

Advisory Opinion 1992-1

Attorney has asked the Advisory Opinions Committee to consider certain circumstances in which third parties might direct business to attorney in connection with the closing of real estate transactions through a title company. In particular, the Committee is asked to determine whether it would be ethical for the attorney to enter into representation arrangements with real estate brokers such that the real estate brokers direct the title companies with which the brokers do business to require that all legal documents needed in connection with the brokers' closings are to be prepared by the attorney. In return for such referrals, the attorney provides other services for the real estate brokers, including, in some instances, undertaking to provide free legal advice to the brokers concerning any real estate transactions with respect to which the attorney is engaged to prepare the requisite documentation.

The Committee is of the opinion that the described practice of directing business to the attorney, coupled with an agreement to provide gratis services to the broker would not be ethical. Moreover, while the Committee does not consider issues of professional liability, the Committee is concerned that such issues might arise due to the respective interests of the various parties to the real estate transactions and the potentially competing duties of loyalty on the part of the attorney.

The question posed is complex. Its answer devolves upon the attorney's obligations and responsibilities with respect to the multiple parties to such transactions. The roles of these parties may be more or less distinct depending upon the complexity of the particular real estate transaction and the relative sophistication of the parties. The Committee observes that most buyers and sellers of real property rely upon the integrity of their respective brokers, and upon the title company, to assure that their interests are considered and that they are not often represented by independent counsel at closing. The listing broker is the agent for the seller and the listing broker owes a fiduciary duty to his or her principal, the seller. In the context of the question before the Committee, it is the listing broker who will have directed the title company to employ the attorney for all of that broker's closings and it is the listing broker who will be receiving free advice or other services from the attorney. Typically, the selling broker is a subagent of the seller, though, with proper disclosure, the selling broker may act as the buyer's agent. In turn, it is the title company's business to undertake the research needed to insure the title when requested and the title company undertakes to determine which documentation is necessary for an insurable title and to serve as a neutral closing agent pursuant to the terms of the parties' purchase agreement.

The attorney who prepares the requisite documentation to close the transaction is, under the facts of the instant question, brought in by the title company at the direction of the listing broker. The principals to the transaction, the buyer and seller (who may be unaware of the selection process), have had no voice in the selection of the attorney, yet the documents drawn should be in most cases for their benefit and protection. The attorney's fees will be paid by either the buyer or the seller or they may have agreed to share that cost.

Of particular concern to the Committee is the potential that the buyer may be led to the mistaken belief that the buyer's interests are represented by the attorney who has drawn the documents. Where the title company, an apparently neutral party, has selected the attorney at the direction of the listing broker who represents the seller, this potential is likely to be realized absent careful prior disclosure to the parties.

An attorney's first duty is to his or her client. SCRA 1986, 16-104(B) (Repl. Pamp. 1991) requires that the client be given the information necessary to enable the client to make informed decisions concerning his or her representation by the attorney. Similarly, rule 16-102(A) directs that the attorney shall abide by the client's decisions concerning the representation. Quite apart from attempts to determine whether the attorney represents the buyer or the seller, in the circumstances presented it does not appear that the attorney will have had an opportunity to apprise either the buyer or the seller of the information necessary to permit an informed decision.

A client's confidentiality shall be inviolate. SCRA 1986, 16-106(A). This could prove difficult for an attorney who is simultaneously providing advice to the listing broker and preparing the documentation for the buyer and seller at the direction of the title company unless all of their interests are congruent. Where there are multiple clients, an attorney may not represent such clients where the representation of one will be directly or substantially adverse to another "unless: (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and (2) each client consents after consultation." SCRA 1986, 16-107(A). Loyalty to the client is an essential element of the

attorney's relationship with the client. See SCRA 1986, 16-107 cmt. The Committee questions whether an attorney who receives business through the title company at the direction of a broker who is also a party to the transaction, where the broker receives services from the attorney, is in a position to provide the requisite loyalty to either the buyer or the seller and to inform them fully concerning their respective rights.

