

NEW YORK STATE BAR ASSOCIATION

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**Committee on Professional Ethics**

Opinion 611 -6/20/90 (3-90)

Topic: Multiple representation, real estate transaction, seller and lender.

Digest: Attorney should not represent both the seller and lender in the same transaction except under unusual circumstances and unless the conditions of DR 5-105(C) are met in the specific matter.

Code: DR 5-105, 5-105(C);  
EC 5-15, 5-16, 5-17.

**QUESTION**

With full disclosure and consent from both clients, may an attorney represent both the seller and the mortgage lender in a real estate transaction?

**OPINION**

The Code acknowledges that there are many instances in non-litigated matters when a lawyer may serve multiple clients having potentially differing interests, so long as the standards of DR 5-105(C) are satisfied. EC 5-15. Even if the interests of the clients are potentially differing, a lawyer may conclude that "it is obvious that he can adequately represent the interests of each," DR 5-105(C), if, for example, the interests differ only slightly, the lawyer concludes that he can maintain and exercise his independent judgment on behalf of each and withdrawal, if that becomes necessary, will not have a disruptive effect upon the causes of his clients. EC 5-15, EC 5-17.

In applying these guidelines, the Committee has concluded that a lawyer may represent the buyer and seller in carrying out their common desire to close a real estate transaction, but this may be done ethically only "in unusual and very limited circumstances, and only after complete disclosure and consent, with a clear understanding by both parties of its possible effect on their respective interests." N.Y. State 38 (1966). Dual representation of both parties in completing the transaction may be permissible when the parties have reached a complete accord on the business terms of the transaction, no points

of importance remain for negotiations, and a title policy is to be obtained. N.Y. State 162 (1970). N.Y. County 615 (1973) reaches the same conclusion:

In a simple real estate transaction, in which there is an agreement on price, time and manner of payment and other basic business terms, an attorney may represent both the purchaser and the seller.

*See also* N.Y. State 438 (1976) (if the requirements of DR 5-105(C) are met, and with express consent, a lawyer may represent the lender and the borrower in the same transaction); *cf.* N.Y. State 258 (1972) (even with full disclosure and informed consent, a lawyer should not represent both spouses at any stage of a matrimonial problem, even if the separation is "friendly" and the divorce uncontested.)

Because there are frequently no direct negotiations between the seller and the lender, the dual representation of those parties seemingly poses an easier issue. Nevertheless, the attorney should not routinely assume that dual representation of these parties will be ethically permissible in every transaction. Before undertaking a multiple representation in a particular matter, the lawyer must carefully weigh the potential differing interests based on the specific facts and circumstances of that transaction. All doubts should be resolved against the propriety of the multiple representation. EC 5-15. Only if the lawyer is satisfied in a particular matter that it is obvious that the interests of both clients can be adequately represented, and only with appropriate full disclosure and express consent, should the multiple representation be undertaken. DR 5-105; EC 5-16.

An admonition for caution applies because the lender and seller may have differing interests depending on the circumstances. If, for example, issues arise concerning the acceptability of title, or environmental conditions, or some other condition of closing, the seller may desire to close while the lender may decide it has no obligation to make the loan. In that event, the lawyer may be obligated to withdraw from representing either party, with possible delay and disruption to the pending transaction. The potential for differing interests is not unlikely when lenders are concerned, for example, about environmental liabilities. Where in a particular matter it is not unlikely that such differing interests may arise, the multiple representation should be declined.

### CONCLUSION

A lawyer may not represent the lender and the seller in a real estate transaction unless after weighing the specific facts and circumstances the lawyer is satisfied that it is not likely that the interest of these parties will differ and unless both clients consent after full disclosure of the implications of multiple representation.

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