

**NEW YORK STATE BAR ASSOCIATION**  
**Professional Ethics Committee Opinion**

Whether or not in any particular case a lawyer may properly advance the payment for these charges as "necessary reimbursable expenses" depends on whether he can do so in good faith, as required by Canon 42, and without violating accepted policies against champerty and maintenance. It is, however, implicit in the "Standards of Practice for Doctors and Lawyers," approved jointly by our Association and the Medical Society of the State of New York, 33 N.Y.S.B.J. 364 (1961), that it would be professionally inappropriate for a patient's attending physician to condition consultations, reports or attendance at trial on receiving advance payment or commitment from his patient's lawyer for services not directly applicable to the prosecution of the claim or suit.

In other words, the services of a physician, whether the attending physician or one separately retained for the purpose, in helping the lawyer prepare for and conduct a lawsuit, fall in the same category as the services of an investigator, expert engineer, or any other individual who renders some special service needed as an incident of trial preparation. There are all contractual obligations which may be appropriately assumed by the lawyer, though subject to ultimate reimbursement by his client.

To the extent inconsistent herewith, Opinion No. 37 is overruled.

Opinion #38 - 12/6/66 (6-66)

Topic: Conflict of Interest.  
Representation of Adverse Parties

Digest: Lawyer may not represent both  
buyer and seller of real estate  
where there is a clear instance  
of conflicting interests.

Canon: Former Canon 6

QUESTION

Is it ethically proper for a lawyer who represents a party to a real estate transaction to undertake also the representation of an adverse party, assuming such representation would ordinarily involve merely computing the adjustments and preparing the deed, or where title insurance is not used, the preparation also of a title abstract? Would the answer be different if a subdivision were involved in which an access road is required to be built but there is no agreement as to who is to build the road?

NEW YORK STATE BAR ASSOCIATION  
Professional Ethics Committee Opinion

OPINION

Canon 6 of the canons of Professional Ethics provides as follows:

"6. Adverse Influences and Conflicting Interests

"It is the duty of a lawyer at the time of retainer to disclose to the client all the circumstances of his relations to the parties, and any interest in or connection with the controversy, which might influence the client in the selection of counsel.

"It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.

"The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed."

Dual representation should be practised sparingly and only when it is clear that neither party will suffer any disadvantage from it. It is difficult to justify, except 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. [Legal Ethics by Henry S. Drinker, page 104 (1954), Legal Ethics by Raymond L. Wise, page 141 (1966).] The lawyer who represents conflicting interests acts at his peril and should realize that the thrust of Canon 6 is to discourage acceptance of such representation.

The attorney has the affirmative duty to be certain that the clients have the capability and actually do fully understand the conflicts that may arise and the peculiar position dual representation may cause them to be placed in.

In real estate transactions it is not always true, even in relatively simple ones, that representation of both buyer and seller involves nothing but computations of adjustments and preparation of the deed. A number of questions arise that require the exercise of legal judgment. Examples are (i) whether the deed should be full covenant and warranty, bargain and sale, with or without covenants, or quiteclaim, (ii) what customs are to be followed in making adjustments, (iii) which points disclosed in the title report are important and which may be disregarded, (iv) what title company to use, considering the fact that a title company reinsuring may perpetuate past errors which another title company would pick up.

The inquiry makes special reference to the necessity of having an access road to the property being transferred. This will involve negotiations in which dual representation is virtually impossible.

**NEW YORK STATE BAR ASSOCIATION**  
**Professional Ethics Committee Opinion**

In Informal Opinion No. 886-9/28/65 the Committee on Professional Ethics of the American Bar Association passing upon the propriety of dual representation in a real estate development said "we suggest that the attorney for the developer would be ill-advised to in any way represent the buyers."

One authority says, "The prudent lawyer would be wise never to put himself in a position of representing conflicting interests," Legal Ethics by Raymond L. Wise, page 141 (1966).

Opinion #38(a) - 12/5/68 (11-68) Topic: Conflict of Interest.  
Representation of Adverse Parties.

Digest: Consent and full disclosure may permit representation of real estate buyer and seller.

Canon: Former Canon 6

QUESTION

In an area where the use of title companies and title insurance is not the usual practice, may the attorney who must examine, pass upon and certify the real estate title to the purchaser, represent the purchaser and seller?

OPINION

This is a supplement to Opinion #38-12/6/66, dealing with representation of both purchaser and seller in real estate transactions. The question is whether Opinion 38 also applies to transactions in which the lawyer certifies title.

The principles set forth in Opinion 38 apply with equal force to cases in which the lawyer examines, passes upon and certifies the title.