

24th March 2015 Dual Representation in Commercial Closings

The NC State Bar issued a formal ethics opinion on January 23, 2015, ruling that common representation of a borrower and lender in a commercial real estate transaction is a “nonconsentable” conflict in most situations.

The formal opinion poses two inquiries and related opinions important to any real estate practitioner that represents either borrowers or lenders on commercial real estate deals.

The first inquiry asks whether a lawyer may represent both a borrower and lender for a closing of a commercial loan secured by real property; and, if so, is informed consent required and what may be disclosed to obtain the consent. The opinion discusses certain ethics rules, a couple of out of state court cases and ultimately states that it is a nonconsentable conflict unless eight conditions can be satisfied:

- the lawyer must confirm that the contractual terms of the deal have been finally negotiated prior to commencement of representation
- there are no material contingencies to be resolved
- the lawyer reasonably believes that he or she will be able to provide competent and diligent representation to each client
- it is unlikely that a difference in interest will occur and if it does, that it will not materially interfere with the lawyer’s independent professional judgment in considering alternatives or forecloses a course of action that should be pursued
- the lawyer reasonably concludes that he or she will be able to act impartially in the representation of both
- the lawyer explains that his or her role is limited to tasks necessary to close the loan and that this prohibits the lawyer from advocating for specific interests for either party
- the lawyer discloses that he or she must withdraw from the representation of both parties if a conflict arises
- both parties give informed written consent after the foregoing disclosures

Attorneys will likely find that satisfying all eight conditions is difficult or impossible in almost all commercial real estate closings. The opinion also states that regardless if the lawyer concludes the eight conditions can be met, the attorney cannot represent the lender, the borrower and the seller if the seller will provide secondary financing secured by a subordinate deed of trust.


The second inquiry asks whether a lawyer can solely represent the lender but handle most aspects of the closing, including the title search, certification, handling of documents, and holding and disbursing the funds. The background information states that a certain large regional bank is requiring that the lender’s counsel handle these aspects of a closing. The opinion allows the lender’s lawyer to serve as the “closing lawyer” if:

- the borrower is informed that the closing lawyer will not represent its interests and will interpret the loan documents in the light most favorable to the lender
- the borrower is given reasonable opportunity to obtain its own counsel
- the lawyers for both parties advise their clients about the risks and benefits of the lender’s lawyer serving as the closing lawyer

- the borrower's lawyer is allowed to participate as necessary to protect the borrower's interests.

You can find a link to the opinion at: <http://www.ncbar.com/ethics/ethics.asp?page=1&from=1/2015&to=3/2015> [<http://www.ncbar.com/ethics/ethics.asp?page=1&from=1/2015&to=3/2015>]

Posted 24th March 2015 by Amy Lanning

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