate Business Resources, Inc. (REBR) a subsidiary of the Kansas Association of Realtors offering free legal opinion to participating brokers and their firm.

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This course is composed of four (4) components:

1. A narrative discussion of agency under current Kansas law in the real estate business. You need to read the narrative before proceeding.
2. Class discussion over an expanded version of the materials covered by the narrative, including questions over the quiz responses.
3. Resolution of fact patterns in small group and class discussion.
4. There is an open book quiz over the narrative material in Part 1. This can be completed at the end of the group discussions or taken with you and faxed to KAR at 785-267-1867 within 10 days of the class.

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NARRATIVE

THE KANSAS REAL ESTATE COMMISSION (KREC)

KREC is an arm of state government. It is composed of five members appointed by the Governor and includes at least three Brokers, each with at least five years experience, and at least one person without a license who is not involved in the real estate business. One member comes from each congressional district to provide regional balance. The KREC hires its executive director who in turn is responsible for day to day management of the KREC staff.

The KREC is charged with establishing processes for issuing and renewing licenses which includes regulating and supervising continuing education courses and instructors. KREC also is responsible for enforcement of the Kansas Real Estate Brokers and Salespersons License Act, the Brokerage Relationships in Real Estate Transactions Act, Real Estate Recovery Fund Act and making and enforcing regulations that interpret and apply these enactments. A licensee is subject to the KREC enforcing any of these three sources of rules.

In this course we will explore the answers to these questions:

- ❖ How do violations come to the attention of KREC?
- ❖ How does KREC investigate violations?
- ❖ If KREC believes you have violated the law how do you find out about it?
- ❖ If KREC finds you in violation and you do not what is your remedy?
- ❖ What are the penalties if you are found to have violated the law?
- ❖ What are some common violations of the license law?
 - Failure to have fixed date of expiration in agency agreement
 - Failure to include accurate agency disclosure in contract
 - Real estate services without a license
 - Crossing another broker's exclusive agreement
 - Misrepresentation
 - Trust account violations
 - Advertising violations
 - Interference with contract claims
 - Record keeping violations
 - Signing documents without power of attorney

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How do violations come to the attention of KREC?

There are three general ways in which KREC becomes aware of violations.

- ✓ A citizen may go to KREC and file a complaint.
- ✓ A licensee may go the KREC and file a complaint.
- ✓ The auditor may come to your offices and find a violation by review of your files.

Some of the common violations come to the attention of KREC in each of these ways.

How does KREC investigate violations?

If the violation comes up by audit then the auditor will likely have found the violation from review of your own files. However, in some cases you may be asked to supplement or explain information that was found by audit. In the cases of a complaint, initiated by citizen or other licensee, you will likely receive a letter from the staff of KREC asking for documents and explanations. They will likely interview other people in the transaction – consumers or other licensees. They may call you to discuss things that require more explanation, but most of their information gathering typically happens in writing -- assuring less likelihood of misunderstanding.

It is important that you not ignore an inquiry and that you fully explain your position.

Never assume the complaint is so without merit that anyone looking at the facts will simply disregard the complainant and find in your favor. Therefore, you should promptly gather your information, make an outline of what KREC asked for and write your response with complete detail. After making a draft it is wise to have someone else read it to make sure you have been complete. Do not sink your own ship with inconsistencies and inaccuracies – if you say a document provides some answer, it better be there.

If KREC believes you have violated the law, how do you find out about it?

In the event the violation was detected by audit then you will sometimes learn of initial findings in an exit interview with the auditor. Later, if the KREC believes the auditor correct in his or her findings, then you will receive written communication of the violation and penalty proposed. In the event a violation is believed to have occurred and it was found based on complaint and investigation then you will receive written communication about the findings.

The written communication comes in the form of a Summary Proceedings Order in which the facts, violation and penalties are all laid out. In conclusion,

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you are informed that if you do nothing the Order becomes final. Your choice is to comply with the findings – pay the fine, agree to the suspension or whatever – or ask for a hearing in the time allowed by the Order. Failure to request a hearing in the time allowed makes the Order **final** and **unappealable**.

