

OPINION 2015-2

SYNOPSIS:

Where a seller refuses to hire an attorney to provide the professional services normally performed by a seller's attorney in a real estate transaction, buyer's attorney may perform those services on behalf of the buyer and charge the buyer for the additional attorney time expended, so long as buyer's attorney informs the seller in writing that: (1) the attorney represents the buyer; (2) no attorney-client relationship exists between seller and buyer's attorney; (3) all work to be performed by the attorney will be performed on the buyer's behalf; (4) the buyer's position is adverse to that of the seller; and (5) seller should seek advice from an attorney if he has questions about the transaction.

QUESTION PRESENTED:

May an attorney represent a buyer in a real estate transaction where seller refuses to hire his own counsel, such that: (1) buyer's attorney will have to prepare all documents typically prepared by seller's counsel; (2) buyer's attorney will have to resolve any issues with marketability of title; and (3) buyer will have to pay extra attorney's fees for such work, and potentially also have to pay extra fees for clearing title objections, in order for the transaction to close?

FACTS:

Under the facts presented, seller wishes to convey property to buyer but refuses to hire an attorney. Buyer retains an attorney to represent her in connection with the purchase. Buyer will not be able to purchase the property unless her attorney provides all of the legal services that are typically provided by a purchaser's counsel (i.e. title search, title opinion, title insurance, HUD, closing and settlement) and all of the legal services that are typically provided by a seller's attorney (i.e. deed, transfer tax return and other applicable tax returns and forms).

RELEVANT RULES:

Preamble to Rules of Professional Responsibility:

[2] As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others.

...

[8] A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done. . . .

[9] In the nature of law practice, however, conflicting responsibilities are encountered. . . .Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the rules. These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.

Rule 4.3. DEALING WITH UNREPRESENTED PERSON

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

ANALYSIS:

This Committee has considered various conflict of interest and dual representation questions relative to real estate transactions in Vermont, including whether an attorney may represent both a buyer and a seller in a particular transaction (see Advisory Ethics Opinions 78-04 and 2004-03)¹, whether an attorney may represent both a buyer and his lender in a particular transaction (see Advisory Ethics Opinions 90-08, 94-08, 95-03, 2001-02, and 2011-02), and whether an attorney may represent a buyer and act as agent for a title insurance company in the same transaction (see Advisory Ethics Opinion 87-03). We have also addressed situations where an attorney represents a lender only and the buyer is unrepresented (see Advisory Ethics Opinions 94-08 and 95-09) and where a seller is represented but his attorney does not attend the closing conducted by buyer's attorney (see Advisory Ethics Opinion 2013-04).

The Opinions referenced above which are most relevant to our analysis in this case are 94-08, 95-09 and 2013-04, as they all concerned real estate transactions in which one or more of the parties was unrepresented. In Opinions 94-08 and 95-09, the Committee determined that an attorney may represent a lender in a real estate transaction but must be extremely cautious in circumstances where the borrower is not represented by independent counsel.² In Opinion 2013-04, we discussed a buyer's attorney's responsibilities at closing where a seller is either unrepresented or her counsel is not present.

However, we have never had the opportunity to address this particular question as to an attorney's professional responsibilities both to his client, the buyer, and to an unrepresented seller in a real estate transaction where the attorney will be performing all of the legal legwork.

As an initial matter, we see no reason why an attorney cannot agree with his buyer client to provide expanded legal services beyond the scope of a buyer's attorney's traditional services in a Vermont real estate transaction, so long as the Rules regarding representation agreements and reasonableness of fees are met.³ Before entering into a representation and fee agreement, the buyer's attorney should discuss with the buyer client any additional costs associated with the representation (i.e. the costs to prepare the traditional seller's documents), and any unknown costs (e.g. potential costs related to title clearing issues),

¹ Also see Professional Conduct Board Notices of Decision No. 53 and 60.

