

ADVISORY ETHICS OPINION 80-03

SYNOPSIS:

Subject to the provisions of Canon 5 of the Code of Professional Responsibility, it is ethically proper for an attorney who has certified marketability of title to a client to later represent the client in an action arising from a boundary dispute as to the subject property.

FACTS:

An attorney represents a husband and wife in a real estate transaction by providing a title search and certificate. Two to three years later, neighbor sues the husband and wife for trespass action. The attorney, concerned about possible negligence on his part, advises his clients that they might have a small claim against him if, in fact, he was negligent. Clients advise the attorney that they still wish to have him represent them.

ISSUE:

Is there a conflict of interest by the attorney's continued representation of his clients?

OPINION:

Upon the facts presented, it would appear that there is no conflict, as long as the attorney discloses to his clients before hand, the possibility that they might have a claim against him if he was negligent in the work he performed.

During the course of his representation, if the attorney discovers that he may be called as a witness with reference to the work he performed on behalf of his clients, he should then disclose that fact to this client pursuant to EC 5-9 and offer to withdraw from further representation of his clients.

It would appear that under the provisions of EC 5-1, further representation by the attorney could raise a conflicting situation.

Ethical Consideration EC 5-1 states:

The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interest, the interest of other clients, nor the desires of third persons should be permitted to dilute his loyalty to this client.

If the lawyer continues to represent his clients with knowledge that he may be called as a witness or with knowledge that he was in fact negligent in the work he performed, is he, in fact, free of compromising influence and his own personal interests? We would not think so.

However, based on the facts in the issue presented to us, we feel that there is no conflict at this point in time and that the attorney, by disclosing to his clients the possibility of a conflict, has fulfilled his responsibilities to them in that respect.