What are the penalties if you are found to have violated the law?

KREC can suspend, revoke, non-renew, or restrict a license based on violations of the law. Typical fines are in the low hundreds of dollars for the most common violations. KREC has the ability to fine a licensee for up to \$1000 for the first offense. If they believe the conduct exhibits aggravating circumstances for some types of violations, like forgery, fraud or lying to financial institutions, you can expect KREC to be properly concerned and levy more severe penalties.

If KREC finds you in violation AND YOU DO NOT, what is your remedy?

Ask for a hearing when you disagree with their findings, either because you do not think the transgression exists or because you think the penalty too stiff.

Once you ask for a hearing the matter proceeds much like any legal matter:

- Documents are exchanged
- Testimony can be taken by deposition,
- Prehearing motions are filed, argued and heard and
- Eventually you find yourself in a room that looks like any other courtroom.

The hearing is just like a trial with KREC attorneys presenting their case, then you present yours – both including witnesses, documents and exhibits.

Eventually there is a ruling. Either side can appeal the result to District Court and on to the Court of Appeals for Kansas, but winning on an appeal is very challenging due to the deference courts give findings by administrative agencies over their special subject matter.

Some common violations:

- ~ Failure to have fixed date of expiration in agency agreement – something the law has long required and any standard form has a blank for this information. The law does not allow permanent or unending listings and buyer agency agreements -- but there is no real limit on how long they can be when buyer or seller agrees.
 - o This violation is most often detected by audit and will likely lead to a modest fine unless there are aggravating circumstances. One version

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of this violation is a listing prepared by someone else that simply has no expiration blank nor date. It might occur where the consumer has an attorney drafting the listing or some out of state company doing the work.

- Another version is where the auditor finds your standard form agreement and on the blank where the expiration should be they find - it still blank.
 - Other things that do not work include putting until closed or to be determined on the blank which of course do not constitute a fixed date of expiration.
 - Changes to a date originally completed by agreement with the consumer but not signed off on in writing by the consumer will also not work.
- ~ Failure to include accurate agency disclosure in contract refers to the obligation to make sure the licensees in a transaction have informed buyer and seller of their agency relationships. It is believed consumers will be happier with their real estate experience if they understand up front which licensee is on whose team. Therefore, the law requires that both listing and selling side licensees disclose to buyer and seller in the sale contract who they represent.
- This violation is most often detected by audit and will likely lead to a modest fine unless there are aggravating circumstances.
 - One version of this error is what I call the “Someone does it to you” version. Factually, the selling agent fills in the agency designation of the listing side and does it incorrectly in the offer. Obviously, the listing side could and should correct the mistake but either does not see it or does not correct it and the deal closes with the mistake still on the contract. Assuming the selling licensee got their own agency correct then the only fine will be on the listing side even though the selling licensee made the mistake.
 - You will also be fined for the differences between designated and straight agency. If you were a designated seller agent but the box for seller agency was marked - it is wrong.
 - Failure to disclose agency at all is another version of this error. It could exist by failure to complete the agency designation section of the contract for your side of the transaction or where the contract is prepared by someone else: attorney for a party; the party’s in house legal department or an out of state broker, any of whom do not

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recognize your duty. The correct answer is to get them to add the correct disclosure but sometimes you cannot get that done because the person in charge of the form will not cooperate. Do the best you can and send a “please will you include . . .” fax or email with the requested disclosure.