² Although the Committee has now revised its position on the propriety of an attorney representing both a lender and a borrower in the same transaction (see Opinion 2001-02), and although Opinions 94-08 and 95-09 were decided under DR 7-104(A)(1) of the Rules of Professional Responsibility rather than Rule 4.3 of the Rules of Professional Conduct, the discussions of attorneys' interactions with unrepresented parties in the Opinions referenced is relevant to our inquiry here.

³ See Rule 1.5(a) ("A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses) and Rule 1.5(b) ("The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client").

as well as the potential difficulties and limitations in the lawyer's negotiations and communications with the unrepresented seller. We believe that if the lawyer candidly explains the risks of potentially unknown title clearing objections that could cost the buyer an unexpected sum of money, and presumably also discusses with the client the circumstances under which the buyer could rescind the contract based on marketability of title issues, the client should be able to give informed consent under these circumstances. It would be good practice to include a reiteration of the discussion about the scope of representation in the representation and fee agreement, and have the client give informed consent to the terms of the expanded representation when she signs the fee agreement.⁴

Furthermore, just as buyers have the right to hire counsel and negotiate the terms of their representation, sellers have the right to choose not to be represented by counsel. Rule 4.3 makes it clear that the "rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person."⁵ While it is true that there may be circumstances where the purposefully unrepresented seller is at a disadvantage in negotiations and document drafting and review, we do not believe the buyer's attorney has any obligation to go out of his way to protect the seller's interests, especially if the attorney's concern over the seller's rights would interfere with the lawyer's obligation to zealously protect and pursue his client's legitimate interests. The essential element of loyalty in the lawyer's relationship with his clients "would be undercut if attorneys were required to go out of their way to avoid harming the adversary in transactions." See Michael Kevin Abernathy, *Client or Adverse Party—Who Shall an Attorney Represent?: Duties Toward an Unrepresented Party in Transactions*, 19 J. Legal Prof. 337 (1994). Indeed:

[i]n his zealous representation of the interests of his client, an attorney must, by the very nature of the relationship, pursue a maximum gain for his client. In the course of transactions, this means that the attorney has a duty to pursue the best result possible for his client, exploiting any weaknesses in the bargaining power of the opposite party. The only restraint on the actions of the attorney would be that he not intentionally mislead, deceive, or defraud the unrepresented party.

Id. Additionally, the lawyer would be prohibited from revealing information related to the representation of his buyer client (which could include information about how the documents drafted in a real estate transaction are in his client's best interests and adversely affect the unrepresented seller's interests) without the informed consent of the client.⁶

Having said that, the lawyer is obviously bound by the other Rules of Professional Conduct, including Rule 4.1 ("[i]n the course of representing a client a lawyer shall not knowingly make a false statement of material fact or law to a third person") and Rule 8.4(c) and (d) ("[i]t is professional misconduct for a lawyer to: . . . (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation; (d) engage in conduct that is prejudicial to the administration of justice").

⁴ See 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."

⁵ Also see Restatement (Third) of Law Governing Law § 103, *Dealings with an Unrepresented Nonclient*, Cmts. (b) and (d) (West 2000) ("Active negotiation by a lawyer with unrepresented nonclients is appropriate in the course of representing a client" and "In a transaction in which only one of the parties is represented, that person is entitled to the benefits of having a lawyer . . . The lawyer may negotiate the terms of a transaction with the unrepresented nonclient and prepare transaction documents that require the signature of that party. The lawyer may advance the lawful interests of the lawyer's client but may not mislead the opposing party as to the lawyer's role").

⁶ See Rule 1.6: "(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is required by . . . or permitted by [this rule]."

The lawyer must be sure not to mislead the unrepresented seller about the attorney's role in the transaction. Rule 4.3 makes it clear that the lawyer "shall not state or imply that the lawyer is disinterested" and "[w]hen the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding."

