Opinion No. 2004-3

Synopsis: An attorney may not simultaneously represent a client who is selling a parcel of real property and provide limited representation to the buyer of the same real estate by providing a title insurance policy to such buyer. The scope of the obligations inherent in issuing the title insurance policy creates a contemporaneous conflict of interest that is of such a serious character that the conflict cannot be properly waived under Rule 1.7.

Facts. An Attorney inquires whether an attorney representing a seller in a real estate transaction (the "Client") may provide limited representation to the purchaser of real estate (the "Buyer") by preparing and issuing a title insurance policy to the Buyer, where the Buyer has chosen not to be represented by counsel. The Attorney proposes to disclose to the Buyer that the attorney is not representing the Buyer and will also have the Buyer execute a written waiver of conflict of interest to memorialize the waiver of the potential conflict of interest and to acknowledge the fact that the Attorney is not representing the Buyer. The Buyer will pay the attorneys fees for preparing the policy and the Buyer will pay the premium.

Discussion. This Committee has reviewed a number of scenarios in which one attorney or one firm has proposed to represent more than one party or more than one interest in a real estate transaction. Rule 1.7 (Conflicts of Interest) of the Rules of Professional Conduct (the "Rules") provides:

**RULE 1.7 CONFLICT OF INTEREST: GENERAL RULE**

**(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:**
**(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and**
**(2) each client consents after consultation.**

**(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:**
**(1) the lawyer reasonably believes the representation will not be adversely affected; and**
**(2) the client consents after consultation.**

**When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.**

The applicable provisions of Rule 1.7 impose such significant limitations on representing more than one party in a transaction that it is difficult to satisfy the requirements and represent two parties in the same transaction. This Committee has previously opined that an Attorney may represent the borrower and lender in a mortgage financing transaction when (i) the attorney reasonably concludes that the attorney can adequately represent the interests of both parties, and (ii) both parties consent to the dual representation after adequate disclosure. See Opinion 2000-2. This Committee has also concluded that an Attorney may never represent the seller and the buyer in a real estate transaction, applying the provisions of Canon 5 and Disciplinary Rule DR 5-105(A) and DR 5-105(C) from the Code of Professional Responsibility which was in effect until September 1, 1999 when the Rules replaced the Code. See Opinion No. 78-04 citing Opinion 73-6. Opinion No. 78-04 and 73-6 contemplated that the representation of both parties by the single attorney would be unlimited. The Attorney requesting the opinion proposes a limited scope of engagement and the Committee reviewed the issue whether the proposed limited scope of engagement and the replacement of the Code by the Rules required a reconsideration of the decisions in Opinion 78-04 and 73-6.

The propriety of the Attorney's proposed actions under the Rules of Professional Conduct depends on the nature of the services provided and the person to whom the services are rendered. Where a potential conflict may arise, there is always the safe harbor for an attorney in picking one party in the transaction and representing only that party. Although not expressed in the facts presented with the question, there is a circumstance where an attorney representing a seller could properly prepare and issue a title insurance policy naming the buyer as the Insured. That circumstance would arise when the Purchase and Sale Contract required the seller (the attorney's client) to deliver a title insurance policy to the buyer as part of the seller's contract obligations. Under that set of facts the buyer could then obtain counsel to review the policy and determine whether the policy met the terms of the contract. The buyer could also forgo having the policy reviewed if the buyer so desired, but in this case the seller's attorney would have to refrain from explaining the policy or answering the buyer's questions. In this particular variation on the facts, the attorney in the hypothetical represented only the seller and assisted the seller in the hypothetical by producing the documentation required in the Contract. In the alternate fact scenario the attorney did not purport to represent the buyer at all and so no conflict would arise.

The nature of the transaction described in the Attorney's request creates a more difficult situation. The Attorney proposes to represent the Seller but also provide limited services to the Buyer.

The services that the attorney proposes to provide have typically been provided by the Buyer's attorney. The buyer's attorney searches the land records to determine the state of the title and prepares a written report advising the buyer of the potential problems and encumbrances on the title. The buyer's attorney is responsible for explaining the nature of the problems and advising the buyer about the issues and risks of proceeding with a transaction with the state of the title.

In the present situation the attorney representing the Seller desires to provide the Buyer with a title insurance policy so that the Buyer will not need to hire an attorney. While it is true that the Seller's counsel may have significant information about the title, and may be in a position to quickly provide a report on the state of the title, the Seller's attorney cannot then provide the equally important element which is the explanation of and counsel about the meaning and effect of the matters discovered and reported in the title insurance commitment or policy.

We must look at the duty owed the attorney's client in the context of the situation. The attorney's first duty is to his or her client and no other duty or obligation may interfere with the performance of that duty. The mere act of providing the title insurance policy to the buyer does not interfere with the attorney's obligation to his or her client. It may be a benefit to the client by expediting the closing. If the buyer in this situation had his or her own attorney to review and explain the significance of the matters disclosed in the title insurance policy, then the circumstances would be less of a concern.

The significant conflict arises or is sufficiently likely to arise where the Buyer receives the title report from the Seller's counsel but is unable to fully comprehend the consequences of the information provided. The Buyer's most obvious option in that case is to ask the person that provided the report what the report means. However, the Seller's attorney cannot both adequately represent the Seller by counseling the Seller about the consequences of the Buyer's objections to matters in the title report, and represent the Buyer by counseling the Buyer about the consequences of the matters in the title policy. Therein lies the irreconcilable conflict that makes it impossible for the Seller's attorney to provide services to the Buyer by providing the title insurance policy.

While many may see the delivery of the title policy as an independent act, it must be taken in the context of the entire transaction. The title insurance policy cannot be delivered in a vacuum, even with a proper disclaimer. If an attorney gives the Buyer a title policy without explanation, the unsophisticated Buyer will likely draw the conclusion that "the title is OK, otherwise the lawyer would have told me there was a problem." A quick review of most title insurance policies will confirm that there are encumbrances on the title, but it will take someone with a

knowledge of real estate law to draw the proper inferences and reach a reasonable conclusion about the risks presented by the matters disclosed.

In the situation under consideration the same conflict that was first discussed in Opinion No 78-04 and 73-06 continues to be an issue. The Seller's attorney cannot simultaneously provide adequate representation to multiple clients with such different requirements, and therefore the attorney cannot possibly make an affirmative determination under the first element of Rule 1.7. That rule requires that an attorney make a reasonable determination that the attorney can adequately represent multiple parties in a potential conflict situation before reaching the question of whether to make an adequate disclosure in the context of procuring an informed consent to the multiple representations.