

EXECUTIVE BRANCH ETHICS COMMISSION

ADVISORY OPINION 03-1

May 29, 2003

RE: May attorneys be involved in the mediation of cases involving a real estate firm when the attorneys' mothers are associated with the real estate firm as independent contractors?

DECISION: Yes, but the attorneys should not be involved in any matters involving either of their mothers, and must disclose such abstention in writing.

This opinion is in response to your November 26, December 11, and December 17, 2002, requests for an advisory opinion from the Executive Branch Ethics Commission (the "Commission"). This matter was reviewed at the February 13, March 25, and May 29, 2003, meetings of the Commission and the following opinion is issued.

You are the General Counsel employed by the Kentucky Real Estate Commission (the "KREC"). Both your mother and the mother of the only other attorney employed by the KREC are associated with the same real estate firm as independent contractors, or "real estate licensees." The real estate firm that employs both of your mothers has 750 to 800 licensees. Real estate licensees receive commissions from sales, but do not receive a salary from the firm. As independent contractors, the "real estate licensees" do not benefit from the success of the firm or from other licensees of the firm.

A large part of the job responsibilities of the legal staff of KREC is to answer daily legal questions, provide seminars on ethics and legal issues to local Boards of Realtors[®] and real estate firms, and review advertising and websites to ensure compliance with state laws. Your staff also has a complaint process that generates sworn complaints. As part of that process, your staff offers a mediation session for all cases. Either you or the other attorney are involved in all mediation sessions for cases. Although you do not have decision-making authority over licensees that you regulate, you are involved in recommendations to the KREC concerning licensees.

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You ask whether you and the other attorney employed by the KREC may work on matters, including mediation of cases, involving the real estate firm or individuals associated with the real estate firm with which both of your mothers are associated. You state that, in the past, in cases involving the firm with which both of your mothers are associated, you always have disclosed at mediation sessions that your mother worked at the firm. You ask whether this disclosure is necessary, and if so, whether it needs to be in writing.

You also state that you have always recused yourself, and plan to continue to recuse yourself, from any case or other matters involving your mother or other individuals with whom you have a personal relationship.

KRS 11A.020(1)(a), (c) and (d), and KRS 11A.040(3) provide:

(1) No public servant, by himself or through others, shall knowingly:

(a) Use or attempt to use his influence in any matter which involves a substantial conflict between his personal or private interest and his duties in the public interest;

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(c) Use his official position or office to obtain financial gain for himself or any members of the public servant's family; or

(d) Use or attempt to use his official position to secure or create privileges, exemptions, advantages, or treatment for himself or others in derogation of the public interest at large.

KRS 11A.040(3)

A public servant shall not knowingly act as a representative or agent for the Commonwealth or any agency in the transaction of any business or regulatory action with himself, or with any business in which he or a member of his family has any interest greater than five percent (5%) of the total value thereof.

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In Advisory Opinion 98-1, the Commission stated that the State Highway Engineer's son was not prohibited from seeking employment with firms that did business with or were regulated by the Transportation Cabinet, but that

“...[u]pon your son's employment, you should abstain from any involvement in matters concerning the firm or firms for which you (sic) son is employed and disclose your intention to abstain in writing as required by KRS 11A.020(3)...”

KRS 11A.020(3) provides:

When a public servant abstains from action on an official decision in which he has or may have a personal or private interest, he shall disclose that fact in writing to his superior, who shall cause the decision on these matters to be made by an impartial third party.

Applying that opinion to this matter seems to dictate that you both should have no involvement in matters concerning the firm with which your mothers are associated. However, an important distinction between the fact scenario set forth in Advisory Opinion 98-1 and your fact scenario is that there is not an employment relationship between the real estate firm and your mothers. That being said, it would appear that so long as you and the other attorney recuse yourselves from any involvement with matters involving either of your mothers, you may be involved in the mediation of cases involving the real estate firm or cases of other individuals associated with the real estate firm with which your mothers are associated. You should both disclose in writing that your mothers are associated with the real estate firm, and that you both plan to recuse yourselves from involvement in matters or cases involving either of your mothers.

The Commission believes that if any of the parties involved in the mediation of cases involve the firm with which your mothers are associated, you should disclose to all parties involved in the mediation the fact that your mother is associated with the firm. You state that,

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in the past, you have disclosed verbally prior to mediation sessions that your mother works for a firm involved in the mediation. So long as all parties are informed of this in a reasonable manner, your prior notification practice is sufficient, but the Commission believes that such disclosure should be in writing and retained in the case file. Additionally, to avoid any perception of impropriety, if the parties involved have a concern regarding the facts in your disclosure, you may want to recuse yourself from that case.

The Commission also agrees with your current practice of recusing yourself from any cases involving a licensee, a complainant, or an attorney with whom you have a personal relationship.

Sincerely,

EXECUTIVE BRANCH ETHICS COMMISSION

BY CHAIR: Joseph B. Helm, Jr.