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Real Estate Brokerage Law Update

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Real Estate Brokerage Law Update

March 30, 2023

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August 2020

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REAL ESTATE BROKERAGE LAW UPDATE

March 30, 2023

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REAL ESTATE BROKERAGE LAW UPDATE



Overview

Join Indiana attorney and real estate broker Ken Williams for this convenient one-hour webcast that will explore these updates in the law of Real Estate Brokerage:

1. Broker's personal LLCs and licensure
2. License law requirements and disciplinary updates
3. Brokers and UPL

Faculty

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March 30, 2023

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Kenneth P. Williams, McColly Bennett Commercial Advantage, Winfield



Kenneth P. Williams has been an active member of the Indiana bar since 1983. He earned his bachelor's degree from Wabash College in 1980, where he was a Lilly Scholar. He earned his J.D. from Indiana University McKinney School of Law in 1983. He served as a deputy in the Indiana Attorney General's office from 1983 to 1985. He worked in the Medicare field for several years and participated in numerous continuing-education programs for ICLEF in that capacity. He has also practiced law in Michigan and worked as a civil mediator.

Mr. Williams began his real-estate career in 2005, working exclusively in commercial real estate throughout northwest Indiana. He earned his broker's license in 2008. In 2010, he started his own company, Williams Commercial Real Estate Services, LLC, which operated until 2016. The following year, he joined another real-estate firm as the director of commercial real-estate services. That same year, he earned his license to teach pre-licensing classes in Indiana and has done so since. He has also taught continuing education classes for real-estate licensees.

In September of 2019, Mr. Williams joined McColly Bennett Commercial Advantage Real Estate, a regional company licensed to do business in both Illinois and Indiana.

Mr. Williams is a member of the National Association of Realtors, the Indiana Association of Realtors, and the Indiana Commercial Board of Realtors. He served on the ICBR's board of directors from 2012 through 2016. In 2018, he rejoined the board of directors and has served as its Chairman in 2022, and continues serving as past Chair. He acts as the chair of the ICBR's legislative committee, serving the needs of the ICBR's members at both the state and local levels.

In addition to his real-estate teaching, Mr. Williams has served as an adjunct instructor in the Paralegal Studies program at Ivy Tech Community College in Valparaiso, where he taught both legal writing and property law. He is on the Porter County Plan Commission and the Porter County Board of Zoning Appeals.

Mr. Williams and his wife Christina (Tina) live in rural Porter County.

Real-Estate Brokerage Law: An Update

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IC 25-34.1-3-4.5

- Effective July 1, 2020
- Broker company may pay compensation to a business entity owned by a broker associated with that company and that has been established to receive compensation.
- Business entity does not need to be licensed; however, it may be owned only by the associate broker or the associate broker and his/her spouse, if the spouse is not licensed.



IC 25-34.1-3-2: A real-estate license is required to sell, buy, trade, exchange, option, lease, rent, manage, list or appraise real estate or offer to perform any of those acts for consideration regarding real estate in Indiana. (Applies to individuals and businesses entities.)

EXCEPTIONS INCLUDE:

- Attorneys engaged in the practice of law
- Acts of a public official
- Acts of a receiver, guardian, or administrator
- Hotels, motels, B&Bs for rentals less than 30 days
- FSBOs or employees of the owners of property

REVIEW: When is a real-estate license required?

IC 25-1-11-5: A licensee is subject to disciplinary action if, after a hearing, the board finds that:

1. The licensee engaged in or cooperated in fraud to obtain a license, engaged in fraud in the course of professional business, advertised in a false or misleading manner, or convicted of a crime or assessed a civil penalty involving fraudulent billing practices;
2. The licensee was convicted of a crime that has a direct bearing on the practitioner's ability to practice competently, or is harmful to the public;

REVIEW: What acts are subject to disciplinary action?

IC 25-1-11-5: A licensee is subject to disciplinary action if, after a hearing, the board finds that:

3. The licensee has violated a State or Federal statute or regulation regarding the profession;
4. The licensee has continued to practice even though he/she has become unfit to practice due to incompetence, failure to keep abreast of current professional theory or practice, physical or mental disability, or addiction to or dependence or abuse of alcohol or drugs;
5. The licensee engaged in lewd or immoral conduct in the course of delivering services;

REVIEW: What acts are subject to disciplinary action?

IC 25-1-11-5: A licensee is subject to disciplinary action if, after a hearing, the board finds that:

6. The licensee has allowed his/her name or license to be used in connection with an individual or business who renders services beyond the scope of that individual's or business's training, experience, or competence;
7. The licensee has had disciplinary action taken against him/her to practice in another state;
8. A licensee assisted another person in committing an act that would be grounds for disciplinary action;

REVIEW: What acts are subject to disciplinary action?

