

Kentucky Bar Association
Ethics Opinion KBA E-408
Issued: July 1999

Since the adoption of the Rules of Professional Conduct in 1990, the Kentucky Supreme Court has made substantial revisions to the rules governing the advertisement of legal services. For example, this opinion refers to Rules 1.7, 7.02 and 7.05, which were amended. Rule 1.8 now requires that certain information be reduced to writing, and in some cases, signed by the client. The prohibition on false, deceptive and misleading communications is contained in Rule 7.15 and Rule 7.30 has been replaced by Rule 7.09. Lawyers should consult the current version of the rules and comments, SCR 3.130 (available at <http://www.kybar.org>) and the Attorneys' Advertising Commission Regulations, before relying on this opinion.

Question 1: May a lawyer who is also a real estate sales agent with a brokerage firm provide legal representation to a client in the same transaction in which the lawyer provides to the client services as a real estate sales agent and is to receive a commission?

Answer: No.

Question 2: May a lawyer who is a real estate sales agent with a brokerage firm provide legal representation to a client if other real estate agents working with the same brokerage firm are providing real estate services for the transaction in which the legal services are to be rendered?

Answer: No.

Question 3: May a lawyer who is also a real estate sales agent with a brokerage firm provide legal representation to a client if the lawyer also provides services as a real estate sales agent to that client and if the legal services are unrelated to the real estate services?

Answer: Yes, upon written disclosure and consent. See opinion.

References: Kentucky Rule of Professional Conduct (KRPC) 1.7(b) (SCR 3.130(1.7)); KRPC 1.8(a); KRPC 1.6; KRPC 7.01-7.5; KRPC 5.4(a); KBA E-74 (1973) ; Jean A. Mortland, Attorneys as Real Estate Brokers: Ethical Considerations, 25 Real Prop. Prob. & Tr. J. 755 (1991); Caryl Yzenbaard, Kentucky Real Estate and Sales Contracts (1995); Stephen L. Frank, Real Estate Professionals and the Law (1986); Colo. Op. 98 (1996); Mich. Op. RI-135 (1992); N.C. Op. RPC 201 (1995); N.Y. Op. 493 (1978); N. Y. County Op. 685 (1991); R.I. Op. 96-29 (1996); R.I. Op. 96-26 (1996); Utah Op. 146A (1995); In re Roth, 577 A.2d 490 (N.J. 1990); Ibanez v. Florida Dept. of Bus. & Prof. Reg., Bd. Of Accountancy, 512 U.S. 136 (1994).

OPINION

There is no doubt that a lawyer may be both a real estate agent and a practicing lawyer. *See* KBA E-74 (1973) (attorney may be a real estate broker). *See also* KBA E-376 (1995) (attorney may be a seller of insurance). The questions presented here deal with the circumstances in which the lawyer may provide both legal services and real estate sales services to the same client. In such situations, the rules relating to conflicts of interest (Kentucky Rule of Professional Conduct (KRPC) 1.7(b)), transaction of business with clients (KRPC 1.8(a)), confidentiality (KRPC 1.6), solicitation (KRPC 7.30), advertising (KRPC 7.01-7.5), sharing fees with nonlawyers (KRPC 5.4(a)), and referral fees (KRPC 7.20(2)) must be observed and followed.

Question 1:

First, KRPC Rule 1.7(b)(SCR 3.130 (1.7(b))) states:

A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

- (1) The lawyer reasonably believes the representation will not be adversely affected; and
- (2) The client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

The comment 4 to KRPC 1.7 states with regard to consent that “when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement, or provide representation on the basis of the client’s consent.”

Question 1 asks whether a lawyer may serve as both lawyer and real estate sales agent for the same client in the same transaction. The lawyer's own interest in consummating the sale and obtaining the commission conflicts with the lawyer's responsibility to the client to protect the client's interests even if such protection takes the form of advising against consummation of the sale. The lawyer’s independent professional judgment would be impermissibly affected by the lawyer’s personal interest in consummating the sale.

In addition, as a real estate sales agent, the lawyer may owe fiduciary or other duties to the other party in the proposed transaction. For example, a real estate agent employed by a brokerage firm representing the seller may have a duty to disclose information about defects in the seller’s property while at the same time may have a duty of confidentiality as an attorney to keep such matters confidential. *See* Jean A. Mortland, Attorneys as Real Estate Brokers: Ethical Considerations, 25 Real Prop. Prob. & Tr. J. 755 (1991). *See also* Caryl Yzenbaard, Kentucky Real Estate and Sales Contracts (1995); Stephen L. Frank, Real Estate Professionals and the Law (1986) (discussing Kentucky law).

