

Consultants Dually Licensed As Agents

**COMMONWEALTH OF KENTUCKY
ENVIRONMENTAL AND PUBLIC PROTECTION CABINET
OFFICE OF INSURANCE**

The following Advisory Opinion is to advise the reader of the current position of the Kentucky Office of Insurance (the "Office") on the specified issue. The Advisory Opinion is not legally binding on either the Office or the reader.

Kentucky Office of Insurance
Advisory Opinion 2006-04

TO: ALL INSURERS AUTHORIZED TO TRANSACT BUSINESS IN KENTUCKY
THE INDEPENDENT INSURANCE AGENTS OF KENTUCKY, INC.
THE PROFESSIONAL INSURANCE AGENTS OF KENTUCKY
ALL AGENTS AND CONSULTANTS LICENSED TO TRANSACT BUSINESS IN KENTUCKY

FROM: R. GLENN JENNINGS, EXECUTIVE DIRECTOR
KENTUCKY OFFICE OF INSURANCE

RE: CONSULTANTS DUALLY LICENSED AS AGENTS

The Kentucky Office of Insurance (Office) finds it necessary to clarify the duties, responsibilities, and prohibitions regarding a consultant who is dually licensed as a consultant and an agent and who is acting in both capacities in a single insurance transaction.

KRS 304.9-350 contemplates that a consultant may be dually licensed as both a consultant and an agent and that a dually licensed consultant may act as both a consultant and an agent in a single insurance transaction. In that event, KRS 304.9-350 and 304.9-360 establish the duties, responsibilities, and prohibitions regarding a dually licensed consultant who chooses to act as both a consultant and an agent in a single insurance transaction. Particularly, the statutes establish a presumption, place prohibitions on the compensation arrangements of a dually licensed consultant, and establish a fiduciary duty that the consultant has to the insured.

PRESUMPTION

KRS 304.9-350(2) provides as follows:

(2) If the licensee has received or is to receive any fee, commission, or compensation from the insured or proposed insured, or from any other person other than the insurer, directly or indirectly, with

respect to any insurance transaction or proposed insurance transaction, or with respect to any insurance or annuity contract existing or proposed, it shall conclusively be presumed that the licensee was acting as a consultant with respect to such transaction or contract.

Given this statutory provision, it is conclusively presumed that a dually licensed consultant is acting as a consultant if the licensee has received or is to receive a fee or other compensation from the insured rather than the insurer. Once this presumption is established, the dually licensed consultant must comply with the prohibitions and duties established by KRS 304.9-350 and 304.9-360.

CONSULTANT COMPENSATION

KRS 304.9-350(1) and (5) provide as follows:

(1) A consultant who is also licensed as an agent shall not, directly or indirectly, receive or share in both a fee and other compensation paid, directly or indirectly, from an insured or any insurer with respect to any insurance or annuity contract procured, renewed, continued, modified, terminated, or otherwise disposed of pursuant to any recommendation given or transaction engaged in by the licensee under this license or any license issued under this code...

(5)(a) No person licensed as a consultant may receive any compensation, direct or indirect, as a result of [t]he sale of insurance or annuities.

Once the presumption is established that a licensee is acting as a consultant, the consultant is prohibited by KRS 304.9-350(1) and (5) from receiving any other compensation, including commission, that might be payable had the consultant been acting only as an agent in the insurance transaction. In other words, the dually licensed consultant is limited to the compensation established by a prior written agreement with the insured. Such an agreement is required pursuant to KRS 304.9-350(3) which provides as follows:

(3) No person licensed as a consultant under this section may receive any fee, commission or thing of value for examining, appraising, reviewing or evaluating any insurance policy, bond, annuity or pension or profit-sharing contract, plan or program or for making recommendation or giving advice with regard to any of the above, unless such compensation is based upon a prior written agreement signed by the party to be charged and specifying or clearly defining the amount or extent of such compensation and the services to be rendered. A copy of every such agreement shall be retained by the licensee for not less than five (5) years after such services have been fully performed.

It should be noted that a dually licensed consultant/agent is prohibited from quoting insurance premium net of commission as that practice is in violation of KRS 304.12-090 and KRS 304.12-110. More specifically, KRS 304.12-090 prohibits the insurer or its agents from offering any rebate of premium to an insured or prospective insured, except to the extent allowed by an applicable filing or policy. In addition, KRS 304.12-110 prohibits the insurer or its agents from giving the insured or prospective insured anything of value in excess of \$25.00 in connection with an insurance transaction. Further, all premium, including that portion of the premium that constitutes commissions, that is collected from the insured by the dually licensed consultant/agent shall be remitted to the insurer as consideration for the insurance product. Any person that violates KRS 304.12-090 and KRS 304.12-110 by offering or bidding on insurance at a premium rate that is net of commissions will be subject to administrative action by the

Office of Insurance. For further analysis of the rebate/inducement issue, please refer to Advisory Opinion 2003-01 issued by the Office.

FIDUCIARY DUTY

KRS 304.9-360 provides as follows:

A consultant is obligated, under his license, to serve with objectivity and complete loyalty the interests of his client alone; and to render his client such information, counsel and service, as within the knowledge, understanding and opinion in good faith of the licensee, as will best serve the client's insurance or annuity needs and interests.

KRS 304.9-350(4) and (6) also address the consultant's fiduciary duty by establishing disclosure requirements in the event that the consultant has an interest in an insurance agency and by prohibiting dealing with insurers where the consultant has a specified interest. The statutes specifically provide as follows:

(4) A person licensed as a consultant under this section shall disclose in the agreement to the party to be charged whether he owns an interest in an insurance agency.

(6) No person licensed as an insurance consultant under this section may be an executive in, or employee of, or own stock which gives him a majority interest, direct or indirect, in any authorized insurer. No consultant may recommend or encourage the purchase of insurance, annuities, or securities from any authorized insurer in which any member of his immediate family holds an executive position or holds a majority interest.

In application, a licensed consultant may place business as an agent but should do so with caution and bearing in mind the following considerations:

1. A consultant is presumed to be acting as a consultant, with a fiduciary duty, if he or she receives a fee or any form of compensation from the insured.
2. A consultant shall not receive commission from an insurer as a result insurance business placed while acting as an agent when the consultant has received a fee from the insured;
3. A dually licensed consultant/agent who chooses to place business as an agent is bound by all laws applicable to agents that do not conflict with KRS 304.9-350;
4. A consultant's fiduciary duty requires objectivity and complete loyalty to the interests of the insured alone.
5. Consultants shall comply with the disclosure requirements outlined in KRS 304.9-350 relating to any conflict of interest with that of the insured.
6. If a consultant acting as such with respect to an insured bids on the placement of the insurance business as an agent, this action by the consultant may result in a breach of the consultant's fiduciary duty in a violation of KRS 304.9-360, thereby subjecting the consultant to both administrative action pursuant to KRS 304.9-440 and KRS 304.99-020. Moreover, under these circumstances there is the potential for civil liability against a consultant for a breach of fiduciary duty owed to the insured.

This Advisory Opinion has been issued industry-wide and is intended as notice to all insurers, consultants, and agents of this Office's position of the duality of consultants placing insurance business as agents. Equally important, are the risks consultants expose themselves to by placing insurance

business. Insurers are charged with notifying their appointed agents of this Office policy. Professional associations are charged with notifying their memberships. Any questions concerning these matters should be directed to R. Glenn Jennings, Executive Director of the Kentucky Office of Insurance.

/s/ R. Glenn Jennings

R. Glenn Jennings, Executive Director
Kentucky Office of Insurance
February 27, 2006