

# ADVISORY ETHICS OPINION 91-07

## **SYNOPSIS:**

In a complex and unconventional real estate transaction, the purchaser's attorney should not counsel his client to execute a declaration drafted by the seller's attorney which might (1) operate as a waiver of the purchaser's attorney client privilege; and (2) limit the purchaser's potential remedies against his attorney or the seller in any subsequent dispute arising from the transaction. In addition, the purchaser's attorney should refuse to execute the declaration as drafted by seller's attorney, since it characterizes the nature, quality and extent of communications between the purchaser's attorney and his client.

## **FACTS:**

Attorney A represents the purchaser in a real estate transaction involving a ground lease and a housing subsidy covenant. Under the terms of the transaction, the purchaser's equity interest in the property will not grow in proportion to any subsequent appreciation in the property's value. Instead, the purchaser's future equity interest is to be limited based upon a complicated formula set forth in the closing documents. The proposed closing documents include an attorney and client declaration form (The Declaration) prepared by the seller's attorney for execution by Attorney A and his client. The seller is requiring execution of the declaration form as a prerequisite of closing.

By signing the declaration the purchaser would acknowledge that he has fully investigated the facts before entering into the transaction and that he has relied upon "detailed information and advice" provided by his attorney in conducting that investigation. By his signature on the declaration, Attorney A would declare that he has reviewed the closing documents with his client in a timely fashion prior to closing and that he has provided his client with detailed information and advice regarding the transaction. Attorney A would also declare that he has made no warranties "as to the long time viability of [the] transaction" and would characterize all advice to his client as a "matter of attorney opinion only" and "given solely to reasonably inform the client of the present and foreseeable consequences of his actions."

## **ISSUE:**

1. Should Attorney A permit his client to execute the declaration?
2. Even assuming his client's consent after full disclosure, may Attorney A execute the proposed declaration?

## **ANALYSIS:**

The facts presented by Attorney A give rise to ethical concerns under several provisions of the Code of Professional Responsibility: DR 6-102(A), which provides that an attorney cannot attempt to exonerate himself or limit his liability to his client for his personal malpractice; DR 4-101, which pertains to preservation of confidences and secrets of a client; and DR 7-101, which provides that an attorney shall not intentionally prejudice or damage his client during the course of their professional relationship.

The fully executed declaration would provide an indirect benefit to Attorney A to his client's detriment since it would characterize the information and advice provided by Attorney A to his client as "detailed." It would also effectively establish that Attorney A had made no warranties as to the long-term viability of the transaction and that any advice in that regard has been "opinion only." These representations, once acknowledged by the purchaser, could operate to limit Attorney A's liability for malpractice in any subsequent dispute he might have with his client. For that reason, the statements pertaining to the quality of Attorney A's services run afoul of DR 6-102(A), which provides that a lawyer shall not attempt to exonerate himself from or limit his liability to his client for his personal malpractice. The differing interests of attorney and client in this regard would also call into question any advice Attorney A might provide to his client regarding the risks incident to execution of the declaration and could result in an appearance of impropriety under Canon 9.

With respect to Attorney A's execution of the declaration, DR 4-101 prohibits a lawyer from revealing the confidences and secrets of a client. Confidential communications between attorney and client in the course of the professional relationship are certainly confidences and in some circumstances may also be secrets within the meaning of DR 4-101. While an attorney would ordinarily be permitted to reveal a client's confidences and secrets with the client's consent after full disclosure DR 4-101(E), on the facts before us, such a consent could be interpreted as a waiver of the purchaser's attorney/client privilege. Thus, in the event of a subsequent dispute between the purchaser and the seller, the declaration would operate to the seller's benefit

and the purchaser's detriment even to the point that Attorney A could be required to appear as a witness against his own client.

Even if we assume that the affidavit does not violate DR 6-102(A), and even if the purchaser was still willing to give his consent to Attorney A's execution of the declaration, after being fully informed of its potential detrimental impact, the Committee believes that Attorney A should decline to execute the declaration on the basis of DR 7-101. That provision prohibits an attorney from prejudicing or damaging his client during the course of the professional relationship. In our recent decision in Opinion No. 90-8, we noted that in the typical consumer real estate transaction, purchasers are often relatively unsophisticated and rely heavily upon the advice of counsel. That consideration is even more compelling in the "atypical conveyance" described by Attorney A. A purchaser, eager to purchase, might well agree to execute the declaration without fully comprehending the ramifications in any subsequent dispute between purchaser and seller or purchaser and his attorney. An attorney representing a purchaser in such a transaction must exercise great caution to avoid any prejudice or damage to his client which might result from the client's lack of sophistication or eagerness to purchase. The attorney must also strive to avoid the appearance of impropriety which could result if the attorney were to indirectly benefit from his client's eagerness. Accordingly, we conclude that Attorney A should advise his client not to execute the proposed declaration and should not agree to execute the attorney portion of the declaration even with the client's consent and after full disclosure.

Attorney A has also asked us to consider the issue of whether the seller's attorney may ethically require the declaration as a prerequisite for closing. We must decline to do so under our own rules of procedure. Rule 2 permits us to advise members of the Bar upon the ethical propriety of their contemplated professional conduct. It does not permit us to address the ethical propriety of conduct or other members of the Bar who have not sought our opinion.