ADVISORY ETHICS OPINION 90-08

SYNOPSIS:

An attorney may not provide simultaneous representation to a borrower and a lender. An attorney may furnish the lender with title insurance and a proposed mortgage deed or comply with other similar loan requirements on the buyer's behalf so long as the attorney does not enter into an attorney-client relationship with the lender.

FACTS:

Our committee has received several requests for opinions with regard to ethical issues involved when one attorney represents both the borrower/buyer and the mortgage lender in a mortgage loan transaction. The requests cover the permissibility of dual representation in several differing factual situations, which may be summarized as follows:

1. Traditional Vermont bank residential mortgage loan: Borrower/buyer retains an attorney in connection with buyer's purchase of a home and mortgage financing. The attorney provides general representation to the borrower/buyer, but also furnishes a title opinion to the lender bank. In many cases the attorney for the borrower also prepares the mortgage deed. All other loan documentation is prepared by the lender bank. The closing is carried out, the HUD-l (RESPA Settlement Statement) prepared, and actual disbursement of proceeds is made, by a bank loan officer, who is not normally a lawyer.

2. Mortgage company arrangement: Recently, many residential mortgage loans have been made by mortgage companies which do not maintain their own closing offices in Vermont. In such cases, the buyer/borrower is often expected to retain his/her own attorney (which attorney must, however, meet the satisfaction of the mortgage lender). In addition to complete representation of the buyer/borrower, and certification of title or furnishing of title insurance as in the above case, the attorney is expected to represent the lender and conduct the actual loan closing on behalf of the lender, usually at the attorney's own office. In many cases, actual disbursement of loan proceeds is made through the attorney's clients' trust account. All loan documentation (usually including the mortgage except for the property description) is prepared by the mortgage company. The attorney is, however, responsible for preparation of the "HUD-l" Settlement Statement, and the IRS form 1099-S.

3. New Proposed Arrangement: One Vermont bank has instituted a policy requiring all loan closings to be conducted by an attorney representing the bank. The fees of this attorney are charged by the bank to the borrower as a closing expense. At the time of making its loan commitment, the bank informs the borrower, by letter, of the above requirement, which letter further stares to the borrower that:

   > An attorney will also be required to conduct the title examination with respect to the property you are purchasing, including preparation of a title opinion, obtaining a title insurance policy acceptable to (bank) and preparing a mortgage deed and other loan closing papers . . .
   >
   > To do this title and related work, you have the right to select your own attorney or you may designate the bank's attorney. If you select your own attorney you must make the necessary arrangements with your attorney to schedule the work and pay associated costs. If you designate. the bank's attorney to perform the title and related work, the bank will pay the attorney and title insurance premium, and you will reimburse the bank these costs at closing . . .
   >
   > Should you choose the bank's attorney to do the title work and the loan closing, you are advised that the attorney is representing the interest of the bank. If at any time during the process you believe your interests require separate representation, you may involve your own attorney . . .

QUESTIONS PRESENTED:

(1) May an attorney simultaneously represent a buyer/borrower and a mortgage lender in the same transaction?

(2) May the buyer's attorney furnish the lender with title insurance and a proposed mortgage deed or comply with other similar loan requirements so long as the buyer's attorney does so on the buyer's behalf and does not act for the lender?

ETHICAL CONSIDERATIONS:

The provisions of the Code of Professional Responsibility governing multiple representation and conflicts of interest are as follows:

DR 5-105: Refusing to Accept or Continue Employment if the Interests of Another Client May Impair the independent Professional Judgment of the Lawyer.

(A) A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C).

(B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C).

(C) In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.

(D) If a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, no partner, or associate, or any other lawyer affiliated with him or his firm, may accept or continue such employment

DR 5-107: Avoiding Influence by Others Than the Client.

(A) Except with the consent of his client after full disclosure, a lawyer shall not:
  (1) Accept compensation for his legal services from one other than his client
  (2) Accept from one other than his client any thing of value related to his representation of or his employment by his client

(B) A lawyer shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services.

