

Ethics Opinion

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FACTS: Attorney is approached by a real estate agent requesting attorney draft a contract for deed containing the terms of a buy-sell the agent facilitated. The realtor has arranged for the buyer and seller to split the cost of the legal work equally. The attorney prepares the documents after meeting with both the buyer and seller. Later, the buyers, unhappy with their purchase, default on the contract and seek rescission and damages. The sellers ask the attorney who prepared the documents to defend their interests.

QUESTIONS PRESENTED:

1. Can an attorney represent both the buyers and sellers in a real estate transaction?
2. Can an attorney who has represented both parties, later represent one of the parties against another?

SHORT ANSWER:

1. Yes, but only if the attorney directly consults both buyer and seller, explains fully the disadvantages of multiple representation, and obtains each client's consent to the arrangement, preferably in writing. The attorney must not rely upon the realtor to convey the information.
2. No.

DISCUSSION AND AUTHORITY: Lawyers should be cautious about representing both the buyer and seller in real estate transactions since the potential for conflict is high and consequences of failure can be severe. See Comment, Representing Vendor and Vendee in a Single Transaction: A Strict View of Conflicting Interests, 2 J. Legal Prof. 133 (1977). However, lawyers can represent multiple clients who, despite potential conflicts of interest, have an overriding desire to achieve a common goal. Rule 2.2 of the Montana Rules of Professional Conduct permit multiple representation so long as the common representation will not adversely affect any one of the clients and all of the clients consent after full disclosure.

A lawyer may act as an intermediary between two or more clients if: 1) the clients each consent after the lawyer explains fully the advantages and risks of such representation, including its impact on the attorney-client privilege; 2) the lawyer reasonably believes that the matter can be resolved on terms consistent with the clients' best interests; 3) the lawyer reasonably believes that the matter can be handled impartially and without improper effect on any other clients; and 4) the lawyer keeps the clients adequately informed about the decisions to be made and the considerations that are relevant to making those decisions. If the lawyer finds that any of these conditions cannot be satisfied the lawyer must terminate the representation.

Before undertaking intermediation, a lawyer must subjectively believe that the benefits of multiple representation will far outweigh the risks posed by any potential conflict. The lawyer

must use independent judgment as to the fairness of any possible agreement and must gauge whether the agreement would be consistent with each individual client's interest. Also, the lawyer must reasonably believe that the clients can each make informed decisions in the matter. For instance, the lawyer should not agree to represent both the buyer and seller in the sale of a business - despite the parties' consent - where the lawyer knows that the seller is unaware of key information about the buyer's financial condition.

Given the facts presented, it is unclear whether the requirements of Rule 2.2 have been met. While the attorney may draft a contract for deed containing the terms of a buy-sell the real estate agent facilitated, the attorney must not rely upon the realtor to convey the information. Nor should the attorney rationalize the relationship as "representing the realtor." The lawyer owes no duty to the realtor as the realtor has no substantive legal rights in the agreement and clearly is not a client. The lawyer is obliged to consult with each client, that is the buyer and seller, explain fully the advantages and disadvantages of multiple representation, and obtain each client's consent to the arrangement, preferably in writing.

Under Rule 2.2 on intermediation, if any one of the clients asks the lawyer to withdraw, the lawyer must terminate the representation. After withdrawal, the lawyer may not represent any of the clients in the matter that was the subject of the intermediation. This responsibility to withdraw is also stated in Rule 1.9, which states:

A lawyer who has formerly represented a client in a matter shall not thereafter:

(a) represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation; or

(b) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 would permit with respect to a client or when the information has become generally known.