

Committee on Professional Ethics



Opinion #244 - 4/28/72 (20-72)

Topic: Dual Practice. Conflict of Interest

Overruled (in part) by 493

Digest: Lawyer whose spouse is a real estate broker:

- (a) Should not share office with spouse's firm;
- (b) Should not accept as client a party to a real estate transaction involving spouse's firm;
- (c) Should not permit unsolicited recommendation by spouse's firm to represent a party to a real estate transaction;
- (d) May act as attorney for spouse's firm to collect commissions earned if attorney did not represent any party to the real estate transaction.

Code*: Canon 9; EC 5-2; DR 2-103(B)

QUESTION

1. May a lawyer maintain a law office in conjunction with a licensed real estate office operated by his or her spouse in the spouse's name and under the spouse's real estate license, and accept as clients persons recommended by the spouse or by the spouse's sales personnel for real estate transactions originating in the spouse's real estate office?

2. If a transaction negotiated in the spouse's real estate office is not consummated and a salesman broker is denied a commission because the property was sold by another broker or otherwise, can the lawyer represent the spouse or the salesman broker in an action to recover an earned commission?

OPINION

1. In N.Y. State 206 (1971) the problems created when an attorney engages in another business or profession were discussed in considerable detail and certain guidelines were set forth. The relationship between husband and wife is sufficiently close and financially so intermingled as to make relevant here the rationale of that opinion. There in discussing the problems presented by a practicing attorney who engages in a second occupation, we stated:

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"Where the other occupation is that of accountant, collection agency, claims adjuster, labor relations consultant, business consultant, insurance agent, marriage counselor, real estate broker, income tax service, loan or mortgage broker or any other business where the lawyer participant's activity would be likely to involve frequent solution of problems that are essentially legal in nature, the risk of having the other occupation used improperly as a feeder for legal practice is very great. To avoid this every precaution should be taken to separate the other profession or business from the legal practice.

"If the business is one in which advertising and promotion are permitted, no material used in connection with the business may disclose the fact that a participant is a lawyer, and the business should be conducted on premises sufficiently separate from those of the law practice to avoid having the clients or customers of the business gain the impression that the two are related. In such situations the lawyer should not accept as a legal client for matters originating through the other occupation, a person whose initial contact with him was as a client or customer of such other occupation, unless the lawyer-client relationship clearly developed entirely on the initiative of the client, without solicitation on the part of the lawyer, and was not dependent upon the lawyer's participation in the other occupation. Thus, absent such conditions, it would be professionally improper for a lawyer who conducts a real estate brokerage business to handle legal work connected with a real estate transaction which originates through his real estate business and which also constitutes the lawyer's initial contact with the client as his lawyer. Even as to totally unrelated problems, the lawyer would be well advised normally to refuse to accept as legal clients all who were initially clients of the other business because of the possible appearance of professional impropriety, unless it is clear that his client has selected him for reasons not related to his participation in the other business. cf. Canon 9".

Accordingly, (a) the office of the attorney should be completely separated from the real estate office of the spouse; (b) the lawyer should not accept as a new client a person engaging in a real estate transaction through the office of the spouse; and (c) unsolicited recommendations by the spouse or personnel of the spouse's office would violate the spirit of DR 2-103(B). Furthermore, in N.Y. State 208 (1971) it was held that a lawyer who was also a real estate broker should not act as both lawyer and broker for a client or party to the same transaction because of the possibility of a conflict of interest. EC. 5-2. The intimate relationship, including financial, of the husband and wife precludes one spouse from acting as attorney for a party to a real estate transaction which the other spouse's firm is handling.

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2. In N.Y. State 208 (1971), it was held that the lawyer broker who did not act in a legal capacity for any party to a real estate transaction, could properly commence suit against the defaulting party to recover real estate commissions earned. Accordingly, if the lawyer has not acted as attorney for any party to a real estate transaction, he may represent the spouse's firm in an action to recover real estate commissions.
