

Rule 18 – Property selling

Solicitors' Code of Conduct 2007

Professional Ethics

Dated 10 March 2007 and commencing on 1 July 2007

Changes to rule 18.01, guidance note 11 and the insertion of new guidance notes 12 & 13 (with subsequent renumbering) are shown underlined and highlighted in red and were made on 1 August 2007.

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Rule 18 – Property selling

Introduction

This rule sets out requirements for providing property selling services through your firm. Requirements for providing property selling services through a separate business are dealt with under rule 21 (Separate businesses).

The seller is your client, and any property selling work you do is, in addition to this rule, subject to the same law and professional rules binding on you in relation to your other work.

The rule applies to your overseas practice from offices in Scotland or Northern Ireland but not to your overseas practice from offices outside the UK.

Rule 18 – Property selling

18.01 Standards of property selling services

- (1) When providing property selling services through your firm, you must:
- (a) ensure that you, or the relevant staff, are competent to carry out the work;
 - (b) not seek from any prospective buyer a pre-contract deposit in excess of any prescribed limit; and
 - (c) promptly send to your client written accurate details of any offer you have received from a prospective buyer in respect of an interest in the property (other than those of a description which your client has indicated in writing that they do not want to receive).

(2) If you are the person who is responsible for marketing a residential property you must comply with any Home Information Packs regulations made under the Housing Act 2004.

(3) (a) In 18.01(1) above:

- (a i) “competent” includes meeting any standards of competence set by the Secretary of State under section 22 of the Estate Agents Act 1979; and
- (b ii) “prescribed limit” means any limit prescribed by the Secretary of State under section 19 of the Estate Agents Act 1979.

(b) In 18.01(2) “the person who is responsible for marketing a residential property” has the meaning used in ss.151-153 of the Housing Act 2004.

18.02 Statement on the cost

- (1) When accepting instructions to act in the sale of a property, you must, at the outset of communication between you and the client, or as soon as is reasonably practicable, and before the client is committed to any liability towards you, give the client a written statement setting out your agreement as to:
- (a) the identity of the property;
 - (b) the interest to be sold;
 - (c) the price to be sought;
 - (d) the amount of your fee or the method of its calculation;

- (e) the circumstances in which your fee is to become payable;
 - (f) regarding any payments to be made to others, and charged separately:
 - (i) the amount, or the method by which they will be calculated; and
 - (ii) the circumstances in which they may be incurred; and
 - (g) the incidence of VAT.
- (2) You must also, within the written statement:
- (a) state whether or not you are to have “sole agency” or “sole selling rights”. The statement must also include a clear explanation of the intention and effect of those terms, or any similar terms used; and
 - (b) if the statement refers to a “ready, willing and able” buyer (or similar term), include a clear explanation of the term.

18.03 Conflict of interests

- (1) In addition to your duties under rule 3 (Conflict of interests), when selling property you must comply with the following requirements.
- (a) If you or any connected person has, or is seeking to acquire, a beneficial interest in the property or in the proceeds of sale of any interest in the property, you must promptly inform your client in writing.
 - (b) If you act in the sale of property, even if not in the conveyancing, you must not act for the buyer in the negotiations.
 - (c) If a prospective buyer makes an offer for a client’s property, you must promptly inform the client in writing if, to your knowledge, you or any connected person has been instructed, or is to be instructed by the buyer to sell an interest in land, and that sale is necessary to enable the buyer to buy from the client or results from that prospective purchase.
 - (d) If you have, or to your knowledge any connected person has, a beneficial interest in a property or in the proceeds of sale of any interest in it, you must promptly inform in writing any person negotiating to acquire or dispose of any interest in that property. You must make this disclosure before entering into any negotiations with a prospective buyer.
 - (e) You must not discriminate against a prospective buyer because they are unlikely to instruct you to sell an interest in land, which sale is necessary to enable the buyer to buy from your client or results from that prospective purchase.
 - (f) When acting for a seller, you must restrict communication with the buyer to your property selling function. In particular:
 - (i) you must communicate about legal matters so far as possible only through the buyer’s solicitor; and
 - (ii) you must not lead the buyer to believe that they are receiving legal advice from you.

- (g) When acting for a seller, if you arrange for a mortgage to be available on the property in order to facilitate the sale, you may inform prospective buyers of the availability of the mortgage (subject to the buyer's status) but, unless exempted by rule 3 (Conflict of interests) you must also inform prospective buyers in writing:
 - (i) that you cannot advise or act for the prospective buyer in respect of the mortgage;
 - (ii) that the mortgage may not be the only one available; and
 - (iii) that the prospective buyer should consult their own lawyer or licensed conveyancer.

