



30 Bank Street  
PO Box 350  
New Britain  
CT 06050-0350  
06051 for 30 Bank Street  
P: (860) 223-4400  
F: (860) 223-4488

*Standing Committee on Professional Ethics*

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### INFORMAL OPINION 15-03

#### DUAL ROLE AS ATTORNEY AND REAL ESTATE AGENT IN THE SAME TRANSACTION

You have asked the Committee whether an attorney who concurrently holds a real estate agent license may represent a client in a real estate transaction wherein the attorney is also acting as the real estate agent. You have further asked, assuming the attorney may act in the capacity of a real estate agent and attorney in the same transaction, may the attorney offer discounted legal fees or represent the client free of charge in the real estate transaction? In addition, assuming that the attorney may offer reduced fees, may the attorney advertise such reduced fees to potential real estate clients?

The Committee makes the following assumptions in rendering this opinion: (1) that the attorney in this transaction is compensated as a real estate agent in an amount equal to a percentage of the sale price of the subject property or an agreed upon “co-broker” percentage offered by a listing agent; and (2) that the attorney is an independent broker or an agent without an ownership interest in a brokerage in which any of the other owners are non-attorneys or maintains a law practice that is separate from any real estate brokerage business in which there are non-attorney owners.<sup>1</sup>

##### *I. Attorney as Real Estate Agent*

The first issue presented is whether or not an attorney who concurrently holds a real estate license may represent a party to a real estate transaction wherein she also represents the same client in the capacity of real estate agent. Rules of Professional Conduct Rule 1.8 governs conflicts of interest: prohibited transactions. In particular, Rule 1.8(a) states that a lawyer shall not enter into a “business transaction” with a client unless the attorney satisfies the requirements of Rule 1.8(a) (1) – (5).

Official Commentary to Rule 1.8 states that “[a] lawyer’s legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of

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<sup>1</sup> Rule 5.4(b) of the Rules of Professional Conduct prohibits a lawyer from forming a partnership with a non – lawyer if any of the activities of the partnership consist of the practice of law.

overreaching when the lawyer participates in a business, property or financial transaction with a client..." The Official Commentary states further that "[t]he risk to a client is greatest when the client expects the lawyer to represent the client in the transaction itself or when the lawyer's financial interest otherwise poses a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's financial interest in the transaction." Because the attorney in this context has a financial interest in the outcome of the transaction (i.e. the highest commission based on the highest sales price), it is the opinion of the Committee that the attorney who represents a client in a real estate transaction in which the attorney is also the client's real estate agent is engaged in a "business transaction" within the meaning of Rule 1.8(a).

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). This is consistent with the requirement that the lawyer provide a scope and fee agreement under Rules 1.2 and 1.5.

The interests of the seller and the seller's lawyer acting as the seller's real estate agent are generally aligned as both are committed to completing the sale. Therefore, absent unusual circumstances, a lawyer may occupy a dual role of the seller's real estate agent and attorney so long as the lawyer is in compliance with Rule 1.8.

The interests of the buyer and the buyer's real estate agent/lawyer are not so aligned. The buyer wants to purchase at the lowest price; the real estate agent benefits from a higher price. This creates a *personal* conflict of interest<sup>2</sup> for the real estate agent/lawyer which must be analyzed under Rule 1.7 (b) to determine whether the lawyer may represent the client.<sup>3</sup>

In addition, there is another conflict of interest which depends on the contractual relationship of the real estate agent with the buyer or third persons. First, the Committee

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<sup>2</sup> A concurrent conflict of interest exists if: "there is a significant risk that the representation of one client or more clients will be materially limited . . . by a personal interest of the lawyer." Rule 1.7(a).

<sup>3</sup> Rule 1.7(b) provides that:

Notwithstanding the existence of a concurrent conflict of interest under subsection (a), a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or the same proceeding before any tribunal; and
- (4) each affected client gives informed consent, confirmed in writing.

considered the “buyer’s broker,” who for the purpose of this opinion, has a fiduciary relationship exclusively with the buyer. In that situation, the dual lawyer-“buyer’s broker” role is permissible provided the lawyer complies with Rules 1.7 and 1.8, as discussed above.

However, a buyer’s lawyer, who is a sub- agent of the listing broker, has a conflict of interest that is non-consentable. 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 owe duties 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).

We express no opinion on whether the dual role satisfies the requirements of any statutes, rules or regulations other than the Connecticut Rules of Professional Conduct.<sup>4</sup>

## *II. Free Legal Services or Discounted Legal Fees for Clients Who Engage the Attorney for Real Estate Services*

The Committee also has been asked whether an attorney may offer free legal services or discounted legal fees to those clients who engage the attorney as a real estate agent. Rule 1.5 of the Rules of Professional Conduct governs the fees that may be charged to a client for legal services. Rule 1.5(a) does not set a minimum fee that must be charged for legal services, instead mandating that legal fees must be “reasonable.” In addition, Rule 1.5(b) mandates that the attorney inform the client in writing of the “scope of the representation,” and that “the basis or rate of the fee and expenses for which the client will be responsible ... be communicated to the client, in writing, before or within a reasonable time after the representation [commences]....” It is therefore the opinion of the Committee that the attorney may offer free or discounted legal services, which should be in a written fee agreement, so long as the attorney is in compliance with Rule 1.5.

## *III. Advertising a Discounted Fee*

Finally, the Committee has been asked whether a lawyer may advertise to “potential real estate clients” an offer to perform legal services at closing for a discounted fee. The focus of this inquiry appears to be on the advertising of the discounted fees. Rule 7.1 (Communications Concerning a Lawyer’s Services) provides that lawyer advertising must not be false or misleading. It is the opinion of the Committee that advertising a discounted fee is permissible. However, the lawyer should state in any such advertisement that the discounted fee is based on

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<sup>4</sup> E.g., Code of Ethics and Standards of Practice of the National Association of Realtors; Conn. Gen. Stats. § 20-320a (prohibiting the referral of any buyer of real property to an attorney for compensation); and Conn. Gen. Stats. § 20-325 (regarding the required disclosure of agency relationships and the non-disclosure of confidential information).

the lawyer's usual fee for the same or similar legal services. The lawyer cannot state or imply a comparison of her discounted legal fees to those of another lawyer's fees "unless presented with such specificity as would lead a reasonable person to conclude the comparison can be substantiated." Rule 7.1, Official Commentary.

Notwithstanding the foregoing, pursuant to Rule 7.3 (a), a lawyer shall not initiate personal contact with a prospective client for the purpose of obtaining professional employment, except in limited circumstances articulated therein. Assuming the limited circumstances are inapplicable, the lawyer should not initiate personal contact offering legal services to a current real estate client. Such conduct would run afoul of Rule 7.3 (a).

Alternatively, if the lawyer is using written or electronic communications to advertise these legal services, she must comply with regulations governing such advertisements, as set forth in Rules 7.2 and 7.3, which include the mandatory filing requirements of Practice Book 2-28A.

THE COMMITTEE ON PROFESSIONAL ETHICS

BY   
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Marcy Tench Stovall, Chair