- ~ Real estate services without a license is a violation imposed on someone who has some form of a license. This violation does not apply to someone who has never had a license because KREC has no jurisdiction over someone who does not and never did have a license. Usually it implies the Broker has allowed someone without a license to act as though they do. This could be an office staff person, a retired salesperson, or someone whose license is currently suspended.
 - This violation may be detected by audit and will then likely lead to a modest fine, unless there are aggravating circumstances. This violation may come from a complaint, in which case the penalty would be more severe.
 - Expired, revoked or retired persons who do not have an active real estate license – do not have a real estate license. Any such person caught in these circumstances will have this factor considered should they become eligible for a license. A broker who permits this activity will be charged with loaning his or her broker’s license.
 - This violation could also arise by paying referral fees to an unlicensed person.

For help with what an unlicensed person may or may not do under a broker, see: <http://www.kansas.gov/krec/guidelinesunl.html>. It tells us:

Unlicensed personnel may not:

- Answer questions concerning properties listed with the firm, except to confirm that the property is listed and to identify the listing broker or salesperson.
- Show property and discuss anything related to the property or related to its purchase.
- Discuss or explain a contract, listing, lease agreement or other real estate document with anyone outside the firm.
- Negotiate or agree to any commission, commission split, or referral fee on behalf of a licensee.

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Crossing another broker's exclusive agreement

This refers to the conduct all licensees know as wrong – crossing another broker's sign. In application it gets more complicated. If a salesperson leaves one broker for another the listings acquired by the salesperson in the name of the old broker belong to that broker and those sellers may not be contacted by the salesperson either before leaving or after leaving the old broker with a transfer to the new broker in mind. If the contact is – “I am getting ready to leave for a new brokerage – I am sure you want to follow me there” – the salesperson is interfering with a contract belonging to the old broker. If the contact is – “I have moved to a new company and am sure you want to follow me here” – it is crossing the old broker's listing.

- This violation usually comes by complaint but will likely not cause a significant penalty unless there are aggravating facts.

Friends that betray you

These are the people you want to ask why they listed with a competitor when you find that sign in their front yard.

Unhappy clients of another agent

These are the sellers who call wanting to move their listing after complaining about their current listing agent.

In either case any conversation even if started by the consumer that is beyond – I would be happy to discuss this with you when you are no longer listed with the other broker - will likely get you in trouble.

Any violation of these rules will also cause ethical issues to arise because violation of the law will also violate ethics rules.

- ~ ***Misrepresentation*** means lying about the property or transaction. A lie can be either intentional in which case we call it *fraud* or it can be passive by simply not disclosing that which you know the consumer would want to know, in which case we call it *passive fraud*.
 - Both are not only the source of risk for losing litigation but also violations of the license law and ethics rules. BRRETA requires A) disclosure of what you know and B) a suggestion by licensees to consumers that they acquire the assistance of qualified third parties to evaluate the property.

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- This violation usually comes by complaint and will likely cause a significant penalty especially if there are aggravating facts. Misrepresentation is one of the factors that can bring about the KREC maximum penalty of \$5000 per offense and of course will likely cause them to seek revocation of the license.

- ~ Trust account violations typically come in the form of (A) mixing client money with your own whether intentionally or accidentally or (B) it is a more benign failure to deposit money when or where it belongs.
 - This violation is most often detected by audit and will likely lead to a modest fine, unless there are aggravating circumstances. If it comes by complaint it is likely to lead to a serious penalty.
 - The law requires earnest money deposits within five (5) business days of the effective date of the contract. Usually that means the date of the last signature to the last change, but it can be defined as some other date by agreement of the parties. Failure to deposit on time is, then, a failure to deposit within the 5 days of that date.
 - It is the parties, buyer and seller, who should decide where the money should be held. Often times the buyer and seller do not care or know where the money should be held, and it probably should not matter to anyone so long as the entity holding the money is reliable. The point is that is not a decision for the listing or selling licensee who should decide – it is the parties.
 - The Real Estate Settlement and Procedures Act (RESPA) would imply that the buyer should choose since it is their money until either closing or default but, in fact, it is negotiable.
 - A broker who mixes his or her own money with that of the client is guilty of commingling. That may arise by way of intentionally taking your clients money from trust or simply leaving too much of the broker's own money in the trust account through an accumulation of interest, an earned commission left behind after closing or letting the bank take the charges for your trust account operation or check printing out of client funds. With written consent of buyer and seller the broker may retain interest on monies in the broker's trust account.

