

NEW YORK STATE BAR ASSOCIATION
Professional Ethics Committee Opinions

Opinion #208 - 11/22/71 (29-71, 38-71)

Topic: Dual Practice
Conflict of Interest

Digest: Lawyer-real estate
broker should not act
as both a lawyer and
as a broker for a
client or party in the
same transaction.

Code*: Canon 5
EC 5-1; 5-2
DR 2-102(E); 5-101(A)

QUESTION

May a lawyer who is also a real estate broker act in both capacities in the same transaction, and also subsequently sue the seller for a commission?

OPINION

In N.Y. State 206 (1971), it was concluded that under DR 2-102(E) a lawyer could engage in the real estate business while continuing to practice law, but that in such case it would be improper for the lawyer to accept as a client, for matters originating through the other occupation, a person whose initial contact with him was as a customer of his other business, unless the lawyer-client relationship clearly developed entirely on the initiative of the client, without solicitation on the part of the lawyer, and was not dependent upon the lawyer's participation in the other occupation. That opinion further stated:

"Thus, absent such conditions, it would be professionally improper for a lawyer who conducts a real estate brokerage business to handle legal work connected with a real estate transaction which originates through his real estate business and which also constitutes the lawyer's initial contact with the client as his lawyer."

Even in a case where the seller or the purchaser was previously a client of the lawyer-broker, or in which the lawyer-client relationship clearly developed entirely on the initiative of the client, without solicitation on the part of the lawyer, and was not dependent upon the lawyer's participation in the other occupation, the lawyer should not represent either of them in a legal capacity in a transaction in which he acted as a broker because of the possible conflict between his client's and his own personal interest. Canon 5; EC 5-1; EC 5-2. It is true that DR 5-101(A) indicates that he may in appropriate cases, accept a possibly conflicting employment "with the consent of his client after full disclosure". However, the principle to be followed is enunciated in EC 5-2 which reads as follows:

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"A lawyer should not accept proffered employment if his personal interests or desires will, or there is a reasonable probability that they will, affect adversely the advice to be given or services to be rendered the prospective client. After accepting employment, a lawyer carefully should refrain from acquiring a property right or assuming a position that would tend to make his judgment less protective of the interests of his client."

Assuming that the lawyer-broker does not act in a legal capacity for either party to a transaction, he, as a broker, is entitled to commence suit against the defaulting party for real estate commissions allegedly earned. As long as he preserves the independent of his other business from his practice of law, the other business should not be subject to any unusual restrictions in its normal operations.

Opinion #209 - 11/22/71 (39-71)

Topic: Conflict of Interest
Attorney-Legislator

Digest: Not proper for attorney who is city councilman to act as attorney for city school district dependent on the city for services.

Code*: EC 8-8; 9-6
DR 5-101(A); 5-105(A)
and (B).

QUESTION

May a city councilman act as attorney for a city school district which receives services from the city?

OPINION

It is improper for a city legislator to act as attorney for a city agency where his duties to act on behalf of his client may foreseeably be in conflict with his duties as a legislator.

EC 8-8 provides:

"Lawyers often serve as legislators or as holders of other public offices. This is highly desirable, as lawyers are uniquely qualified to make significant contributions to the improvement of the legal system. A lawyer who is a public officer, whether full or part-time, should not engage in activities in which his personal or professional interests are or foreseeably may be in conflict with his official duties."