ADVISORY ETHICS OPINION 95-09

SYNOPSIS:

An attorney who, either directly or indirectly, performs legal services on behalf of a bank/lender in the closing of a residential real estate transaction, does so at his/her peril when the borrower is not represented by counsel. The attorney must exercise caution to avoid any suggestion that he/she acts on behalf of the borrower. The need to exercise caution is particularly strong with respect to loan packages which provide significant savings to a borrower who chooses to proceed to closing without his/her own attorney.

FACTS:

A title insurance company (the "Title Insurance Company") for whom the requesting attorney (the "Attorney") is an agent, has entered into a contractual arrangement with a mortgage lending institution (the "Bank") to provide services to the Bank in connection with mortgage closings. The Title Insurance Company has agreed to close all of the Bank's mortgage loans. Generally the arrangement provides that the Bank will accept and process applications for mortgage loans. At the time of the loan application, the Bank provides the applicant with a written statement/waiver describing the procedure for closing.[1] The Borrower is given the option of proceeding to closing without having an attorney to represent him/her.

If the customer elects not to retain his/her own attorney, then the Title Insurance Company (not the Attorney) examines title to the property to be mortgaged and prepares a title insurance policy for the Bank. At the Borrower's option, the Title Insurance Company will also provide a title insurance policy for the Borrower. The Title Insurance Company retains the Attorney to prepare/review the closing documents, prepare the Closing Statement, review the documentation tendered by the Seller and the Borrower, arrange for the payoffs of liens on the property, and generally do the things that an attorney representing the Bank in a residential real estate closing would do. The Bank provides a detailed set of instructions on how to close the loans for the Bank and what practices and procedures are acceptable to the Bank. For his/her services, the Attorney is paid a portion of the title insurance premium received by the Title Insurance Company for the title insurance policy. Neither the Bank nor the Borrower pays the Attorney directly.

If, on the other hand, the Borrower elects to retain his/her own attorney to examine the title, the Title Insurance Company (not the Attorney) schedules the closing, prepares/reviews the closing documents, prepares the closing statement, arranges for payoffs of liens on the property and generally does the things an attorney representing the Bank would do. All work is performed by non-attorney employees of the Title Insurance Company.

The Attorney's inquiry is whether the Attorney may participate in such a program without violating the Code of Professional Responsibility.

DISCUSSION:

The question of when and how an attorney may interact with an unrepresented purchaser/borrower in a residential closing is a persistent one. The instant request raises one more permutation of the issue which has been addressed inter alia in Opinion 90-8, 94-8 and 95-3.

In Opinion No. 90-8 we concluded that an attorney may not provide simultaneous representation to a borrower and a lender in a residential real estate transaction.

Subsequently, in Opinion 94-8 we stated that an attorney may represent a lender in a residential real estate transaction where the borrower is not represented by counsel, provided that the attorney insures that he/she does not provide legal advice to the borrower. While the lender's attorney may issue a title insurance policy to the borrower and may describe the loan documents and the lender's requirements from the lender's point of view, such explanations should include a renewal of the warning that

[1] The disclosure provided by the Bank (1) describes the process for the closing and the roles of the Bank and the Title Insurance Company; (2) descries the requirement that the Borrower provide the Bank with a lender's title insurance policy at the closing and discloses that the title insurance issued to the Bank does not protect the Owner; (3) describes the Borrower's option to have his/her attorney represent him/her and provide the Lender's Title Insurance; (4) indicates that the necessary title insurance may also be obtained from the Title Insurance Company and that the Borrower need not have his/her own attorney in order to obtain the insurance; (5) discloses that an Owner's policy of title insurance is also available to the Borrower from the Title Insurance Company; and (6) states "SOME REAL ESTATE TRANSACTIONS CAN BE COMPLEX. YOUR INTERESTS AND THOSE OF [THE BANK] ARE OR MAY BE DIFFERENT AND MAY CONFLICT. [THE BANK] WILL NOT BE RENEWING ON YOUR BEHALF THE TITLE TO THE PROPERTY OR TIS MARKETABILITY, YOU SHOULD RETAIN AN Attorney TO REPRESENT YOUR INTERESTS AND TO ADVISE YOU REGARDING THE DOCUMENTS AND THE TRANSACTION."

the attorney represents the lender and not the borrower. When the unrepresented borrower poses a legal question to the lender's attorney at the closing, the attorney's only option is to advise the borrower to seek the advice of another attorney.[2]

In Opinion 95-3 we concluded that an attorney may not represent a borrower and act as the lender's "closing agent" in the same transaction.