- ~ Advertising violations include both false advertising and a failure to include the brokerage firm name in ads or on signs appropriately. The law requires:

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. . . all advertising conducted by a licensee shall:

Be conducted under the direct supervision of the supervising broker or branch broker;

include the name of the supervising broker's trade name or business name by prominently and conspicuously displaying

or announcing the supervising broker's trade name or business name in a readable and identifiable manner; and

include any other information that the supervising broker or branch broker considers necessary.

- The idea that the broker or brokerage firm name be “prominently and conspicuously” displayed is relatively new. There is thought that means in print and form more noticeable than the licensee name or Team name. Clearly this means a consumer knows who the responsible broker is simply by looking at the ad (ad includes business cards, sign, internet web pages and pretty much every promotional piece you can imagine.)
 - This violation sometimes comes by complaint but will likely not cause a significant penalty unless there are aggravating facts.
 - False advertising would likely cause a more severe reaction from KREC and in some cases has resulted in revocation.
- ~ Licensee owned property creates a special case. In this instance, if the property is listed with the broker, then the traditional rules apply - see above. If the property is not listed then all advertising must inform a consumer seeing the advertising that they are contacting someone with a license by noting – either “owner licensee” or “owner agent” or the equivalent – but must “be done in a manner that clearly informs the public that a real estate licensee is the owner of or has an interest in the property advertised.”
- ~ Interference with contract violations refer to situations where a licensee knows a consumer has a contract of some form with someone else – could be a purchase agreement or an agency agreement – and tries to keep them from performing their obligations under that contract.

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- This violation usually comes by complaint but will likely not cause a significant penalty unless there are aggravating facts like some financial loss to someone.
- Examples of this violation include:
 - Crossing another broker listing – which is a separate violation discussed above. In this situation the licensee tries to obtain a listing or buyer agency agreement from a consumer who already has one with someone else. This could be the best friend you find listed with another broker. KREC has posted some scenarios to help explain their view of how to handle contact with the client of another licensee:
http://www.kansas.gov/krec/forms/AgencyScenarios_4-16-07.doc
- In some cases licensees have been working with a buyer for a period of time without success and then find the buyer bought something through another licensee. Trying to talk the buyer or seller out of the deal they have already made on the basis you could do better for them will result in this problem.
- Finding a buyer interested in one of your listings and then trying to talk that buyer out of the buyer agency agreement they have with another broker so you can get both sides of the deal provides a direct example of this issue.
- ~ Record keeping violations are typically imposed on the Broker because it is the broker who is supposed to keep the records. Usually, of course, the salesperson has the records initially and often has their own file on the transaction. The KREC regulations require:
 - Each broker shall retain in the broker's files for a period of at least three years true copies of all records relating to the broker's real estate business, including:
 - contracts;
 - closing statements;
 - correspondence; and
 - records required by K.A.R. 86-3-18" (the latter refers to trust account)
 - This violation is most often detected by audit and will likely lead to a modest fine unless there are aggravating circumstances. Some situations have come up by complaint and been dealt with more seriously.

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- ~ Signing documents without power of attorney is a very serious violation. The law has long required two things when it comes to this issue. It is illegal to sign documents for a client without a power of attorney and a power of attorney cannot be included as part of an agency agreement. Generally, it is unwise to sign documents for a consumer even with a power of attorney for two reasons 1) in this day and age it is a rare occasion when someone is so inaccessible they cannot sign for themselves and 2) we can always see what we should not have signed after it is too late to fix it – hindsight being 20/20.
 - o This violation is sometimes detected by audit and will then likely lead to a modest fine unless there are aggravating circumstances. This violation can come by complaint and then would likely cause a significant penalty.