First and foremost, the lawyer must make it clear that the lawyer represents the buyer and not the seller, that the buyer's interests are adverse to those of the seller, and that the lawyer cannot give legal advice to the seller, except to suggest that seller hire or contact his own counsel. This information should be communicated regardless of the sophistication of the seller, and regardless of whether there is a concern that the unrepresented seller misunderstands the lawyer's role in the matter. Additionally, it would be good practice to provide this information to the seller in writing at the commencement of the arrangement and to review it at the closing. While the Committee will not approve or endorse any particular form, the Committee recommends that the form be as clear and simple as possible and that it be separate from any agreement between the attorney and the client buyer. We specifically reject the provision of the proposed form requiring the seller to indemnify and hold the buyer's attorney harmless for any matter related to the preparation of the closing and settlement documents. We believe it would be impossible for buyer's counsel to explain this provision to the unrepresented seller without giving prohibited legal advice. While there may be contractual negotiation with a *pro se* party where such a provision could be ethically negotiated, the inclusion of this language in an informational disclosure form provides too much potential for overreaching and exploitation of an unrepresented party.

Beyond the above disclosures, what else can the lawyer communicate to the unrepresented person within the bounds of Rule 4.3 in order to close the real estate transaction? Rule 4.3 states that a "lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client." Under the facts presented, there can be no question that the unrepresented seller's interests are directly adverse and in conflict with the interests of the buyer, the lawyer's client. Therefore, the Rule's admonition to not give legal advice, other than advice to secure counsel, to the unrepresented seller applies.

Can the lawyer answer seller's questions at closing or explain the contents of the closing documents? Comment 2 to Rule 4.3 states that in situations where the unrepresented person's interests are adverse to those of the lawyer's client, "the possibility that the lawyer will compromise the unrepresented person's interests is so great that the rule prohibits the giving of any advice." However, the Comment goes on to state that "[s]o long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying obligation." Accordingly, we believe the lawyer may offer an explanation of the documents at closing.

However, the lawyer should be cautious not to advise the unrepresented seller. The Preamble to the Rules helps define when a lawyer is acting as an advisor: "[a]s an advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications." The buyer's lawyer should not be acting in this advisory capacity vis a vis seller at closing. The lawyer can explain what the documents are and what their effect is from the buyer's perspective, but to the extent the seller asks questions about the documents which go beyond the lawyer explaining the documents from his client's perspective, the lawyer should refrain from responding, and state that the seller would need to ask his own counsel those questions. The lawyer would be well advised to add an

additional verbal disclaimer that the lawyer represents the buyers, not the seller, and is not purporting to give the seller legal advice about the effect of the documents on the seller.

If the seller is a foreclosing lender or an otherwise sophisticated and knowledgeable party, would that change the analysis? While the Comments to Rule 4.3 suggest that it might,⁷ we continue to discourage the giving of any legal advice or acting as advisor to unrepresented opponents beyond the boundaries outlined above. Such advice could implicate the conflict of interests rules and the potential for dual representation, which we have prohibited in our earlier Opinions referenced above.

In short, we believe a buyer's attorney can ethically proceed in the manner presented, so long as she does not mislead the unrepresented seller about her role or provide any legal advice to the seller. This decision is consistent with some other state bars decisions on this point. See, e.g., North Carolina 2004 Formal Ethics Opinion 10, which states that an attorney may prepare the deed in a real estate transaction as an accommodation to the needs of her client, the buyer, without becoming the lawyer for the seller. However, the attorney must explain to the seller that her client is the buyer, that she does not represent the seller, and that she cannot give legal advice to the seller except advice to secure legal counsel. Furthermore, the North Carolina committee determined that the attorney should inform the seller that she will prepare the deed consistent with the specifications of the contract, if any, but that otherwise she will prepare a deed that will protect the interests of her client, therefore seller may desire to seek legal advice. The opinion also stated that it would be good practice to include the above disclosures in a written statement provided to the seller prior to execution of the deed.

⁷ See Comment 2 to Rule 4.3: "Whether a lawyer is giving impermissible advice [to an unrepresented person whose interests are adverse to the lawyer's client] may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur."