



**ILLINOIS STATE
BAR ASSOCIATION**

ISBA Advisory Opinion on Professional Conduct

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This Opinion was AFFIRMED by the Board of Governors in May 2010. Please see the 2010 Illinois Rules of Professional Conduct 1.4(b), 5.4(c), and 5.5(a). 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 No. 94-01
July, 1994**

Topic: Unauthorized Practice of Law; Conflicts of Interest; Limitation of Scope of Representation

Digest: A lawyer aids in the unauthorized practice of law, and may violate rules pertaining to confidentiality, conflicts, and the duty to communicate with and explain matters to a client, by limiting his role in a real estate transaction to the drafting of documents and delegating the gathering and dissemination of information, the resolution of problems arising from the documents drafted, and other problems which may arise at the closing, to the real estate broker.

Ref.: Illinois Rules of Professional Conduct, Rules 5.5(b), 1.4(b), 5.4(c)
ISBA Opinion on Professional Conduct, Nos. 90-35 and 87-2

FACTS

A seller of real estate retains X realty company as its broker. Lawyer A is retained (it is unclear whether by the broker or seller) to prepare closing documents. Telephone calls from purchaser's lawyer were responded to by Lawyer A with the statement that his clients only wanted him to prepare documents, that he could not discuss the transaction, and that any changes the purchaser's attorney desired in the documents prepared by Lawyer A would have to be discussed at the closing, which Lawyer A would not be attending.

At closing, problems and questions arose both as to the issues previously raised by Lawyer A and otherwise. Such questions were dealt with by the seller's broker. This included the giving of advice to the seller that it was alright for the seller to agree to the removal of a clause conveying the real estate subject to encroachments and overlaps.

QUESTIONS

1. Whether X realty company is engaged in the unauthorized practice of law when it clears title objections and advises persons at closing regarding the deletion of provisions from documents?
2. Is Lawyer A aiding in the unauthorized practice of law by his actions?
3. Is Lawyer A violating other ethical obligations?

OPINION

While it is not the province of this Committee to determine what acts constitute the unauthorized practice of law on the part of lay people, it appears clear in the present instance that X realty company's clearing of title objections at closing, and advising sellers as to the deletion of meaningful provisions from the closing documents, does constitute such unauthorized practice.

The more important question before us is whether Lawyer A's role in such process, limited to the preparation of documents and without participation in discussions or attendance at the closing, runs afoul of provisions of the Rules of Professional Conduct. We believe that several provisions of the Rules were or may have been violated.

Initially, it appears clear that the lawyer is aiding in the unauthorized practice of law by the broker contrary to Rule 5.5(b) of the Rules of Professional Conduct. Such Rule provides that a lawyer shall not:

assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

In the present instance, the facts indicate that information necessary for the preparation of closing documents is gathered by the broker, who provides such information to the lawyer to prepare the documents. The lawyer then, knowing that legal questions have been raised which will have to be dealt with the transaction to close, disappears from the picture, leaving such questions to be dealt with by the broker at closing. Under such circumstances, it appears clear that the attorney is knowingly delegating legal responsibility for dealing with such questions to the broker. Such constitutes aiding in the unauthorized practice of law by the broker.

The situation here is similar to and, in fact, goes beyond that in Opinion No. 90-35. There we found that an attorney aided in the unauthorized practice of law where a not-for-profit organization procured from its members information necessary for the preparation of wills, submitted the information to the attorney who drafted the wills and returned them with advice relating thereto, with the organization then, in turn, transmitting the wills and advice to its members.

In the present instance, not only does it appear, as in Opinion 90-35, that the broker is gathering the information necessary for the preparation of the closing documents from the seller, but that the

attorney is then additionally leaving questions raised by the documents and other issues that may be raised with regard to the closing to be dealt with by the broker. Such clearly constitutes a prohibited aiding in the unauthorized practice of law.

The present arrangement also infringes upon the lawyer's duty under Rule 1.4(b) to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation" By limiting the scope of his representation to the preparation of documents, and presumably leaving the meaning and effect of such documents to be explained to the client and dealt with by the broker, the attorney is not fulfilling his obligation under Rule 1.4(b). See Opinion Nos. 90-35 and 849.

Similarly, conflict of interest and confidentiality problems may arise from the present arrangement. Although unclear from the inquiry, it appears that it is the broker, not the seller, who retains and deals directly with the lawyer and communicates and receives information from him (although the seller pays the attorney's fees). In such instance, the lawyer may be aware of his duties to the seller. Rule 5.4(c) provides that "[a] lawyer shall not permit a person who recommends, employs or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services." This, the lawyer must satisfy his duties owing to the client seller, although presumably retained through the offices of the broker. As stated in Opinion No. 87-2:

a lawyer retained by a broker on behalf of a seller may perform legal services for the seller if the lawyer has verified that the broker has the authority to retain the lawyer. Even when the authority exists, the lawyer should be mindful of exercising his own independent professional judgment to adequately perform the services required.

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