

Imputed Conflicts Where Firm Attorney Also Acts as Real Estate Agent (Follow-up to Informal Opinion 15-03)

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Informal Opinion 18-03

An attorney (Attorney) has asked for clarification of our Informal Opinion 15-03 as it relates to her factual situation. The Attorney informs us that she is licensed as an attorney in Connecticut and works as an associate in a law firm with two other attorneys. Her annual compensation is fixed without regard to the profitability of the law firm. The Attorney is also a licensed real estate salesperson representing both buyers and sellers and is employed independently by a brokerage firm in which she has no ownership interest.¹ Other attorneys at the law firm are representing the Attorney's real estate clients in real estate transactions.

Our informal opinion 15-03 addressed the ethical obligations of an attorney serving in a dual role as attorney and real estate agent in the same transaction. We concluded that:

A lawyer may engage in a business transaction with a client provided the lawyer complies with Rule 1.8(a)(1) - (4). The transaction and terms of the lawyer's interest must be fair and reasonable to the client and be transmitted in writing. Rule 1.8(a)(1). The client must be advised in writing to consider the desirability of seeking the advice of other legal counsel. Rule 1.8(a)(2). The client must give written informed consent to the essential terms of the transaction and the lawyer's role in the transaction. Rule 1.8(a)(3). The lawyer must advise in writing that the lawyer is providing legal services under Rule 1.8(a)(4).

However, we also concluded that an Attorney could not fulfill both roles where the Attorney serves, not as the exclusive real

estate agent of either the seller or buyer, but as a sub-agent of the seller's broker.² We advised that:

However, a buyer's lawyer, who is a sub-agent of the listing broker, has a conflict of interest which is nonwaivable. A current conflict of interest arises when "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a *third person*...." See Rule 1.7(a)(2) (Emphasis supplied). Here, the lawyer/real estate agent for the buyer will have duties owed to the seller as a sub-agent of the seller's real estate broker. It is uncertain whether the lawyer could provide competent and diligent representation under these circumstances or whether the representation would be prohibited because it involves claims or assertions by one party against the other, see Rule 1.7((b)(1), (3).

The Attorney has inquired whether the law firm may represent the buyer or seller in the real estate transaction without satisfying the requirements of Rule 1.7 and 1.8 if another law firm attorney represents the client.

Rule 1.10(a) provides that the Attorney's conflict of interest is imputed to the law firm's other attorneys. Therefore, the disclosures required of the Attorney are also applicable to the law firm as a whole. Further, the law firm may not represent the buyer while the Attorney is acting as the real estate agent for the seller.

The Attorney also asked if the law firm could provide free or discounted legal services to the real estate clients of the Attorney or to all of the clients working with agents of the same brokerage firm as the Attorney. The committee, in Informal Opinion 94-23, said, "An attorney is under no ethical obligation

to determine the amount of his or her charges in the same manner from one client to the next, as long as the fee is 'reasonable' in all cases." See Rule 1.5(a). Assuming compliance with the attorney advertising limitations discussed in Informal Opinion 15-03, providing discounts to a particular client(s) violates no ethical prohibition. The Attorney should consider whether providing this type of discount exclusively to a particular brokerage firm could constitute the giving of something of value, in the form of a significant marketing advantage, to a person for recommending the lawyer's services which is forbidden under Rule 7.2(c).³

Finally, the Attorney asks if she could ethically solicit business on behalf of the law firm while working as a real estate salesperson. Due to the risk of abuse, harassment, and over-reaching, an attorney may not solicit legal work in-person, by telephone, or through real-time electronic persuasion. Rule 7.3(a). The Rules of Professional Conduct apply to all attorneys at all times, without regard to the common practice of another profession with which the attorney may be associated. ■

Notes

1. The Committee assumes that the Attorney is employed as a real estate sales person pursuant to an independent contractor agreement.
2. Sub-agency usually arises when a cooperating sales associate from another brokerage, who is not the buyer's agent, shows property to a buyer. The sub-agent works with the buyer to show the property but owes fiduciary duties to the listing broker and the seller. The Committee assumes that the Attorney, while acting as a real estate sales person, has disclosed her agency relationship to any seller or potential purchaser as required by Connecticut General Statute § 20-325 (d) and (f).
3. Similarly, CGS Sec. 20-320a forbids the paid referral of any buyer of real property to an attorney, mortgage broker, or lender by a real estate salesperson or broker.