

The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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OFFICE OF SECRETARY

OPINION 2006-1

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[Former CJC Opinion-provides advice under the former Ohio Code of Judicial Conduct which is superseded by the Ohio Code of Judicial Conduct, eff. 3/1/2009.]

SYLLABUS: A full-time judge or full-time magistrate may not maintain or use an active license as a real estate salesperson. A licensed real estate salesperson must affiliate with a broker to maintain an active license and must fulfill fiduciary duties when representing real estate clients. A full-time judge or full-time magistrate cannot fulfill these conditions without violating Canon 2(C)(3) and Canon 4(D)(1).

A part-time judge or part-time magistrate is not subject to Canon 2(C)(3) and Canon 4(D)(1) and therefore may maintain and use an active license as a real estate salesperson, provided the real estate activities do not result in violations of any other provisions of the Ohio Code of Judicial Conduct or any provisions of Ohio Ethics Law. Most significantly, the activities must not exploit the judicial position; must not involve the judge or magistrate in frequent transactions or business relationships with lawyers or other persons likely to come before the court; must not interfere with the performance of judicial duties; and must not take place in the court, occur during court hours, or use court resources or personnel. Compensation for activities as a licensed real estate salesperson must be reported pursuant to Canon 2(D)(3)(a) on the annual financial disclosure statement.

OPINION: This opinion addresses the propriety of judges and magistrates maintaining active licenses as real estate salespersons.

Is it proper for a full-time judge or full-time magistrate to maintain an active license as a real estate salesperson and to use the license in buying or selling real estate for him or herself as investments or in providing real estate services to others?

Is it proper for a part-time judge or part-time magistrate to maintain an active license as a real estate salesperson and to use the license in buying or selling real estate for him or herself as investments or in providing real estate services to others?

Real estate salespersons are licensed and regulated by the State

Real estate salespersons are licensed and regulated by the State of Ohio pursuant to Chapter 4735 of the Ohio Revised Code. No person may act as a real estate salesperson without being licensed. Ohio Rev. Code Ann. § 4735.02 (West 2004).

By definition, a “ ‘real estate salesperson’ means any person associated with a licensed real estate broker to do or to deal in any acts or transactions set out or comprehended by the definition of a real estate broker, for compensation or otherwise.” Ohio Rev. Code Ann. § 4735.01(C) (West 2004).

The license of a real estate salesperson is held by a licensed broker with whom the salesperson is or is to be associated. The salesperson’s license remains with the broker until the salesperson places the license on inactive status or leaves the brokerage or is terminated. Ohio Rev.Code Ann. § 4735.13(B) (West Supp. 2005). Each license is valid until placed on inactive status, revoked, suspended, or the license expires by operation of law. Ohio Rev.Code Ann. § 4735.13(A) (West Supp. 2005).

A licensed real estate salesperson is considered an associate of a real estate broker, not an independent contractor. See, e.g., *Fulton v. Aszman* (1982), 4 Ohio App.3d 64, 71, 446 N.E.2d 803, 812. *Wolf v. Hyman* (1957), 104 Ohio App. 32, 35, 143 N.E 2d 633, 635. A licensed real estate salesperson is the agent of a licensed real estate broker for whom he works as a matter of law when commissions are collected in the name of the broker. *Bunch v. Tom Althaus Realty, Inc.*, (1977) 55 Ohio App. 2d 123, 129, 379 N.E. 2d 613, 617.

A licensed real estate salesperson is a fiduciary and must use his or her best efforts to further the interests of the client. Ohio Rev. Code Ann. § 4735.62 (West 2004). A licensed real estate salesperson must exercise reasonable skill and care in representing the client and carrying out the responsibilities of the agency relationship; must perform terms of the written agency agreement; must follow lawful instructions of the client; must perform the duties required by law in a manner loyal to the client; must comply with applicable statutes, rules, and regulations; must disclose to the client material facts; must advise the client to obtain expert advice when necessary or appropriate; must account for all moneys and property received; must keep confidential all confidential information. Ohio Rev.Code Ann. § 4735.62 (A) – (I) (West 2004).

Judges and Magistrates Are Governed by the Ohio Code of Judicial Conduct

The applicable Canons of the Ohio Code of Judicial Conduct are Canon 2(C) and 4(D). Canon 2(C) restricts financial and business activities. Canon 4(D) restricts fiduciary activities.