Given the nature of these conflicts, the Committee believes that the situation is one for which consent cannot properly be requested and thus the lawyer may not provide both real estate

sales agent services and legal services in the same transaction. This position was stated earlier in KBA-74 (1973) and is thus not new to the lawyers of Kentucky. See KBA E-74. Ethics opinions of several other states are in agreement in disapproving of dual representation in a single transaction. See R.I. Op. 96-29 (1996); N.C. Op. RPC 201 (1995); N.Y. Op. 493 (1978); N. Y. County Op. 685 (1991). In *In re Roth*, 577 A.2d 490 (N.J. 1990), the New Jersey Supreme Court stated, “We are satisfied that an attorney who seeks to obtain a commission for brokerage services in connection with legal services rendered in the same transaction for the same client will have violated our ethics rules.” *Id.* at 496 (the court was reviewing the recommendation of discipline for an attorney who had provided both real estate services and legal services to the same client in the same transaction but without a real estate license). See also Colo. Op. 98 (1996) (in an opinion dealing generally with all sorts of dual practices, the committee stated that it “strongly discourages lawyers from ever wearing two hats in the same transaction, for example serving both as lawyer and real estate broker”).

Question 2:

Question 2 inquires whether the lawyer may provide legal services in the same transaction in which another real estate sales agent working with the same brokerage firm provides the real estate services. KRPC 1.7(b) must again be followed. Since the representation “may be materially limited” by the lawyer’s attachment to the brokerage, the lawyer must consider whether he or she “reasonably believes” the representation will not be adversely affected and whether client consent can be sought given the limitation on requesting client consent contained in comment 4 to KRPC 1.7. Comment 4 to KRPC 1.7 states with regard to consent that “when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement, or provide representation on the basis of the client’s consent.”

Because the lawyer shares in benefit to the brokerage, direct or indirect, that accrues as the result of the real estate representation, KRPC 1.7(b) would prohibit requesting consent from the client and thus the representation cannot occur. Obviously, if the lawyer is to share in the real estate commission in any way, the conflict is such that a disinterested lawyer would conclude that the client should not consent to the representation. Even if the lawyer does not share directly in the commission, the lawyer benefits in indirect ways such as an increased advertising budget for the brokerage which results in the possibility of increased business for the lawyer as a real estate agent. This indirect benefit creates a conflict such that a disinterested lawyer would conclude that the client should not consent to the representation. But see N.C. Op. RPC 201 (1995) (lawyer can represent the client if lawyer “reasonably concludes that the exercise of his independent professional judgment on behalf of his clients will not be ‘materially impaired’ by his desire to advance the interests of Real Estate Company or his desire to encourage future referrals”).

Question 3:

Question 3 inquires whether the lawyer may provide legal representation to clients to whom the lawyer also provides real estate services if the legal representation is not related to the real estate services. KRPC 1.7(b) must be considered and followed. Because the potential for conflict is less, KRPC 1.7(b) does not, in general, preclude the representation.

The lawyer should explain the implications of such dual role representation to the client so that the client understands the different roles of the lawyer and duties of the lawyer as lawyer as opposed to duties as real estate sales agent. It is especially important that the lawyer explain the application of the lawyer's ethical duty of confidentiality as stated in KRPC 1.6 as well as the application of the attorney-client privilege so that the client understands which communications are protected and which are not. In addition to explaining the confidentiality issues to the client, the lawyer must ensure that confidential information protected by KRPC 1.6 or the attorney-client privilege maintains its confidential or privileged status.

Further, the lawyer must heed KRPC 1.8(b) which states that a "lawyer shall not use information relating to representation of the client to the disadvantage of the client unless the client consents after consultation." A lawyer may have financial or other information about the client. The lawyer must be ever mindful that he or she not use that information to the disadvantage of the client when the lawyer is acting as lawyer or when the lawyer is acting as real estate agent.

A lawyer providing a dual role representation must take care to follow KRPC 1.8(a) which governs entering into a "business transaction with a client or knowingly acquir[ing] an ownership, possessory, security or other pecuniary interest adverse to a client." KRPC 1.8(a) requires that the "transaction and terms on which the lawyer acquires the interest" be "fair and reasonable to the client" and "fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client." This disclosure should include a full explanation of fees and commissions. The client must be "given a reasonable opportunity to seek the advice of such independent counsel in the transaction." The arrangement will be ethical only if the client "consents in writing thereto."

