

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

Opinion No. 14-01

Topic: Real Estate Closing/Demand by Mortgage Title Company that Seller's Attorney agree to indemnify and hold the title company harmless from any loss due to water charges, real estate taxes, and Outstanding mortgages

Digest: A Seller's attorney may not ethically contract with the mortgage title company to indemnify and hold the title company harmless from loss due to water charges, real estate taxes and outstanding mortgage

New York Rules of Professional Conduct:

1.7(a) and (b) and 8.4(a)

QUESTION

In connection with the closing of a contract to purchase real estate, is it ethical for the seller's attorney to comply with the demand of a mortgage title company to indemnify and hold the title company harmless from any loss due to water charges, real estate taxes, and outstanding mortgages?

OPINION

The opinions by the Bar Association of Erie County #11-02 (a personal injury attorney may not guarantee client's settlement obligations) and #11-03 (a seller's attorney may guarantee a limited "de minimis" escrow of twice the amount of a current water bill). These opinions are available on the Bar Association of Erie County website.

Specifically, Rule 1.7(a) provides:

"... a lawyer shall not represent a client if a reasonable lawyer would conclude that either:

(1) the representation will involve the lawyer in representing differing interests; or

(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."

Rule 1.7 is premised upon the principle that loyalty and independent judgment are essential aspects of a lawyer's relationship with a client. Moreover, a lawyer's professional judgment should be

exercised within the bounds of the law, solely for the benefit of the client and free from compromising influences and loyalties. (See Roy D. Simon, *Simon's New York Rules of Professional Conduct Annotated* (2014 Edition) Comment 1 to Rule 1.7).

This form of indemnity agreement which requires the lawyer's participation as a party to the real estate contract will necessarily impair the lawyer's professional judgment by creating competing responsibilities and interests thereby impairing the lawyer's ability to exercise professional judgment on behalf of their client.

Subsection 1.7(b) provides a four prong test to determine if a conflict under Rule 1.7(a) can be waived by a client. Here we determine that the nature of the conflict makes the conflict non-consentable as no reasonable attorney would determine that the guaranty of a water bill, real estate taxes and the outstanding mortgage would not effect the attorney's interest unless the amounts were "de minimis" and an amount held in escrow was well in excess of the amount that could become due.

The obligations of which the seller's lawyer is requested to undertake, indemnification of a client's real estate taxes and outstanding mortgage, creates 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 and other personal assets. Such obligation is not a "de minimis" water escrow guarantee of up to \$250 found permissible in Opinion No. 11-03.

Moreover, as noted in Opinion No. 11-02, a lawyer that demands that seller's counsel guarantee or request indemnification which creates such a conflict between seller's attorney and seller may themselves be knowingly assisting or inducing another lawyer to violate the Rules of Professional Conduct in violation of Rule 8.4.

CONCLUSION

In a real estate transaction, for the purchase of real estate, the attorney for the seller may not ethically agree with the mortgage title company to indemnify the mortgage title company for any loss due to water charges, real estate taxes, and any outstanding mortgages.

Such an agreement, unlike a "de minimis water escrow guarantee," creates an unconsentable conflict of interest between seller and seller's attorney.