

DIGEST OF ETHICS ADVISORY PANEL
OPINION 90-23, REQUEST #102
Issued May 31, 1990

An attorney seeks Panel advice as to the propriety of accepting certain payments for services which are calculated in the manner described.

The attorney advises the Panel that a residential real estate lender, ("Lender"), has asked him to represent it in connection with residential real estate transactions in two different situations. In the first circumstance the attorney would provide document preparation and closing services. In this case he would be paid two itemized amounts, disclosed to the borrower as: "Document Preparation" and "Closing Services."

In a second circumstance the attorney would provide document preparation, closing services and title services. In this case Lender proposed to disclose and itemize the charge for the attorney's services as "Closing Fee" and "Title Insurance Fee." In this second circumstance the total fee paid to the attorney would be higher than in the first circumstance. The attorney states that he feels the higher fee is acceptable in terms of compensating him proportionately for the amount of work done. The attorney adds, however, that Lender would keep an amount equal to the "Document Preparation" fee as additional compensation for documents it has prepared. The attorney asks whether these fee arrangements are proper.

General Laws 1956 § 19-10-9 (1981 Reenactment) provides:

Lending institutions -- Title attorneys. -- Every bank, trust company, loan investment company, and credit union or any other lending institution which accepts an application for any residential mortgage loan or any commercial mortgage loan and which requires that a title attorney search the title of the subject real estate shall first permit the prospective mortgagor to select a qualified title attorney of his or her own choice to search the title of the subject real estate, provided the lending institution may require the prospective mortgagor to provide it with a title insurance policy in the amount of the mortgage.

In the event the prospective mortgagor does not select a qualified title attorney, then the prospective mortgagor shall sign a waiver permitting the lending institution to select its own attorney.

In responding to the attorney's questions the Panel assumes that before representing Lender in either of the situations described the attorney has satisfied himself that the provisions of § 19-10-9 have been met. Failure to do so would constitute participation in the violation of a state statute.

Rule 5.4 titled "Professional Independence of a Lawyer," provides, in pertinent part:

(a) A lawyer or law firm shall not share legal fees with a nonlawyer . . .

General Laws 1956 § 11-27-3 (1981 Reenactment) provides:

Receipt of fees as practice of law. -- Any person, partnership, corporation or association that receives any fee or any part of a fee for the services performed by an attorney at law shall be deemed to be practicing law contrary to the provisions of this chapter.

The Panel takes the position that it is a violation of Rule 5.4 and § 11-27-3 for the attorney to participate in the scenarios described given the fee arrangements described. In the first scenario the attorney is paid for the legal service of "document preparation." If this is, in fact a legal service then the attorney is in violation of Rule 5.4 and § 11-27-3 when, in the second scenario the fee for "document preparation" is paid to the lender instead of to the attorney. If the document preparation is not, in fact, a legal service in either scenario then in the first scenario the attorney would be charging legal fees for a non-legal service, in violation of the general requirement that a lawyer's fee be reasonable. (See Rule 1.5). In past opinions the Panel has noted that an attorney violation of a state statute also constitutes a violation of the prohibition against "conduct . . . prejudicial to the administration of justice." See Rule 8.4, DR 102(A)(5), Digests of opinions 88-21, 88-32.

The attorney asks whether the ethical problems arising from the arrangements described can be avoided if the attorney refuses the document preparation fee in all cases. Since the document preparation fee would presumably continue to represent a fee for legal services, the same ethical problems and rule violations would arise if the attorney allowed Lender to share the legal fees in both situations instead of just one.

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.