Reference should also be had to Title 9, Vermont Statutes Annotated, Section 42(b):

> A borrower may procure an opinion and abstract of title from an attorney of his choice acceptable to the lender, or hazard insurance in a company or in companies of his choice acceptable to the lender, and in such cases the lender's acceptance shall not be unreasonably withheld.

PRIOR OPINIONS:

In Opinion No. 78-4, the Professional Responsibility Committee stated that general representation of both purchaser and seller in a normal “arm's length” transfer of real estate constituted a violation of the Code of Professional Responsibility, even though consent to such dual representation was obtained from both parties. The Committee, in that opinion, confirmed an earlier opinion, PCC Opinion No. 73.6 to the same effect, in which it was stared that:

> the Committee . . . feels that such a possibility of conflict is inherent in any normal, arms-length real estate transaction. There are simply too many possible problems in any such transfer, which may create a conflict between the parties, for a reasonable man ever to say that it is ‘obvious’ that such conflicts cannot arise.

Opinion 78-4 went on to say that:

> It is difficult to see how a lawyer could ever make full disclosure in the real estate area given the myriad of problems that may arise. Moreover, real estate transactions often involve parties of different legal sophistication and disclosures suitable to one may be insufficient for the other.

In Opinion No. 79-23 the Committee addressed the problem of dual representation of a borrower and mortgagee bank in the context of a set of “guidelines” issued by a bank to attorneys wishing to represent buyers in real estate transactions with the bank. The guidelines included the following:

> The attorney representing the borrower in a particular real estate transaction is presumed to represent the bank’s interest as well and is expected to attend the closing. If a conflict of interest develops or is foreseen in a particular case, the bank should be notified and a review attorney will be engaged at borrower's expense.

The Opinion observed that the dual representation of a lender bank and a borrower raised such foreseeable possibilities for conflicts of interest that it could never be obvious that one lawyer could adequately represent the interest of each. The Opinion concluded that such dual representation was not permissible and could not be consented to by the clients.

DISCUSSION:

Under DR 5-105(C) in any case of dual representation two separate tests must be met; first that it is obvious that the lawyer can adequately represent the interest of each client, and second, that each client consents to the dual representation after full disclosure.

As to the first requirement, Opinion No. 79-23 noted that the possibilities for conflict between the interests of a lender and a borrower are numerous enough that it is never "obvious" that one attorney can represent the interests of both. A predictable possibility for conflict arises out of the desire of lenders to keep their loans as safe as possible, and therefore to obtain all available information regarding the borrower's financial status and capacity. A lender would normally expect its counsel to bring to its attention any information possessed by said counsel which might have a negative effect on the credit-worthiness of the borrower. As attorney for the borrower, however, any such information about the borrower which the attorney obtained in the course of his representation would not be discloseable.[1]

Other areas of likely conflict include the terms of the loan itself and conditions of title. In commercial settings, buyer representation may actually involve negotiating the terms and conditions of purchase financing. In such a negotiation no single attorney can aggressively further the interests of both borrower and lender.

In the typical homeowner purchase with standard bank financing the borrower may arrange for financing without the assistance of counsel, or before counsel has been retained; nevertheless, counsel's role in representing the buyer clearly extends to a review of the financing documents and advice to the borrower as to the terms, particularly when competing lenders actively solicit borrowers and may reduce loan costs to increase business. Even where no such negotiation occurs, the buyer's attorney must insure that the closing requirements imposed by the lender do not exceed those set forth in the lender's commitment letter. Finally, conditions of title or of the premises themselves which are acceptable to one but not to the other may lead to an escrow of mortgage proceeds or a postponement of closing. Without the guidance of independent counsel, an unsophisticated buyer, eager to buy, and concerned about a disruption in moving plans might well agree to new loan terms in order to close the transaction. Under these circumstances, we do not believe it is "obvious" that the lawyer can adequately represent the interest of each client [borrower and lender] and thus the first required prong for dual representation under DR 5-105(c) cannot be met.

