

**JUDICIAL ETHICS ADVISORY COMMITTEE
OF THE
STATE OF DELAWARE**

The Hon. Joseph R. Slight, III, Chair
The Hon. Mardi F. Pyott, Vice Chair
The Hon. Kenneth S. Clark, Jr., Secretary
The Hon. James T. Vaughn, Jr.
The Hon. Sheila G. Blakely
The Hon. Donald F. Parsons, Jr.
The Hon. Robert B. Coonin

JEAC 2005-1

January 19, 2005

Dear Magistrate :

You have requested an advisory opinion from the Judicial Ethics Advisory Committee (the "Committee") regarding whether you may, having just become qualified to obtain a Real Estate Agent's license, affiliate with the real estate agency with whom your wife is associated in order to assist her in her business. You have advised that the Real Estate Commission rules require that you hold and have a real estate agent's license in order to assist your wife and that to do so, you must associate with a licensed Real Estate Broker. The broker in question, considers its agents as independent contractors, rather than employees.

I. THE COMMITTEE'S ADVICE

The Committee believes that you may not initiate an affiliation with a real estate brokerage agency, nor actively engage in the real estate business during your tenure as a magistrate.

II. THE APPLICABLE CANONS OF JUDICIAL CONDUCT

Canons 5(C) and 5(D) of the Delaware Judges' Code of Judicial Conduct provide:

C. Financial Activities.

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(1) A judge should refrain from financial and business dealings that tend to reflect adversely on the Judge's impartiality, interfere with the proper performance of judicial duties, exploit or demean the judicial position, or involve the judge in frequent transactions with lawyers or other persons likely to come before the court on which the judge serves.

(2) Subject to the requirements of subsection (1), a judge may hold and manage investments, including real estate and engage in other remunerative activity, but should not serve as an officer, director, partner, manager, advisor or employee of any business other than a business closely held and controlled by members of the judge's family. For this purpose, "members of the judge's family" means persons related to the judge or the judge's spouse within the third degree of relationship calculated according to the civil law system, and the other relative with whom the judge or the judge's spouse maintains a close familial relationship, and the spouse of any of the foregoing.

D. Fiduciary Activities.

A judge should not serve as the executor, administrator, trustee, guardian or other fiduciary, except for the estate, trust or person of a member of the judge's family, and then only if such service will not interfere with the proper performance of judicial duties. "Member of the judge's family" includes a spouse, child, grandchild, parent, grandparent, or other relative by blood, adoption, or marriage or person with whom the judge maintains a close familial relationship.

III. ANALYSIS

Subparagraph C(2) of Canon 5 contains an express prohibition against serving as an "officer, director, partner, manager, advisor, or employee of any business other than a business closely held and controlled by members of the judge's family." The request for an

advisory opinion suggests that your affiliation with the real estate agency should be permitted because (1) you are

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an independent contractor rather than an employee and (2) the purpose of your activity would be limited to you assisting your wife in her real estate business. You have noted in your inquiry to the Committee that in order to engage in such activity, the Delaware Real Estate Commission requires that you hold a valid Real Estate license. Therefore, it seems pertinent in examining the nature of your relationship with the real estate brokerage house to first consider any requirements imposed by statute on the vocation of real estate agent.

The statutory provisions regulating the sale of real estate, Title 24, Chapter 29 of the Delaware Code, recognize two distinct categories for licenses of individuals engaged in that practice, “salesperson” and “broker”. *Del. Code Ann. tit. 24, § 2901(3)* defines real estate salesperson as:

(3) “Real Estate salesperson” means any person who, for a compensation or valuable consideration, is *employed, either directly or indirectly* by a real estate broker, to sell or offer to sell, or to buy or offer to buy, or to negotiate the purchase or sale or exchange of real estate, or to lease or rent or offer for rent any real estate, or to negotiate leases thereof or of the improvements thereon, as a whole or partial vocation, but shall not include an auctioneer as defined in § 2301(a)(3) of Title 30. (Emphasis added.)

While the real estate agency with which you may affiliate may structure its compensation in a manner consistent with the concept of being an independent contractor, the statute clearly refers to the relationship to your broker as one in which you are “employed” as a salesperson. As your relationship with the real estate agency is deemed, by statute, as one

in which you are employed by the broker, the relationship is expressly prohibited under subparagraph C(2) of Canon 5.

The nature of the duties that you may be called upon to engage in as a real estate sales- person also cause concern to the Committee. Certain fiduciary obligations are inherent in the

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relationship between the seller of real estate and the seller's agent. As a sub-agent through your wife, you will be under the same duties of fidelity to your principal as would your wife. Serving in the capacity of a fiduciary to your customer is the type of conduct expressly prohibited under subparagraph D of Canon 5.

The Committee's decision in this matter is consistent with decisions rendered in other states barring judges from actively engaging in real estate sales business¹ and requiring judges holding real estate licenses to place the license in an inactive status during the term of judicial office².

IV. CONCLUSION

The Committee concludes that under the Delaware Judge's Code of Judicial Conduct you are prohibited from entering into a professional relationship of Real Estate Salesperson with a real estate broker.

For the Committee:

Robert Burton Coonin

¹ Alabama Judicial Inquiry Commission Opinion Nos. 78-34; and 78-40 (1978);

² Georgia Judicial Qualifications Commission Opinion No. 11 (1977); Florida Committee on Standards of Conduct Governing Judges Opinions, No. 90-11 (1990).

Judicial Ethics Advisory Committee

RBC/bft

cc: Members of the Judicial Ethics Advisory Committee
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