FLORIDA BAR ETHICS OPINION
OPINION 97-2
May 1, 1997

Advisory ethics opinions are not binding.

An attorney may not ethically act as “closing agent” for a transaction where material terms of the contract have not been agreed to or have not been discussed by the parties.

RPC: Rule 4-1.7(a), Rule 4-1.7, Rule 4-1.7(b), Model Rule 1.7(b), Model Rule 2.2,

A member of The Florida Bar has requested an advisory ethics opinion as to whether he can represent both buyer and seller in the closing of the sale of a business in Florida, acting as “closing agent” for the transaction. The inquirer had been requested by a licensed business broker to act as a “closing agent” for the sale and transfer of business assets. The member explains that the majority of these sales are a sale of assets only and not of a corporate entity. The business brokers envision a “closing agent” as an attorney who will prepare all closing documents and other instruments that may be required by the terms and conditions of the transaction. The buyer and seller would each agree to pay 50% of the closing agent’s fees and expenses. The inquiring attorney asks whether it would be ethically permissible for him to act as a “closing agent” under the circumstances set forth above.

The member has particular concerns regarding the financing of these transactions. He would be required to prepare promissory notes and security agreements which, although somewhat standardized documents, must be negotiated between buyer and seller as to interest rate, payment terms, and especially as to the extent of the security given to the seller for the financing and the terms and conditions imposed upon the purchaser in the event of a default. Under these circumstances, could one attorney handle such negotiations and drafting for both parties as part of acting as “closing agent” for the sale of a business?

Rule 4-1.7(a), Florida Rules of Professional Conduct generally provides that attorneys may not represent a client if the representation of that client will be directly adverse to the interests of another client, unless:

(1) the lawyer reasonably believes the representation of that client will not adversely affect the lawyer’s responsibilities to and relationship with the other client; and

(2) each client consents after consultation.
As set forth in the Comment to Rule 4-1.7, loyalty to a client prohibits an attorney from undertaking representation directly adverse to that client or another client’s interests without the affected client’s consent. A client may consent to representation where there is some conflict or potential conflict after full disclosure and consent of the affected clients. However, as stated in the Comment, “when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client’s consent.”

The Comment to Rule 4-1.7 specifically addresses common representation of multiple parties to a negotiation, such as the question now before the Committee:

For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference of interest among them.

Court decisions from Florida and other states are useful in determining the types of transactions in which the parties are “fundamentally antagonistic” such that common representation is not possible. In *The Florida Bar v. Reed*, 644 So.2d 1355 (Fla. 1994) the Court found an attorney’s attempt to represent both buyer and seller of the same property and to assume multiple roles in the transaction to be unethical and suspended the attorney for six months. Similarly, in *The Florida Bar v. Belleville*, 591 So.2d 170 (Fla. 1991), the Court found it improper for the attorney representing the buyer in a real estate transaction to ask the seller to pay all or part of his fees. The attorney was disciplined for improper representation of conflicting interests. *See also The Florida Bar v. Teitelman*, 261 So.2d 140 (Fla. 1972) (attorney reprimanded for representing mortgage and title companies in real estate closings, but charging unrepresented sellers a portion of his attorney’s fee); Florida Ethics Opinion 65-34 (seller’s attorney who prepares all documentation in sale of property may not charge buyer for a portion of the attorneys’ fees when the buyer did not employ the attorney or agree to pay him a fee; attorney erred in not explaining adverse nature of transaction and attorney’s loyalty to seller).