General Discussion:

Because other ethical pitfalls are inherent in a dual practice setting, dual practice attorneys must be ever careful to avoid not only the problems discussed above but also those touching upon the ethical constraints on solicitation, advertising, sharing fees with non-lawyers and referral fees.

Solicitation

Rule 7.30 prohibits in-person or live telephone solicitation of professional employment but allows otherwise prohibited solicitation if the lawyer has a "prior professional relationship" with the prospective client or if the prospective client is a member of the family. "Prior professional relationship" refers to a prior lawyer-client relationship, not any other arguably "professional" relationship. *See* R.I. Op. 96-26 (1996) ("'professional relationship' refers to the attorney-client relationship, and not to some other business relationship"); Colo. Op. 98 (1996) ("'[p]rior professional relationship' has been construed as limited to a prior lawyer-client relationship."); Utah Op. 146A (1995); (same); Mich. Op. RI-135 (1992) (same). Thus, if the lawyer has performed legal services in the past for a prospective client, the lawyer may engage in in-person or live telephone solicitation of a non-family member. In any other situation, in-person or live telephone solicitation cannot occur ethically. Thus, a dual practice lawyer cannot solicit, in person or by telephone, legal business from a real estate client for whom the lawyer has not rendered legal services in the past.

Advertising

With regard to advertising, Kentucky's advertising rules apply to "advertisements in any way related to or concerning legal services, which are directed to residents of the Commonwealth of Kentucky, or which originate in the Commonwealth of Kentucky." KRPC 7.01. KRPC 7.02 states: "'Advertise' or 'advertisement' means to furnish any written, printed or broadcast information or any other communication containing an attorney's name or other identifying information." KRPC 7.02 also lists communications that are specifically excluded from the definition of advertising. Anything that meets the definition of "'advertise' or 'advertisement'" in KRPC 7.02 and is not excepted by KRPC 7.02 is subject to the submission, retention, and approval requirements of KRPC 7.05.

KRPC 7.05(1) provides for the submission of the advertisement to the Advertising Commission simultaneously with the publication of the advertisement if the advertisement states only the information specified in 7.05(1)(a). *See* KRPC 7.05(1)(a) & (b). KRPC 7.05(1)(a)(12) specifically lists "technical and professional licenses" as a kind of information that can be included in an advertisement and yet be within the realm of 7.05(1)'s simultaneous submission scheme. Thus, a lawyer may indicate that he is a licensed real estate broker if that is, in fact, the case.

Any advertisement not excluded by KRPC 7.02 and not within KRPC 7.05(1) must be submitted to the Advertising Commission no fewer than thirty days prior to the scheduled use of the advertisement. *See* KRPC 7.05(2). Though there are specific requirements in the rules that must be followed such as the advertisement identification requirement of KRPC 7.25 and the fees rule of KRPC 7.04, the general rule is that a lawyer must not "make a false, deceptive or misleading communication about the lawyer or the lawyer's service." KRPC 7.10. A statement by the lawyer that he is also a licensed real estate broker would not be "false, deceptive or misleading" if the lawyer in fact has such a license. *See also* *Ibanez v. Florida Dept. of Bus. & Prof. Reg., Bd. Of Accountancy*, 512 U.S. 136 (1994). Lawyers should be aware that submission and/or approval of advertising material pursuant to either KRPC 7.05(1) or 7.05(2) does not insulate the lawyer from a later claim that the material is "false, deceptive or misleading."

Legal Fees

A dual practice lawyer must not share legal fees with non-lawyers such as the brokerage firm in contravention of KRPC 5.4 (a). In addition, the lawyer must guard against violation of KRPC 7.20(2). KRPC 7.20(2) prohibits "giving anything of value to a non-lawyer for recommending the lawyer's services," other than paying the "reasonable cost of advertising or communication permitted" by the advertising rules. KRPC 7.20(2). Compensation arrangements must be carefully scrutinized to avoid these problems.

Finally, all lawyers considering a dual practice should investigate the statutes and case law regulating the provision of real estate services. This opinion deals only with the issues raised by the ethical rules applicable to attorneys.

Note to Reader

This ethics opinion has been formally adopted by the Board of Governors of the Kentucky Bar Association.
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Association under the provisions of Kentucky Supreme Court Rule 3.530 (or its predecessor rule). The Rule provides that formal opinions are advisory only.