

ETHICS ADVISORY PANEL
OPINION # 95-25, Request # 587
Issued May 4, 1995

The inquiring attorney is employed by a law firm that represents lenders in financing transactions including foreclosure and bankruptcy work. The inquiring attorney anticipates including real estate closings to his/her practice. In this regard, the inquiring attorney anticipates representing both lender and borrower in real estate closings, with the consent of both parties. The inquiring attorney asks if a conflict of interest would arise if he/she represented a foreclosing lender in an action against a borrower who he/she represented in connection with the purchase of real estate subject to the defaulted mortgage.

Rule 2.2 entitled "Intermediary" is appropriate when a lawyer represents two or more parties with potentially conflicting interests. The Rule states:

(a) A lawyer may act as intermediary between clients 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 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.

(b) While acting as intermediary, the lawyer shall consult with each client concerning the decisions to be made and the considerations relevant in making them, so that each client can make adequately informed decisions.

(c) A lawyer shall withdraw as intermediary if any of the clients so requests, or if any of the conditions stated in paragraph (a) is no longer satisfied. Upon withdrawal, the lawyer shall not continue to represent any of the clients in the matter that was the subject of the intermediation.

PANEL DRAFT

95-25, Request # 587

March 23, 1995

Page Two

In considering whether to act as an intermediary, a lawyer should consider the relationships between the parties. If the relationship between the parties is subject to contentious litigation or negotiations or is presently antagonistic, then intermediation is an impossible task. See, Comments to Rule 2.2. The Panel opines that the inquiring attorney should follow the criteria set forth in the Rule. If and when a conflict of interest arises between lender and borrower, the inquiring attorney must withdraw from representation of both parties pursuant to Rule 2.2(c).