

§174-1-21. Broker Supervision of Salespersons and Associate Brokers.

COMMENTS FROM KANAWHA VALLEY BOARD OF REALTORS

21.1.c. Directing or requiring that a salesperson or associate broker violate state, federal, or local laws while conducting licensed activity;

PUBLIC COMMENT

§174-1-21.1.c. – This subsection places a broker’s license in jeopardy if a broker by “[d]irecting or requiring that a salesperson or associate broker violate state, federal, or local laws while conducting licensed activity.” This subsection, as written, does not take into account whether the broker knowingly or intentionally directed a salesperson or associate broker to violate the law. As written, the broker’s license is subject to revocation even in instances where the broker may have given an instruction without knowing such action would violate a law or regulation. The Commission should consider amending this subsection to include “knowingly” or “intentionally” language to this subsection.

RESPONSE

The Agency is agreeable to striking the word “local laws” and while these words could provide added clarity the rule is succinct as written.

As to the comment regarding the terms “directing” and “requiring,” these terms necessarily imply that the broker acted “knowingly.”

21.1.d. Allowing a salesperson or associate broker to violate state or federal law related to the practice of real estate while conducting licensed active if the broker has actual knowledge or, through reasonable diligence, should have actual knowledge of the impending or continuing violation;

PUBLIC COMMENT

§174-1-21.1.d – This subsection is both overly broad and ambiguous. First, the term “allowing” is not defined and subject to interpretation. Moreover, there is no distinction or clarity as to exactly what “state, federal, or local laws” the rule encompasses. The subsection, if given a literal reading, would subject a broker potential discipline if a salesperson or associate broker received a speeding ticket on the way to show a home.

RESPONSE

The Agency proposes to amend this subsection to address the "allowing" term by tying it to actual knowledge or constructive knowledge (should have known through reasonable diligence), which is a common legal standard. Therefore, simply "allowing" without knowledge or a reasonable expectation of knowledge would not subject a broker to discipline.

Regarding the concern about a speeding ticket, the Agency does not interpret this subsection as applying to minor infractions unrelated to the practice of real estate, such as a speeding ticket. The phrase "state or federal law related to the practice of real estate" clarifies the scope of the rule. This language limits the applicability of the rule to violations that directly pertain to real estate activities,

thereby excluding personal infractions that do not impact professional conduct or compliance with real estate regulations.

21.1.e. Failing to promptly correct or mitigate a violation of license law or regulation committed by a salesperson or associate broker after learning of the conduct giving rise to the violation

PUBLIC COMMENT

§174-1-21.1.e – Similar to the previous subsection, the broker is required to “promptly” correct or mitigate violations of license law or regulation committed by a salesperson or associate broker “after learning of the conduct giving rise to the violation.” Again, this subsection is vague and ambiguous as to “promptly,” and a literal reading presents further unintended consequences. The rule requires mitigation upon “learning of the conduct” and not upon learning that the conduct is illegal. In this scenario, a broker may know that a salesperson or associate broker is engaging in the specified conduct and be subject to license revocation even if they did not know the conduct was unlawful at the time it occurred.

RESPONSE

It is the Broker’s responsibility to know the WV Licensing Act and Legislative Rules, therefore they should know if the conduct is illegal. Furthermore, “promptly” is used throughout WV code and means just that – promptly. Some violations can be corrected in 24 hours while others may take weeks to correct. The Commission feels by putting a definitive timeline on correcting violations of law and regulations a broker could be further burdened.

21.1.f. Failing to ensure that all forms used by a salesperson or associate broker comply with applicable statutes and regulations of the Commission

COMMENT

§174-1-21.f – This subsection attempts to confer a power over broker contracts which exceeds the statutory authority of the Commission. The Commission, pursuant to W. Va. Code §30-40-8(a)(12), has authority to create rules as to the form and use of contracts used in a real estate transaction. This subsection, however, would purport to allow the Commission to review and make determinations as to the legality of provisions in the real estate contracts between private parties – an unreasonable intrusion into the business dealings of brokers that exceeds the powers granted to the Commission by the Legislature.

RESPONSE

The Agency approved filing removed the word contracts.

21.1.g. Failing to ensure that all salespersons and associate brokers maintain reasonable and timely communication with the broker regarding all aspects of the brokerage's agency relationships with its clients and the brokerage's real estate transactions

COMMENTS

§174-1-21.g – This subsection subjects a broker to discipline for failing to ensure “reasonable and timely communication” with the broker’s salespersons and associate brokers regarding all aspects of the brokerage’s agency relationships and real estate transactions. The overbreadth and vagueness of this subsection makes it impossible to understand or objectively enforce in any way. It seems the Commission is attempting to regulate interoffice communication between a broker and their employees. Aside from there being no identifiable method for determining what constitutes “reasonable and timely communication” or what qualifies as “all aspects of the brokerage’s agency relationships . . . and real estate transactions,” this is a needless invasion into the brokerage’s ability to operate its business as it deems appropriate.

