



ILLINOIS STATE
BAR ASSOCIATION

ISBA Advisory Opinion on Professional Conduct

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This Opinion was **AFFIRMED** by the Board of Governors in July 2010. Please see the 2010 Illinois Rule of Professional Conduct 1.7 with its Comments [23] and [29-33]. See also ISBA Ethics Advisory Opinion 90-25. This opinion was affirmed based on its general consistency with the 2010 Rules, although the specific standards referenced in it may be different from the 2010 Rules. Readers are encouraged to review and consider other applicable Rules and Comments, as well as any applicable case law or disciplinary decisions.

Opinion No. 86-15

May 13, 1987

Topic: Conflict of Interest

Digest: It is generally improper for a lawyer to represent both the buyer and the seller in a real estate transaction. Instances where such multiple representation may appropriately be undertaken are extremely rare and depend on the facts of the particular situation.

Ref: Rules 5-105(a), (b), (c)
ISBA Opinion Nos. 644, 809, 822.

FACTS

A buyer and seller of real estate agree to be represented by a single lawyer following what the inquirer terms to be full disclosure of possible conflicts raised by such representation. The buyer and seller agree to share the legal fees.

QUESTION

Is it ethically appropriate for a lawyer to represent both parties to the real estate transaction?

OPINION

Rules 5-105(a) and (b) of the Illinois Code of Professional Responsibility generally prohibit multiple employment if the exercise of the attorney's professional judgment on behalf of either client is likely to be adversely affected by his representation of the other. However, Rule 5-105(c) provides that in situations covered by Rules 5-105(a) and (b), a lawyer may represent multiple clients where both of the following elements are present: (1) if it is obvious that he can adequately represent interests of each, and (2) if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of the attorney's independent professional judgment on behalf of each. See ISBA Advisory Professional Ethics Opinion Nos. 809 and 822.

The primary question raised by the present inquiry is whether it is obvious that an attorney can adequately represent the interests of both the buyer and the seller in a sale of real estate. Under normal circumstances involving an arms-length unrelated buyer and seller, we feel it by no means obvious that their interests can be adequately represented by a single attorney. We would, therefore, conclude under such circumstances that their dual representation would be improper, regardless of their consent thereto.

We cannot say, however, that no possible set of factual circumstances could exist in which representation of both the buyer and seller of real estate by a single attorney would be ethically appropriate. In this regard, the question presented is not unlike that raised in our prior Opinion No. 644. The question that raises was whether it was professionally proper for a lawyer to represent both the lender and the borrower in a mortgage loan transaction, with the knowing consent of each. Our discussion was as follows:

[W]hether a lawyer may represent both the lender and borrower in a mortgage loan transaction depends upon the facts of the particular transaction when viewed in the perspective of Rule 5-105. If it is obvious that each client can be adequately represented and if each client consents after full disclosure of the possible effect of such representation on the exercise of the lawyer's independent professional judgment on behalf of each client, then such multiple employment is professionally proper. While a theoretical fact situation can be envisaged in which such multiple representation would be professionally proper, whether in practice such multiple employment is proper must depend on the fact[s] thereof.

Nevertheless, if it is professionally proper for the lawyer to embark upon such multiple employment, he is admonished to constantly monitor such representation to insure that each client is adequately represented and that each client is at all times fully informed of the possible effect of such multiple representation on the lawyer's independent professional judgment on behalf of each client. This is necessary to be certain that each client's consent to such multiple employment is a fully informed consent. If, after accepting such multiple employment [it becomes no longer obvious that the attorney can continue to adequately represent the interests of each client] consistent with his duties under Rule-5-105, he must withdraw therefrom.

As with the situation involved in Advisory Opinion No. 644, we are not prepared to say categorically in the present instance that an attorney can never, under any circumstances, adequately represent the interests of both the buyer and seller in a real estate transaction. We do, however, believe such instances to be extremely rare. Whether the lawyer can adequately represent both such interests in a particular transaction must to some degree be dependent upon the facts of that transaction. However, as noted in Advisory Opinion No. 644, even where such representation may be appropriate, the adequacy of this representation must continuously be monitored, and if the circumstances become such that the adequacy of the attorney's representation on behalf of either client becomes less than obvious, he must withdraw from each such representation. Moreover, his disclosure to the clients prior to undertaking the representation must refer to the possible necessity of such subsequent withdrawal.

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