Ethics opinions and caselaw from other states dealing directly with the ethics of an attorney acting as closing agent for the sale of a business have found an irreconcilable conflict between the interests of buyers and sellers of businesses, prohibiting dual representation of both parties by the same lawyer. Maine Bar Ethics Opinion 106, May 25, 1990, ruled that an attorney or law firm may not act as escrow agent or closing agent for both parties involved in sale of a business. A Maine firm had attempted to act as a neutral “closing agent” in the sale of a business, telling both parties it would not ‘represent’ either of them, but would draft documents to complete the sale. The committee found that the attorneys involved had improperly represented two parties with conflicting interests and that disclosure could not cure the violation. *Accord, People v. McDowell*, 718 P.2d 541 (Colo. 1986) (held unethical for attorney to represent both buyer and seller in sale of a business; court found attorney would be unable to maintain independent professional judgment required by Model Rule 1.7(b) [Florida Rule 4-1.7(b)]; *Stark Co. Bar Ass’n v. Ergazos*, 442 N.E.2d 1286 (Ohio 1982)(lawyer could not ethically represent buyer and seller of business where the parties had conflicting interests regarding assumption of existing debts of the business). *See also, Baldasarre v. Butler*, 625 A.2d 458 (N.J. Sup. Ct.)
1993) (attorney cannot represent both buyer and seller in “complex commercial real estate transaction;” consent of clients is immaterial; conflict cannot be waived).

Other state bar ethics opinions have only allowed one attorney to close a sale of business transaction between buyer and seller where there was little or no adversity between the parties and buyer and seller have already agreed to all critical terms of financing and security agreements. Connecticut Bar Informal Opinion 91-14. The Connecticut opinion allowed one attorney to draft the sales contract and handle the closing of the sale of a business between two longstanding clients, where both parties agreed to the dual representation. However, the opinion deals with the very narrow factual situation where both buyer and seller are long time clients of the same attorney and relies upon Model Rule of Professional Conduct 2.2, allowing an attorney to act as intermediary between two clients under certain specified circumstances.

Other state bar opinions allowing dual representation of buyer and seller at a closing, deal only with sales of real estate, not sales of entire businesses. See, New York State Bar Association Opinion 611 (attorney may represent both buyer and seller in same real estate transaction if the parties are in agreement on price, time, manner of payment and security; if the parties’ interests diverge, attorney must withdraw); Massachusetts Bar Association Opinion 1990-3 (lawyer may represent both borrower and lender in real estate purchase, provided that there are no apparent disputes or conflicts between the parties and both parties consent in writing after full disclosure); West Virginia State Bar Opinion 89-1 (lawyer may represent multiple parties in same real estate transaction if full disclosure to all parties and written consent; lawyer may not represent any of the parties in subsequent litigation relating to the transaction); Maryland State Bar Opinion 84-85 (attorney may represent all parties to a real estate closing, with proper disclosures and waivers as to all parties).

It is an unavoidable fact that the sale of a business, even in the friendliest of circumstances, is by its very nature an adversarial process. The buyer is relying upon sales and profit figures produced by the seller as well as projections of future profits based upon those figures. Security and financing are critical issues in any business purchase and, particularly in the case of smaller businesses, such transactions are often financed by the seller. The closing often includes the transfer of licenses or applications by the new owners for special licenses, zoning changes, and so forth. Such closings often include assumption of existing debts of the selling corporation and representations by the seller as to other actual and potential claims against the seller. Such transactions are fraught with adversity and conflict, even for the most scrupulous attorney in the friendliest of deals.

The facts presented by the inquirer reference the typical situation in which some or all terms of the sale, particularly elements of financing, must be negotiated between buyer and seller. Where there is disagreement or material terms of an agreement have not been addressed between buyer and seller as to financing, security, consulting agreements with the seller, title defects, or any other material matter relating to the sale, conflicts may exist or develop. Under the foregoing circumstances, it would be unethical for a Florida attorney to represent both buyer and seller in the closing of the sale of a business in Florida, acting as “closing agent” for the transaction. A member of The Florida Bar may not be involved in negotiations of the parties to a sale of a business and then attempt to represent both parties to the transaction at closing of the
sale. Under the foregoing circumstances, such representation presents a nonwaivable conflict under Rule 4-1.7(a) and (b) and is ethically prohibited.