

ADVISORY ETHICS OPINION 87-18

SYNOPSIS:

An attorney is disqualified from representing a mortgagee in a foreclosure action when he represented the mortgagor in the subject property's purchase. This disqualification extends to the attorney's law firm and may not be waived by the clients' consent.

FACTS:

Attorney A and his firm frequently represent local banks/mortgagees in foreclosure actions. They also represent clients who purchase property in the same transaction in which mortgages are created. After representation in the purchase transactions, they do not represent the mortgagors any further. They then receive a request from a bank/mortgagee to initiate a foreclosure action against a mortgagor who is a former client.

DISCUSSION:

D.R. 5-105(A) prohibits an attorney's acceptance of proffered legal employment "if it would be likely to involve him in representing differing interests." The term "differing interests" include[s] every 'interest that will adversely affect either the judgment or loyalty of a lawyer to a client, whether it be conflicting, inconsistent, diverse, or other interest.'¹

In the case presented for review, Attorney A owed and continues to owe a duty of loyalty to the mortgagor. During the purchase transaction, Attorney A advocated the mortgagor's position, a position which was adverse to the mortgagee. This adversity of interest and Attorney A's duty of loyalty remain after the mortgage is executed and a dispute over its effect arises. Thus, switching sides in a midstream battle between the mortgagor and mortgagee fits squarely within the prohibition of D.R. 5-105(A).² ("[H]aving represented a party to a transaction, a lawyer may not thereafter represent the other party in an action against his former client arising out of or closely related to the transaction.")

Because Attorney A is disqualified under D.R. 5-105(A), moreover, "no partner, or associate, or an other lawyer affiliated with him or his firm" may represent the bank/mortgagee. D.R. 5-105(D). This is a situation where the prohibition of employment is "firmwide."

Finally, the "waiver of conflict" provisions of D.R. 5-105(C) cannot lift the prohibition from Attorney A and his firm. In some cases, clients may consent to joint representation. Detailed and full disclosure is a prerequisite to such consent. In addition, however, the 5-105(A) situation creating the conflict must be one in which "it is obvious that [the attorney] can adequately represent the interest of each [client]." D.R. 5-105(C). Here, Attorney A cannot adequately represent both interests; loyalty to both the mortgagor and the mortgagee in a foreclosure action is impossible. Furthermore, if it were possible, the adequacy of such representation is far from obvious. The proffered employment from a bank/mortgagee when Attorney A or his firm represented the mortgagor in the purchase/mortgage transaction, therefore, is prohibited.

¹ Vermont Code of Professional Responsibility Definitions §1.

² See ABA Informal Opinion 1322 (1975).