IC 25-1-11-5: A licensee is subject to disciplinary action if, after a hearing, the board finds that:

9. The licensee has allowed his/her license to be used by another person, displayed the license to the public when it had expired, or was inactive, revoked or suspended; or
10. The licensee failed to comply with an order of sanction previously imposed by the Real Estate Commission.

REVIEW: What acts are subject to disciplinary action?

What constitutes incompetent practice?

SEE 876 IAC 8-2-7 (attached)

RECENT CASES

*In re Indy Metro Northeast, LLC dba Keller Williams et al.,
2020 IREC 0057 (2021):*

- Respondent Smith (an associate of Respondent Indy Metro) represented both Sellers and Buyer in a sale.
- Smith agreed to facilitate the transaction for compensation, but did not first execute a Limited Agency Agreement between the parties, even though evidence showed an agency relationship with both.

- At closing, a representative of Respondent Indy Metro asked Seller to execute a back-dated Limited Agency Agreement; neither party signed it.

HELD: Respondent Smith violated IC 25-34.1-10-12(a) by not providing a limited agency agreement prior to executing a purchase agreement. Respondent Smith was reprimanded and ordered to undergo continuing education on agency.

In re Indy Metro (continued)

HELD: Respondent Ruble (the managing broker) assisted Smith in committing an act that would constitute grounds for disciplinary action. Ruble was reprimanded.

HELD: Respondent Indy Metro also assisted Smith in committing an act that would constitute ground for disciplinary action. Indy Metro was reprimanded. (See IC 25-34.1-4-1)

In re Indy Metro (continued)

Respondent entered into a listing agreement with Mr. McCracken at a six percent commission; listing agreement also stated that \$3,880 would be paid to the seller after closing. Purchase agreement executed on 1/2/2017 showed Respondent as agent for both Seller and Buyer; however, Respondent failed to provide written informed consent to limited agency. After the sale closed, Respondent paid McCracken only \$880.

In re Thomas, 2021 IREC 0027 (2022)

HELD: Respondent violated IC 25-34.1-10-12(a) by failing to obtain written consent to limited agency from both parties; Respondent violated IC 25-34.1-10-10(a)(1) by failing to fulfill agency relationship to McCracken by not remitting full amount due under listing agreement. Respondent was placed on indefinite probation with no right to petition for removal for a period of one year, and ordered to pay the cost of the proceedings.

Respondent represented both buyers and sellers in purchase of a residence. Respondent failed to provide written consent of limited agency; however, he notified both parties verbally and sent several written notices of his status as limited agent. Respondent was found incompetent because of his failure to obtain written consent and was assessed a civil penalty (he had previously been sanctioned by MIBOR).

In re Talhelm, 2020 IREC 0012 (2020)

Respondent knowingly entered into a listing agreement to sell her brother's home without her brother's wife's consent, and accepted an offer on the property without telling the buyer that the wife had not consented to selling the house.

Respondent was found in violation of IC 25-1-11-5(c)(3) for listing and advertising a property for sale without the owner's consent; violated IC 24-9-3-7(c)(3) by asserting

In re Richey, 2021 IREC 0013 (2021)

That the owner had consented to sell the property when she knew or should have known that the owner had not consented; and was found in violation of IC 25-1-11-5(a)(4)(b) by failing to keep abreast of current theory or practice. Respondent was put on indefinite probation with no ability to petition to remove the probation for a minimum of one year and ordered to take six hours of continuing education.

In re Richey (continued)

Respondent entered into a buyer's exclusive agency contract with Complainant. Under the contract, Respondent was to remit Complainant one percent of the purchase price of a newly-built home (which was to be used as a referral fee to another broker). Sale closed in September 2018, but Respondent did not pay the money until February 2019.

Respondent was found in violation of 876 IAC 8-2-7(1) for failing to remit funds belonging to a client in a timely manner. Respondent was placed on probation, ordered to pay a civil penalty of \$750, and ordered to undergo six hours of continuing education on agency and escrow management.

In re Hodges (continued)

In re Tiffany Group Real Estate Advisors, LLC et al.; 2020 IREC 0064 (2021):

- Respondents John Tiffany and Joseph Tiffany were associated with Respondent Tiffany Group; John was originally the managing broker.
- John Tiffany had his license suspended effective 9/29/2016 and was reinstated on a probationary basis on 1/26/2018. Joseph became managing broker.

