



**ILLINOIS STATE
BAR ASSOCIATION**

ISBA Advisory Opinion on Professional Conduct

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This Opinion was AFFIRMED by the Board of Governors in July 2010. Please see the 2010 Illinois Rule of Professional Conduct 1.2. This opinion was affirmed based on its general consistency with the 2010 Rules, although the specific standards referenced in it may be different from the 2010 Rules. Readers are encouraged to review and consider other applicable Rules and Comments, as well as any applicable case law or disciplinary decisions.

**Opinion Number 728
March 16, 1981**

Topic: Assisting a client in a breach of contract.

Digest: It is proper for an attorney to advise a client on the consequences of a breach of contract and to prepare documents that accomplish such a breach after the client has made an informed decision to breach, provided the attorney is not a party to a plan or scheme to enter into a contract with the intent to breach the same as to a material condition.

Ref: Illinois Code of Professional Responsibility Rule 7-101 and Rule 7-102

FACTS

A client borrows money on residential real estate and gives an institutional lender a mortgage and note. A condition of the mortgage is that the property not be sold, assigned or otherwise transferred. The remedy of the mortgagee in the event of a violation of that provision would be to declare the entire debt due and payable. Subsequently, the client entered into a contract of sale to a third party which provided that the parties would not give a copy of the contract of sale to the institutional mortgagee. This contract of sale was drawn by the attorney for the client. In a prior conversation, attorney advised his clients to circumvent the due on sale clause. The

client's attorney had subsequently stated that he will continue to advise clients to enter into similar real estate contracts in order to avoid due on sale covenants and he maintains this practice is professionally ethical as long as he gives informed advice to his client of the purpose and existence of the due on sale clause.

QUESTION

Is it professionally proper for an attorney to advise his client of the consequences of breaching a contract and to assist the client if the client elects to commit a breach of the contract based upon full knowledge of the consequences of such a breach.

OPINION

It is the opinion of the Committee that it is proper for an attorney to advise a client of the consequences of breaching a contract where full disclosure is made to the client of the legal ramifications and consequences. If the client makes an election that he can not or will not comply with the terms of his contract after competent legal advice of the consequences of a breach of contract, the attorney may assist the client in preparing documents to implement the client's election. Our answer is expressly predicated upon an assumption that the breach of the contract of sale in contravention of the due on sale clause is not a crime. Obviously, our answer would be different if it were. It is also assumed that full disclosure and competent professional advice was given to the client.

Rule 7-101 of the Code of Professional Responsibility effective July 1, 1980, states:

- "(a) A lawyer shall not intentionally
 - (1) fail to seek the lawful objectives of his client through reasonably available means permitted by law..."

and further:

- "(b) In his representation of a client, a lawyer may refuse to aid or participate in conduct that he believes to be unlawful, even though there is some support for an argument that the conduct is legal."

furthermore under Rule 7-102 it is stated:

- "(a) In his representation of a client, a lawyer shall not
 - (7) counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent..."

and further under that rule:

- "(b) A lawyer who receives information clearly establishing that

- (1) his client has...perpetrated a fraud upon a person...shall promptly call upon his client to rectify the same..."

It is the opinion of the committee that the terms "reasonably available means permitted by law," "legal," "unlawful," "fraudulent," "fraud" or "illegal" generally relate to actions which are criminal in nature and for which the law provides sanctions. A breach of contract which is not a crime does not rise to this prohibition.

All clients have the right to legal counsel and the right to advice on the consequences of a breach of contract. A client is entitled to informed advice as to the potential consequences of a breach of contract as opposed to the consequences of compliance with the contract terms.

The economic survival of a client may well depend upon failing to fulfill a contract. The relative consequences of breach or compliance are to be weighed by the client after informed advice. If the client elects to breach a contract after being fully informed, it is not unethical for his attorney to prepare documents to implement the client's decision.

On the other hand, it is the opinion of the Committee that it would be professionally improper for an attorney to knowingly aid a client to enter into a contract where the attorney is aware of the client's plan to breach a material provision of the contract at the time the contract is executed and to thereafter assist and counsel the client in carrying out such a scheme. Such conduct would amount to a fraud at the inception and it would be unethical for an attorney to participate in such a plan.

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