29 REPRESENTATION OF SELLER, BUYER OR BORROWER BY LAWYER FOR FINANCIAL INSTITUTION*

Adopted January 18, 1964.

Syllabus

A lawyer who represents a financial institution may not permit his client systematically to refer its customers to him for legal services the customers may require personally in connection with loans in which the financial institution is involved. Furthermore, the lawyer may not represent, in addition to the financial institution, the seller, buyer, or borrower, unless he has the express consent of such parties given after a full disclosure of the facts.

Facts

A lawyer represents a financial institution engaged in making residential loans. Home owners and purchasers who apply for loans are directed by the financial institution to its lawyer, who then prepares the contract of sale between the parties. Later, for the closing, this lawyer prepares the deed, the note and deed of trust, and any second mortgage papers. He also examines the abstract and performs necessary title remedial work. The seller is charged by the lawyer for the deed, the remedial work, and one-half of the fee for the contract and the closing. The buyer is charged for the abstract examination, the note and deed of trust to the lending institution, any second mortgage papers, and one-half of the fee for the contract and closing.

Is the lawyer in violation of the Canons of Professional Ethics?

Opinion

In the opinion of the Committee, the lawyer may be in violation of Canon 27 (solicitation of professional employment), Canon 35 (intervention of lay intermediary), and Canon 6 (representation of conflicting interests).

The lawyer is in violation of Canon 27 if the financial institution, with his knowledge and consent, systematically refers its customers to him for such legal services as the customers may require personally in connection with loans in which the financial institution is involved. The lender is utilizing the services of its own lawyer in the preparation of the loan statement and the note and deed of trust to which it is a party. The other documents, while necessary to the loan, are instruments to which the lender is not a party and which should be drawn by the parties' own attorneys. The lender's lawyer, in systematically accepting this employment and charging the parties therefor, is guilty of the solicitation of professional employment through touters in violation of Canon 27. The lawyer should request his client not to refer customers to him unless they have no attorney of their own and unless they ask the lender to recommend counsel. Even in these circumstances, the customers should be apprised by the lender of the other local counsel available for such services, in addition to the lender's lawyer.

If the lawyer permits the systematic referral to him of the lender's customers, he is also in violation of Canon 35, because of the intervention of the lay intermediary between himself and the parties to the transaction. It is obvious that if the parties do not freely select the lawyer, but instead are routinely referred to him, he has allowed his lay client to intervene between himself and the parties whose rights and liabilities are affected by the performance of his services. The lawyer's relation to these parties becomes impersonal and his responsibility, rather than being direct to them, is to the lender to whom he owes his primary allegiance.

Finally, the lawyer violates Canon 6 unless he obtains the express consent of all parties whom he represents after a full disclosure of the facts. The interests of the lender may conflict with the interests of the buyer and seller and the interests of the buyer and seller may conflict with each other. If the lender's

lawyer also represents either the buyer or seller or both, he must have their consent to do so. The lawyer is "representing" these parties if he prepares documents affecting their rights and liabilities for a fee as in the instant case.

The above conclusions apply whether the loan involved is a residential loan or other type of real estate loan.

The Committee has relied in part upon its prior Opinion No. 12, adopted March 12, 1960, Opinion No. 17, adopted January 20, 1961, and Opinion No. 24, adopted July 20, 1962.

* With the changes effective January 1, 2008, the term "consent after consultation" was changed to "informed consent." "Consultation" only required "communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question." Despite the fact that the American Bar Association Ethics 2000 committee indicated that no substantive change was intended by the change to "informed consent," its definition now "denotes the agreement by a person to a proposed course if conduct after the lawyer has communication adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." See Rule 1.0 Comment [6] to Rule 1.0 indicates that the crux of this requirement is that "the lawyer must make reasonable efforts to ensure that the client or the other person possesses information reasonably adequate to make an informed decision." Thus, the lawyer's duty is not just to explain the significance of the decision, but also to make sure the client is sufficiently informed to consider available options and risks prior to making that decision. The Subcommittee recommends appending this legend to the following Formal Opinions: 29 (representation of seller, buyer or borrower by lender's counsel); 58 (water rights representation, multiple clients), 97 (service on board of public entity), 107 (Third-Party Auditors), 115 (collaborative law).