

KENTUCKY BAR ASSOCIATION
Unauthorized Practice of Law Opinion KBA U-42
Issued: January 1987

Question: May licensed real estate brokers or licensed sales persons complete standard form agreements in connection with real estate transactions?

Answer: Qualified yes.

References: SCR 3.020; Federal Intermediate Credit Bank v. Kentucky Bar Assn., 540 S.W.2d 14 (Ky. 1976); Kentucky Bar Association v. Tussey, 476 S.W.2d 177 (Ky. 1972); Howton v. Morrow, 106 S.W.2d 81, 82 (Ky. 1937); C. Wolfram, Modern Legal Ethics 842 (1986); Cultum v. Heritage House Realtors, Inc., 694 P.2d 630 (Wash. 1985); Pope County Bar Assoc. v. Suggs, 624 S.W.2d 828 (Ark. 1981).

OPINION

The Kentucky Real Estate Commission has forwarded a set of attorney prepared contract forms for "approval", along with the question of whether licensed real estate brokers or licensed salespersons can complete such forms as an integral part of their role in "routine" real estate transactions.

Although some states have legislation specifically authorizing such licensed persons to fill out form contracts, most states rely on case law to support this practice. Our review of the national case law on point reveals that there are two lines of cases - one holding that such conduct amounts to the unauthorized practice of law, and the other that allows licensed realtors to fill out at least some types of standardized forms as a routine part of their practice so long as there is no separate charge for such services and so long as no legal advice is given. While the latter group of cases is said to represent the majority position, many of the opinions are sufficiently qualified to render generalizations hazardous. *See generally*, C. Wolfram, Modern Legal Ethics 842 (1986).

Kentucky has been listed as a jurisdiction which condemns the practice. Wolfram at 842, n.12, citing Federal Intermediate Credit Bank v. Kentucky Bar Assoc., 540 S.W.2d 14 (Ky. 1976). *See also* Kentucky Bar Association v. Kelley, 421 S.W.2d (829 (Ky. 1967) and Kentucky Bar Association v. Tussey, 476 S.W.2d 177 (Ky. 1972). On the other hand, Federal Intermediate Credit Bank dealt with the preparation of a mortgage by a bank employee.

The members of the Committee have stressed their concern that the Committee is bound to follow the pronouncements of the Court, but have generally concluded that any rule the Committee can formulate regarding this issue will be welcomed by the Bar and the public, and at least provide some input to the Court.

Generally, jurisdictions that have attempted to prohibit the practice described in the question have done so on fairly formalistic grounds, opining that the practice of law necessarily

embraces the preparation of all instruments of a legal nature. Cf. Howton v. Morrow, 106 S.W.2d 81,82 (Ky. 1937). Nevertheless, more recent cases have given more weight to the following interests:

- (1) The ready availability of legal services in the context of the simple real estate transaction;
- (2) The logic of using the full range of services that other professions and businesses can provide;
- (3) The public interest in limiting costs;
- (4) The public convenience;
- (5) The need to allow licensed brokers and salespersons to participate in an activity in which they have special training and expertise; and
- (6) The interest of brokers and salespersons in completing standard agreements which are incidental to the main business of brokers and salespersons.

See, e.g., Cultum v. Heritage House Realtors. Inc., 694 P.2d 630 (Wash. 1985) (en banc); Pope County Bar Association. Inc., v. Suggs, 624 S.W.2d 828 (Ark. 1981).

A majority of Committee members share the view that the advantages, if any, to be derived by enjoining licensed real estate brokers and licensed salespersons from completing such agreements are outweighed by the fact that such agreements are incidental to the everyday business of the broker or realtor and necessary to the effective completion of such a business. Accordingly, approval to complete such agreements seems appropriate, so long as the forms will not be used for other than simple real estate transactions which arise in the usual course of business and that such forms will be used only in connection with real estate transactions actually handled by brokers or salespersons in such capacities and then without charge for the service. Cultum, *supra*, at 4-5. Agreements of this nature include listing contracts and earnest money arrangements.

On the other hand, a majority of the Committee members have expressed concern about several of the forms forwarded to the Committee, such as the Residential Lease, and the Contract for Deed, deeds, mortgages, and other financing documents. Concern has been expressed that the preparation of such documents are not incidental to the purchase and sale of real estate, are not temporary in nature, are not instrumental in facilitating routine transactions, and are more complicated than listing contracts, earnest money agreements, and the like. Such documents involve substantial rights and liabilities of the parties, and the interests of the parties and the public would not be served by the recognition of too broad an exception to SCR 3.020. In addition, the Committee has no authority to change the case law of the Commonwealth, and is bound by the language of Federal Credit Bank and Tussey with respect to the preparation of deeds and mortgages.

Accordingly, the Committee is of the opinion that the preparation of deeds, mortgages, leases, and the contract for deed, and other complicated documents by one other than a practicing attorney, whether on preprinted forms or not, would constitute the unauthorized practice of law. However, the preparation of brokerage contracts to which the broker is a party, and the

completion of other standard forms for simple real estate transactions which arise in the usual course of the broker's or salesperson's business, in connection with transactions actually handled by such brokers or salespersons as such, without charge and unaccompanied with legal advice, should be permitted.

Finally, we note that the Committee is not authorized to “approve” the forms submitted to us.

Note to Reader

This unauthorized practice opinion has been formally adopted by the Board of Governors of the Kentucky Bar Association under the provisions of Kentucky Supreme Court Rule 3.530 (or its predecessor rule). Note that the Rule provides in part: “Both informal and formal opinions shall be advisory only.”