



# ISBA Professional Conduct Advisory Opinion

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**Opinion No. 17-04**  
**March 2017**

- Subject:** Conflict of Interest; Conflict of Interest – Transactional Matters
- Digest:** In most circumstances, a lawyer will not be able to represent both the buyer and seller in a real estate transaction.
- References:** Illinois Rules of Professional Conduct, Rules 1.0(e) and 1.7
- ISBA Op. 86-15
- New York State Bar Ass’n Op. 807 (2007)
- Vermont Ethics Op. 78-04 and 2004-03
- In re Dixon, 07 CH 115, M.R. 22629 (2008)
- In re Jeffers, 08 CH 103, M.R. 23537 (2010)
- In re Murzyn, 05 CH 73, M.R. 21436 (2007)
- In re Scott, 09 CH 102, M.R. 25453 (2012)

## **FACTS**

A mother wants to sell her home to her son. Mother and son worked out the details of the transaction without the assistance of counsel. They contact a lawyer to handle the purchase and sale of the home and to represent each of them at the closing.

## **QUESTIONS**

May the lawyer represent both the buyer and the seller in the transaction and at the closing?

## **ANALYSIS**

At the outset, we caution that numerous lawyers have been disciplined for representing or attempting to represent both the buyer and seller in a real estate transaction. *See, e.g., In re Scott*, 09 CH 102, M.R. 25453 (2012); *In re Jeffers*, 08 CH 103, M.R. 23537 (2010); *In re Dixon*, 07 CH 115, M.R. 22629 (2008); *In re Murzyn*, 05 CH 73, M.R. 21436 (2007). Accordingly, we caution lawyers to fully research and analyze any such contemplated representation.

In addition, we have previously issued an opinion that concluded, in most circumstances, lawyers cannot represent both the buyer and seller in a real estate transaction. We concluded that the circumstances where a lawyer could undertake such multiple representation are extremely rare. *See ISBA Op. 86-15*. We believe that this opinion is still sound under the 2010 Rules of Professional Conduct.

Illinois Rule of Professional Conduct 1.7, the rule that addresses concurrent conflicts of interest, provides:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client; or
- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent.

As stated in Comment 7 to Rule 1.7, directly adverse conflicts can arise in transactional matters. Representation of a buyer in a real estate transaction is directly adverse to the representation of the seller. Therefore, there is a concurrent conflict of interest under Rule 1.7.

Accordingly, the lawyer must then determine if the lawyer can take on the representation, even with the conflict of interest, if the lawyer can obtain the informed consent of each client. Some conflicts of interest are nonconsentable; the lawyer must determine consentability on a case-by-case basis. *See*, Comment 14, Rule 1.7.

Pursuant to Rule 1.7(b)(1), the lawyer must analyze whether the lawyer may reasonably believe that the lawyer will be able to provide competent and diligent representation to each affected client. The question is whether a reasonable lawyer would conclude that the lawyer could provide the required diligence and competence to both the buyer and the seller in the transaction.

In our view, if the buyer and the seller have not already executed a valid sales contract, the lawyer could not reasonably believe that he or she could provide competent and diligent representation to both the buyer and the seller. The lawyer could not negotiate on behalf of one client without harming or potentially harming the other client. The lawyer's obligations and loyalties are so divided that the lawyer could not reasonably believe that the lawyer could provide adequate representation to both parties.

As we stated in Op. 86-15, "Under normal circumstances involving an arms-length unrelated buyer and seller, we feel it by no means obvious that their interests can be adequately represented by a single attorney. We would, therefore, conclude under such circumstances that their dual representation would be improper, regardless of their consent thereto."

Even if the parties agree on the terms of the sale, and have already executed the sales contract, we believe that it is highly unlikely that a lawyer could properly represent both the buyer and seller in concluding the transaction. Issues often arise after the parties have executed the contract and prior to closing that would require the lawyer to give unqualified advice to his or her client.

Our conclusions are consistent with several opinions in other states. *See e.g.*, Vt. Ethics Op. 2004-03 (2004)(an attorney may not simultaneously represent a client who is selling a parcel of real property and provide limited representation to the buyer of the same real estate by providing a title insurance policy to such buyer); Vt. Ethics Op. 78-04 (general representation of both purchaser and seller in a normal "arms-length" real estate transaction is not permitted under the rules even though both parties consent); New York State Bar Ass'n Op. 807 (2007)(the buyer and seller of residential real estate may not engage separate attorneys in the same firm to advance each side's interests against the other, even if the clients give informed consent to the conflict of interest).

However, in Opinion 86-15, we stated, "We are not prepared to say categorically in the present instance that an attorney can never, under any circumstances, adequately represent the interests of both the buyer and seller in a real estate transaction. We do, however, believe such instances to be extremely rare."

We decline to consider under what circumstances the representation of the buyer and seller might be proper even with informed consent. Whether the lawyer can adequately represent both the buyer and the seller will depend on the facts of that transaction. If the lawyer concludes that a reasonable lawyer could undertake the joint representation, the lawyer must then obtain the

informed consent of each client. Such a consent must include all of the possible ramifications of the waiver of the conflict, including the likelihood that the lawyer would be obliged to withdraw from representation if any conflict ensues, at the expense of the clients.

### **CONCLUSION**

In most circumstances, a lawyer will not be able to represent both the buyer and seller in a real estate transaction, even if the buyer and seller are related.

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