

DIGEST OF ETHICS ADVISORY PANEL
Opinion #88-1, Request #1
ISSUED APRIL 15, 1988

An attorney seeks Panel advice as to whether he, as counsel for the borrower should sign an opinion indicating that the documents prepared by the lending bank's counsel are "legal, valid, binding and enforceable." The inquiring attorney suggests that the lender's requirement is actually coercive in nature, since many banks will not close the loan unless the borrower's counsel gives the opinion specified. The precise language the inquiring attorney submits for Panel review reads as follows:

The loan and all agreements required of the Borrower and Guarantor in connection with the transactions thereunder constitute the legal, valid and binding obligations of the Borrower and Guarantor enforceable in accordance with their respective terms, except as may be limited by any applicable bankruptcy, reorganization, insolvency, moratorium or other laws affecting creditor's rights generally and except as certain remedies thereunder may be subject to equitable principles.

Canon 5 requires a lawyer to exercise independent, professional judgment on behalf of a client. EC 5-1 requires a lawyer to exercise his professional judgment "free of compromising influences and loyalties" and EC 5-21 emphasizes that "the obligation of a lawyer to exercise professional judgment solely on behalf of his client requires that he disregard the desires of others that might impair his free judgment." DR 5-105 (A) implements these considerations by prohibiting a lawyer from accepting legal employment if that employment "would be likely to involve him in representing differing interests." In Opinion #87-18 of the Vermont Bar Association Committee on Professional Responsibility, published in the March 2, 1988 issue of the current reports of the ABA/BNA Manual on Professional Conduct, the Vermont Committee on Professional Responsibility reviewed a scenario in which a lawyer represented clients "who purchase property in the same transaction in which mortgages are created." The lawyer did not represent any of these clients after the purchase transaction but was engaged by local banks to initiate foreclosure actions against mortgagors who, in some cases, he had represented earlier.

Reviewing this scenario, the Vermont Committee on Professional Responsibility concluded that the term "differing interests" as used in DR 5-105 (A) must include "every interest that will adversely affect either the judgment or loyalty of a lawyer to a client, whether it be conflicting, inconsistent, diverse, or some other interest." The Vermont Committee took the position, further, that the waiver-of-conflict provisions of DR 5-105(C) could not lift the prohibition imposed by DR 5-105(A), because the lawyer could not adequately represent both interests.

In State Bar v. Rockwell W. Va. Supp. Ct. App. No. 17679, decided December 17, 1987 the Committee on Legal Ethics of the West Virginia State Bar reviewed a convoluted situation in which a lawyer serving in one capacity obtained confidential information relevant to matters handled in another capacity. Reviewing the evidence, the West Virginia Committee specifically

noted that it was not clear whether the lawyer actually had used confidential information gained in one capacity when he acted in the other capacity. The Committee nevertheless concluded that the lawyer had involved himself in a situation which "created the possibility of the misuse of client confidences and created an appearance of impropriety."

The Panel takes a position consistent with the reasoning set forth in the opinions cited. The Panel therefore advises the inquiring attorney that to sign a document as counsel for a borrower which contained the specific language submitted for review would constitute a violation of Ethical Considerations 5-1 and 5-21 and a violation of Disciplinary Rule 5-105(A).

Ethics Advisory Panel advice is protective in nature. There is no requirement that an attorney abide by a Panel opinion, but if he or she does, he or she is fully protected from any charge of impropriety.