

# ADVISORY ETHICS OPINION 91-08

## **SYNOPSIS:**

An attorney is entitled to represent a private client seeking financing through a lending agency in which the attorney sits on the Board of Directors<sup>1</sup> PROVIDED THAT:

- (1) the attorney does not participate in *any* part of the process which determines the client's eligibility for the loan (e.g., the loan review process, voting on approval of the loan, etc.); and
- (2) the attorney, at the outset, fully discloses to the private client and to the bank his representation of the client and, after full disclosure to the client of potential conflicts that could arise, both parties consent to his representation.

## **QUESTION PRESENTED:**

May an attorney, who is a director of a bank, represent persons purchasing property which will be financed through the bank (either obtaining a new mortgage or re-financing an existing mortgage), if the attorney does not participate in the loan review process at the bank?

## **ETHICAL CONSIDERATIONS:**

The provisions of the Code of Professional Responsibility which appear to govern the answer to the above question are contained in Canon 5, Ethical Consideration 5-1, 5-2, 5-14 and 5-16. Also of consideration is Ethical Consideration 2-23.

Canon 5 of the Code of Professional Responsibility states:

A lawyer should exercise independent professional judgment on behalf of a client.

The Ethical Considerations cited above provide:

**EC 5-1** The professional judgment of a lawyer should be exercised, within the bounds of the law, *solely for the benefit of his client and free of compromising influences and loyalties*. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client. [emphasis added].

**EC 5-2** 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 should carefully 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.

**EC 5-14** Maintaining the independence of professional judgment required of a lawyer precludes his acceptance or continuation of employment that will adversely affect his judgment on behalf of or dilute his loyalty to a client. This problem arises whenever a lawyer is asked to represent two or more clients who may have differing interests, whether such interests be conflicting, inconsistent, diverse, or otherwise discordant.

**EC 5-16** In those instances in which a lawyer is justified in representing two or more clients having differing interests, it is nevertheless essential that each client be given the opportunity to evaluate his need for representation free of any potential conflict and to obtain other counsel if he so desires. Thus, before a lawyer may represent multiple clients, he should explain fully to each client the implications of the common representation and should accept or continue employment only if the clients consent. If there are present other circumstances that might cause any of the multiple clients to question the undivided loyalty of the lawyer, he should also advise all of the clients of those circumstances.

## **DISCUSSION:**

While it is not the role of this Committee to make conclusions of substantive law, we believe it is fair to say, as a well-established general principle, that directors of a bank are fiduciaries whose duty it is to exercise independent judgment from the standpoint of ultimate benefit to the bank and, further, not to let any competing interests interfere with their unfettered loyalty to the bank.

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<sup>1</sup> The attorney sitting on the Board of Directors does *not* in any way act as counsel for the lending agency so there is no issue or simultaneous representation.

Conversely, Canon 5 of the Code of Professional Responsibility and, more specifically, EC 5-1 and EC 5-14 require that a lawyer's professional judgment be exercised solely for the benefit of his client, free from any compromising influences and loyalties.

In the question presented for review, the lawyer is concerned about the propriety of serving simultaneously as a director of a bank and as attorney for a customer of the bank in connection with the acquisition of real estate financing from that bank. The attorney notes that the attorney will not personally be involved in the loan review process. The Committee believes that, if a bank director- attorney were to rescue himself or herself completely from any involvement with a loan or refinancing that the attorney was pursuing on behalf of a private client, and, as long as the client and the bank were fully informed from the outset regarding the director-attorney's representation of the private client and consented to that representation, there is no per se prohibition barring the attorney from acting on behalf of the private client.

**EC 5-16** provides:

" . . . before a lawyer may represent multiple clients, he should explain fully to each client the implications of the common representation and should accept or continue employment only if the clients consent. If there are present other circumstances that might cause any of the multiple clients to question the undivided loyalty of the lawyer, he should also advise all of the clients of those circumstances."

An example of the type of disclosure which the Committee believes should be made to the client, there should be a discussion relating to the possibility that the attorney might acquire information regarding the client or the client's financial circumstances during the course of his representation which information might be sufficient to jeopardize the attorney's uncompromised vigorous efforts on behalf of the private client when viewed in conjunction and comparison with the duty of loyalty the attorney owes to the bank as a director. The attorney should make clear that in the event such a scenario were to arise, the attorney would have to withdraw from the representation of the client.

Moreover, as a part of the disclosure, the Committee believes that the attorney should discuss with the client not only the existence of such a possibility but the discussion should include a discussion of the fee consequences to the client in the event such withdrawal from further representation becomes necessary. In this regard, the attorney must give consideration to the provisions set forth in EC 2-32:

A decision by a lawyer to withdraw should be made only on the basis of compelling circumstances ...A lawyer should not withdraw without considering carefully and endeavoring to minimize the possible adverse effect on the rights of his client and the possibility of prejudice to his client as a result of his withdrawal. Even when he justifiably withdraws, a lawyer should protect the welfare of his client by giving due notice of his withdrawal, suggesting employment of other counsel, delivering to the client all papers and property to which the client is entitled, cooperating with counsel subsequently employed, and otherwise endeavoring to minimize the possibility of harm. Further, he should refund to the client any compensation not earned during the employment.

It is only after *full* disclosure is made and all parties have consented to the dual roles of attorney and director that the attorney may proceed with representation of the client- under the circumstances herein described.

As this Committee indicated in Opinion 90-8, the client of an attorney who sits as a board member of a bank may not be sufficiently sophisticated in business matters to knowingly, voluntarily and intelligently, consent to the dual roles of the director serving as an attorney.

## Sec. 5 – Consumer Litigation Funding

Creates 8 V.S.A. § 2246 governing consumer litigation funding.

(a) – Findings

(b) – Definition – “consumer litigation funding” - a nonrecourse transaction in which a person provides personal expense funds to a consumer to cover personal expenses while the consumer is a party to a civil action or legal claim and, in return, the consumer assigns to such person a contingent right to receive an amount of the proceeds of a settlement or judgment obtained from the consumer’s action or claim

(c) Report - Directions Commissioner of Financial Regulation and Attorney General to report by December 1, 2015 on recommendation/draft legislation to balance (1) consumer access to funds and (2) protecting consumers against predatory practices

(d) Moratorium – Prohibits consumer litigation funding contract on or after July 1, 2015

(e) Enforcement – by DFR under Title 8 authority