

Testimony before the Kentucky Real Estate Commission Public Comment Hearing on KREC Forms 400, 401B, 401S, and 402.

June 22, 2022

Executive Director Astorino, Chair Disponett, and members of the Kentucky Real Estate Commission:

Good morning. My name is Mike Inman and I have the distinct pleasure of serving as President of Kentucky REALTORS® this year. Kentucky REALTORS® (KYR) represents more than 12,800 members who are involved in all aspects of real estate, including residential and commercial real estate brokers, sales agents, developers, builders, property managers, office managers, appraisers and auctioneers. On their behalf, I thank you for the opportunity to address the Commission in this hearing today on the proposed regulations.

We value the strong relationship that we have built and maintained over the years with the Kentucky Real Estate Commission and hope to build on that relationship in the future.

We appreciate the open process by which these proposed forms were developed and for allowing our organization and others in our industry to provide input and feedback. We fully understand the amount of hard work and time each of the Commissioners and staff at the Kentucky Real Estate Commission have put into this process, as well as all attempts to make improvements to the real estate profession in Kentucky.

The Kentucky Real Estate Commission and Kentucky REALTORS® share a mission to protect the public (the consumer) and licensees from

overregulation. Kentucky REALTORS® is concerned that these proposed changes do not protect the consumer or licensees. These proposed changes have a real chance to negatively impact both.

Kentucky REALTORS® has recommendations for changes that I wish to share with you. Before this meeting, we polled the leadership of Kentucky REALTORS®, including our Government Affairs Committee, our Legislative Quick Response Team, and our local Association Executives across the state. The response was unanimous about the concerns we have for these forms.

First, let me address form 400 – A Guide to Agency Relationships:

The Guide to Agency Relationships is an informational form or pamphlet. Nowhere on the form does it state the purpose of this form, to provide information.

Kentucky REALTORS® believes this form has become too long, confusing, and redundant. If the consumer does not have the desire to read this form to completion, the licensee is obligated to ensure the consumer understands the form before the agent asks them to sign it. Modern real estate practice often involves the use of internet-based form engines – such as Dotloop, DocuSign, and Instanet. The agent may not be physically present with the client when this form is completed. The complexity of the form makes it difficult for the agent to explain the form while the client is accessing it on their mobile device. This is not good practice for consumer protection. A shortened and simplified version of this form is needed. The proposed form is not materially different from the current form and does nothing to make the information clearer to the consumer.

We do not believe the phrase “This is not a contract” is needed in two places on the form. Further, there is no need to highlight the phrase in the 4th paragraph, “This is not a contract or agreement for services”. The paragraph stands on its own with the underlining.

The next forms I would like to talk about are Form 401B and 401S – Agency Consent Agreement Buyer and Seller:

These two proposed forms have caused the most confusion within our membership.

Part A of Form 401B and 401S will be difficult to implement. They will require a licensee to specify a type of agency, upfront, before a particular property is identified for showing or at time of listing. The type of agency is subject to change if the buyer chooses to view one of their agent's broker's listings, or the listing agent shows their own listing. There is no ability on this form to update the agency type in play or to select more than one type of agency. This appears to imply that a new form will be required when an agent's role changes. For example: if an agent is showing properties that are listed by an agent in another brokerage, and encounters a property listed by an agent within their company or a property that is their listing then a new form 401B would need to be generated in each case. This information is highly redundant with the Guide to Agency Relationships, Form 400, and we do not believe it is needed on these forms.

All real estate transactions are conducted in the name of the broker. These forms in two different places indicate that the buyer/seller is retaining an agent, when in fact they are retaining a broker. To be clear where this is stated: In Part A, paragraphs 4 and 5, "the licensee being retained is" and "At this time licensee is being retained". It should be clear that the broker is being retained and the services are being provided by a licensee in the name of the broker.

In section IV on page 2 of Forms 401B and 401S, "Transactional Brokerage" is listed. However, in "Part A" on page 1, this term is not listed under "type of agent". If "Part A" is going to remain on this form, KYR recommends adding "Transactional Brokerage" to the list of "types of agents" in "Part A" on page 1.

To be clear, our position is that the present Agency Consent Agreement Buyer and Seller forms are superior to the proposed forms and should be continued.

Finally, we would like to address Form 402 – Seller’s Disclosure of Property Condition:

Our members believe the removal of the “unknown” column would be a mistake and we strongly recommend keeping this column on Form 402. We do not believe any changes are necessary to Form 402’s current format.

Landlords, executors, or other parties often do not know the answer as “Yes” or “No.” Also, the use of the “unknown” box ensures that “reckless fraud” is avoided.

We acknowledge that the “unknown” column is sometimes used incorrectly, the answer is not the elimination of this column, but to provide more education. There are many times when a seller may not know the answer to some questions about their property. “No” is NOT the same as “unknown”. We have consulted with our attorney, who also consulted with other real estate attorneys, and with attorneys who practice contract law. It is our attorney’s opinion that bolding and enlarging “best of your knowledge” will not protect the seller from liability in the event they inadvertently check “no” on an item where they do not know the true condition. Our attorney cited a case in which he was involved where a plaintiff won a \$100,000 plus judgment against the seller who checked “no” when they should have checked “unknown”.

As I am sure you are aware, there are three types of fraud: 1. Misrepresentation, 2. Omission, 3. Reckless Fraud. Reckless fraud includes stating something as true or false when you do not know the answer. For example, an owner that does not live on the property that marks “No,” to the fact that the basement does not leak when he/she has

no idea, has arguably committed reckless fraud. A person acts recklessly when making a representation that he/she does not have actual knowledge about.

In the previous example, you might argue the buyer was not harmed by the seller checking “no”. However, because the seller checked “no,” and then the buyer relied on that representation, the buyer may choose not to independently check the basement for leaks. So, when the basement leaks, the buyer is harmed, an outcome that may have been avoided if the seller had checked “unknown”. To protect the consumer buying the property, sellers must fill these answers in as responsibly and as correctly as possible, this includes the option to mark some answers as “unknown.”

For example, if a husband and wife bought a foreclosed property, they would not necessarily know its full history, only what they had done to the home during their ownership. It would be their responsibility, to fill this form out completely and correctly, but the form should not compel them to represent something to the Buyer that they do not know, as if it was a true, fully informed, statement.

Again, our members believe the removal of the “unknown” column would be a mistake and we strongly recommend keeping the “unknown” column on Form 402.

We all want to be sure the consumer is fully aware of all the information necessary to make a wise and informed decision when purchasing and/or selling a home. However, it is not the role of the licensee to require the consumer to have a complete understanding of the extensive jargon of the real estate industry when it comes to their personal real estate transaction. It is the responsibility of real estate licensees who are professionals to advise the consumer in making their decisions. The proposed changes in the forms may harm the consumer by confusing them with unneeded terminology and even more so with the seller’s disclosures when a seller marks “No”, and the consumer acts on

inaccurate information. This could also cause damage to the sellers who fill out the forms and now are open to liability for “falsifying” a document.

We strongly encourage you to reconsider the proposed regulation changes and the changes to these forms..

As I stated at the beginning, we value the strong relationship we have with the Kentucky Real Estate Commission.

We especially appreciate the opportunity to be part of the process of reviewing the proposed forms and regulations and look forward to working with you to enhance the consumer protections afforded by the Real Estate Authority.

On behalf of the 12,800 members of Kentucky REALTORS®, I want to thank you for your hard work and the dedication that you demonstrate on behalf of the Commonwealth of Kentucky.

Thank you for your time.