

**CONSULTANTS DUALY 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 2006-07

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 DUALY LICENSED AS AGENTS

- ADDENDUM TO ADVISORY OPINION 2006-04
- HOUSE BILL 561

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ADVISORY OPINION 2006-04

On February 22, 2006, the Kentucky Office of Insurance issued Advisory Opinion 2006-04 regarding Consultants Dually Licensed as Agents. The intent of Advisory Opinion 2006-04 was to clarify the Office's interpretation of KRS 304.9-350 and KRS 304.9-360. Since the issuance of Advisory Opinion 2006-04 the Office has engaged in a great deal of discussion internally and with various associations representing consumers, insurance carriers, agents, and agencies regarding the role and responsibilities of a consultant dually licensed as an agent. The Office has also received various complaints alleging illegal practices of consultants dually licensed as agents. As a result of the discussions and complaints, the Office has become aware that Advisory Opinion 2006-04 authorizes or potentially creates unforeseen marketplace issues and concerns that affect consumers, consultants, and agents. Because of potential illegal practices related to acting as a consultant and placing the business as an agent with respect to a single insurance transaction, the Office finds it necessary to issue this addendum to Advisory Opinion 2006-04. This addendum is intended to clarify the Office's position with respect to the roles and responsibilities of a consultant who also acts as an agent in a single insurance transaction.

As noted in Advisory Opinion 2006-04, 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. Moreover, the Advisory Opinion states that a consultant's fiduciary duty, as outlined in KRS 304.9-360, requires objectivity and complete loyalty to the interests of the insured alone. Advisory Opinion 2006-04 made clear that 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 consumer/insured.

## STATEMENT OF POSITION

After reviewing allegations that form the basis of complaints received and, after discussing the consultant/agent issues with interested persons, it is the opinion of this Office that a licensed consultant dually licensed as an agent is prohibited from acting as both an agent and consultant in a single insurance transaction. This is true despite the fact that KRS 304.9-350 contemplates one person with dual roles as both a consultant and agent.

The Office finds that the potential for conflict of interest and/or breach of fiduciary duty to the consumer/insured must ultimately control this Office's opinion and regulation of dually licensed consultants and agents. The fiduciary duty a consultant has to the consumer/insured is a binding legal relationship that has very real consequences for breach. The harm done by even the slightest appearance of a conflict of interest or breach of fiduciary duty to the consumer/insured outweighs consultants' and agents' market freedom to act as both in a single insurance transaction. Further, KRS 304.9-035 makes it clear that an "agent" is a representative of the insurance company. There is an inherent conflict between KRS 304.9-035 and the consultant fiduciary responsibility as outlined in KRS 304.9-360. Given this conflict, the Office opines that a dually licensed consultant cannot represent the insurer in accordance with KRS 304.9-035 and act in a fiduciary capacity to the insured as a consultant in a single transaction.

As such, a consultant dually licensed as an agent must determine, at the inception of each and every single insurance transaction, whether to act as a consultant and maintain a fiduciary duty to the insured or act as an agent and represent the insurer. From that point on, in each and every single insurance transaction, the consultant dually licensed as an agent must maintain his or her decision at inception until the expiration of the written consultant contract. No crossover in titles or duties will be permitted since the duties of a consultant and agent cannot be statutorily reconciled. The intermingling of the duties of a dually licensed consultant and agent in a single insurance transaction is both potentially damaging to the insurance consultant/agent and consumer/insured.

The laws governing consultants, specifically KRS 304.9-350, is an area of regulation that the Kentucky Insurance Code takes very seriously. In fact, violations of the KRS 304.9-350 may result in the most severe penalties the Kentucky Insurance Code allows. Specifically, KRS 304.99-025 states as follows: "[I]n addition to any applicable suspension, revocation, or refusal to continue the consultant's license, violation of KRS 304.9-350 shall, upon conviction, be punishable by a fine of not more than five thousand dollars (\$5,000), or by imprisonment up to one (1) year, or by both." This Office will not

hesitate to utilize the statutory authority provided in KRS 304.99-025 to regulate the behavior of consultants in Kentucky.

#### HOUSE BILL 561

With the passage of HB 561 during the 2006 legislative session, a consultant license will no longer be limited to an individual. Instead, effective July 12, 2006, a business entity will be able to be licensed as a consultant.

While concerns have been expressed to the Office regarding HB 561 and the assumption that the bill effectively legalizes the ability of the business entity consultant to share in fees/commissions not otherwise allowed, it is the Office's position that a business entity consultant is bound by the same standards, laws, prohibitions, and restrictions in carrying out the functions of a consultant as is an individual licensed as a consultant. The provisions of the Kentucky Insurance Code applicable to an individual consultant are also applicable to a business entity consultant. Just as an individual is prohibited from acting as a consultant and agent within the same insurance transaction, so also is the business entity consultant subject to the same restriction.

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. Any questions concerning these matters should be directed to R. Glenn Jennings, Executive Director of the Kentucky Office of Insurance.

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R. Glenn Jennings, Executive Director  
Kentucky Office of Insurance  
June 14, 2006