Advisory Committee on Professional Ethics
Appointed by the New Jersey Supreme Court

Opinion 696
Overrules Opinion 341

Conflict of Interest
Attorney for an Executor of a decedent's estate listing decedent's real estate for sale with an agency employing the attorney's wife

The Advisory Committee on Professional Ethics has been asked under what circumstances an attorney for an executor of a decedent's estate, or as the executor of a decedent's estate, may list the decedent's real estate for sale with an agency which employs the attorney's wife, where the wife is not to receive any financial benefit from the sale. A number of opinions of this Committee which predate the first adoption in September of 1984 of the Rules of Professional Conduct (the "RPCs") address this question, generally finding that a referral to the spouse's agency does not result in a conflict of interest for the attorney where the realtor spouse, although employed by the listing or selling agency, does not receive any financial benefit from the transaction by way of commission, salary or otherwise. Opinion 312, 98 N.J.L.J. 646 (1975); Opinion 341, 99 N.J.L.J. 610 (1976); and cf Opinion 518, 111 N.J.L.J. 513 (1983). These opinions also find where there is a conflict by reason of a pecuniary interest in the spouse, consent of the client is not available to cure the attorney's conflict.

The introduction of the RPCs materially changed the approach to the problem inherent in referrals of clients to businesses in which the referring attorney has an interest. RPC 1.8(a) provides:

> A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:
>
> (1) the transaction and terms in which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner that can be understood by the client;
>
> (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel of the client's choice concerning the transaction; and
>
> (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

We have previously found that this Rule is applicable to referrals to businesses in which the attorney has an interest (Opinion 657, 130 N.J.L.J. 656, 1 N.J.L. 129 (1992)), and that the rule applies equally to referrals to a business of the attorney's spouse. (Ibid., and see Opinion 518, supra ("the interest of the realtor spouse is in effect an interest of the attorney spouse").) As we said in Opinion 657:

> It is clear that a client has a special trust in, and is frequently dependent upon, the independent judgment of the lawyer, which is always to be exercised in the client's best interests, free from any outside influences. The possibility of

> referral of legal clients to another business of the lawyer introduces an extraneous and potentially conflicting motive, which can threaten or interfere with the lawyer's independence of judgment. At the same time, because of the trust and dependence that the client must place on the lawyer, a client's ability to independently evaluate the desirability or necessity of following through on such a referral is presumptively impaired. The situation is inherently coercive rendering even the standard approach of full disclosure and informed consent suspect.
>
> Without barring the possibility of such a referral entirely, we conclude that a lawyer may only refer a legal client to a business the lawyer owns, operates, controls, or will profit from, if the lawyer has (1) disclosed to the client in writing, acknowledged by the client, the precise interest of the lawyer in the business, and that the same services may be obtained from other providers, and (2) advised the client, orally and in writing, of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent counsel of the client's choice as to whether utilization of the business in question is in the client's interest.

These conditions form a part of RPC 1.8(a) as amended in 2004, and quoted above. We find in the instant case that a lawyer's duty to protect the interests of the client/seller may well be different from the interests of the realtor in seeing that a closing takes place, thus invoking the Rule.

We now also find that the distinctions made in our earlier pre-RPC opinions based upon whether a lawyer or a lawyer's spouse will obtain a financial benefit from the specific referral do not go to the question of whether lawyer has an interest in the business, but rather to whether the particular transaction is "fair and reasonable to the client" within the

meaning of RPC 1.8(a)(1). And even then, the client must consent in writing after full disclosure pursuant to the terms of the rule. In short, where an attorney, or the attorney's spouse has a business interest in a real estate agency it must be assumed that referrals to that real estate agency benefit the attorney even where a specific referral may not give rise to direct financial compensation to the spouse. To the extent that Opinion 341 indicates a contrary result, we overrule it.

In the present inquiry, where the attorney represents an executor of an estate, a referral of a proposed real estate sale to the spouse's real estate agency is permissible whether or not the spouse receives a share of the commissions or is otherwise compensated, provided there is strict compliance with RPC 1.8(a), including the written consent of the executor to the referral. The matter of consent is more complicated where the attorney is also the executor or one of several executors of the estate. Clearly the consent of the attorney/executor is meaningless. In the case of multiple executors RPC 1.8(a) may be satisfied by the required consent of the independent executors. Where the attorney is the sole executor, nothing short of the consent of all of the beneficiaries of the estate who have an interest in the real estate or the proceeds of its sale will satisfy rule RPC 1.8(a). The Committee takes no position with respect to substantive law dealing with conflicts of interest of fiduciaries, all of which are in addition to and not in limitation of the obligations of an attorney under the RPCs. See, for example, N.J.S.A. 3B:14-36.

Finally, the inquirer in this matter has asked whether a violation of RPC 1.8(a) would be cured by the attorney/executor engaging separate counsel to deal with the real estate sale transaction. It clearly would not be since the separately engaged attorney would still be subject to the instructions of the attorney/executor who is the client.