OPINION NO. 2011-2

Synopsis

Although there have been changes in the Rules of Professional Conduct and in the rules and regulations applicable to real estate closings, the Committee concludes the opinion expressed in Opinion 2001-02 remains valid under the present circumstances. The Committee continues to believe that an attorney may represent the lender and the buyer/borrower in a real estate closing if the attorney complies with the provisions of Rule 1.7. The requirements for representing multiple parties in a real estate transaction are set out in Rule 1.7. The additional issues raised by changes in various rules and regulations related to real estate closings are a factor in determining whether the possibility of conflicting interests is of such significance that an attorney cannot provide diligent and competent representation to both parties simultaneously.

Question Presented

An attorney inquires whether the attorney may continue to represent both the lender and the borrower/buyer in a real estate transaction, giving consideration to the changes in the rules and regulations applicable to real estate practice and the changes to the Rules of Professional Conduct.

Applicable Rules

> ***Rule 1.0 (b) "Confirmed in writing,"*** *when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (e) for the definition of "informed consent." If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.*
>
> ***Rule 1.0 (e) "Informed consent"*** *denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.*
>
> ***Rule 1.7. CONFLICT OF INTEREST: CURRENT CLIENTS***
>
> *(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:*
>
> *(1) the representation of one client will be directly adverse to another client; or*
>
> *(2) there is a significant risk that the representation of one or more clients will*

be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.—

Amended June 17, 2009, eff. Sept. 1, 2009.

Discussion

Based on recent inquiry, the Committee was encouraged to review and reconsider the issues raised in PRC Opinion 01-02 which concluded that under many circumstances the Rules of Professional Conduct would allow the joint representation of the lender and the buyer/borrower in a real estate transaction. The current inquiry suggests that changes in the regulations applicable to residential real estate closings increase the possibility of a direct conflict arising in the course of the dual representation and the conclusion of PRC Opinion 01-02 should be revisited to account for the increased risk of conflicts.

PRC Opinion 01-02 relied in part upon the replacement of the Code of Professional Responsibility with the Rules of Professional Conduct creating a different standard for review of conflicts involving current clients. A significant element of the Committee's decision in 2002 was the revision to Rule 1.7. The reason for the current request is that the Rules of Professional Conduct have been revised again, including substantial revisions to Rule 1.7, that became effective in September of 2009.

The 2009 change in the language of Rule 1.7 did not alter the essential provisions of the Rule or the procedures for determining when it is appropriate to represent more than one party in a specific transaction. The new Rule 1.7 acknowledges that there is no absolute prohibition on representing multiple clients in a single matter by providing a method for assessing when representing multiple parties is appropriate.

Prior to commencing the representation of multiple clients in a single transaction, the attorney must make an independent determination that the attorney will be able to provide "*diligent and competent representation to each affected client."* This assessment must be made on a case by case basis; it can never be presumed that it is generally acceptable to represent two parties in a single transaction. The assessment must be made based on the circumstances of each party, in

particular, the sophistication and general knowledge of each party should be taken into account when making the assessment. Once the attorney makes the determination that both parties can be appropriately represented, the attorney must make a meaningful disclosure of the risks and benefits of the multiple representation to both parties and obtain each party's informed consent. The meaning of “informed consent” is found in Rule 1.0 as cited above.

The factual circumstances here are the same as those discussed in Opinion 01-02. The closing practices described in that opinion continue to be the norm. The number of firms involved in doing real estate closings is probably contracting so that the majority of closings are conducted by a relatively small number of firms. Those firms likely continue to view the lender as the primary client and the borrower as the second client. The services provided to the borrower are generally limited to completing the closing and providing title insurance. There is likely limited consultation with the borrower or buyer prior to the closing beyond confirming the need for a certain amount of money to finalize the closing.

The change in circumstances flowing from the adoption of the Good Faith Estimate under the RESPA rules introduces a new factor into the analysis but may not ultimately change the determination whether it is appropriate to represent the lender and the borrower/buyer in a real estate transaction. Very briefly, the changes in the Good Faith Estimate rules require the lender to provide a borrower with an estimate of the closing costs applicable to a specific transaction. With respect to some of those closing costs, the estimate is binding on the lender. If the lender provides an erroneous estimate, the lender may not amend the closing costs when the error is discovered absent certain extenuating circumstances. This would appear to create a clear opportunity for conflict. For example, if a lender underestimates and improperly discloses the Vermont Property Transfer Tax applicable to a transfer, the lender cannot collect a greater transfer tax at the closing without demonstrating a change in circumstances. The potential conflict arises when the same attorney represents the lender, whose interest is in collecting the increased transfer tax and at the same time represents the borrower who is interested in enforcing the provisions in the rule that require the lender to make up the difference between the low estimate and the actual amount of the tax. This circumstance is a good example of a situation in which the attorney cannot provide appropriate representation to both parties because only one party can prevail in this circumstance. If this situation is known in advance, the attorney cannot make the initial determination that the interests of one party will not interfere with the representation of the other. The real question for attorneys representing clients in real estate transactions is how frequently circumstances arise in which the interests of the lender are adverse to the interests of the borrower/lender.

The process of obtaining consent to multiple representations begins with an appropriate disclosure of the risks and benefits of the joint representation. The rules do not describe the contents of the disclosure, but the Comments do advise that the relative sophistication of the parties may be a factor in determining whether the consent was informed. If one party is relatively unsophisticated and has limited experience and understanding of general business affairs, the attorney must assess whether that party fully understands the potential risks of multiple representation. The attorney should also consider if the buyer’s consent is based on the increased cost of separate representation rather than a true consideration of potential conflicts.

The consent to the representation of multiple parties must be memorialized in a writing. The best "written consent" includes a summary of the disclosures made by the attorney and includes a signature of the client. Rule 1.0 acknowledges that written consent may also be satisfied with a communication by the attorney to the client confirming an oral consent. Attorneys should be careful when using the later method, however, because the risk that the disclosure or consent was inadequate rests on the attorney.

As with PRC Opinion 01-02, there are additional issues which all attorneys should keep in mind. Several of these issues are closely related to the actual inquiry, but are not directly raised in the inquiry.

An attorney who undertakes the representation of the lender and borrower/buyer in a real estate transaction may find that a more extensive conflict arises during the course of the representation. For example, the attorney may know that the lender does not allow concessions by the sellers to the buyers in excess of the closing costs, but the attorney is advised at the commencement of the representation that the first task will be to negotiate a substantial concession by the seller to the buyer well in excess of the estimated closing costs, and to disguise the concession to avoid the lender's rules. The attorney is now presented with a new conflict in which the rules permitting a waiver will not likely apply. The attorney has information gained in the course of the representation which the attorney must now disclose to the lender client. However, having obtained the information from a current client, the attorney must first obtain consent, after disclosure from the borrower client before advising the lender of the circumstances. In this example, it is unlikely that the borrower will authorize the attorney to share the information with the lender. The attorney must now withdraw because the attorney can no longer provide competent representation to both parties. Whether the attorney can continue to represent one party after withdrawing is governed by the provisions of Rule 1.9.

Of equal importance is the issue that arises when the closing attorney elects to represent only the lender, leaving the borrower/buyer unrepresented. The attorney should be careful to comply with the provisions of Rule 4.3, including the newest addition to the rule. An attorney interacting with an un-represented person at a closing should be careful to disclose the attorney's role in representing only the lender. In addition, the attorney should be prepared to identify circumstances in which the attorney must advise the unrepresented person to seek counsel from an independent attorney. The closing is a particularly stressful time for many people and the unrepresented may find that the attorney's explanations or discussions about the documents may seem like the attorney is representing them also.