

ADVISORY ETHICS OPINION 78-04

SYNOPSIS:

General representation of both purchaser and seller in a normal “arms-length” real estate transaction is a violation of the Code even though both parties consent.

OPINION:

The request to the Committee is as follows: May a lawyer properly represent both buyer and seller in a purchase and sale of real estate, and if so, then under what circumstances?

We take the request to cover circumstances where both purchaser and seller want whatever representation is necessary to consummate the sale – that is, the representation of neither party is limited.

This Committee (under the former name of Professional Conduct Committee) rendered an opinion on this subject in 1973. Although our conclusion is the same as it was in 1973, it is appropriate to go through the problem in detail because the question persistently arises in practice in this generally rural state.

DR 5-105(A) states the general rule on conflicts of interest:

A lawyer shall decline proffered 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 the 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).

The term “differing interests” is defined to include “every interest that will adversely affect either the judgment or the loyalty of the lawyer to a client.”

The exception in DR 5-105(C) covers instances where consent is appropriate:

In the situations covered by DR 5-105(A) . . . , 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.

There is no question that representing the seller and purchase of real estate involves differing interests and is prohibited under DR 5-105(A) unless it can be authorized by consent under DR 5-105(C). It is important to emphasize, however, that consent – even if knowledgeable given – is not a general panacea to conflicts of interest. It will only vitiate the conflict if “it is obvious that [the lawyer] can adequately represent the interest of each.” The Ethical Considerations underscore the narrowness of the exception by emphasizing that the lawyer “should resolve all doubts against the propriety of the representation.”¹ The requirement that its be “obvious” that the lawyer can represent both is fleshed out in terms of “interests [that] vary only slightly.”

In PCC Opinion No. 73.6, the Professional Conduct Committee reviewed these provisions of the Code and concluded that dual representation of purchaser and seller was inappropriate in a normal, “arms-length” real estate transaction even with consent. That opinion states:

The Committee . . . feels that such a possibility of conflict is inherent in any normal, arms-length real estate transaction. There are simply too many possible problems in any such transfer, which may create a conflict between the parties, for a reasonable man ever to say that “it is obvious” that such conflicts cannot arise. A few of the more obvious potential sources of conflict are arguments at closing over proration of taxes or the amount to be withheld under the Land Gains Tax law, defects in title unknown to either party at the time of closing, and deficiencies in acreage. Any attorney practicing in the real estate field can easily site many others.

For the reasons set forth above, the Committee continues to take the position that, as a practical matter, DR 5-105 bans the representation, by one lawyer or by two members of the same firm, of both the buyer and seller in a normal real

¹ See EC 5-15.

estate transaction (as opposed to a straw transfer, or possibly a gift between relatives, or similar non “arms-length” transfer).

We believe the conclusion of the 1973 opinion is equally valid today.

The 1973 opinion, however, emphasized only one aspect of the problem. Another aspect is the difficulty in ever making “full disclosure of the possible effect” of dual representation as provided in DR 5-105(C). In general, the burden imposed on the lawyer by the section has been viewed broadly. For example, in In Re Boivin,² the court stated the lawyer must explain “the nature of the conflict of interest in such detail so that [the clients] can understand the reasons why it may be desirable for each to have independent counsel with undivided loyalty to the interests of each of them”; and must search “to discover any latent impropriety not readily perceptible to the consenting layman.” The court held that even full disclosure may not be enough where an unsophisticated client may not understand the ramifications of the conflict.³ Other cases suggest that if the sale is unfair in any respect, it will be presumed that the unfairness resulted from inadequate disclosure.⁴

It is difficult to see how a lawyer could ever make full disclosure in the real estate area given the myriad of problems that may arise. Moreover, real estate transactions often involve parties of different legal sophistication and disclosures suitable to one may be insufficient for the other.

In view of the above discussion, the Committee reaffirms its position that representation of both purchase and seller in a normal “arms-length” real estate transaction is unethical, at least when the representation of neither side is in any way limited. We have not discussed limitations that might be imposed on representation of one or the other party that may attenuate the conflict and make meaningful disclosure possible preferring, in view of the request, to leave the subject to a more specific inquiry.

² 533 P.2d 171 (Ore. 1975).

³ See also Kelly v. Grearson, 23 N.Y.2d 368, 244 N.E.2d 456 (1968).

⁴ See, e.g., Crest Inv. Trust, Inc. v. Comstock, 23 Md. App. 280, 327 A.2d 891 (Md. App. 1974).