



ETHICS ADVISORY OPINION

09-07

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:

Lawyer is conducting a standard real estate closing after being chosen and retained by the Borrower. Borrower is financing the purchase with a loan from Lender. Lender typically sends Lawyer a loan package with closing instructions that Lawyer is expected to follow.

Question Presented:

In a standard real estate closing where Borrower retains Lawyer, should Lawyer assume that Lawyer is representing the Lender as well such that Lawyer should comply with the requirements of Rule 1.7? Under the facts above, is Lawyer representing both the Borrower and the Lender? Does Lender's requirement that Lawyer follow Lender's "closing instructions" create an attorney-client relationship with Lender?

Summary:

In a standard real estate closing where Borrower has chosen and retained Lawyer, absent additional facts and circumstances, Lawyer does not represent the Lender. The mere supplying of closing instructions by a Lender to Lawyer does not, in and of itself, create an attorney-client relationship between Lender and Lawyer nor create a significant risk that Lawyer's representation of Borrower will be materially limited by Lawyer's responsibility to Lender. As such, the requirements of Rule 1.7(a) do not apply.

Opinion:

In *Doe v. McMaster*, 355 S.C. 306, 585 S.E 2^d 773, (2003), the Court noted that the ethical concerns contemplated by Rule 1.7 are, “only applicable when there is a business relationship between Lender and the attorney.” A business relationship does not exist when Lawyer is not employed or engaged by Lender, has not drafted Lender’s closing package, and has not provided a legal opinion to Lender on the quality or legitimacy of the documents contained in Lender’s closing package.

Case law and the prior opinions of this Committee have consistently pointed out that an attorney-client relationship can be created in a variety of situations. In *Ethics Advisory Opinion 06-11*, we state the following caution: “The issue of who lawyers represent in a residential real estate closing has not been clearly resolved in South Carolina and caution should be taken.” That being said, it is clear in the case law and our prior opinions that the protection of an unsophisticated buyer/borrower is of paramount concern.

As noted in *Ethics Advisory Opinion 02-16*, a lawyer’s involvement in a real estate closing on behalf of one party does not necessarily mean that the lawyer is also representing another party at closing, however, “a lawyer may create an attorney-client relationship when the lawyer ‘volunteers to provide a legal explanation of the various documents involved in the settlement of a loan’ to another party. In other words, it is possible for a lawyer representing a lender to also create an attorney-client relationship with a buyer even where the lawyer specifically notified the buyer that he was only representing the lender. (See also, *Ethics Advisory Opinion 00-17*). Does a lawyer’s promise to ensure that a lender’s loan package is executed in accordance with lender’s instructions automatically create an attorney-client relationship between the attorney and lender? The answer is ‘no’.

As noted in *Ethics Advisory Opinion 91-03*, “other courts have said ‘in determining whether an attorney-client relationship existed..., the focus must be on the subjective expectations’ of the would-be clients, ‘such that their individual belief and reliance are safeguarded.’ *Glover v. Libman*, 578 F. Supp. 748 (N.D. Ga. 1983).” In a standard real estate closing, a lawyer may reasonably conclude that an institutional lender does not have any subjective expectation that the lawyer is providing legal representation to lender. In fact, a lender typically supplies its documents in the form of a pre-determined package with instructions on how its forms are to be executed. The lawyer is not supplying any legal advice to the lender.

A “standard real estate closing” means a residential real estate closing where Borrower has chosen and retained Lawyer and a sophisticated institutional Lender is providing financing evidenced by a loan package prepared in advance by the Lender and forwarded to the closing attorney for execution. While the Lawyer has an obligation to explain the documents proffered by Lender to the Borrower, Lender’s instructions that Lawyer ensure that its documents be properly executed does not, in and of itself, create an attorney-client relationship between Lender and Lawyer.

A different conclusion would be reached if Lender requested that Lawyer review the documents on behalf of the Lender to ensure Lender’s interests are protected or if Lender requested Lawyer to draft or opine on the sufficiency of the note and mortgage and other loan documents.

In those instances where a reasonable basis exists for a lawyer to believe that the lawyer represents both the borrower and the lender or that a party to the closing does not fully understand the situation, lawyer should take the appropriate steps to comply with Rule 1.7, Conflict of Interest and Rule 4.3, Dealing with Unrepresented Person.