

ADVISORY ETHICS OPINION 84-02

SYNOPSIS:

May a lawyer, consistent with the provisions of the Code of Professional Responsibility, represent a client in connection with a real estate transfer in connection with which the lawyer's spouse who is a licensed Vermont real estate broker or salesman, has acted in the capacity of a broker?

QUESTION 1:

May a lawyer, consistent with the provisions of the Code of Professional Responsibility, represent a client in connection with a real estate transfer in connection with which the lawyer's spouse, who is a licensed Vermont real estate broker or salesman, has acted in the capacity of a broker?

OPINION:

The principal provision of the Code of Professional Responsibility governing the above factual situation is, DR 5-101((A), which reads as follows:

Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be, or reasonably may be, affected by his own financial, business, property or personal interests.

It is assumed for purposes of this opinion, that, even in a situation in which spouses are engaged in independent professional practices in different professions, and maintain separate bank accounts, etc., a financial benefit to one spouse will necessarily constitute at least an indirect financial benefit to the other. In light of the broad provisions of Vermont law regarding the definition of marital property for purposes of property disposition in a divorce action¹, and of the various rights of surviving spouses² it would appear very unlikely that a spousal pair could arrange their financial affairs in such a way that their financial fortunes were not to some extent co-mingled.

The following points, which are treated as assumptions of fact for purposes of this opinion, should also be noted:

- (1) A real estate broker has a substantial financial interest in the final closing of a transaction with which he or she has been involved. It is true that most listing agreements provide that the broker is entitled to his/her commission in the event that the broker procures a buyer willing and able to purchase at the agreed price, regardless of whether the transfer eventually closes, unless, of course, the failure to close is due to default on the part of the buyer, which would negate his willingness or ability. The standard broker's form of real estate contract provides, however, that, in the event of default by the buyer, the advance deposit which is normally made is forfeited, and that one-half of the amount forfeited is retained by the broker. Notwithstanding these provisions, there is in fact a very substantial likelihood that the broker will not collect any commission from a given sale if it fails to close. In the event of default by the buyer, a broker's share of the amount forfeited is, in the great majority of cases, only a fraction of the anticipated commission. In the event of default by the seller, or inability of the seller to convey good title, the seller is likely to be unwilling to pay the broker any commission voluntarily, and it may be impossible or impractical to collect the amount involved by litigation. The bulk of the real estate broker's income is realized through transactions which close, and the broker has a very strong financial motivation to see that a closing actually takes place in any transaction in which he/she is involved.
- (2) In Vermont practice, final responsibility for determining the marketability of the seller's title rests on the buyer's attorney. Traditionally, buyers' attorneys in Vermont conducted a title examination, either in person, or through abstractors employed by them, and gave a personal certificate of title to the buyer and the lender bank, if any. Since no title insurance companies yet maintain their own plants in Vermont, the increasing use of title insurance in real estate transactions in the state has only had the effect of causing the buyers' attorneys' examination and certification to be provided to a title insurance company, which in turn provides a policy of title insurance to the buyer and/or a bank, rather than direct certification of title. The buyer's attorney remains the person liable for making the determination as to the marketability of the seller's title, and remains the person exposed to liability in the event of a certification of marketability of a title which is not in fact marketable.

¹ See T. 15 VSA §751.

² See T. 14 VSA Chapter 43, 45.

Under DR 5-101, it is impossible to state that any particular class of transaction is unethical per se. As prior opinions on potential conflict situations between spouses in their separate, professional capacities have pointed out, the fact that spouses represent divergent interests in a single transaction does not necessarily disqualify either under the Code.³ The Disciplinary Rule requires a review of each specific fact situation, in light of the particular circumstances of the attorney involved, before making a determination as to whether the attorney is barred from representation of the client.

It would appear, however, in light of all of the above assumptions, that there is a very strong likelihood of a personal conflict arising if an attorney represents a buyer of real estate in connection with a transfer in which his/her spouse is the procuring or listing broker, or both. The broker has a strong financial interest in seeing the matter close, and this interest presumably extends to the attorney spouse. The attorney/spouse, however, is under the obligation to determine the marketability of title, and, in the event that he/she discovers the title to be non-marketable, and the seller is unable to correct the defect(s) involved within a reasonable time, it becomes, in effect, the duty of the attorney to advise his client to withdraw from the transaction – to the direct detriment of his/her own financial interest in seeing the matter close, derived from the interest of the broker/spouse.

It is the opinion of the committee that, notwithstanding that no absolute statement that a conflict of interest will exist in every such situation can be made, the situation in which an attorney/spouse represents a client in connection with the purchase of real estate in connection with which the attorney's spouse has acted as broker, the requirement that the attorney/spouse pass on title to the property, and therefore determine whether or not his client should be advised to proceed to closing, creates a situation in which “. . . the exercise of his professional judgment on behalf of his client . . . reasonably may be affected by his own financial, business, property or personal interest,” and therefore should be avoided in order to comply with DR 5-101.

The situation in which an attorney/spouse represents a seller of real estate, in a transaction brought about through the broker/spouse, is less clear. Since, in most cases, there is no question of the client's interest being best served by proceeding to closing, the likelihood of a situation involving a duty on the party of the attorney/spouse to take action that may block a closing, arising, is not as great. A conflict may well develop, however, in this area as well. The attorney may discover that the sale by the client would violate some provision of zoning or subdivision laws of which the client was not aware, and with which it is not possible to bring the transfer into compliance; or the proposed sale may involve financing by the seller on terms which the attorney finds him (her) self obliged to advise the seller are unreasonable or hazardous to the seller. In contrast to the situation of representation of a buyer, however, it is not possible to state whether the exercise of the professional judgment of the attorney/spouse on behalf of the client “reasonably may be affected . . .” without an analysis of the particular facts of the given situation.

SUMMARY OF OPINION:

An attorney who is the spouse of a real estate broker would normally be barred by DR 5-101, from representing purchasers of real estate, in real estate transactions in which the broker/spouse is involved as broker, unless the client consents to such representation after full disclosure with respect to the potential conflicts involved. It is not possible to state categorically that an attorney/spouse is barred from representing the seller of real estate in a similar situation, but the attorney should represent such a seller only after a thorough review of the matter in light of the provisions of DR 5-101, and should resolve any question concerning the propriety of such representation in favor of declining representation.

QUESTION II:

The second question submitted in this request deals with the propriety of use of interest-bearing accounts for clients' funds held in trust, and the use of the interest from such funds for the attorney's personal needs. It is noted that the opinion request is dated January 6, 1984, and that the Order of the Supreme Court amending DR 9-102 and 9-103 of the Code of Professional Responsibility, to provide for interest on lawyers' trust accounts, was distributed to the Bar by Memorandum of the Court Administrator dated February 9, 1984. It is assumed that the revised Disciplinary Rule set forth the required handling of clients' funds explicitly enough so that no further analysis by this Committee is necessary or advisable.

³ See this committee's opinion nos. 79-20 and 77-6, and ABA Formal Opinion No. 340, dated September 23, 1975.