- While John's license was suspended, John and Joseph entered into listing agreements showing both as co-brokers. Joseph also sent John to a closing as his designee.

HELD: John Tiffany continued to practice real estate after being found incompetent, and also failed to comply with an order of sanction. His license was suspended

In re Tiffany Group (continued)

Indefinitely with no right to petition for reinstatement for a minimum of six months. He was also required to undergo six hours of continuing education on license law.

HELD: Joseph was found to have continued to practice after having been found incompetent by allowing himself to be associated with an unlicensed person and unlawfully sending that person to a closing as his

In re Tiffany Group (continued)

Designee. Joseph was issued a letter of reprimand.

HELD: Respondent Tiffany Group was found to be incompetent by assisting John in practicing real estate with a suspended license. Tiffany Group was issued a letter of reprimand.

In re Tiffany Group (continued)

Respondent was licensed but not designated a managing broker. Respondent operated a property management company that was not licensed and offered services for consideration.

Respondent entered into a lease with two tenants. Tenants vacated the property when the lease expired, but Respondent did not return the security deposit until 87 days later.

In re Parks, 2020 IREC 0006 (2020)

Respondent was found to have allowed his license to be associated with an unlicensed company; conducted business without being associated with a managing broker or broker company; failed to obtain managing broker designation; and failed to provide itemized list of damages to tenants within 45 days as required by IC 32-31-3-12. Respondent was fined \$500, received a letter of reprimand, and ordered to cease management business until the company was licensed.

In re Parks (continued)

2020 IREC 0039 and 2021 IREC 0040 (2021)

Respondent Kevin Fish owned and was managing broker of Respondent Fish Realty Services, Inc., d/b/a Go Fish Realty. Go Fish advertised real-estate services online, but was not licensed as a real estate company. Go Fish was found to be an unlicensed entity; Kevin Fish was found to have allowed to have his licensed associated with an unlicensed entity.

In re Fish Realty Services, Inc. et al.

Both respondents were issued letters of reprimand and ordered to pay a total of \$750 in civil penalties.

In re Fish Realty Services, Inc. (continued)

Respondent, a licensed broker, owned and operated Turn Key Property Management and Clean Up, LLC, which offered property management services. Turn Key was not licensed at the time the investigation began; by the time the Commission issued its Final Order, the company was licensed. Respondent was reprimanded.

Respondent, a licensed broker, owned and operated WMI Property Management, LLC, which was not licensed. A tenant at a property managed by Respondent filed a complaint with the Marion County Public Health Department alleging several health and safety violations at the property. The Health Department confirmed several violations and Respondent failed to address them in a timely manner.

HELD: Respondent violated IC 25-1-11-5(a)(6) for allowing herself to be associated with an unlicensed company, and violated IC 25-1-22-5(a)(3) for failing to comply with a municipal ordinance. Respondent was placed on indefinite probation with no ability to petition for removal of probation for a minimum of six months, she was also ordered to take three hours of continuing education on license law.

In re Neu (continued)

Respondent, a licensed real-estate company, managed property for the Complainant. The Commission found that Respondent inappropriately withheld security deposits from Complainant and authorized repairs without Complainant's permission, in violation of the management agreement. Respondent also failed to refund security deposits from tenants.

Respondent was found to have violated 876 IAC 8-2-7(1) by failing to remit funds to tenants; failed to account for rent due to the landlord in violation of IC 25-34.1-1-10(a)(3)(E); and failed to exercise reasonable care and skill in delaying refunds of security deposits, in violation of IC 25-34.1-1-10(a)(3)(F). Respondent was placed on probation for three years and ordered to attend three hours of continuing education.

In re Kline Properties (continued)

Respondent, a licensed broker, made an offer to purchase a house on behalf of her husband and herself but failed to notify the seller that she was licensed. (The sale did not go through.) Respondent was found in violation of 876 IAC 8-2-5 for failing to disclose her status as a licensed broker and failing to put her license number on the purchase agreement. Respondent was reprimanded.

Respondent, a licensed broker, offered her home for sale as For Sale By Owner. She failed to disclose to a prospect's agent that she was licensed and refused to provide the agent with written documentation. When the Attorney General investigated, Respondent refused to cooperate with the investigation.

HELD: Respondent failed to cooperate with an investigation, in violation of 876 IAC 8-1-14; offered to sell her home without disclosing her license or her interest in the home in writing, in violation of 876 IAC 8-2-6(1)&(2); and acted in dual capacity of broker and undisclosed client, in violation of 876 IAC 8-2-7(4). Respondent's license was suspended for one year, and she was required to attend four hours of continuing education.

