



ETHICS ADVISORY OPINION

10-05

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:

§29-3-68(b) of the Code of Laws of South Carolina provides that a mortgagor may waive the right of appraisal in a mortgage. If a deficiency exists after foreclosure, the waiver would prevent an obligor from reducing the deficiency by having the property appraised.

The statute requires that the waiver be placed on the signature page. Most lenders provide the documents for closing including the mortgage. The waiver of appraisal rights often appears on a page other than the signature page.

Question Presented:

Does closing attorney have an obligation to inform either the Borrower or Lender that the waiver to right of appraisal attached to the mortgage is potentially unenforceable?

Summary:

Whether the lawyer may disclose the potential deficiency and to whom depends on the relationship between the lawyer and the parties to the closing. The question of whether a lawyer is obligated to disclose the potential deficiency is a standard of care issue and is outside the scope of this committee. Because Rule 1.4, SCACR Rule 407 does not apply, we do not address this issue further.

Opinion:

While the waiver of appraisal does not affect the purchase and closing of residential property, during a foreclosure action the waiver may prevent a Borrower from reducing the deficiency by having the property appraised. (§29-3-68, S.C. Code Ann.). It is the opinion of this Committee that advice related to anticipatory foreclosure litigation may be outside the scope of Lawyer's representation for purposes of overseeing a real estate purchase and, therefore, whether he must disclose the defect is a question of the proper standard of care, rather than professional conduct.

If, however, the question is whether the Lawyer may disclose to either the Borrower or Lender that the waiver is deficient, the primary determination must be whether the Lawyer represents the Borrower only, or if he represents both Borrower and Lender.

In Opinion 09-07, this Committee determined that a lawyer conducting a standard real estate closing where Borrower has chosen and retained Lawyer and the Lender has merely supplied the closing instructions, Lawyer does not represent the Lender. In such a case, while the Lawyer has an obligation to explain the documents prepared by Lender to the Borrower, Lawyer does not have an obligation to ensure the Lender has properly protected itself in the creation of its documents. Lawyer may therefore disclose the defect to Borrower, but this Committee does not opine whether he "must" disclose as that is a question of the proper standard of care regarding the scope of Lawyer's representation of Borrower.

If, however, Lender requested that Lawyer draft the loan documents, review the documents on behalf of the Lender to ensure Lender's interests are protected or otherwise opine on the sufficiency of the loan documents, it would be reasonable to believe the Lawyer represents both Borrower and Lender. At that point, discovery of the defective waiver may generate a conflict in Lawyer's representation of the parties to the closing.

Rule 1.7(a)(2) addresses an attorney's obligations when conflicts arise between clients. If the Lawyer represents the Borrower only in a standard real estate closing, he may disclose the deficiency and its potential benefits to Borrower. If, however, Lawyer represents the Borrower and the Lender, or otherwise has a duty to the Lender, he may not disclose the defective waiver to either party, but should advise both to seek new counsel for the closing. Since Lawyer is charged with advising Lender as to its interests, and since Lawyer's discovery would be beneficial to Borrower and detrimental to Lender in future litigation, the conflict requires Lawyer's removal as counsel for both parties.

Under Rule 1.7(a)(2), a Lawyer may not represent a client if there is a significant risk that the representation of another client will be materially limited by the lawyer's responsibilities to the first. In this case, should future litigation arise between Lender and Borrower, the parties would be directly adverse to one another. If the Lawyer represents both the Lender and the Borrower in the closing and notifies either party of the defective waiver, he is essentially giving anticipatory legal advice to one client that is directly adverse to the other. While this Committee believes such

anticipatory advice would be outside the scope of his representation, in assisting Lender in the correction of its documents at the closing table, Lawyer would be working directly adversely to the Borrower's potential future interests against Lender.