

# ADVISORY ETHICS OPINION 95-03

## **SYNOPSIS:**

An attorney may not simultaneously represent a borrower and act as closing agent for a mortgage lending company in the same transaction. For additional information, see Professional Responsibility Opinions 90-8 and 94-8.

## **FACTS:**

An attorney received a proposal from a local bank for whom the attorney has done work in the past (the "Lender"). The proposal calls for the attorney to act as a closing agent for the Lender in residential real estate loans. The attorney would be required to appear at the Lender's office and conduct the closing, assuring that all of the Lender's requirements are satisfied. The loan documentation would generally be prepared by the Lender, although in some cases, the attorney would mark up the closing statement or other documents as required. The attorney also proposes to do the necessary title work and prepare any necessary documentation on behalf of the Borrower.

## **DISCUSSION:**

The Committee has received a request to reconsider its conclusion reached in Opinion 90-8 based on a modified fact pattern. In Opinion 90-8, the Committee opined that an attorney may not provide simultaneous representation to the borrower and the Lender (as the Lender's closing agent) in the same residential real estate loan transaction. That opinion further stated that an attorney may furnish the Lender with title insurance and a proposed mortgage deed or comply with other similar loan requirements on the borrower's behalf, so long as the attorney does not enter into an attorney-client relationship with the Lender. The facts in Opinion 90-8 described the usual Lender arrangement where borrower would select an attorney to do the title work for the closing. The Lender would send the attorney a package of loan documents, sometimes complete or partially completed and the attorney would prepare the loan documents, conduct the closing and disburse the proceeds from the attorney's client trust account. The latter actions constituted representing the Lender in the Committee's opinion. The Lender's attorney was expected to represent the Lender, usually at the attorney's own office at the closing procedure. Some of the loan documentation was prepared by the Lender and the remainder by the attorney, while its attorney, however, was responsible for preparation of the "HUD-1" Settlement Statement and the IRS Form 1099-S.

The facts described in the present request vary from Opinion 90-8 sufficiently to merit further consideration. In the circumstance of the present request, the closing would take place at the offices of the Lender. The Lender's literature indicates that any mortgage loan which it originates must be closed by an attorney on the Lender's approved list. It further states that the approved attorney may then act as the borrower's attorney as well as the closing agent for the Lender. The closing takes place at the Lender's offices. The Lender would handle the disbursement of the proceeds from the Lender's facilities. As closing agent for the Lender, the attorney would be responsible for putting the actual amounts required on the HUD form.

In Opinion 94-8, the Committee considered the circumstance where an attorney was retained to represent the Lender and provide title insurance to the borrower if requested. The conclusion in Opinion 94-8 was that an attorney may accept an engagement from a lender, who would make a loan secured by a mortgage on the borrower's property, to represent the lender in the transaction, provided that the attorney does not directly or indirectly undertake to represent the borrower in the same transaction.

## **CONCLUSION:**

The circumstances in the current inquiry are not sufficiently different from the inquiry presented to the Committee in Opinion 90-4 to support a different conclusion. The facts of the present inquiry are distinguishable from the situation in Opinion 94-8. We therefore reiterate our opinion that it appears inevitable that questions would arise at the closing on various matters that would put the attorney for the borrower 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.

The factual situation presented here raises the same potential ethical problems as addressed in Opinion 90-8, although the scope of the attorney involvement in representing the Lender are less significant in the present circumstance than in the situation described in Opinion 90-8. We conclude that the unsophisticated borrower/client is entitled to representation such as would preclude the attorney from acting as closing agent for the Lender.