

OPINION 525

May 1998

Question Presented

May an attorney who prepares loan documents for a real estate purchaser at the request of the attorney's lender-client prepare a deed to be used in the transaction if he is not requested to do so by the seller and without submitting a dual representation disclosure?

Statement of Facts

An attorney represents a lender and drafts loan documents for residential loans to the lender's customers. The lender's loan commitment to its customer provides that the lender will have the loan documents (typically a note and deed of trust) prepared by the lender's attorneys and requires the lender's customer to pay for the loan documents.

When a purchase money loan is being made to the lender's customer, the loan may have to be additionally secured by a vendor's lien retained in a deed to the lender's customer (a purchaser) from a seller with whom the lender's attorney has no contact. In that case, the lender's attorney (without being requested by the seller to do so) prepares a warranty deed for execution by the seller to the purchaser and delivers it and the loan documents to the title company for closing. The attorney sometimes delivers a statement to be submitted to the seller for preparation of the deed. At other times, the attorney may not submit a statement but indicates to the title company the amount of his charge to the seller for preparation of the deed "if it is used."

The attorney (or lender) delivers to the lender's customer a written notice that the attorney represents only the lender in the transaction and does not undertake to represent or advise the lender's customer and that the lender's customer should obtain counsel or representation from another attorney.

Although the seller pays for the attorney's preparation of the deed (assuming it is used), the attorney has no contact with the seller and does not make any disclaimer of representation or dual representation disclosure to the seller.

Questions

1. Is the lender's attorney ethically prohibited from preparing a deed for execution by a seller and submitting a bill for payment by the seller without having been requested or authorized by the seller to prepare the deed for the seller and without giving the seller a notice disclaiming that he represents the seller?
2. Under the facts presented, may the lender's attorney prepare a deed for the seller if the seller requests or authorizes him to do so?
3. If the answer to the second question is "yes," is the lender's attorney to provide a full dual representation disclosure to the seller?

Discussion

Some of the issues under consideration were the subject of Ethics [Opinion 150](#), decided in May 1957,

Ethics [Opinion 228](#), decided in April 1959, Ethics [Opinion 408](#), decided in January 1984, and Ethics [Opinion 448](#), decided in September 1987.

Opinion 150 held that, notwithstanding a borrower's desire to use his own attorney, it was not improper for a lender to demand that all papers incidental to its loan transactions be prepared by a law firm of its choice even though one of the members of the attorney's law firm was an officer of the lender and the costs of preparation were charged as part of the transactions. Opinion 150 did not expressly consider the ethical issues related to the preparation of documents for the seller without the seller's consent.

Opinion 228 was based on former [Canons 6, 24, and 32](#) in effect at the time of that opinion and affirmed the right of a lender to select its own attorneys and to require that its attorneys prepare the mortgage and promissory note in connection with a loan made by the bank, and stated that the attorneys selected by the lender may properly accept employment to prepare such loan documents. Opinion 228 stated that other papers, such as deeds and curative matter, should be prepared by the attorney selected by the borrower. (Although this opinion states that the deed and other papers should be prepared by the attorney selected by the *borrower*, we believe the real import of that statement is that the deed and any curative documents should be prepared by an attorney selected by the seller or purchaser-borrower, depending upon the agreement between them.)

[Opinion 228](#) recognized that an attorney, after full disclosure of the facts to all parties, may properly represent both the buyer and seller of real estate if the parties agree thereto, but that an attorney for a buyer of real estate may not advise the seller he is representing the buyer and thus will prepare the deed of trust and promissory notes, and that he will prepare the deed for the seller either at buyer's or seller's expense according to their desires. Again, the import of this opinion is the seller or purchaser must be allowed to select the attorney to prepare the deed.