Canon 2(C) Financial Activities

- (1) A judge shall not engage in either of the following financial and business dealings:
 - (a) Dealings that reasonably may be perceived to exploit the judge's judicial position;
 - (b) Dealings that involve the judge in frequent transactions or continuing business relationships with lawyers or other persons likely to come before the court on which the judge serves.
- (2) Subject to the requirements of this Code, a judge may hold and manage investments of the judge and members of the judge's family, including real estate, and engage in other remunerative activity.
- (3) A judge shall not serve as an officer, director, manager, general partner, advisor, or employee of any business entity except that a judge, subject to the requirements of this Code, may manage and participate in either of the following:
 - (a) A business closely held by the judge or member of the judge's family;
 - (b) A business entity primarily engaged in investment of the financial resources of the judge or members of the judge's family.
- (4) A judge shall manage his or her investments and other financial interests to minimize the number of cases in which the judge is disqualified. As soon as the judge can do so without serious financial detriment, the judge shall divest himself or herself of investments and other financial interests that might require frequent disqualification.

Canon 4(D) Fiduciary Positions

- (1) A judge shall not serve as executor, administrator, or other personal representative, trustee, guardian, attorney in fact, or other fiduciary, except for the estate, trust, or person of a member of the judge's family, and then only if the service does not interfere with the proper performance of judicial duties.
- (2) A judge shall not serve as a fiduciary if it is likely that the judge as a fiduciary will be engaged in proceedings that would

ordinarily come before the judge or if the estate, trust, or ward becomes involved in adversary proceedings in the court on which the judge serves or one under its appellate jurisdiction.

- (3) The same restrictions on financial activities that apply to a judge personally also apply to the judge while acting in a fiduciary capacity.

Full-time judges and full time magistrates may not maintain or use an active license as a real estate salesperson

Full-time judges and full-time magistrates must comply with the Ohio Code of Judicial Conduct in its entirety. Thus, they are subject to Canon 2(C)(3) and Canon 4(D)(1). See Section A, Compliance with the Code of Judicial Conduct.

Canon 2(C)(3) prohibits a full-time judge or full-time magistrate from serving as an officer, director, manager, general partner, advisor, or employee of any business entity (except for managing and participating in a business closely held by the judge or member of the judge's family or a business entity primarily engaged in investment of the financial resources of the judge or members of the judge's family).

Canon 4(D)(1) prohibits a full-time judge or full-time magistrate from serving as a fiduciary (except for the estate, trust, or person of a member of the judge's family).

It is impossible for a full-time judge or full-time magistrate to maintain and use an active license as a real estate salesperson and also comply with Canon 2(C)(3) and Canon 4(D)(1). The affiliation as a licensed real estate salesperson with a licensed real estate broker as required by R.C. 4735.13(B) and the existing agency relationship between the broker and the salesperson would violate Canon 2(C)(3). The performance of the fiduciary duties of a licensed real estate salesperson as required in R.C. 4735.62 would violate Canon 4(D)(1).

Advisory committees in other states agree that a magistrate or judge should not be engaged actively as a real estate salesperson. A magistrate may not initiate an affiliation with a real estate brokerage agency, nor actively engage in the real estate business. Delaware, Judicial Ethics Advisory Comm., Op. JEAC 2005-1 (2005). A full-time judge may not apply for a real estate broker's or sales license. New York, Advisory Comm. on Judicial Ethics, Op. 95-100 (1995). A judge may not maintain an active real estate license, but may place the license in an inactive status. Florida, Comm. on Standards of Conduct Governing Judges, Op. 90/11 (1990). It would violate the Canons of Judicial Ethics for a judge, who is a properly licensed real estate salesman, to engage for remuneration in the sale of real estate for a licensed real estate broker. Alabama, Judicial Inquiry Comm'n, Op. 78-34 (1978). It would be impossible for a judge to sell real estate for a

licensed broker without violating Canon 5(C). Alabama, Judicial Inquiry Comm'n, Op. 78-40 (1978).

In conclusion, the Board advises that a full-time judge or full-time magistrate may not maintain or use an active license as a real estate salesperson. A licensed real estate salesperson must affiliate with a broker to maintain an active license and must fulfill fiduciary duties when representing real estate clients. A full-time judge or full-time magistrate cannot fulfill these conditions without violating Canon 2(C)(3) and Canon 4(D)(1).

Part-time judges and magistrates may maintain and use an active license as a real estate salesperson

Part-time judges and part-time magistrates are subject to less restriction than their full-time counterparts. Part-time judges and part-time magistrates are “not required to comply with Canon 2(C)(3) [business]; Canon 4(C)(2) [governmental appointments], (D) [fiduciary], (E) [arbitration, mediation], (F) [practice of law], and Canon 2(D)(3) [quasi-judicial and extra-judicial activity reporting], except that a part-time judge must file the annual disclosure statement required by section 102.02 of the Revised Code.” Section (B)(1) Compliance with the Code of Judicial Conduct.

Because part-time judges and part-time magistrates are not subject to Canon 2(C)(3) and Canon 4(D)(1), they may maintain and use an active license as a real estate salesperson, provided their activities as a licensed real estate salesperson do not result in violations of any other provisions of the Ohio Code of Judicial Conduct or any provision of Ohio Ethics Law.

Canon 2(C)(1)(a) of the Ohio Code of Judicial Conduct restricts a judge or magistrate from financial and business dealings that may be perceived to exploit the judicial position. Canon 2(C)(1)(b) prohibits financial and business dealings that involve a judge or magistrate in frequent transactions or continuing business relationships with lawyers or other persons likely to come before the court. Canon 2(C)(4) requires that a judge manage investments and financial interests to minimize the number of cases in which he or she is disqualified. Canon 3(A) requires that judicial duties take precedence over all the judge's other activities. Canon 3(B)(8) requires that a judge dispose of all judicial matters promptly, efficiently, fairly, and in compliance with the Rules of Superintendence.

In Opinion 98-12 the Board advised that participation of judges and magistrates in permitted business activities must not (1) exploit the judicial office through misuse of the position or through time consuming activities that detract from judicial duties; (2) involve frequent transactions or continuing business relationships with lawyers or other persons likely to come before the court on which the judge or magistrate serves; or (3) involve business interests that would

require frequent disqualification of the judge or magistrate. Ohio SupCt, Bd Comm'rs on Grievances & Discipline, Op. 98-12 (1998).

Under Canon 2(C)(1)(a), Canon 2(C)(1)(b), Canon 2(C)(4), Canon 3(A), and Canon 3(B)(8), if a part-time magistrate or part-time judge performs services as a licensed real estate salesperson, the activities must not exploit the judicial position, must not involve the judge or magistrate in frequent transactions or business relationships with lawyers or other persons likely to come before the court; must not interfere with the performance of judicial duties, and must not take place in the court, occur during court hours, or use court resources or personnel.

If a part-time judge or part-time magistrate advertises the real estate activities, he or she must not use the judicial title or mention the judicial office in the real estate advertising.

Divisions (D) and (E) of Section 102.03 of the Ohio Revised Code are the pertinent provisions of Ohio Ethics Law.

102.03(D) No public official or employee shall use or authorize the use of the authority or influence of office or employment to secure anything of value or the promise or offer of anything of value that is of such a character as to manifest a substantial and improper influence upon the public official or employee with respect to that person's duties.

103.03(E) No public official or employee shall solicit or accept anything of value that is of such a character as to manifest a substantial and improper influence upon the public official or employee with respect to that person's duties.

Ohio Rev. Code Ann. §102.03(D), (E) (West Supp. 2005).

Under Divisions (D) and (E) of Section 102.03 of the Ohio Revised Code a part-time judge or part-time magistrate may not engage in activities as a licensed real estate salesperson for parties that are interested in matters before, regulated by, or doing or seeking to do business with the court, unless the judge or magistrate is able to disqualify from their cases and withdraw from any matters involving their interests. Further under Division (D) of Section 102.03, a part-time judge or part-time magistrate who engages in activities as a real estate salesperson should not use public time, facilities, personnel, or resources in conducting his or her real estate activities, use the judicial title in connection with the real estate activities, use his or her relationship with other officials and employees to secure a favorable decision or action regarding his or her real estate activities; discuss, deliberate, vote on, or preside over any matter involving his or her real estate activities, participate in decisions regarding his or her competitors, or use the

judicial office or authority of the office in any other way to secure a benefit to his or her activities as a real estate salesperson.

In conclusion, the Board advises that a part-time judge or part-time magistrate is not subject to Canon 2(C)(3) and Canon 4(D)(1) and therefore may maintain and use an active license as a real estate salesperson, provided the real estate activities do not result in violations of any other provisions of the Ohio Code of Judicial Conduct or Ohio Ethics Law. Most significantly, the activities must not exploit the judicial position; must not involve the judge or magistrate in frequent transactions or business relationships with lawyers or other persons likely to come before the court; must not interfere with the performance of judicial duties; and must not take place in the court, occur during court hours, or use court resources or personnel. Compensation for activities as a licensed real estate salesperson must be reported pursuant to Canon 2(D)(3)(a) on the annual financial disclosure statement.

Advisory Opinions of the Board of Commissioners on Grievances and Discipline are informal, nonbinding opinions in response to prospective or hypothetical questions regarding the application of the Supreme Court Rules for the Government of the Bar of Ohio, the Supreme Court Rules for the Government of the Judiciary, the Code of Professional Responsibility, the Code of Judicial Conduct, and the Attorney's Oath of Office. Pursuant to Section 102.08 of the Ohio Revised Code, the requester of the opinion may reasonably rely on the opinion as it applies to Ohio Ethics Law and related statutes.