In Atlantic Richfield Co. v. Sybert, 456 A.2d 20 (Md. 1983), the Court declined to find a conflict where the buyer and seller to a real estate transaction were both clients of the same attorney and the attorney's chief duty was to furnish a channel of communication between the parties. The attorney had disclosed to each party his relation to the other and had acted with the consent of both. In considering the requirement of full disclosure the Court stated:

"Full disclosure requires the attorney not only to inform the prospective client of the attorney's relationship to the seller, but also to explain in detail the pitfalls that may arise in the course of the transaction which would make it desirable that the buyer have independent counsel. The full significance of the representation of conflicting interests should be disclosed to the client so that [the client] may make an intelligent decision before giving his [or her] consent. If the attorney cannot properly represent the buyer in all aspects of the transaction because of [the attorney's] relationship to the seller, full disclosure requires that [the attorney] inform the buyer of the limited scope of [the attorney's] intended representation of the buyer's interests and point out the advantages of the buyer's retaining independent counsel."

Id. at 24-25, quoting *Crest Inv. Trust, Inc. v. Comstock*, 327 A.2d 891, 905 (Md. Ct. App. 1974)) emphasis omitted; bracketed words added to avoid stereotypical language).

While adequate disclosure and informed consent will vary depending upon the particular facts of each transaction, the Committee believes the type of disclosure described by the Maryland court constitutes the full disclosure contemplated by the applicable provisions of our Code of Professional Responsibility.

Concomitant with the attorney's duty of loyalty to his or her client is the directive that the attorney not allow himself or herself to be directed or regulated by a non-client. SCRA 1986, 16-504(C). Even if the attorney were able to provide full disclosure to all parties and to receive informed consent from them, it is unlikely that the attorney would not be influenced in representation of the buyer or the seller by the interests of the broker to whom the attorney must be responsive in order to continue to receive business.

The rules are also specific in prohibiting an attorney from giving anything of value to a person in exchange for recommending the attorney's services. SCRA 1986, 16-702(C). In the instant situation, the attorney would be prohibited from providing free advice to the broker who has directed the title company to utilize the attorney's services. Of course, the attorney may represent one of the parties to the transaction and undertake, on behalf of that party and with that party's consent, to provide services to another party to the transaction. See SCRA 1986, 16-203(A). Thus an attorney may, at the behest of the seller, provide an evaluation of title for the use of the buyer. However, when the attorney's work product is intended for the use or information of a third party, questions arise concerning the attorney's duty to such third party. See SCRA 1986, 16-203 cmt.

In the judgment of the Committee, an attorney selected to prepare the documents needed to close a real estate transaction should disclose any relationship with the other parties to the transaction and determine which of the parties is his or her client within the context of each such transaction. Such disclosure must be full, complete and timely. The spirit of the Rules of Professional Conduct requires diligent adherence to the avoidance of conflict and of loyalty to one's client untrammeled by the dictates of third parties whose interests may influence the attorney's exercise of independent judgment on behalf of his or her client.

1 It is beyond the purview of the Committee to consider the actions of real estate professionals. However, the Committee observes that real estate brokers are governed by similar principles. The National Association of Realtors Code of Ethics and Standards of Practice ("Realtors' Code") sets forth those standards. Article 7 of the Realtors' Code states "In accepting employment as an agent, the [broker] pledges himself (sic) to protect and promote the interests of the client. This obligation of absolute fidelity to the client's interests is primary, but it does not relieve the [broker] of the obligation to treat fairly all parties to the transaction." New Mexico has concluded that the duty owed by an attorney to his or her client

is no less exacting than that owed by a real estate broker to his or her principal. *Van Orman v. Nelson*, 78 N.M. 11 (1967), rev'd on other grounds, 80 N.M. 119 (1969).

2 Just as an attorney who perceives a conflict will recommend that other counsel be obtained, the Realtors' Code, Article 17, in part, requires that a broker "... shall recommend that legal counsel be obtained when the interest of any party to the transaction requires it."

3 Article 16 of the Realtor's Code. Standard of Practice 16-2, appears to require that the real estate broker make appropriate disclosure of benefits received from other professionals whom the broker has recommended. "When acting as an agent or subagent, the [broker] shall disclose to a client or customer if there is any financial benefit or fee the [broker] or the [broker's] firm may receive as a direct result of having recommended real estate products or services..." Similarly, the New Mexico Real Estate Commission requires that an agent obtain written authority from his or her principal which outlines the scope of the agent's authority and that such authority be disclosed to the other party. NMREC Rule 18 (effective 4/1/92). While beyond the purview of this Committee, it appears that disclosure of the "scope of authority" would include whether the agent may select or contract with counsel on behalf of the principal.