

OPINION 26 REVISITED

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As a real estate agent, you know that you have an obligation to provide a notice to buyers and sellers that they have a right to hire an attorney as the cover of any sales contract you prepare. However, is that all you have to do to satisfy the mandates of the case known as Opinion 26? If the buyer or seller do not hire an attorney, what can you do to assist them to ensure the transaction will close? What do you have to do to satisfy your obligations under Opinion 26 even if the buyer and seller hire attorneys?

Although you undoubtedly are familiar with the requirement that you provide the Opinion 26 notice to buyers and sellers, in these difficult economic times you also must be familiar with your other responsibilities under Opinion 26, as well as the opportunities that Opinion 26 provides to you to assist buyers and sellers when they decide not to incur the cost of hiring a lawyer.

BACKGROUND

In 1995, the New Jersey Supreme Court decided in In re: Opinion No. 26 that it is in the public interest to permit buyers and sellers of residential real estate to choose whether or not to incur the cost of hiring a lawyer. If they choose not to hire a lawyer, then real estate brokers and salespersons (collectively referred to as "brokers" in this article) and title agents can provide certain assistance in the title closing process as long as the broker provides the mandatory notice to the buyer and seller advising them of their right to hire a lawyer.

Opinion 26 originally was issued by the Committee on the Unauthorized Practice of Law ("UPL Committee") in response to a request by the New Jersey State Bar Association to prohibit what is known as the South Jersey Practice. Under this practice, real estate brokers and title agents have provided assistance to buyers and sellers in South Jersey who have not retained an attorney to represent them in the title closing process for over half a century. In Opinion 26, the UPL Committee declared that such assistance by brokers and title agents constitutes the unauthorized practice of law.

Brokers in South Jersey were outraged by this decision since they believed it would severely impact real estate sales in South Jersey where many of the 60-75% of buyers who choose not to incur the cost of hiring a lawyer do so to be able to afford to buy a home. In addition, South Jersey brokers sought to preserve their role as the "quarterback" of the transaction, including setting a time of the essence closing date in the contract, so that the parties (and brokers) will have certainty as to when the settlement will take place.

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NJAR® agreed to support South Jersey brokers and advocate the right of buyers and sellers to choose whether or not to hire an attorney. After NJAR® convinced the New Jersey Supreme Court to stay Opinion 26 so that a full record could be created upon which the Court could decide whether or not to uphold the UPL Committee's decision, the Court appointed a Special Master to conduct a trial concerning the propriety of the South Jersey Practice.

After a lengthy trial, the Special Master recommended to the Supreme Court that the South Jersey Practice be permitted as long as there was a disclosure to buyers and sellers about their right to hire an attorney and other requirements were met. The Supreme Court then rendered its decision permitting the South Jersey Practice to continue with certain conditions.

THE SUPREME COURT'S DECISION

The Court emphasized that its decision to permit brokers and title agents throughout New Jersey to assist buyers and sellers who choose not to hire a lawyer was based upon the "public interest." In determining the public interest, the Court balanced the Court's belief that many aspects of the South Jersey Practice constitute the practice of law and that buyers and sellers would be well served to hire a lawyer against the fact that there was no evidence that any harm had befallen the public as a result of the South Jersey Practice.

The Court noted that the South Jersey Practice also appears to save money for consumers who choose not to incur the cost of attorneys fees. It concluded that "the parties must continue to have the right to decide whether those savings are worth the risks of not having lawyers to advise them in what is almost always the most important transaction they will ever undertake."

A cornerstone of the Court's decision was its requirement that a written notice be provided by the broker to every buyer and seller before they sign a broker-prepared contract of sale and that the notice must be attached as the cover page of the contract. If the written notice is not given, then the broker will be deemed to have engaged in the unauthorized practice of law, which can subject the broker to criminal sanctions and civil liability for any damages.

In addition to providing the required notice, the Court set forth specific requirements for brokers who assist buyers and sellers in lawyerless closings that brokers must carefully follow.

PERMITTED, REQUIRED AND PROHIBITED CONDUCT BY REAL ESTATE BROKERS

The following list provides the requirements set forth by the Court in Opinion 26 and some guidelines concerning the assistance that a broker can provide to buyers and sellers in the title closing process.

1. Preparation of Contract. A broker has the right to prepare the contract of sale. However, the broker must include the Opinion 26 notice advising the buyer and seller about their right to hire an attorney as the cover page of the contract when the contract is delivered to the buyer and seller.

2. Advice Regarding Notice. The broker must personally advise the buyer and seller to read the notice before signing the broker-prepared contract.

3. Broker's Copy of Notice. Although the Supreme Court did not require that the broker obtain a copy of the notice signed and dated by the buyer and seller, it is strongly recommended that the broker have the buyer and seller sign and date a copy of the notice so that the broker can bring it to the closing. This practice will help to avoid any later claim that the notice was not properly provided.

4. Notice If Contract Not Personally Delivered. If the broker does not personally deliver the broker-drawn contract, then the broker must contact the buyer and seller regarding the mandatory notice by speaking to them personally or by telephone. Even in this circumstance, it is strongly recommended that the broker then obtain a signed copy of the notice indicating when and how the buyer and seller were provided with the notice. If this is not feasible, it would be prudent for the broker to send a letter to the buyer and/or seller by certified mail, return receipt requested, stating how and when the notice was provided.

5. Ordering Title Search. A broker is permitted to order the title search on behalf of the buyer when the buyer has chosen not to hire an attorney.

6. Inspections and Tests. The broker can order and assemble all necessary tests and inspections, as well as the survey, when the buyer is not represented by an attorney. Similarly, if the seller is not represented by an attorney but has a responsibility to provide certain documents, such as a certificate of occupancy or a smoke detector certificate, the broker can arrange for these documents.

7. Deed and Affidavit of Title. The broker can arrange for an attorney to prepare the deed and affidavit of title for the seller but cannot prepare either of these conveyancing documents.

8. Clearing Up Title Exceptions. A broker can assist the seller in clearing up routine exceptions to title, which are known as Type 1 exceptions (preprinted items in all title reports that deal with such issues as marital status and name changes) and Type 2 exceptions (judgments, tax liens and other money liens that typically are paid at the closing). However, a broker is prohibited from assisting in clearing up Type 3 exceptions (easements, covenants and the like) and Type 4 exceptions (other serious legal objections to title). The broker has a duty to recommend that the parties retain an attorney to deal with any unusual or serious exceptions in the title report.

9. