

Nebraska Ethics Advisory Opinion for Lawyers
No. 77-1

AN ATTORNEY WHO HAS RENDERED A TITLE OPINION TO A CLIENT ON REAL ESTATE HE IS PURCHASING, MAY ALSO, WITH THE CLIENT'S CONSENT, RENDER A TITLE OPINION TO THE BANK FINANCING THE PURCHASE, AND HE WOULD NOT SUBSEQUENTLY BE PRECLUDED FROM REPRESENTING EITHER PARTY IN A FORECLOSURE PROCEEDING WHICH DOES NOT BRING INTO QUESTION THE VALIDITY OF THE LEGAL TITLE OR THE MORTGAGE AS A VALID FIRST LIEN, PROVIDED HE IS NOT THEN REPRESENTING BOTH BANK AND MORTGAGOR AS REGULAR CLIENTS OR THAT THERE ARE NO ADDITIONAL CONFLICT OF INTEREST FACTORS INVOLVED BEYOND THE FACT OF HAVING RENDERED THE ORIGINAL TITLE AND LOAN OPINIONS.

FACTS

You have inquired as to whether it would be proper for you to render a title opinion to a bank with respect to a tract of land which a client of yours is planning to purchase and with respect to which you have already prepared and given a title opinion to your client.

You asked for the advice of the Committee with respect to whether a conflict of interest existed with respect to preparing a title opinion for the bank for loan purposes, and whether or not you would be precluded from representing your client in the event the bank took foreclosure action on the mortgage at a later date.

DISCUSSION

The Canon involved would appear to be Canon 5 of the Code of Professional Responsibility which provides as follows:

"A lawyer should exercise independent professional judgment on behalf of a client."

Ethical Consideration 5-14 provides as follows:

"Maintaining the independence of professional judgment required of a lawyer precludes his acceptance or continuation of employment that will adversely affect his judgment on behalf or dilute his loyalty to a client. This problem arises whenever a lawyer is asked to represent two or more clients who may have differing interests whether such interests be conflicting, inconsistent, diverse or otherwise discordant."

An analogous situation is found in ABA Formal Opinion No. 37 wherein it was held that an attorney who, as a publicly employed Assistant Chief Title Examiner, perfunctorily approved a title examination may not represent a party in a suit concerning that title even though such approval antedated his representation by 10 years.

Also applicable is the following from Drinker, Legal Ethics, Chapter 6, Page 113:

"A lawyer may not accept employment to attack the validity of an instrument which he drew for a client, or accept employment to take a position with regard to an instrument contrary to an opinion which he has given construing it. Where two individuals for whom he drew a contract or a mortgage get into a dispute over it, he may not represent either."

On the other hand, it is also stated in Drinker at Page 105:

"The test of inconsistency is not whether the attorney has ever appeared for the party against whom he now proposes to appear, but it is whether his accepting the new retainer will require him, in forwarding the interest of his new client, to do anything

which will injuriously affect his former client in any matter in which he formerly represented him, and also whether he will be called upon, in his new relation, to use against his former client any knowledge or information acquired through their former connection."

Normally, a mortgage foreclosure action does not raise an issue of title or the validity of the mortgage lien. The subject matter of the inquiring attorney's opinions, therefore, are not material to the questions involved in the usual foreclosure action.

CONCLUSION

Accordingly, your questions are answered as follows:

1. There is no basic conflict of interest in preparing a title opinion for the Bank for loan purposes so long as you disclose to your client for whom you have previously prepared the title opinion that you are doing so, and he has no objection.

2. Unless the subsequent foreclosure action brings into question the validity of legal title or of the mortgage as a valid first mortgage lien as to which you have rendered opinions, the majority of the Committee feel that you would not be precluded from representing either party in the foreclosure proceeding--assuming, of course, that you are not at that time representing both the Bank and the mortgagor as regular clients or that there are no additional conflict of interest factors involved other than the fact of your having rendered the title and loan opinions originally.