



**ILLINOIS STATE
BAR ASSOCIATION**

ISBA Advisory Opinion on Professional Conduct

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This Opinion was AFFIRMED by the Board of Governors in May 2010. Please see the 2010 Illinois Rules of Professional Conduct 1.7 and 5.4(c). 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 Number 89-1
(July 17, 1989)**

Topic: Conflict of Interest; Multiple Representation

Digest: Multiple Representation of Business Broker and the Seller and Buyer of a Business in the Same Transaction is Professionally Improper.

Ref: Rules 5-105(a) and (c); Rule 5-107
Canon 3
ISBA Opinion Nos. 86-15, 281

FACTS

An attorney has been asked to serve as attorney for a "business broker." The "business broker" represents sellers of businesses. The "business broker" negotiates on behalf of the seller and drafts and secures execution of a written contract setting forth the terms of the proposed sale. Some sales involve business assets consisting solely of personal property, others involve business assets consisting of both personal and real property.

The "business broker" proposes to hire an Attorney on a per-case basis. The fee will be paid by seller and buyer equally.

The Attorney will represent the "business broker" and will prepare such closing documents as may be necessary in the Attorney's opinion to properly complete the transaction. The documents then will be submitted to the seller and the buyer for review by them or by their Attorney. The Attorney would prepare the Bulk Sale compliance documents for signature by the seller and the buyer and would prepare the closing statement in addition to all documents necessary to transfer title.

The Attorney would not prepare the initial contract. It would be prepared by the "business broker."

QUESTIONS

1. Whether such representation of the "business broker" and the drafting of the closing documents is professionally improper?
2. Would the Committee's answer be different if the "business broker" (rather than the attorney) prepared the bulk sales notices and/or closing statement?

OPINION

The facts raise a foreseeable Pandora's box of pitfalls and perils for the inquiring attorney. He is hired by the "business broker." Accordingly, the "business broker" is his client even though his fee will be paid by others. He is to render services to both the buyer and seller, for which he will be paid equally by them. By virtue thereof, the buyer and seller have become his clients also, unless or until either one or both retain their own independent counsel. By virtue of this tripartite relationship, albeit even for perhaps a limited time period, the attorney has placed himself in an absolutely untenable position relative to several provisions of the Code.

Generically, he has a conflict of interest. Specifically, the exercise of his independent professional judgment and his duty of undivided fidelity are impaired in violation of Rules 5-105 and 5-107. Additionally, he may be condoning the unauthorized practice of law in violation of Canon 3 of the Code.

Rules 5-105(a) and (c) state as follows:

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

(c) In the situations covered by Rules 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.

It is difficult at best for the Committee to perceive how, in an arm's-length transaction, both parties to the transaction can be adequately represented by a single party particularly when that attorney was initially hired by a third party, the "business broker." This view was previously set forth in ISBA advisory ethics opinion number 86-15 wherein the Committee stated, "It is generally improper for a lawyer to represent both the buyer and seller in a real estate transaction."

That opinion set forth "the general rule" but left the door slightly ajar under Rule 5-105(c) by permitting multiple representation after full disclosure coupled with the strong admonition that the attorney must constantly monitor the situation to ensure a conflict doesn't develop. That same admonition applies here as well; however, in this instance there is an additional factor that closes the door permitted by Rule 5-105(c).

Should a commission dispute arise between the "business broker" and the seller, who would the attorney represent? Likewise, should a dispute arise between the buyer and the seller, who will the attorney represent?

Rule 5-107(a) and (c) state:

(a) A lawyer shall represent his client with undivided fidelity.

(c) A lawyer shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services.

When the questions posed are compared to the aforesaid provisions of Rule 5-107, it is readily apparent that the attorney is in a conflict position from which he cannot extricate himself.

The Committee also voices concern that the attorney may have aided or abetted the unauthorized practice of law in violation of ISBA advisory ethics opinion number 281 as well as the Quinlan-Tyson case cited therein.

Opinion number 281 said "Attorney retained by a real estate broker may not represent the broker, and through him, the buyer and seller in a real estate transaction and therefore the attorney may not prepare all the legal documents for the transaction."

The preparation of contracts for the sale of a business and/or its assets by an unlicensed layman could well be the unauthorized practice of law, and the attorney is hereby cautioned that "A lawyer should assist in preventing the unauthorized practice of law." (Canon 3).

For the reasons stated, it is the Committee's opinion that it is professionally improper for an attorney hired by a "business broker" to draft any closing documents on behalf of the seller and buyer under the facts presented in this inquiry.