Supreme Court Approved
November 2, 2016
Committee Opinion
June 26, 2000

LEGAL ETHICS OPINION 1742

ACTIVITIES OF CLOSING ATTORNEY IN CONNECTION WITH REAL ESTATE TRANSACTION WHEN TITLE COMPANY IS REPRESENTING SELLER

You have presented a hypothetical situation in which Attorney has received a contract concerning a real estate transaction showing that Attorney will be the settlement agent. The contract has an addendum which indicates that the settlement agent was chosen by the purchaser and that seller will have a separate attorney. The contract states, "Fees for the preparation of the deed, that portion of the Settlement Agent's fee billed to the Seller, costs of releasing existing encumbrances, appropriate legal fees and any other proper charges assessed to the Seller shall be paid by the Seller." Subsequently, Attorney receives a letter from a title company stating: 1) that the title company has been retained to represent the seller; 2) that the title company will prepare the seller's documents, including the deed, the Certificate of Satisfaction, etc.; and 3) that Attorney's settlement statement should show no charges to the seller from Attorney. The letter further states that the title company's fee to the seller should be shown on the settlement statement, payable to the title company, and that seller will sign all documents in the title company's office.

Under the facts you have presented, you have asked the committee to opine on the following questions:

1. Can the title company be retained to represent the seller in the real estate transaction if the title company is not the settlement agent named in the contract?

    a. If so, does representation by a title company put the named settlement agent in the same position as if the sellers were represented by an attorney, i.e., does this representation by a title company relieve the seller of any charges by the settlement agent except those disclosed and agreed to by the seller?
    b. If the title company can represent the seller, can the fee to the title company on the settlement statement include the preparation of the deed, or should this be itemized separately with the preparing attorney's name?

2. If Attorney complies with the instructions of the title company, is Attorney aiding the unauthorized practice of law and thus subject to disciplinary action?

3. Would the answers be different if the person representing the title company is an attorney who owns or is employed by the title company?

4. Can an attorney acting in his capacity as an owner/employee of a title company ethically perform legal services for clients of the title company, or is he considered to be the same as a non-attorney in his relationship with title company clients? Are the clients considered to be represented by their own attorney in this situation?

The appropriate and controlling rules relative to your inquiry are: Rule 1.5 (b), requiring that fees be adequately explained to the client; Rule 5.4 (a) which prohibits a lawyer from sharing fees with a nonlawyer; Rules 5.4 (b) and (d) which generally prohibit a lawyer from practicing law as an employee of a corporation owned or controlled by nonlawyers; and Rule 5.5 (a)(2), stating that a lawyer shall not assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

The committee has previously opined, in the context of a real estate closing, that absent an agreement with or forewarning to the seller or seller's attorney, it is improper for a closing attorney engaged by the purchaser to impose certain fees on the seller. LEOs 425, 647, 878, 911,[(1)] 922, 927, 1177, 1228, and 1346.

Your inquiry raises the question of whether these opinions apply if the seller is represented by a lay title company as opposed to a licensed attorney. The conclusion reached in these opinions was not based, however, on whether the seller was separately represented. As we stated in LEO 1346, "if purchaser's attorney undertakes to perform those functions on behalf of the seller, the fees for the services first must be adequately explained to the seller who must then, after consulting with his own attorney, consent to the charge before it can be imposed on the seller." LEO 1346 (1990). The committee believes that Rule 1.5 (b)'s requirement that fees be adequately explained to a client would require advance notice and agreement by the seller, *even if the seller has not engaged independent counsel.* In that case, the closing attorney would be representing the seller as well as the purchaser. *Pickus v. Virginia State Bar*, 232 Va. 5, 348 S.E.2d 202 (1986)(When a lawyer acts as a closing or settlement attorney and no other lawyer is involved, the closing or settlement attorney represents all the parties and, in this limited sense, all the parties are his clients). Regardless of whether the title company is authorized to represent the seller, the seller must consent to the charges imposed by the closing attorney. This requires notice to the seller that he or she will be charged for certain fees or costs by the closing attorney sufficiently in advance of the closing. The purpose is to provide an opportunity for the seller, if he or she chooses, to avoid the imposition of charges for the performance of certain ministerial functions. LEO 1228.

In the companion opinion issued by the Standing Committee on the Unauthorized Practice of Law, that committee determined that the lay title company which is the subject of your inquiry could not lawfully undertake a legal representation of the seller. UPL Op. 197 (2000). The UPL committee opined that no employee of the title company is authorized to give legal advice to the seller nor prepare on the seller's behalf legal instruments affecting the title to real estate such as a deed transferring title to the purchaser. *Id.* Therefore, the UPL committee concluded that the closing attorney may regard the seller as unrepresented by independent counsel. This means, for example, that the closing attorney may communicate directly with the seller to obtain consent regarding the fees and costs the closing attorney intends to charge to the seller without violating Rule 4.2 of the Virginia Rules of Professional Conduct.[(2)]

As to your second inquiry, if the closing attorney complies with the instructions of the title company, the committee believes that the closing attorney would be assisting a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law. Rule 5.5 (a)(2). In the facts you present, the closing attorney would be disbursing to the title company payment for the preparation of the seller's deed, knowing that the title company is not authorized to practice law. Such conduct, in the committee's opinion, is violative of Rule 5.5 (a)(2).

With regard to your third and fourth inquiries, the committee agrees with the distinction drawn by the UPL committee in UPL Op. 197 between a lawyer who is an employee of the title company as opposed to a lawyer in private practice who simply owns the title company. If the seller were represented by a licensed attorney in private practice and that attorney also owns the title company, the attorney could properly advise the seller and prepare legal instruments on seller's behalf, subject to the ethical obligations discussed in LEO 1564 concerning lawyer-owned title companies. In contrast, if the attorney owns the title company but is working not as the seller's private attorney but on behalf of the title company, then that attorney should not be treated by the purchaser's attorney as representing the seller. Only an attorney engaged in private practice specifically retained by the seller may undertake legal representation of the seller. Similarly, if the licensed attorney is employed directly by the title company, and subject to its control, it would not be proper for the lawyer to provide legal services to customers of the title company. Rule 5.4 (a) prohibits the lawyer from sharing legal fees with the title company. Rules 5.4 (b) and (d) generally prohibit a lawyer from providing legal services or practicing law within a corporation owned by nonlawyers. Since the title company is not authorized by law to serve as the seller's legal representative at closing, the committee believes that the seller should not be regarded as represented by their own counsel.

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1. It is no longer permissible for the buyer's (or lender's) attorney to charge the seller for the preparation and filing of an IRS Form 1099-S. I.R.C. § 6045 (e)(3). This provision overruled, in part, LEOs 911, 922 and 927.

2. In representing a client, a lawyer shall not communicate about the subject matter of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.