- (2) In 18.03(1) above:
 - (a) "connected person" means:
 - (i) spouse, former spouse, reputed spouse, brother, sister, uncle, aunt, nephew, niece, direct descendant, parent or other direct ancestor;
 - (ii) any employee of your firm, and any member of your employee's family;
 - (iii) any owner or employee of an associated firm defined in rule 24 (Interpretation) or any member of their families;
 - (iv) any company of which you are a director or employee, or any LLP of which you are a member or employee, or any company in which you, either alone or with any other connected person or persons are entitled to exercise, or control the exercise of, one-third or more of the voting power at any general meeting;
 - (v) any company of which any of the persons mentioned in (i) to (iii) above is a director or employee, or any LLP of which any of them is a member or employee, or any company in which any of them, either alone or with any other connected person or persons, is entitled to exercise, or control the exercise of, one-third or more of the voting power at any general meeting; and
 - (vi) any other "associate" as defined in section 32 of the Estate Agents Act 1979; and
 - (b) "you" includes anyone with whom you carry on a joint property selling practice, and owners of an associated firm as defined in rule 24 (Interpretation).

18.04 Waivers

In spite of 22.01(1) (Waivers), the Board of the Solicitors Regulation Authority shall not have power to waive any of the provisions of this rule.

Guidance to rule 18 – Property selling

General – business structures and property selling

1. You may sell property through a separate business – see notes 8 and 9 below and rule 21 (Separate businesses) – or as part of the general work of your firm, or through a firm formed especially for that purpose, either alone or with other firms. If you form a property selling firm with solicitors from other firms, it will be a distinct firm for all purposes.
2. A jointly owned property selling firm may be incorporated as a SEAL (Solicitors' Estate Agency Limited). A SEAL is defined in 3.12. See rule 3 (Conflict of interests) for the position of a SEAL regarding conflicts of interests.
3. A further alternative for firms wishing to co-operate in selling property is a joint Property Display Centre (PDC), where the principal activity carried on is publicising properties in the sale of which an individual participating firm is instructed. It is also possible for a single firm to establish its own PDC. A PDC:
 - (a) is not itself a firm, and is not a separate entity; it is an administrative extension of the practices of the participating firms, and its address should be notified to the Registration department of the Solicitors Regulation Authority;
 - (b) can have no clients; it may merely carry out certain activities on behalf of the participating firms (only individual participating firms may be instructed in the sale of a property);
 - (c) is a place where the principal activity carried on is the display and dissemination of information about properties which the individual participating firms have for sale; and
 - (d) cannot carry on any part of your professional practice. In particular no negotiations may be conducted at the PDC; prospective buyers must be referred to the individual participating firm instructed in the sale of the property in question. Instructions to sell a property may only be accepted at offices of participating firms. To avoid problems with rule 3 (conflict of interests), the participating firms must operate totally independently so far as their professional business, including property selling, is concerned.
4. You and the other participating firms may wish to establish a joint service company to carry out support functions connected with the running of the PDC, e.g. hiring premises and equipment. The service company (as with a service company established by an individual firm of solicitors) cannot carry on any legal practice or have any dealings with the property selling or property buying public.
5. As no part of the professional practice of the participating firms is carried out at the PDC, rule 5 (Business management in England and Wales) does not apply. Nor would rule 5 apply to a PDC established by a single firm. The participating firms, or the single firm, would nevertheless be responsible for the activities of the PDC staff and would have a duty to supervise them.

6. If you sell property you may share your professional fees with an estate agent who is your sub-agent for a sale – see 8.01(j).
7. You may properly provide structural surveys and formal valuations of property through your firm. You must ensure that you, or relevant staff, have the appropriate level of competence.
8. You may provide property selling services through a separate business – see 21.04(1)(c). If so, you must comply with the safeguards in 21.05. Note also that a separate business will not fall within the exemption in section 1 of the Estate Agents Act 1979 (see note 10 below). The effect of this is that your separate business providing property selling services will be subject to all the provisions of the Estate Agents Act 1979.
9. If you are selling a property through a separate business, your firm may do the seller's conveyancing, but may not normally do the buyer's conveyancing unless you comply with 21.05(2)(f), and:
 - (a) your firm is not doing the seller's conveyancing; or
 - (b) your firm is allowed to act for both buyer and seller under rule 3 (Conflict of interests).

Your separate business may, however, provide mortgage related services to the buyer even if your firm is doing the seller's conveyancing.

