

ADVISORY ETHICS OPINION 94-08

SYNOPSIS:

An attorney may accept an engagement from a lender, who makes loans secured by a mortgage on the borrower's property, to represent the lender in a closing, provided that the attorney does not directly or indirectly undertake to represent the borrower in the same transaction.

INTRODUCTION:

An attorney (the "Attorney") inquires whether the Attorney may accept employment from a financial institution making loans secured by mortgages on real estate (the "Lender") to act as the closing agent for the Lender. The Attorney would be retained to represent the Lender's interest in the transaction. The scope of the Attorney's engagement is described as (1) examining the title and procuring title insurance for the Lender, making arrangements for the closing, collecting the information necessary to prepare the closing statement, prepare or obtain the documents required for the closing, make arrangements for the payment and discharge of existing loans, attend the closing and record the mortgage and any other documents required to be recorded from the closing. The customer of the Lender (the "Customer") receives a notice from the Lender which states - the bank has retained an attorney to perform certain services on behalf of the bank and that the customer may retain an attorney to represent the customer's interest. The attorney is paid by the Lender and no separate line item charge against the Customer appears on the Closing Statement. The Lender does not charge the customer for the premium for the loan title insurance policy.

ANALYSIS:

It seems self-evident that the Lender may hire its own attorney to represent the Lender's interest in the Closing. The areas where the potential problems arise come from the notice that is sent to the Customers and the events that are likely to occur immediately before and at the closing.

The Committee has responded to inquiries in related but distinguishable situations. In Opinion 90-8 the committee considered the circumstance where an attorney was retained by lender's customer, but the lender asserted the attorney represented the lender's interest also. The attorney raising the question answered in Opinion 90-8 did a title examination and all of the things an attorney representing a borrower normally would do, and also prepared the loan documents (generally by filling in blanks in partially prepared forms) and disbursing the funds on behalf of the lender. This Committee concluded in Opinion 90-8 that the potential for conflict between the attorney's obligation to the borrower-client and the attorney's obligation to the bank was so great, and the likely ability of most home buyers to understand the potential and consequences of the conflict so affected by the enormity of the event, that the conflict was one which could not be waived within the guidelines of the Code. In Opinion 79-23, a bank attempted to establish guidelines for attorneys who would be permitted to represent borrowers. The guidelines included a requirement that the attorney "also represent the bank." In the event of a conflict, the borrower was required to get a new attorney. The committee again concluded that the potential conflict already existed and could not be waived by the bank's customer and that the attorney could not adequately represent both sides of the transaction.

The circumstances in the present inquiry are different from either of the prior inquiries. In those cases the attorney was intending to represent both parties in the transaction. In the present case, the attorney is retained by the Lender and paid by the Lender to represent the Lender. Under applicable law, the Lender is obligated to have evidence of the marketability of title before making a loan secured by a mortgage. Thus it is within the scope of the Lender's interest to have its attorney do a title search and to procure title insurance for the Lender's benefit. The Lender may also desire counsel in preparing the loan documents and seeing that the loan is closed in compliance with an increasingly complex collection of government regulations and private secondary market requirements. Matters such as incorrect entries on the HUD closing statement will lead to problems for the Lender at the time of the sale of the mortgage.

The Lender proposes to send the Customer a notice indicating that the Attorney is representing only the interest of the Lender and that if the Customer desires counsel, the Customer must retain his/her/their own attorney. It may be prudent to present the Customer with a similar notice at the commencement of the Closing and request that the Customer countersign the notice to bring that point to the Customer's attention again. The pre-closing notice should indicate that the Customer will be signing a number of documents involving significant legal obligations and that the Lender's attorney is not permitted to answer questions at the closing. If the Customer has questions, the Customer should retain an attorney to review the documents. Similarly, the notice must warn the Customer that the Lender is reviewing the title only for the Lender's comfort and if the Customer has any questions about the title to the property, the Customer must retain an attorney to review the title to the property. If there are defects in the title that render the title unmarketable from the perspective of the Lender, the Attorney may require/undertake

corrective action **on behalf of the Lender**. If there are matters in the contract that do not affect the Lender's interest, the Attorney should not take any action to advise the Customer regarding those terms and conditions.

The potential pitfall for the Attorney in this arrangement is the unintended representation of the Customer prior to or at the closing.

An attorney communicating with a party not represented by counsel must avoid giving advice to the unrepresented party. See DR 7-104(A)(1). It is almost inevitable that questions will arise at the closing on various matters involving the title, the meaning of a paragraph in the documents, or the purpose of a particular document and numerous other potential questions. If the Attorney gives the Customer advice, the Attorney will violate DR 7-104(A). The Attorney is not giving advice if the Attorney describes the loan documents and the requirements from the Lender's perspective. Such explanations should include a renewal of the warning that the Attorney is representing the Lender and not the Customer. The Attorney's only option when a Customer asks a question at the closing that requires a communication of something other than the Lender's view of the documents is to advise the Customer to seek counsel from another Attorney. See DR 7-104(A)(1).

Within the scope of representing the Lender, the Attorney may (1) disclose to the Customer that an Owner's Policy of Title Insurance is available from the title insurance company issuing the Lender's policy; and (2) issue an Owner's policy to the Customer if the Customer requests one.