

Final

**Rhode Island Supreme Court
Ethics Advisory Panel Op. 2024-03
Issued April 11, 2024**

FACTS

The inquiring attorney works for a municipal law department. In the course of the inquiring attorney's work, he or she encountered a matter in which a law firm represented both Buyer A and Seller A in the same real estate transaction wherein Buyer A purchased certain real property from Seller A. Immediately thereafter, the law firm represented Buyer A in a second real estate transaction in which Buyer A resold the real property Buyer A had just purchased from Seller A to Buyer B for fifty percent (50%) more than the price at which Buyer A originally purchased the property from Seller A. According to the inquiring attorney, the terms of the sale from Buyer A to Buyer B were negotiated before Seller A sold the subject property to Buyer A.

ISSUE PRESENTED

The inquiring attorney asks whether these transactions violate the Rules of Professional Conduct?

OPINION

It is the Panel's opinion that the transactions as described by the inquiring attorney violate the Rules of Professional Conduct.

REASONING

The scenario as described by the inquiring attorney concerns concurrent conflicts of interest as addressed in Rule 1.7 of the Rules of Professional Conduct:

(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, confirmed in writing.

In this case, a single law firm represented both Buyer A and Seller A in the same real estate transaction in which real property was conveyed from Seller A to Buyer A. This scenario implicates Rule 1.7(a)(1) because Buyer A's and Seller A's interests may be adverse. See Rule 1.7, Comment [7] (recognizing that “[d]irectly adverse conflicts can also arise in transactional matters”); see also Credit Union Central Falls v. Groff, 966 A.2d 1262, 1267-70 (R.I. 2009). It also raises the specter that the law firm could not adequately represent the interests of both parties as described in Rule 1.7(a)(2). See Rule 1.7, Comment [8] (noting that “a conflict of interest exists if there is a significant risk that a lawyer’s ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer’s other responsibilities or interests”).

“Ordinarily, clients may consent to representation notwithstanding a conflict.” Rule 1.7, Comment [13]. However, “some conflicts are nonconsentable, meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client’s consent.” Id. Pertinent here is Rule 1.7(b)(1), pursuant to which “representation is prohibited if in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation.” Rule 1.7, Comment [14]. This determination must be made on a per-client, case-by-case basis. See Rule 1.7, Comment [13].

The Panel has not squarely addressed whether a law firm may obtain client consent to represent both parties to a real estate transaction. C.f. Ethics Advisory Panel Opinion 88-26 (permitting the inquiring attorney to represent “the borrower/buyer . . . in the closing of the purchase and sale agreement in addition to . . . in closing the loan and doing title work”). Significantly, however, several attorney ethics bodies in other states have answered this question in the negative, determining that lawyers cannot do so absent rare and extraordinary circumstances.

For example, in Professional Conduct Advisory Opinion 17-04, the Illinois State Bar Association (the “ISBA”) considered whether a lawyer may represent both the buyer and seller of a residential home “in the transaction and the closing,” where the buyer and seller had already “worked out the details of the transaction without the assistance of counsel.” The ISBA began by noting both that “numerous lawyers have been disciplined for representing or attempting to represent both the buyer and seller in a real estate transaction,” and that it had generally prohibited the practice in a prior opinion. See ISBA Op. 86-15. In-keeping with these observations, the ISBA found that pursuant to Illinois Rule of Professional Conduct 1.7 (nearly identical to Rhode Island’s Rule 1.7) “there is a concurrent conflict of interest” in this case because “[r]epresentation of a

buyer in a real estate transaction is directly adverse to the representation of the seller.” It further found that the conflict was likely not consentable because under the circumstances “the lawyer could not reasonably believe that he or she could provide competent and diligent representation to both the buyer and the seller.” It elaborated that “[e]ven 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” because “[i]ssues 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.” Accordingly, the ISBA concluded that “[i]n most circumstances, a lawyer will not be able to represent both the buyer and seller in a real estate transaction” This analysis comports with reasoning expressed by attorney ethics bodies in New York and Vermont as well. See New York State Bar Association Opinion 807 (2007) (determining that separate attorneys associated in the same firm cannot represent the buyer and seller of residential real estate, even if the clients give informed consent to the conflict of interest, except in cases in which there is little or no actual adversity between the parties such as family transactions); Vermont Ethics Opinion 2004-03 (finding that an attorney may not represent a client in selling a parcel of real estate and simultaneously represent the buyer by providing him with a title insurance policy, even if both clients consent).

The Panel finds these decisions compelling. As the ISBA observed, the complex and negotiated nature of real estate transactions may generally preclude a lawyer from diligently and competently representing both the buyer and the seller thereto. See Rule 1.7, Comment [27] (observing that “a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other . . .”). Under the facts of this case as reported by the inquiring attorney, this conclusion is evidenced by the structure and outcome of the transactions between Buyer A, Seller A, and Buyer B. Buyer A was able to immediately resell the subject property to Buyer B for fifty percent (50%) more than the cost Buyer A paid to purchase the property from Seller A—a significant sum—pursuant to terms agreed upon between Buyer A and Buyer B before the initial sale. These facts strongly suggest that the law firm affirmatively advanced the interests of Buyer A over those of Seller A, such that its representation of Seller A necessarily fell below the standard of competency and diligence required by the Rules of Professional Conduct. See Rules 1.1, 1.3.

Based on these facts, the transactions as described by the inquiring attorney violate multiple Rules of Professional Conduct. The Panel cautions all Rhode Island attorneys to carefully consider the full implications of a representation or representations before accepting the work to forestall situations such as the instant matter.