Standards of property selling services – 18.01

10. Section 1(2)(a) of the Estate Agents Act 1979 exempts from that Act “things done in the course of his profession by a practising solicitor or a person employed by him.” This exemption is on the basis that certain standards, set out in the Act, are already required of you under the rules of professional conduct. These standards are contained in rule 18 and in other rules of professional conduct, all of which remain applicable when you are selling property.
11. These standards are:
 - (a) a requirement of competence, imposed by 18.01(a);
 - (b) a prohibition on making false statements as set out in section 1 of the Property Misdescriptions Act 1991 – “a false or misleading statement about a prescribed matter” (section 1(1)). A prescribed matter is “any matter relating to land which is specified in an order made by the Secretary of State” (section 1(5)). A statement can be made by pictures as well as words. Any false statement will be a breach of 1.02 (Integrity);
 - (c) a prohibition on seeking a pre-contract deposit in excess of the prescribed limit, imposed by 18.01(1)(b);
 - (d) requirements for the holding of clients' money and the keeping of client accounts, which are imposed on you under the Solicitors' Accounts Rules 1998;

- (e) requirements relating to the provision of information to clients, imposed on you by 18.01(1)(c) and 18.02; this also reflects rule 2 (Client relations); and
- (f) requirements relating to conflict of interests. Some of these are imposed on you by 18.03, and some by rule 3 (Conflict of interests). In addition to the general provisions on conflict of interests (3.01 to 3.06), you should also have regard to the provisions specifically on conveyancing, property selling and mortgage related services (3.07 to 3.22). Note that there are also special conflict provisions where you sell property through a separate business – see notes 8 and 9 above and 21.05(2)(f);
- (g) requirements relating to home information packs resulting from the Housing Act 2004 and the Home Information Pack Regulations (No. 2) 2007 (SI 2007/1667). These are imposed on you by 18.01(2).

Statement on the cost – 18.02

- 12. If you are acting for a seller in marketing a property, you have a duty to have a home information pack for the property under the Housing Act 2004. The Home Information Pack Regulations (No. 2) 2007 set out the requirements in relation to home information packs.
- 13. Under the Housing Act, enforcement of the Regulations in respect of non-solicitor estate agents is carried out by the Office of Fair Trading. Because of the exemption of solicitors' services from the provisions of the Estate Agents Act 1979, enforcement of the requirements of the Regulations in respect of solicitors is carried out by the Solicitors Regulation Authority. Similarly, the redress scheme operated by the Ombudsman for Estate Agents does not apply to solicitors: redress is provided by the Legal Complaints Service.
- 124. Notes 135 to 168 below set out the detailed information requirements to help you comply with 18.02. These requirements correspond to those in the Estate Agents (Provision of Information) Regulations 1991 (SI 1991/859) and the Schedule to those Regulations.
- 135. A clear explanation of the intention and effect of the terms sole agency/sole selling rights or similar terms, given to clients will take the following form.

“Sole agency

You will be liable to pay a fee to us, in addition to any other costs or charges agreed, if unconditional contracts for the sale of the property are exchanged at any time:

with a buyer introduced by us with whom we had negotiations about the property in the period during which we have sole agency; or

with a buyer introduced by another agent during the period of our sole agency.

Sole selling rights

You will be liable to pay a fee to us, in addition to any other costs or charges agreed, in each of the following circumstances:

if unconditional contracts for the sale of the property are exchanged in the period during which we have sole selling rights, even if the buyer was not found by us but by another agent or by any other person, including yourself; or

if unconditional contracts for the sale of the property are exchanged after the expiry of the period during which we have sole selling rights but to a buyer who was introduced to you during that period or with whom we had negotiations about the property during that period.”

146. A clear explanation of the term “ready, willing and able” given to clients will take the following form.

“A buyer is a “ready, willing and able” buyer if he or she is prepared and is able to exchange unconditional contracts for the purchase of your property. You will be liable to pay a fee to us, in addition to any other costs or charges agreed, if such a buyer is introduced by us in accordance with your instructions and this must be paid even if you subsequently withdraw and unconditional contracts for sale are not exchanged, irrespective of your reasons.”

157. If, by reason of the provisions of the statement in which any of the terms referred to above appear, any of the prescribed explanations is in any way misleading, you should alter the content of the explanation so as accurately to describe the liability of the client to pay a fee in accordance with those provisions. Subject to this requirement, you should reproduce the explanations prominently, clearly and legibly without any material alterations or additions. They should be given no less prominence than that given to any other information in the statement apart from the heading, firm names, names of the parties, numbers or lettering subsequently inserted.
168. You may quote or publicise a composite fee for property selling and conveyancing, but should be prepared to quote separate fees if asked. The separate fees may total more than the composite fee.

Conflict of interests – 18.03

179. The requirements of 18.03 are similar to those imposed on estate agents by the Estate Agents (Undesirable Practices) (No.2) Order 1991 (SI 1991/1032).
1820. It is important to read the requirements of 18.03 in close conjunction with rule 3 (Conflict of interests).

Waivers – 18.04

1921. The exemption from the Estate Agents Act 1979, explained in note 10 above, is on the basis that the standards in rule 18 are complied with in all circumstances. For this reason there is no power to waive rule 18.