
E-69-3 Lawyer-realtor relationship

This committee was requested to consider the following questions raised in a letter:

Questions

Question 1. What ethical questions, if any, arise out of the following situation?

A real estate broker wishes to hire our firm to represent him in all real estate closings where the buyer and/or seller are not represented by legal counsel. In many of these situations the broker is requested by the parties to have the documents prepared by his attorney and billed to them. No representation is requested or desired by them at the closing but the broker feels legal counsel should be there.

May the same attorney prepare the documents in this situation and then represent the broker during the closing?

Answer: The same attorney cannot prepare the documents in this situation and then represent the broker.

In drafting documents for a seller or a buyer, the attorney acts for the party in interest. This is especially true when the party in interest (the buyer or the seller, etc.) will pay for the service. The simple drafting of the documents nevertheless involves, in most cases, substantial property rights. The attorney, therefore, at the closing will in fact be acting in behalf of the seller, the buyer, the broker, and any other parties in interest, such as the mortgagee or parties having a security interest in the transaction.

Canon 6 of the Canons of Professional Ethics applies. Canon 6 reads as follows:

6. Adverse Influences and Conflicting Interests.

It is the duty of a lawyer at the time of retainer to disclose to the client all the circumstances of his relations to the parties, and any interest in or connection with the controversy, which might influence the client in the selection of counsel.

It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.

It is stated in *Legal Ethics*, Henry S. Drinker, at page 104 as follows:

In observing the admonition of Canon 6 to avoid the representation of conflicting interests, the lawyer must have in mind not only the avoidance of a relation which will obviously and presently involve the duty to contend for one client what his duty to the other presently requires him to oppose, but also the probability or possibility that such a situation will develop. In such cases . . . even though the clients both consent to the assumption of the relation, the lawyer may eventually regret that he did not initially refuse to take the case. . . . He should avoid not only situations where a conflict of interest is actually presented, but also those in which a conflict is likely to develop.

The Code of Professional Responsibility, American Bar Association Special Committee on Evaluation of Ethical Standards, preliminary draft, January 15, 1969, at page 60 states as follows:

§ 1. 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 interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client.

See also § 12 on page 63 of the Code of Professional Responsibility, supra:

§ 12. 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 of 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. As used in this discussion, the term 'differing interests' includes every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest.

Canon 35, relating to Intermediaries, would not sanction the arrangement suggested in Question 1. Canon 35 reads as follows:

The professional services of a lawyer should not be controlled or exploited by any lay agency, personal or corporate, which intervenes between client and

lawyer. A lawyer's responsibilities and qualifications are individual. He should avoid all relations which direct the performance of his duties by or in the interest of such intermediary. A lawyer's relation to his client should be personal, and the responsibility should be direct to the client. . . .

The broker can legally draft the title documents for his client. *See State ex rel. Reynolds v. Dinger*, 14 Wis. 2d 193. However, by asking the attorney to participate in the transaction, the attorney/client relationship immediately arises. When the seller or the buyer pays for the drafting of the title documents, multiple clients are involved. Canon 6 and Canon 35 apply. The attorney should avoid those situations in which a conflict is likely to develop.

We conclude, therefore, that what may appear to be a meritorious desire upon the part of the broker to have a lawyer present at closing, under the circumstances stated in Question 1, is in conflict with the aforementioned Canons of Professional Ethics.

Question 2: Assuming the same facts in Question A, may different members of the same firm perform the foregoing?

Answer: Different members of the same firm may not perform the services described in Question A. A lawyer may not do what his partner may not do. See *Legal Ethics*, Henry S. Drinker, at page 106, wherein it is stated:

“The injunction not to represent conflicting interests applies equally to law partners representing different clients who have interests conflicting with one another; . . .”

Question 3: May an attorney in private practice who is also an employee of a corporation perform services involving the public for the corporation where the services may or may not be legal in nature? Example: Serve as an escrow for the corporation.

Answer: An attorney in private practice, who is also an employee of a corporation may perform services involving the public for the corporation, where the services may or may not be legal in nature. See Canon 35, relating to Intermediaries, Canons of Professional Ethics, which reads as follows:

A lawyer may accept employment from any organization, such as an association, club or trade organization, to render legal services in any matter in which the organization, as an entity is interested, but this employment should not include

the rendering of legal services to the members of such an organization in respect to their individual affairs.

In this regard, see Code of Professional Responsibility, *supra*, at § 17 at page 64, which reads as follows:

§ 17. A lawyer employed by an entity owes his allegiance to the entity and not to a stockholder, director, officer, employee, or representative thereof. In advising an entity through a stockholder, director, officer, employee, or representative, he should keep paramount the interests of the entity and his professional judgment should not be influenced by the personal desires or wishes of any such individual. Occasionally a lawyer for an entity is requested by a stockholder, director, officer, employee, or representative to represent him in an individual capacity; in such a case the lawyer may serve the individual only if the lawyer is convinced that differing interests are not present.

Question 4: I have been specifically requested to determine the ethics of the following matter involving a brother member of the Bar. A private request has been made to avoid embarrassment, if the activity is proper.

A member of the Bar is serving as attorney for an individual and also is a licensed real estate broker or salesman. His client (attorney-client relationship) is selling a business. A broker has secured a buyer and has inserted in the contract a clause to cover his commission. The attorney has now purportedly advised his client that he has a listing of the business and wants a commission out of the sale as well as legal fees. Purportedly, this same attorney has also told another client that an offer to purchase she received was too low and she shouldn't let the broker sell it. He allegedly requested a listing on this property. The prospective seller had already advised the broker the price was acceptable.

Answer: Present rules of the Committee on Professional Ethics of the State Bar of Wisconsin preclude opinions upon past conduct, unless the request is from the State Bar of Wisconsin. The facts stated in Question 3 involve past conduct, and under the rules the Committee cannot render an opinion.