RESPONSE

The Commission disagrees that this provision improperly invades on a broker’s ability to manage his or her office. The bottom line, and the KVBR no doubt understands this, is that a broker is required by law to supervise all salespersons licensed under him or her. The Commission continues to receive calls to the public in addition to Formal Complaints from consumers that evidence a lack of “reasonable and timely communication” between the subject salesperson and his/her broker. There have been several occasions where a broker was completely unaware that one of their licensees was having difficulty with a consumer. To put it another way, the Commission sees too many complaints that would not have been necessary had the broker communicated with his/her salespersons about the requirements of the WV Real Estate License Act. As to the use of the terms “reasonable and timely,” these terms are used throughout the Code and provide the broker with flexibility to based on the circumstances at issue. What is “reasonable and timely” depends on the situation at hand. Ironically, placing a definition on the type and timeframe for the communication may actually invade on the broker’s ability to manage his/her office as he or she see fit, which is at the heart of KVBR’s concern and not the Commission’s intent with this rule.

21.1.i. Failing to promptly provide orientation for salespersons or associate brokers newly affiliated with the broker

COMMENT

§174-1-21.i – This subsection requires “orientation” to be promptly provided for salespersons or associates that are new to the brokerage. However, there is no clarity as to what satisfies the orientation requirement, because “orientation” is undefined.

RESPONSE

The Commission understands and agrees that the term “orientation” may be interpreted to encompass more than what the Commission intended with this rule. The intent of this rule is to ensure that all brokers provide some entry-level information to new salespersons in their brokerage. Therefore, the

Commission is agreeable to amending the section to read “Failing to provide new salespersons or associate brokers with information regarding the requirements of the WV Real Estate License Act.” At a minimum, this can be accomplished by providing each new salesperson or associate broker with a written copy of the Act, which is supplied by the Commission.

21.2. The broker must provide coaching and assistance to a salesperson or associate broker for, at a minimum, the first two real estate transactions in which the salesperson or associate broker participates after coming under the broker's supervision

COMMENT

§174-1-21.2 – This section requires “the broker” to provide “coaching and assistance” to a salesperson or associate broker for, at a minimum, the first two real estate transactions in which the salesperson or associate broker participates after coming under the broker’s supervision. First, this places an undue burden on the broker, as the literal reading of the rule requires the broker to personally, not through a designee, to provide coaching and assistance. Moreover, there is no definition of “coaching and assistance,” making it impossible for brokers to know if they are in compliance. Finally, this applies to all salespeople and associate brokers that come under the broker’s supervision. It makes no distinction between a newly licensed salesperson and a veteran realtor who may have taken a position with a new broker. It is a burden on the brokerage to have to hand-hold competent realtors and provide additional barriers to operating a business efficiently.

RESPONSE

The Commission agrees that this section does not achieve the end intended by the Commission. First, adding the words “or designee” is appropriate. Second, it is also acceptable to strike the two-transaction minimum. Depending on the experience of the salesperson, some salespersons may require more than two, some may require less.

OTHER COMMENTS

My thought process is that this is really over reach. I supervise my agents the best I can, and when I find something incorrect I bring it to their attention. And I verify that my agents have a mentor if they are new. I am not going to be that mentor. The auditors can't police everything.

RESPONSE

The Agency has agreed to add “or designee”.

COMMENT

Clearer Expectations Are a Win.

'The list in 21.1 (a-i) lays out a solid framework. It helps brokers know what is expected and what can get them in trouble - which ultimately protects the public and the profession.

RESPONSE

We agree and this is exactly why we want to clarify and layout a blueprint for brokers and the public.

COMMENT

Coaching Requirement in 21.2 Could Use Some Flexibility.

Requiring the broker to personally coach a licensee through their first two transaction sounds great in theory but in practice it's not always that simple. Many of us run offices with full-time mentors, team leaders, or trainers who do that hands-on work while the broker oversees the big picture.

Maybe there's a way to adjust the language here - something like "the broker or their designee;" while keeping the broker ultimately responsible. That would let the rule work across different models and sizes of brokerages.

RESPONSE

Addressed above as the Agency is agreeable to adding the term "designee"

COMMENT

Remote Supervision - Totally Agree.

Love that they included language in 21.3 acknowledging that brokers don't have to be in the same office to supervise effectively. That's just the reality of how a lot of us are operating now. Maybe down the road there could be some examples or best practices shared for what solid supervision looks like in remote or multi-office setups.