In our view, the second required prong of DR 5-105(c) – that each client consent to the dual representation – cannot be met. The problem does not lie with the consent of bank officers or lending institutions. These commercial lenders are generally sophisticated with respect to their rights and liabilities and extremely knowledgeable regarding the forms and requirements of the lending market. It might be possible for such a sophisticated lender to give informed consent to an attorney's representation of one with potentially adverse interests. The circumstance that precludes consent to dual representation lies with the unsophisticated borrower. The borrower in the typical residential transaction is facing a situation the borrower will encounter only a few times in the borrower's life and encounters a vast heap of papers that the borrower cannot possibly read and understand in the time allocated for the loan closing. Typically the borrower is not sophisticated with respect to mortgage lending and bank financing and is totally dependent upon counsel's advice for any understanding of what is transpiring at closing. In view of these realities of the typical borrower/lender transaction, we continue to hold the view that a knowing, voluntary, and intelligent consent by a borrower to an attorney's dual representation of the borrower and the lender is not possible.

The position of an attorney representing an institutional lender while at the same time representing an individual borrower pursuant to the borrower's "consent" is inherently suspect for an oilier reason as well. The attorney's relationship to the lender puts the attorney in a compromised position from the outset due to the potential long term benefits to the attorney from maintaining in good standing the attorney's ongoing relationship with the lender. This inherent conflict and its vitiating effect on any consent cannot be ignored.[2]

The Committee is aware that the ethics committees of two neighboring states have reviewed this issue and come to a different conclusion. We have reviewed the opinions of both the Massachusetts Bar Association's Ethics Committee in their Opinion No. 90-3 and the New Hampshire Bar Association's Ethics Committee article that appeared in the New Hampshire Bar newsletter in its June 6, 1990 edition. We agree with the cautions expressed by both neighboring committees regarding dual representation

[1] DR 4-101.
[2] *See* Matter of Dolan, 384 A.2d 1076 (N.J. 1978) (Pashman, J., concurring and dissenting).

in real estate matters, but for the reasons set forth above we do not find persuasive those committee conclusions that consent to dual representation can be obtained consistent with the requirements of our Code of Professional Responsibility.

The New Hampshire Bar newsletter article recognizes that in most instances of contemplated dual representation between lender and borrower, the risk of actual conflict of interest between the two parties will require separate representation. As the article stated, "even if consent is obtainable, the lawyer should decline to represent the general interests of both a buyer and a seller, or a lender and a borrower, absent unusual circumstances." The New Hampshire Ethics Committee determined that there is "a presumption that the lawyer should generally decline multiple representation when there is any question of a potentially damaging conflict or appearance of impropriety." We agree generally with the analysis of potential conflict detailed in the New Hampshire Bar newsletter article but conclude that the conflicting interests of the 1ender and borrower are such that it can never be obvious that a lawyer can adequately represent the interest of each.

Our analysis here requires us to examine the traditional Vermont practice of a buyer's attorney providing a title opinion and/or title insurance to the lender, preparing a proposed mortgage deed or otherwise complying with loan requirements on the buyer's behalf. We do not find that these matters in any way suggest an attorney-client relationship between the buyer's attorney and the lender so long as the lender is aware that the services are performed on the buyer's behalf and not on behalf of the lender.

In more complex real estate transactions it is not uncommon for a purchaser or a lender to require seller's attorney to provide an opinion regarding compliance with permits and the like. Although the opinion is provided for the benefit of the buyer or the lender, it does not create an attorney-client relationship between the seller's attorney and those other parties. Similarly, in a typical real estate transaction, it is seller's attorney who prepares the deed. Clearly the deed is for the benefit of the buyer but the act of preparing the deed does not create an attorney-client relationship between seller's attorney and the buyer.

In some of the material we have reviewed in connection with this opinion, the authors have expressed concern with the economic realities of the marketplace and the unjustified additional cost to borrowers that would result from a *per se* rule requiring separate representation. We do not believe that a *per se* prohibition of dual representation in real estate transactions will unduly increase the costs of real estate purchases to buyers. The vast majority of lending institutions do not retain the services of an attorney to represent them at closing. In order to do business in a competitive market, those lenders who do retain counsel at the buyer's expense must find other ways to reduce their loan costs. Furthermore, the "savings" pointed to from dual representation would be ephemeral indeed if gained at the cost of less than full, vigorous representation in what to many people is one of the most important legal occurrences of their lives.