
**E-97-1 Limitation of representation in
residential real estate transactions**

Question

May a lawyer ethically limit the scope of the lawyer's representation in a residential real estate transaction to drafting a deed and transfer return?

Facts

It is common for title companies to offer closing services to residential real estate customers, and to advise sellers that the title company will obtain a deed and transfer return from a lawyer in order to assist the seller and the buyer in completing the necessary transaction. The title company supplies a lawyer with the specific information necessary to complete the deed and transfer return. The lawyer prepares the documents based solely on information received from the title company and delivers the documents to the title company prior to the closing. The lawyer does not have direct contact with the seller or buyer and does not do a conflict check on either seller or buyer. The lawyer sends a statement for legal services rendered to the title company. And the lawyer's fee is deducted from the proceeds received by the seller from the buyer. The title company then issues a check to the lawyer for payment of the fee.

Opinion

The Rules of Professional Responsibility for Attorneys support several models, or approaches, to legal representation in residential real estate transactions. Among the parties which might be represented either individually or collectively in a residential real estate transaction are the seller, the buyer, the lender, as well as the title company. In some situations, a lawyer might represent one party to the transaction, and in other situations multiple representation might be appropriate. Although many residential real estate transactions are straightforward and routine, some are not. Furthermore, unanticipated problems can develop in apparently routine transactions. Consequently, the model of representation appropriate to a specific transaction will vary with the complexity of

the transaction and the extent to which the needs, interests, and expectations of the parties to the transaction vary.

Single Client Model

A lawyer representing only one party in a residential real estate transaction should be aware that there is a danger that the other parties might incorrectly assume that the lawyer is either acting on their behalf or is disinterested. Consequently, the lawyer should be careful not to state or imply either that the lawyer is acting on behalf of a party who is not a client or that the lawyer is disinterested. See SCR 20:4.3 and comment. Furthermore, SCR 20:4.3 requires that a lawyer who knows or reasonably should know that an unrepresented party misunderstands the lawyer's role in the matter make reasonable efforts to correct the misunderstanding. To avoid possible misunderstanding, the lawyer should be proactive and communicate with all parties about the nature of the representation that is being provided.

If the lawyer is representing a party other than the title company, the lawyer must ensure that the lawyer's relationship with the title company does not interfere with the duties owed by the lawyer to the client, whether the client is the seller, the buyer, or the lender. SCR 20:5.4(c). Similarly, if the lawyer is representing a party other than the seller, the lawyer must ensure that the fact that the seller is paying the lawyer's fee does not interfere with the lawyer's professional judgment or with the client-lawyer relationship and that the client consents after consultation. SCR 20:1.8(f).

Multiple Client Model

Under SCR 20:2.2, a lawyer may act as an intermediary and represent more than one party to a residential real estate transaction if:

(1) The lawyer consults with each client concerning the implications of the common representation, including the advantages and risks involved and the effect on the attorney-client privileges and obtains each client's consent in writing to the common representation;

(2) The lawyer reasonably believes that the matter can be resolved on terms compatible with the clients' best interests, that each client will be able to make adequately informed decisions in the matter and that there is little risk of material

prejudice to the interests of any of the clients if the contemplated resolution is unsuccessful; and

(3) The lawyer reasonably believes that the common representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients.

In residential real estate transactions of the type described above, the lawyer would normally accomplish the consultation by some form of letter which fully describes the implications of the common representation. Under some circumstances, however, personal consultation with clients may be necessary to fully apprise them of the implications of the common representation.

Limiting Representation

Under SCR 20:1.2(c), a lawyer may limit the scope of representation, after consultation with the client, to the preparation of deed and transfer return. When the scope of representation is so limited, it is the lawyer's responsibility to ensure that the client understands and accepts the limited nature of the representation. This obligation exists whether the lawyer is representing a single client or multiple clients. In residential real estate transactions of the type described above, a lawyer would normally accomplish this purpose by some form of letter which fully describes the limited role that the lawyer will serve in the transaction. Under some circumstances, however, more specific or personal consultation with the client or clients may be necessary to fully apprise them of the limited nature of the representation.

Assisting in the Unauthorized Practice of Law

Under SCR 20:5.5, a lawyer cannot assist a non-lawyer in the unauthorized practice of law. The Committee is of the opinion that an attorney who limits the scope of representation in real estate transactions to drafting deeds and transfer returns does not solely by that limitation assist a title company in the unauthorized practice of law. Such a conclusion would depend upon the specific activities of the title company both before and during the closing; a legal determination that the activities of the title company amounted to the unauthorized practice of law; and, a review of the involvement of the lawyer in the activities of the title company related to, and at, the closing.