

NEW YORK STATE BAR ASSOCIATION

Committee on Professional Ethics

Opinion 626 - 3/19/92 (13-91)

Topic: Real estate attorney; multiple representation; amount of fee.

Digest: Lawyer representing lender in transaction where fee is paid by borrower must disclose to borrower that lawyer also will receive compensation from title insurer for representing its interests at closing; lawyer may retain total fees paid by borrower and title insurer so long as lender-client consents and total amount is not excessive.

Code: DR 2-106(A); DR 4-101;DR 5-107(A); EC 2-17.

QUESTIONS

(1) Is a lawyer who represents a lender in a real estate transaction obligated to disclose to the borrower, who will pay the lawyer's fee, that the lawyer also will be compensated by the title insurance company for whom the lawyer will act at the closing of the real estate transaction?

(2) May the lawyer retain the fees paid by the borrower and the title insurer where the lawyer's client, the lender, has consented to that arrangement?

OPINION

This opinion addresses the disclosure obligation that may arise from the restriction on excessive legal fees found in DR 2-106(A) where a lawyer's fees are paid by a person other than the lawyer's client. The issues discussed here involve circumstances in which a law firm represents a lender in a real estate transaction in which the borrower pays the law firm's fee for its representation of the lender, and also authorizes the lender to obtain the title insurance necessary to the transaction. The lender's law firm, which orders the title insurance, receives an additional fee directly from the title insurance company. An attorney from the firm attends the closing of the transaction on behalf of both the lender and the title insurance

company. The lender is aware of and consents to the firm's work for the title insurance company and the compensation the firm receives from it.

With respect to the first question, we conclude that the firm is obligated to report to the borrower that it will act for both the lender and the title insurer at the closing, and the amount of the fee it will receive from the title insurer for such services. We recognize that the firm has no attorney-client relationship with the borrower, and the borrower's contractual obligation to pay the fee for services performed for the lender usually does not confer upon the borrower any authority to negotiate with the firm the amount of that fee. Nevertheless, DR 2-106(A) prohibits a lawyer from charging or collecting an excessive fee, and where a nonclient is paying the firm's fee, the nonclient is entitled to be charged an amount that is not impermissible¹. Consent by the lender, the firm's client, cannot authorize the firm to receive "amounts from the transaction that would in the aggregate constitute an excessive fee." N.Y. State 576 (1986) (citing DR 2-106[A]). As we stated in that opinion: "DR 2-106(A), prohibiting the lawyer from charging or collecting a clearly excessive fee, and EC 2-17 limiting a lawyer's fee to a 'reasonable fee,' are not limited to situations where it is the client that pays the fee (even assuming the agreement of the borrower with the lender does not require that the fee be reasonable)."

The restriction of DR 2-106(A) can be effectuated in the circumstances at issue here only where the party with the economic interest in the lawyer's fee has sufficient information about the compensation to be received by the lawyer in the transaction to determine whether the total amount is excessive and therefore impermissible. It bears noting that nothing in the facts presented suggests that the fact or amount of the compensation received by the firm from the title insurer constitutes a client confidence or secret which the lawyer would be prohibited to disclose by DR 4-101. Hence, compliance with DR 2-106 compels the lawyer to disclose to the borrower the amount of compensation to be paid to the lawyer by the title insurer for services rendered at the closing of the borrower's real estate transaction. Cf. Connecticut Inf. Op. 84-15 (1984), ABA/BNA 801:2065 (not addressing any issue under DR 2-106, but recommending that a lender's lawyer disclose to the borrower that the lawyer will receive a commission from a title company for obtaining the lender's title insurance policy that is paid for by the borrower, but only where the nonclient borrower is unrepresented in the transaction and might believe that the lender's lawyer is acting on the borrower's behalf; recommendation that disclosure be made is based on analogy to DR 5-107[A], requiring consent of client for receipt by lawyer of compensation from source other than client).

¹ As we stated in N.Y. State 576, the total compensation received by a lawyer from its client and from the title insurer will constitute an excessive fee "[t]o the extent that the services for which the title company is paying are duplicative of services the lawyer would render to the client in any event. ..." We do not make any determination as to whether such circumstances are present in the facts described here. In addition, the Committee does not pass upon questions of law, and therefore we do not address any issues that might be raised by such circumstances under the Real Estate Settlement Procedures Act, 12 U.S.C. § 2601, et seq., the New York Insurance Law, § 6409(d), or any other legal provision.

We believe that the second question is addressed fully by N.Y. State 576 and N.Y. State 351 (1974), which provide that the lawyer acting as an "attorney closer" for a title insurance company in a real estate transaction in which the lawyer also represents a party must credit the client with the amount received from the title insurer "unless the client otherwise consents." In the facts at issue here, the lender client has so consented. The fact that the borrower pays the fee agreed upon between the firm and its lender-client does not affect, as an ethical matter, the firm's ability to determine with its clients the appropriate amount of compensation it should receive from the transaction, so long as that amount is not excessive. See generally DR 5-107(B). We note, however, as we did in N.Y. State 576, that "we do not examine what legal duties and restrictions are imposed upon the lender vis-a-vis the borrower in the circumstances with respect to lender's attorney's fees."

CONCLUSION

For the reasons stated, the questions posed are answered in the affirmative.