

# ADVISORY ETHICS OPINION 79-23

## SYNOPSIS:

A bank cannot require that an attorney represent the borrower and the mortgagee (the Bank) in the real estate transaction.

## FACTS:

A Vermont Bank has issued certain mandatory guidelines for all attorneys and law firms wishing to represent buyers in real estate transactions with the Bank.

A question has been raised as to one of the guidelines. Specifically, that guideline is set forth as follows:

5. “The attorney representing the borrower in a particular real estate transaction is presumed to represent the Bank’s interest as well and is expected to attend the closing. If a conflict of interest develops or is foreseen in a particular case, the bank should be notified and a review attorney will be engaged at borrower’s expense.” (emphasis added)

## QUESTION:

Obviously, on its face this requirement of multiple representation calls into play a division of responsibility, loyalty and singular representation to a client.

The question is whether there is a conflict of interest or a division of loyalty in this situation.

Could an attorney in certain situations represent both the borrower and the bank until an item of conflict arose?

## OPINION:

Under the Professional Responsibility Code, this issue would appear to be governed by several of the Canons.

Specifically, DR 5-105(a) speaks as follows:

“Refusing to accept or continue employment if the interest of another client may impair the independent professional judgment of a lawyer.

- (a) A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of the client will be or is likely to be adversely affected by the acceptance of a proffered employment, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(c).”

DR 5-105(c) states:

- (c) “In situations covered 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 that each consent 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.” (emphasis added)

Canon 5 states that a lawyer should exercise independent professional judgment on behalf of a client. The Ethical Considerations to be taken into consideration in this determination are covered by EC 5-14, “Interests of Multiple Clients.”

“Maintaining the independence of professional judgment required of a lawyer precludes his acceptance or continuation of employment that will adversely affect his judgment on behalf or dilute his loyalty to a client. This problem arises whenever a lawyer is asked to represent two or more clients who may have differing interests, whether such interests be conflicting, inconsistent, diverse or otherwise discordant.”

On its face it can be definitely stated that initially any real estate transaction could potentially give rise to a situation. These could arise initially in any loans as to matters involving usury. Truth and Lending applications, or Disclosures, RESPA, let alone as to further recommendations as to the quality or reasonableness of the Lender’s loan requirements.

In this type of situation, any attorney can only have one answer and being placed in the situation of answering to two masters who have differing interests is not only unethical but unprofessional and could lead to professional liability of the attorney, to either or both “clients.”

For instance, if a question of usury were involved, the attorney would obviously be required ethically to advise the borrower that the bank was acting improperly and illegally and as such the borrower had a cause of action against the Bank. In this situation, obviously, there is a conflict and the attorney would have to and should have withdrawn from the representation of either, given the requirements of the instant Bank.

Requirements as set down by the Bank above, are not much different as from what this Committee has determined to be a conflict when an attorney represents the Buyer and the Seller, in a real estate transaction, although, it may be more subtle. In that situation there is clearly a conflict between Buyer and Seller and in the future there is potentially a conflict even if it is a "friendly transaction." Extensive litigation and problems between parties generally comes to the forefront subsequent to a "friendly transaction."

EC 5-15 distinctly sets forth the limitation as follows:

"If a lawyer is requested to undertake or continue representation of multiple clients having potentially differing interests, he must weigh carefully the possibility that his judgment may be impaired or his loyalty divided if he accepts or continues the employment. He should resolve all doubts against the propriety of the representation . . ." (emphasis added)

This limitation should and does stay in effect even with the mollifying requirements set forth later in EC 5-15.

". . . on the other hand, there are many instances in which a lawyer may properly serve multiple clients having potentially differing interests in matters not involving litigation. If the interests vary only slightly, it is generally 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; and if the interests become differing, withdrawal is less likely to have a disruptive effect upon the causes of his client."

Even with this issue we are involved with a situation that if and when there is a difference of opinion or a conflict or potential conflict, the attorney himself must withdraw and two attorneys would have to enter into the situation and it would be more disruptive and certainly more expensive to the borrower-client.

EC 5-17 answers the point of the "slight possibility" if the interests of the clients become differing. In the opinion of this Committee, the requirements of the "Lending Bank," creates more than a "slight possibility." The potential for differing interests in themselves exists in each and every transaction.

The giving of a title opinion as to the merchantability of a piece of property is done on behalf of client-borrower to a lending institution in order to permit the borrower to obtain the money. This is certainly far removed from the requirements of the bank to unilaterally require practicing attorneys to represent the bank at the same time. As such it is an improper requirement and would require improper conduct on behalf of a practicing attorney.

Again, the modifying matters of EC5-19 are ineffective to permit the representation of several clients.

EC5-19 states:

"A lawyer may represent several clients whose interests are not actually or potentially differing. Nevertheless, he should explain any circumstances that might cause a client to question his undivided loyalty. Regardless of the belief of a lawyer that he may properly represent multiple clients, he must defer to a client who holds the contrary belief and withdraw from representation of that client."

EC5-19 would place an attorney in the untenable position of being constantly defensive and open to criticism for any advice or actions he may take or may have taken and as such lay himself open to a violation of Canon 9 that "A Lawyer Should Avoid Even the Appearance of Professional Impropriety." The permitting of a client, or former client, to question the professionalism or the ethics of an attorney would be too much of a threat to the professional statutes and the requirements of Canon 5 that "A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client."

As such, it is this Committee's opinion that the requirements of the "Lending Bank" would on its face indicate a conflict of interest, and it would be a violation of the Code of Professional Responsibility for an attorney to practice under those situations and requirements.