



**NEW YORK STATE BAR ASSOCIATION**

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**Committee on Professional Ethics**

**Opinion 588 - 1/6/88 (22-87)**

**Topic:** Conflict of interest; County Department of Social Services; purchase of client real estate; use of secret information; appearance of impropriety.

Modified by N.Y. State 629

**Digest:** Lawyer employed by the department of social services may not bid on real property owned by the department.

**Code:** Canon 9;  
DR 5-104(A), 4-101(B)(2)  
and (B)(3).

**QUESTION**

May an attorney employed by the Department of Social Services ("Department") bid to purchase real property, the title of which is held by the Department? The property is to be sold in a public sale by sealed bid and notices of the sale posted in the newspaper with a request that bids be submitted to the Commissioner of Social Services (the "Commissioner"), who will review all submissions.

**OPINION**

DR 5-104(A) of the Code of Professional Responsibility ("Code") states:

A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his professional judgment therein for the protection of the client, unless the client has consented after full disclosure.

Since the Department is a public body and therefore cannot consent to a conflict of interest, N.Y. State 450 (1976), analysis must focus on whether the attorney and client (which we understand to be the Department or the

Commissioner) have differing interests and whether the client expects the attorney to exercise his professional judgment on the client's behalf.

Occasionally the Department comes into possession of real property or interests therein in consideration of reduction of claims against the recipient or his estate for services rendered. Procedures for disposing of such property are governed by Social Services Law §106.

Under section 106(3) of the statute, the property must be sold at a public sale at least two weeks after notice is published in a newspaper of general circulation in the section of the county where the property is located. The notice must specify the time and place of sale and provide a brief description of the property or interest to be sold. "Unless in the judgment of the public welfare official, it shall be in the public interest to reject all bids, such parcel or mortgage shall be sold to the highest responsible bidder." Social Services Law §106(3).

Discretion is also conferred in connection with the settlement of claims. *Id.*, §106(2)(d). While the Committee does not pass upon matters of law, it appears that the statute also grants discretion to the public welfare official to reject all bids and to determine whether a bidder is "responsible."

The attorney's best interest lies, of course, in purchasing the property at the lowest possible price, while the Department, by statute, is required to sell the property at the highest price offered by a responsible bidder. Assuming all bids are sealed, in the event that the attorney has made the highest bid, his interest and the Department's are arguably not in conflict. The Department may receive a higher bid from another party of unknown reputation, however, and a lower bid from the Department's attorney. The Department would then be required to determine the highest "responsible" bidder, and the possibility of conflict arises.

The sale may be held at public auction with oral bids or at a silent auction with sealed bids. *Goodman v. Fisher*, 205 Misc. 896, 131 N.Y. Supp. 2d 184 (Sup. Ct. 1954).

Where the statute confers discretion, the attorney may be called upon to exercise professional judgment concerning these matters. The attorney may take part in determining which property will be listed for sale, how the sale is to be conducted, and on whether the highest bidder is "responsible."

Further, an appraisal may be required under section 106(2) of the statute. The Committee has been advised that any appraisal or other professional assessment of the property is not generally made available to the public, but would be accessible to the attorney.

DR 4-101(B)(2) and (3) state:

- B. Except when permitted under DR 4-101(C), a lawyer shall not knowingly:

\* \* \*

(2) Use a confidence or secret of his client to the disadvantage of the client.

(3) Use a confidence or secret of his client for the advantage of himself or a third person unless the client consents after full disclosure.

In the present instance, the appraisal is secret information not otherwise available to the public, and of considerable advantage to the attorney. Once again, the Department may not consent to its use.

Without knowing the full involvement of the attorney in the decision making process, it is impossible to assess the degree to which the lawyer may be required to exercise his professional judgment on the client's behalf, but given the various stages in the procedure when discretion may be exercised, it appears virtually impossible for the attorney to avoid being involved in some measure. At the very least, those members of the Department who make the decisions (if not the attorney) will be aware of their colleague's interest, and that fact could possibly affect the decision making process. Conflict of interest or, at least, the appearance thereof would be inherent. In sum, under these circumstances, an attorney may not bid without the consent of his client, and as already stated, consent is not possible in this instance.

Case law is replete with cautionary advice to lawyers who contemplate personal involvement in client affairs. Any time an attorney purchases property from a client, the transaction is subject to the most intense scrutiny.

N.Y. City 525 (1940) states:

Such a transaction would be fraught with danger because of the fiduciary relationship of the parties and the presumptions which arise in such a transaction, which may later, if the transaction is ever challenged, put the burden upon the purchasing attorneys to show affirmatively that no deception was practiced; that there was no overreaching, no undue influence used, that there was independent advice and that all was fair, open, voluntary, with full disclosure and well understood. Naturally, such a transaction will be most closely scrutinized, and if the slightest advantage is taken therein it will be set aside. But if there was no overreaching or concealment, it would, in the opinion of this Committee not be professionally improper for the attorney to be the purchaser.

*See also, ABA Inf. 677 (1963).*

Finally, Canon 9 of the Code requires that a lawyer avoid even the appearance of professional impropriety. The public may perceive that an attorney employed by the Department could have had access to non-public information or may even have exercised a modicum of control over the sale process and reasonably conclude that the attorney's actions were ethically improper.

### CONCLUSION

For the reasons stated above, the question posed is answered in the negative.