

**BAR ASSOCIATION OF ERIE COUNTY  
COMMITTEE ON PROFESSIONAL ETHICS**

Opinion No. 13-02

Topic: Real Estate Closings/Demand by Lender that Borrower's Attorney Confirm Terms in Mortgage Contract and Undertake Disclosure Obligation to Lender in Event of Breach by Borrower

Digest: A borrower's attorney may not ethically contract with the lender to inform the lender of facts constituting a breach of mortgage contract by the borrower, unless all conditions required by the applicable Rules of Professional Conduct, including, without limitation, informed consent by the borrower, are satisfied

Rules: 1.0(j), 1.1(c), 1.2(e), 1.6(a), 1.7(a), 1.8(a) and (b), 5.7, and 8.4(a)

**QUESTIONS**

In connection with the closing of a contract to purchase residential real estate, funds for which are being provided to the purchaser/borrower by a mortgage lender, is it ethical for the lender's attorney to demand that the borrower's attorney sign a written summary of the terms of the mortgage contract and undertake an obligation to notify the lender if the borrower's attorney discovers facts indicating that there has been a breach of the borrower's agreement not to obtain secondary financing?

If the lender makes such a demand upon the borrower's attorney, may the borrower's attorney ethically accede to the lender's demand?

**OPINION**

The effect of agreeing to the undertaking demanded by the lender's attorney would be to change in material respects the role normally assumed by the borrower's attorney, and potentially violative of the following Rules of Professional Conduct:

Rule 1.1 Competence

Rule 1.1 ... (c) **A lawyer shall not intentionally:...**

- (2) **prejudice or damage the client during the course of the representation** except as permitted or required by these Rules.

One of the most basic characteristics of the attorney-client relation is that the attorney should give undivided loyalty to the client, and not act contrary to the client's interests. This basic principle is embodied in Rule 1.1 and imposes on the borrower's attorney the duty to make sure that his or her actions are consistent with the borrower's interests and objectives. An agreement to disclose to the lender facts supporting a potential claim that the borrower breached the mortgage contract would appear to be damaging to the buyer and therefore should not necessarily be undertaken.

#### Rule 1.6 Confidentiality

**Rule 1.6(a) A lawyer shall not knowingly reveal confidential information, as defined in this Rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person, unless:**

- (1) the client gives informed consent, as defined in Rule 1.00);[ the other exceptions are not applicable here.]

Rule 1.0(j) makes clear that, to be effective, informed consent is to be given "after the lawyer has communicated information adequate for the person to make an informed decision, and after the lawyer has adequately explained to the person the material risks of the proposed course of conduct and reasonably available alternatives." The borrower's attorney should understand that a willingness of the borrower to sign the lender's form is not, by itself, proof that all the requirements of Rule 1.0(j) have been satisfied.

#### Rule 1.7 Conflict of Interest

Rule 1.7(a) Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that ... (2) **there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests.**

A serious ethical issue raised by the lender's form is that it would impose on the borrower's attorney duties to the lender that would likely conflict with the attorney's duties to the borrower. Those conflicting duties could in turn give rise to a perceived need by the borrower's attorney to protect his or her own interests by avoiding future disputes with the lender about compliance. This concern for the lawyer's own financial business, property, or other personal interests in the matter could themselves adversely affect the lawyer's judgment on behalf of the borrower. As stated in Comment [1] to Rule 1.7,

Loyalty and independent judgment are essential aspects of a lawyer's relationship with a client. The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of the client and free of compromising influences and loyalties. Concurrent conflicts of interest . . . can arise from the lawyer's responsibilities to ... a third person, or from the lawyer's own interests.

See also Rule 5.4 and Comment [2] to that rule. Rule 5.4 relates specifically to a lawyer's duty not to allow third parties who pay his or her attorney's fees for the representation of a different entity to influence the attorney's professional judgment. The attorney's duty to avoid such influence by third parties should apply with equal or greater force to prevent influence by parties whose interests are at odds with

those of the client, as in the case of a lender and borrower. Other relevant provisions are found in Rules 1.2(e), 1.8(a) and (b), and 5.7(a)(1).

#### Rule 8.4 Misconduct

Rule 8.4 A lawyer or law firm shall not:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

Where the facts and circumstances of a particular transaction show that it would be unethical for the borrower's attorney to sign the lender's form, a demand by the lender's attorney that the borrower's attorney nevertheless do so would put the lender's attorney in the position of inducing another to violate the Rules. This would be a violation of Rule 8.4(a).

#### **CONCLUSION**

In a mortgage loan transaction for the purchase of residential real estate, the borrower's attorney may not ethically agree with the lender to inform it of facts, arising or discovered in the future, that would constitute a breach by the borrower of the mortgage terms, unless the applicable requirements specified in, without limitation, Rules 1.00), 1.I(c), 1.2(e), 1.6(a), 1.7(a), 1.8(a) and (b), and 5.7, are satisfied.

Because there may theoretically be circumstances in which a borrower's attorney is permitted to enter into such an agreement with the lender without violating any of the Rules of Professional Conduct, the committee is currently unwilling to opine that a request by the lender's attorney that the borrower's attorney sign the agreement would necessarily violate Rule 8.4(a). However, where it is evident to the lender's attorney that the borrower's attorney is entering into the agreement without having obtained the informed consent of the borrower or without having complied with other conditions imposed by the rules, the lender's attorney may be acting in violation of Rule 8.4(a). The determination of that issue would require analysis of the circumstances presented by each particular case.