



**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 Rule of Professional Conduct 1.7 with its Comments [23] and [29-33]. 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. 90-31
May 15, 1991**

Topic: Conflict of Interest

Digest: Multiple representation of buyer and lender in real estate transaction may be prohibited where interest of each cannot be adequately represented.

Ref.: 1990 Illinois Rules of Professional Conduct, Rule 1.7

FACTS

Inquiry is made regarding multiple representation by an attorney of both the lender and the borrower in a real estate transaction.

In a typical real estate transaction where financing of all or part of the purchase price is involved, legal services may be required by the buyer/borrower or the lender, or both. Such services will differ, depending upon whether they are performed for the buyer or for the lender.

The inquiring lawyer and his law firm are often called upon to represent the interests of both the buyer and the lender in a particular transaction. In such cases, the firm discloses to both the buyer and the lender the potential conflict of interest and obtains signed waivers from the parties. Where the firm acts as outside general corporate counsel for the lender, the buyer in the transaction is

advised that, in the event of a conflict, the firm would continue to represent the lender, but would no longer represent the buyer. In other cases, where the firm does not act as outside general corporate counsel for the lender, the firm informs both the borrower and lender that, in the event of conflict, it would no longer represent either of the parties.

The firm's inquiry questions the practicality of the disclosure and consent requirements of the rules of professional conduct, suggesting that such requirements may "foster distrust of the profession in general, as well as that of the individual attorney involved."

QUESTIONS

1. Can an attorney ethically represent a lender as outside general corporate counsel and at the same time be involved in a real estate transaction wherein the attorney represents the borrower/buyer?
2. Can an attorney who does not represent the lender as outside general corporate counsel nevertheless represent that lender in a real estate transaction, to the extent of preparing the lender's usual and customary note and mortgage and providing title work for the lender, and at the same time represent the borrower/buyer therein?
3. Can an attorney who serves as shareholder, director or officer of or in-house attorney for a lender represent that lender in a real estate transaction and at the same time represent the borrower therein?
4. Where an attorney is requested by the lender to perform certain services related to the transaction and is instructed to bill the borrower directly for such services, may the attorney perform such services and directly bill the borrower without ever having had contact with the borrower prior to such billing?

OPINION

This inquiry raises a number of issues dealing with conflicts of interest. The general rule is stated in Rule 1.7.

- (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
 - (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and,
 - (2) each client consents after disclosure.

In Opinion No. 644, we addressed the question of whether it is professionally proper for a lawyer to represent both the lender and the borrower in a mortgage loan transaction. In construing the predecessor to Rule 1.7, (Rule 5-105, 1080 Code of Professional Responsibility), we pointed out that the Code prohibited such multiple employment if the exercise of the lawyer's independent professional judgment on behalf of either client would be, or was likely to be, adversely affected. Under Rule 5-105(c), however, representation of multiple clients was deemed proper if it were "obvious" that the lawyer could adequately represent the interests of each and if each consented after full disclosure of the possible effect of such representation of the exercise of the lawyer's independent professional judgment on behalf of each. We emphasized that the propriety of such multiple employment must depend upon the facts of each case.

In our recent Opinion No. 90-3 (November 6, 1990), we pointed out that new Rule 1.7(c) requires that the disclosure to the multiple clients include an explanation of the "implications of the common representation and the advantages and risks involved." The committee interpreted this language to mean that the disclosure of relevant facts "should be ongoing over the course of representation as they arise," not simply at the beginning.

This requirement of continuing disclosure is consistent, the committee believes, with the admonishment in Opinion No. 644, that the attorney "constantly monitor such representation to ensure that each client is adequately represented and that each client is at all times fully informed of the possible effect of such multiple representation....This is necessary to be certain that each client's consent to such multiple employment is a fully informed consent." See also Opinion No. 86-15, holding that no per se prohibition exists against representing both buyer and seller in a real estate transaction, but that each case must depend on its own facts.

With Rule 1.7 and the Committee's previous opinions as guidance, we address the questions presented:

1. Whether an attorney who serves as outside general corporate counsel for the lender in the transaction can, at the same time, represent the buyer in a particular transaction, is governed by Rule 1.7(b).

A lawyer shall not represent a client if the representation of the client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

- (1) the lawyer reasonably believes the representation will not be adversely affected; and,
- (2) the client consents after disclosure.

The additional element not addressed in our previous opinions, but presented in this part of the inquiry, is whether the attorney's serving as general corporate counsel for the lender would preclude representation of that lender and the buyer in a particular transaction. It is noted that the inquiring firm's policy, in such case, is to inform the buyer that, in the event that a conflict arises, the firm will represent the lender and not the buyer.

The Committee believes that, under these circumstances, the firm may not represent the buyer in regard to the transaction in question. Rule 1.7(b) prohibits representation of the client if such representation may be materially limited by the lawyer's responsibilities to another client, absent client consent after full disclosure and absent the lawyer's "reasonable belief" that his representation will not be adversely affected.

It seems clear that the firm in question foresees, at the outset, that its representation of the buyer will be adversely affected, inasmuch as it has advised the buyer/prospective client that its loyalties will remain with the lender in the event of an actual conflict. Therefore, the lawyer cannot "reasonably believe" that his representation of the buyer will not be adversely affected. The continuing

representation by the lawyer's firm of the lender creates a clear conflict of interest for the lawyer and his firm. See Opinion No. 90-26.

If the lawyer does represent both the lender and borrower at the outset and subsequently the multiple representation may not continue due to a conflict between the clients, the lawyer must withdraw from representation of both clients and cannot represent either client without consent and disclosure, if permitted under Rule 1.7 and 1.9.

2. While no absolute prohibition against representing both the lender and the buyer exists (Opinion No. 644, discussed supra), care must be taken to continuously monitor the adequacy of the representation of both parties, and, if and when circumstances dictate that the attorney reasonably believes that the representation of one client adversely affects the representation of the other client, the attorney must withdraw from each such representation. Moreover, the lawyer's disclosure to the clients prior to undertaking the representation of each must refer to the possible necessity of subsequent withdrawal. In this connection, we note that it would be professionally improper for the lawyer to represent either party in a subsequent foreclosure action or in a proceeding in bankruptcy where the lender's security interest is involved (Opinion No. 644).

3. A lawyer who serves as an officer or in-house counsel for a lending institution has a fiduciary duty to that institution and may also have a personal interest therein. (See Opinion No. 88-5). As such, the lawyer's relationship to the lender is even closer than that of its outside general counsel, and, for the reasons given in response to the first inquiry, the Committee believes that the lawyer and his firm would be precluded from representing the buyer in such a case.

Where the lawyer is only a shareholder, or serves on the Board of Directors, that fact alone would not, in the Committee's judgment, disqualify him from representing the buyer, but would be a circumstance which must be disclosed under Rule 1.7(b) and the client's consent obtained.

4. A lawyer may be retained by one person to perform legal services for the benefit of another. No impropriety exists in such a practice, so long as the lawyer's independent professional

judgment is not comprised. Rule 5.4(c) states:

A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

The lawyer must, however, be satisfied that the lender has authority to retain him to perform legal services on behalf of the borrower/buyer. See Opinion No. 87-2, stating that a lawyer retained by a broker on behalf of the seller may perform legal services for the seller if the lawyer has verified that the broker has the authority to retain the lawyer. We stated in that opinion that the principle would also apply to other situations where the lawyer is asked to represent a client by an agent.

The lawyer, in representing a client through an agent, is professionally obligated to provide competent representation under Rule 1.1, fully communicate with the client under Rules 1.4 and 1.5 and the other requirements of the Rules.

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