

You have presented a hypothetical situation in which an attorney acts as closing attorney for Lender and closes most of Lender's loans. Occasionally, Builder refers borrowers to Lender, and Lender will make a loan to borrower from which proceeds are paid to Builder. Lender then instructs Attorney, usually on the day of closing, to manage and disburse escrow funds by checks jointly payable to Builder and to Borrower as particular phases of the work are completed. When the work is completed, Lender picks up the check, obtains borrower's endorsement, and gives the check to Builder.

Builder referred a Client to the Lender, who made a loan as described above. In this case, Client was unsuccessful in getting Builder to complete the work, and Client requested assistance from Attorney. Ultimately, Attorney filed suit against Builder on Client's behalf. Builder has made a motion to disqualify Attorney.

Attorney has no relationship with Builder except for the holding and disbursing of escrow funds. Subsequent to the matter in which Attorney filed suit, Attorney has closed other loans made by Lender to borrowers referred by Builder.

Under the facts you have presented, you have asked the committee to opine as to the propriety of Attorney continuing the representation of Client in the suit against Builder. Considering that Attorney is holding funds in other transactions which may ultimately be payable to Builder, does the situation change if Builder states to Attorney that any judgment obtained will be uncollectible?

The appropriate and controlling disciplinary rules relative to your inquiry are DR:4-101 which requires an attorney to protect confidences and secrets; DR:5-105 which governs the representation of multiple clients with conflicting interests; and DR:7-101(A)(3) requiring that a lawyer not intentionally damage or prejudice a client during the course of the professional relationship.

The committee has previously opined that a law firm defending a property owner from the imposition of liens against the subject property could not continue to represent another client, a creditor in an unrelated collection action against an interested purchaser of the same property. The law firm's collection action against the interested purchaser would jeopardize assets which the interested purchaser would otherwise use to purchase the subject property from the law firm's other client. LE Op. 1609. Similarly, in your hypothetical, the Committee believes that Attorney cannot represent Client against the Builder, while administering settlement funds on behalf of other borrowers, which Client could use in satisfaction of his breach of contract claim against Builder. Such an action might impair the other contracts between Builder and the other borrowers on whose behalf Attorney is conducting closings and administering escrow funds.

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In the facts you present, the committee shares your observation that Attorney's pursuit of a breach of contract claim against Builder on behalf of Client potentially conflicts with the interests of other borrower-clients whose loans are being closed by Attorney. DRs 5-105(A), (B) and (C) state respectively that a lawyer shall decline proffered employment and discontinue multiple employment if the exercise of his professional judgment on behalf of a client will be or is likely to be adversely affected by the representation of another client. However, a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents after full disclosure of the possible effect of such multiple representation on the lawyer's independent professional judgment.

In addition, by virtue of closing different loans for each borrower, Attorney would be privy to information regarding funds owed or to be disbursed to Builder under such loans. Thus Attorney, in his capacity as a creditor's attorney for Client could use such information to his advantage in enforcing the collection of a judgment against Builder. Absent consent from the other borrower-clients, such action would violate DR:4-01(B)(3) which states that a lawyer may not use a client's confidence or secret for the advantage of himself or a third person. Also, Attorney's use of such information for the benefit of one client may damage or prejudice the other borrower-clients by financially impairing Builder's ability to discharge his contracts with those parties. Use of such financial information by Attorney to the disadvantage of the other clients would violate DR:4-101(B)(2) and DR:7-101(A)(3).

As with the conflict in LE Op. 1609, the Committee is of the view that Attorney must withdraw from the representation of Client because the conflict cannot be cured or reconciled with consent. Attorney cannot adequately represent the interests of the other borrowers while representing Client against Builder. However, since the conflict in your hypothetical is potential and not matured, Attorney may continue to handle the closings on behalf of the other borrowers.

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