Ethics [Opinion 408](#) also involved an attorney's dual representation of parties to a real estate transaction and held that an attorney may accept a portion of a title insurance premium in a multi-party real estate transaction, but that the attorney is required to fully disclose the possible adverse effects of multiple representation to each of the prospective clients and only proceed with such representation when each client has consented after such disclosure and it is obvious that the attorney can adequately represent each client's interest.

[Opinion 448](#), dated Sept. 11, 1987, stated that an attorney could not ethically represent both parties to a real estate transaction (seller and buyer) by preparing instruments of conveyance and instruments of indebtedness and security without having any personal contact with such parties, particularly in the absence of full disclosure by the attorney of the possible effect of such dual representation on the exercise of his independent professional judgment on behalf of each, as well as the consent of each party (after such full disclosure is made) to such dual representation. Opinion 448 was decided after adoption of the Disciplinary Rules and cited Ethics Opinions 228 and 408 in support of its conclusion.

Former [DR 5-105\(C\)](#) was the "conflicts of interest" rule when Opinion 448 was decided and provided that (in some instances) "a lawyer may represent multiple clients if it is obvious that he can adequately represent the interests 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."

[Rule 1.06](#), Texas Disciplinary Rules of Professional Conduct, is the current conflict of interest rule and provides:

- a. A lawyer shall not represent opposing parties to the same litigation.
- b.
- c. In other situations and except to the extent permitted by paragraph (c), a lawyer shall not represent a person if the representation of that person:
 1. involves a substantially related matter in which the person's interests are materially and directly adverse to the interests of another client of the lawyer or the lawyer's firm; or
 2. reasonably appears to be or becomes adversely limited by the lawyer's or law firm's responsibilities to another client or to a third person or by the lawyer's or law firm's own interests.

A lawyer may represent a client in the circumstances described in (b) if:

1. the lawyer reasonably believes the representation of each client will not be materially affected; and
2. each affected or potentially affected client consents to such representation after full disclosure of the existence, nature, implications, and possible adverse consequences of the common representation and the advantages involved, if any.

The remainder of Rule 1.06 does not aid in answering the questions considered by this opinion.

Rule 1.06 sets no lower standard than did former [DR 5-105\(C\)](#). In fact, the nature of the "full disclosure" required under the current rule is even more specific than under the former disciplinary rule.

Conclusion

A lender's attorney may prepare loan documents at the request of the lender and be paid by the purchaser-borrower. A deed reserving a vendor's lien and transferring it to the lender could be a "loan document."

If the lender's attorney is representing only the lender, either the lender or the lender's attorney must fully advise the purchaser-borrower that the lender's attorney does *not* represent the purchaser-borrower and that the purchaser-borrower should obtain advice and representation by another attorney. In the absence of notice that the lender's attorney does not represent the purchaser-borrower, [Rule 1.06](#) is applicable and the full disclosure required by that rule must be made to the purchaser-borrower.

Neither the lender nor its attorney can suggest to the seller that the seller allow the lender's attorney to represent the seller in the preparation of the deed.

If the seller requests or authorizes the lender's attorney to represent the seller in preparing a deed for execution by the seller, the lender's attorney may prepare the deed but in doing so will be engaged in the dual representation of the lender and the seller.

Before undertaking the joint representation of the seller and the lender, the lender's attorney must reasonably believe the representation of each client will not be materially affected, and must provide full

dual representation disclosure to the seller and lender and obtain the consent of each after full disclosure of the existence, nature, implications, and possible adverse consequences of the common representation and the advantages involved, if any.

A lender's attorney may not prepare a deed for use in a real estate transaction without having been requested or authorized to do so by the seller unless the attorney provides written notice to the seller that he has prepared the deed at the request of the lender, that he represents the lender and only the lender in the transaction, and that the seller is advised to consult his own legal counsel before signing the deed. If the lender's attorney knows that the seller has an attorney, lender's attorney must send the draft deed to that attorney. If the lender's attorney initially does not know but later learns that the seller is represented by an attorney, he should send a copy of the draft deed to the seller's attorney promptly after acquiring such knowledge.