

NEW YORK STATE BAR ASSOCIATION
Professional Ethics Committee Opinion

Opinion #162 - 10/9/70 (42-70)

Topic: Dual Representation

Digest: An attorney may represent both buyer and seller of real property only when there is no actual or potential differing interests and there is complete disclosure to and consent by both clients

It is not proper for a lawyer to represent a client to whom the lawyer is selling his own property

Code: Canon 5; DR 5-105, 104; EC 5-1, 5-14 to 19

QUESTIONS

1. Is it ethically proper for a lawyer to represent both buyer and seller in a real estate transaction where the parties have agreed on the terms of their deal and where a title policy is to be obtained?
2. Is it ethically proper for a lawyer to represent a client who is purchasing a parcel of real property from the lawyer?

OPINION

As to Question 1

Canon 5 provides, "A lawyer should exercise independent professional judgment on behalf of a client"

DR 5-105 provides in part:

"Refusing to accept or continue employment if the interests of another client may impair the independent professional judgment of the lawyer.

(A) A lawyer shall decline proffered employment if the exercise of his independent professional judgment on behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, except to the extent permitted under DR 5-105 (C).

(C) In the situations covered by DR 5-105 (A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each."

EC 5-1 and EC 5-14 to 19 expand at length on this rule and should be read in full by each lawyer faced with this problem.

Essentially they impose on the lawyer the to accept employment from one client if it will judgment or divided loyalty to another client resolve all doubts against the propriety of the serious obligation not result in impaired They admonish him to representation.

If the clients' interests are not actually or potentially differing, or vary only slightly, so that it is likely that the lawyer will not be subjected to an adverse influence and that he can retain his independent judgment on behalf of each client, such representation would not be improper.

However, there must first be a complete disclosure to the clients of all facts and circumstances which might cause any client to question his undivided loyalty, and a full understanding and a consent by each client to the multiple representation.

It is this committee's opinion that on observing the Disciplinary Rules and Ethical Consideration of the Code of Professional Responsibility, it is not improper for a lawyer to represent both the buyer and seller of real property. But the admonition of this committee in N.Y. State 38 (1966) still stands:

"Dual representation should be practiced sparingly and only when it is clear that neither party will suffer any disadvantage from it. It is difficult to justify, except in unusual and very limited circumstances, and only after complete disclosure and consent, with a clear understanding by both parties of its possible effect on their respective interests.

"In real estate transactions it is not always true, even in relatively simple ones, that representation of both buyer and seller involves nothing but computations of adjustments and preparation of the deed. A number of questions arise that require the exercise of legal judgment Examples are (i) whether the deed should be full covenant and warranty, bargain and sale, with or without covenants, or quitclaim, (ii) what customs are to be followed in making adjustments, (iii) which points disclosed in the title report are important and which may be disregarded, (iv) what title company to use, considering the fact that a title company reinsuring may perpetuate past errors which another title company would pick up."

As to Question 2

DR 5-104 (A) provides:

"A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his professional judgment therein for the protection of the client, unless the client has consented after full disclosure."

EC 5-1 provides:

"The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client"

It is the committee's opinion that by the very nature of the transaction a lawyer cannot give his client the undivided loyalty to the interests of his client that the relationship requires. He cannot look objectively at his own title, his own boundary lines, at the instruments he draws, or the adjustments he makes.

Even a business transaction between an attorney and client is fraught with danger and places a severe burden on the attorney if the transaction is ever challenged. See N.Y. City 525 (1940), where that committee recommended that the client be represented by independent counsel.

Where a lawyer is a principal party to the transaction, it is improper for him to purport to represent the other party.