In re Dong (continued)

Respondent was the subject of a complaint from a former client. Respondent refused to turn over documents requested by the Attorney General's office.

Pursuant to a settlement agreement, Respondent was found to be in violation for refusing to cooperate with an investigation and was issued a letter of reprimand.

Respondent, a licensed broker, was convicted in Federal court of thirteen counts of wire fraud (conviction was unrelated to any real-estate business). Respondent failed to notify the Commission of the conviction, as required by IC 25-34.1-3-12. Although Respondent was incarcerated, because he could be released early, he was deemed a clear and immediate danger to the public; his license was summarily suspended pending a formal hearing.

In re Norden, 2022 IREC 0066 (2022)

In January 2021, Respondent, a licensed broker, was charged with Child Molesting and Sexual Misconduct with a Minor. The Commission determined that Respondent posed a clear and immediate threat to public health and safety and ordered his license summarily suspended for ninety days.

In re Hauersperger, 2021 IREC 0003 (2021)

In December 2019, Respondent's license was summarily suspended for ninety days after she was arrested for Operating a Vehicle While Intoxicated. In April 2020, Respondent's license was placed on indefinite summary suspension while her criminal case was adjudicated. As part of a plea agreement in July 2020, Respondent pleaded guilty to one count of OWI. Respondent failed to notify the Commission of this conviction.

In re Miracle, 2019 IREC 0032 (2022)

Respondent's license expired on June 30, 2020, and she did not renew it.

HELD: Respondent's multiple criminal convictions for OWI subjected her to sanctions pursuant to 25-1-11-5(a)(2)(B). Respondent violated 25-34.1-3-12(a) by failing to report a criminal conviction to the Commission within thirty days of the conviction.

Respondent was on probation under a prior case (2017 IREC 0013). In July 2019, the State filed a complaint for further action claiming that Respondent had committed three violations of license law while on probation. Two counts were dismissed; Respondent was found in violation on the third (interfering with an ongoing investigation). Respondent was placed on indefinite suspension with no right to petition for reinstatement for

In re McDonald, 2019 ICEC 0010 (2020)

A period of 90 days. While on suspension, Respondent continued to manage property for clients in expectation of consideration; his clients were not aware of his suspension. Respondent's license was revoked.

Respondent was charged with multiple violations, including: Failing to return an earnest money deposit on a purchase that was never consummated; failing to provide a buyer with a payoff amount at the closing of a sale; cashing an earnest money check submitted as payment on a property without transferring ownership; notarizing and recording a deed that falsely represented payment in full had been made on the purchase.

Brokers and UPL

Thank you.

876 IAC 8-2-7 Incompetent Practice

Incompetent practice of real estate includes the following:

1. Failing to account for and remit any funds or documents belonging to others that come into the broker's possession.
2. Accepting or offering any inducement or rebate for the purpose of obtaining a listing or inducing a sale, where full disclosure in writing has not been given to all parties to the transaction at the time of the offer or acceptance.
3. Receiving, accepting, or giving an undisclosed direct profit on expenditures made in connection with a real estate transaction.
4. Acting in dual capacity of broker and undisclosed client in any transaction.
5. Guaranteeing, authorizing, or permitting any person to guarantee future profits that may result from the resale of real property.
6. Listing or offering real property for sale, exchange, option, rent, or lease without the express written consent of, or on any terms other than those authorized by, the owner or the owner's authorized agent.
7. Inducing any party to a written agency agreement or contract of sale to breach such agreement or contract for the purpose of substituting a new contract with another person.
8. Accepting employment or compensation that is contingent upon the issuance of an appraisal report on real estate at a predetermined value.
9. Issuing an appraisal report on real property in which the broker holds an interest and fails to disclose the interest in writing to all parties.
10. Soliciting or negotiating, or both, a written agency agreement, a sale, exchange, or lease of real property directly with lessor, lessee, seller, or buyer if the broker knows that the party has a written contract in connection with the property that guarantees an exclusive agency to another broker unless the seller, buyer, lessor, or lessee initiates the action in writing prior to the expiration of the agreement.
11. Except as allowed by 876 IAC 8-1-1(a), as a broker representing, or attempting to represent, more than one (1) Indiana broker company.
12. Paying a commission to or otherwise compensating a person who is not licensed for performing the services that, by law, require a license.
13. Committing an act of fraud or material deception while engaged in acts that, by law, require a license.
14. Otherwise violating IC 25-34.1-1 or this title.
15. Having been finally determined to have engaged in unlawful discriminatory practice under the Indiana Civil Rights Act, IC, 22-9.