FORMAL OPINION NO. 33 *

PROPRIETY OF ATTORNEY DRAFTING LEGAL INSTRUMENTS FOR REALTORS AND TITLE COMPANIES

The following inquiry has been submitted to the Committee for its consideration and opinion:

> "Is it proper for an attorney to prepare deeds, contracts and mortgages for a real estate broker or title insurance company who sends to the attorney the information concerning real estate transactions with the request the attorney prepare and return the appropriate legal documents? You may assume the attorney has no personal contact with the parties to the transactions."

The Committee is informed the foregoing practice is quite prevalent in Idaho as well as in other states. Custom does not, however, make such conduct proper if in fact it is improper.

Canon 35 provides that professional services of a lawyer should not be controlled or exploited by any lay agency which intervenes between client and lawyer. The lawyer's responsibilities and qualifications are individual. He should avoid all relations which direct the performance of his duties by or in the interest of such intermediary. A lawyer's relation to his client should be personal, and the responsibilities should be direct to his client.

Canon 47 provides, "No lawyer shall permit his professional services, or his name, to be used in aid of, or to make possible, the unauthorized practice of law by any lay agency, personal or corporate."

It is the opinion of this Committee that an attorney cannot properly prepare legal instruments under the circumstances described in the inquiry.

The Oregon State Bar in recent years has had occasion to pass upon similar questions. In one instance the following inquiry was posed:

> "A has been contacted by a title insurance company which proposes to employ him, on a

> retainer basis, to prepare deeds, mortgages and contracts for customers of the title insurance company or its escrow department. The title company would make no charge for the preparation of such instrument. Each real estate broker or party to an escrow transaction would be asked by the title company if he had his own attorney and wanted him to draw the papers. If the customer's answer were negative, then he would be advised that the papers would be drawn by the title company's attorney with no charge to the customer other than the regular escrow fees."

The Oregon committee held such employment would be improper, since it would permit the exploitation of the professional services of A by a lay intermediary and would contemplate the practice of law by the title company (Oregon State Bar Opinion No. 77-1960).

In yet another opinion dealing with an identical situation now before this Committee, the Oregon Bar held such conduct improper for the reason the attorney's relationships to the customers of the title company have not been personal, nor has his responsibility to the buying and selling parties been direct. It was assumed by that Committee that the title company was not a party to the transaction and that the attorney has neither seen, discussed with nor billed the parties directly involved in buying or selling (Oregon State Bar Opinion No. 88-1960).

In two opinions issued this year the Oregon Committee has reaffirmed its position that such conduct is improper (Oregon State Bar Opinions No. 102 and 103). In the latter opinion it was assumed the title company were (sic) to secure from its patrons a writing designating attorney "A" as their attorney and directing the title company to secure the services of the attorney to prepare the documents. These additional facts were not sufficient to create an attorney-client relationship.

The precise question before our Committee was submitted to the Committee on Professional Ethics of the American Bar Association. The following excerpts are from the opinion of that Committee:

"It is our opinion that a lawyer cannot properly prepare deeds, contracts, mortgages, etc., under the circumstances you have described. Such a transaction lacks the personal contact which should exist between attorney and client. Such relationship is necessary to a proper representation of any client.

"For example, does a client wish to take title individually or in his wife's name, or as a co-tenant or joint tenant or tenant by the entirety with his wife? This sometimes vital determination requires an understanding by the lawyer, of the source of the funds with which the property is being purchased, how previous property was held by a client and his wife and other possible tax considerations.

"It is obvious that few contracts of purchase are of such a nature that a word of explanation is not required by the purchaser or the seller. In this connection an attorney must be familiar with the title in order to determine what encumbrances exist in many instances (and) must be prepared to explain the effect of restrictive covenants, easements, etc. If the premises are being sold subject to an existing mortgage, the principals will have questions regarding the due date of the existing mortgage, and various questions regarding the terms. The lawyer must also determine under what circumstances the seller can or should give a warranty deed and of course a purchaser is ordinarily entitled to whatever assurances of title are customarily given, in the absence of special circumstances.

"The disadvantage of drawing deeds or other instruments without opportunity to confer with a client are many as indicated above. It seems almost impossible for a lawyer to properly prepare a deed, contract or mortgage in total ignorance of existing problems and with no opportunity to discuss the situation with his client. Furthermore, there is no way to avoid a client relying

> on the lawyer's work if his name is printed on the deed or a statement is rendered for preparing certain papers. Most buyers or sellers would assume that the instruments had been prepared to the best of the lawyer's professional ability. Thus mispresentation (sic) might occur or serious misunderstanding result.
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> "In connection we refer you to Canon 47 which provides 'No lawyer shall permit his professional services, or his name, to be used in aid of, or to make possible, the unauthorized practice of law by any lay agency, personal or corporate.'" ABA Informal Opinion C-508 (1962).

This Committee concurs in the views expressed by both the Oregon State Bar opinions and the American Bar Association opinion above cited.

One other contention urged in apparent justification of the questioned conduct is the argument the realtor or title company is the actual client. This is fallacious, since neither is a party to the instruments drawn. Furthermore, if the realtor or title company assumed and paid the attorney's fees but still was not a party to the instruments, such conduct would constitute the unauthorized practice of law and the exploitation of professional services through intermediaries.

DATED this 18th day of April, 1962.

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*See, DR 3-101(A) and DR 5-107, Idaho Code of Professional Responsibility; I.S.B. Opinion No. 9 (March 11, 1958).