In the above-described opinions we highlighted the obvious conflict between the interests of a lender and those of a borrower in a residential real estate transaction. We cautioned against any arrangement which might lead to unsophisticated borrower to conclude that his/her interests are being safeguarded by the lender's attorney acting as the lender's closing agent.

The Attorney's dilemma and that of the attorneys involved in our prior discussions have been occasioned in large part by the desire of banks and other lenders to outperform their competition by offering low cost loan packages. Such loan packages invariably provide a potential borrower with the opportunity to realize significant savings if the borrower chooses to proceed to closing without his/her own attorney. Even in the presence of written warnings, the potential savings have an obvious attraction. The dangers associated with proceeding to closing without an attorney may not be as apparent, particularly when the borrower is told that the bank's attorney will attend the closing. The end result is an ethical minefield for the attorney who sits across the closing table from an unrepresented borrower, regardless of whether the attorney represents the lender directly, as in Opinion 94-8, or indirectly, as in the facts before us.

CONCLUSION:

We see no reason to distinguish this case from any of our prior decisions, simply because the Attorney is paid by the Title Insurance Company.[3] The Attorney is being retained to provide legal services to the Title Insurance Company which has contracted to safeguard the Bank's interests at the closing. The fact that the Attorney will be paid by the Title Insurance Company is merely a reflection of the Title Insurance Company's contractual obligations to the Bank.

Another potential violation of the Code relates to the manner in which the Attorney is to be paid. The facts, as presented to this Committee, reflect that the fee to be paid to the Attorney is to be calculated based on the total title insurance premium paid to the Title Insurance Company in connection with the transaction. The facts before us also reflect that the title work and preparation of the title insurance policy are not being handled by the Attorney. Accordingly, the Attorney should make sure that any payment made to him/her is a legal fee for services rendered at closing and not a title insurance commission. Any other arrangement could give rise to a violation of the Code's prohibition against fee splitting.[4]

It is the Attorney's clear obligation to see that any fee paid to the Attorney is a reasonable fee for the actual work done. The reasonableness of a legal fee for services rendered in a real estate transaction will ultimately be determined by the factors outlined in DR 2-106. The mathematical formula utilized to calculate the fee is insignificant. In Vermont, title insurance premiums are calculated by a simple mathematical exercise. Generally speaking, title insurance premiums increase in relation to the size of a particular real estate transaction. The larger the transaction, the larger the premium. Similarly the size of a particular transaction often affects the legal fees paid to an attorney. We know of no Code provision which would prohibit a fee based on a percentage of the title insurance premium, provided that the amount of the fee is reasonably related to the value of the services actually performed.

It is our intention in this Opinion to reaffirm and extend the conclusions which we reached in Opinion Nos. 90-8, 94-8 and 95-3. We urge each attorney to heed the guidelines presented in these opinions, using his/her judgment on a case-by-case basis. Simply put, an attorney who provides legal services to a bank in a residential real estate transaction where the borrower is not represented by counsel, must use caution to avoid any suggestion that he/she acts on behalf of the borrower. The need to exercise caution is particularly strong with respect to loan packages which provide significant savings to a borrower who chooses to proceed to closing without his/her own attorney.

[2] See DR 7-104(A)(2).

[3] This Committee does not comment upon the legality of the arrangement between the Bank and the Title Insurance Company under the laws regulating title insurance companies or the scope of the services that they may provide in Vermont. Because this Committee provides guidance only to members of the Vermont Bar who request an opinion about their proposed activities, we cannot comment on the question of whether the Title Insurance Company is providing legal services to the Bank in violation of the prohibition on unlicensed persons providing legal services, particularly in those cases where non-attorney employees of the Title Insurance Company handle the closing and related matters of review and preparation of closing documents.

[4] See DR 3-102.