

ETHICS ADVISORY OPINION

11-06

UPON THE REQUEST OF A MEMBER OF THE SOUTH CAROLINA BAR, THE ETHICS ADVISORY COMMITTEE HAS RENDERED THIS OPINION ON THE ETHICAL PROPRIETY OF THE INQUIRER'S CONTEMPLATED CONDUCT. THIS COMMITTEE HAS NO DISCIPLINARY AUTHORITY. LAWYER DISCIPLINE IS ADMINISTERED SOLELY BY THE SOUTH CAROLINA SUPREME COURT THROUGH ITS COMMISSION ON LAWYER CONDUCT.

Factual Background:

Buyer is represented by Lawyer A. Seller is represented by Lawyer B. As part of the real estate closing transaction, at closing, Lawyer A collects from Seller the mortgage debt payoff amount and is responsible for the transmittal of the payoff of the existing mortgage debt. Lawyer A creates the settlement statement. Lawyer A proposes to create a line item on the settlement statement entitled "Payoff Handling Fee" which is a charge to Seller (who is Lawyer B's client). The "Payoff Handling Fee" is in excess of the actual cost of an overnight delivery letter package or a wire handling fee charged by Lawyer A's bank.

Questions Presented:

1. In a real estate closing transaction, is it ethically permissible for Lawyer A to charge a "Payoff Handling Fee" to a person who is not his client, who has not entered into a fee arrangement with Lawyer A, and with whom Lawyer A has no attorney/client relationship?
2. In a real estate closing transaction, is it ethically permissible for Lawyer A to seek actual reimbursement from a person who is not a client, who has not entered into a fee arrangement with Lawyer A, and with whom Lawyer A has no attorney/client relationship?

Summary:

In a standard real estate closing, absent additional facts and circumstances, a buyer's lawyer preparing a settlement statement may add a reasonable payoff handling fee to the Seller's side of the statement even though the lawyer has not entered into a fee arrangement nor has an

attorney/client relationship with the seller. The lawyer may, alternatively, choose to seek actual reimbursement.

Opinion:

Rule 1.5(a) states that “A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses.” It is important to note that this rule does not limit its applicability to a client. In fact, in listing the eight factors to be considered in determining the reasonableness of a fee, the word “client” appears in only two of them.

In a standard real estate closing in South Carolina, a buyer’s attorney typically prepares the settlement statement. Preparation of the settlement statement involves listing various settlement charges and other adjustments (including, but not limited to, prorated real estate taxes, assessments, title charges, government recording and transfer fees, and additional costs and fees) on one side or the other. In charging the seller a “Payoff Handling Fee,” buyer’s lawyer is only communicating the fact that buyer’s lawyer is seeking payment for a service performed in-house in satisfying an obligation of the seller and/or reimbursement of related expenses. As long as buyer’s attorney has charged an amount that is not unreasonable considering the time and labor required, and has also considered any other applicable factors under Rule 1.5, buyer’s attorney is not in violation of Rule 1.5.

It is important to note that in listing a payoff handling fee on the seller’s side of a settlement statement, buyer’s lawyer has only communicated an intention to charge the seller such a fee. Presumably, buyer’s lawyer has forwarded a copy of the proposed settlement statement to seller’s attorney (as it appears to be the case in the facts above) and seller may refuse to sign the settlement statement if he does not agree to it.

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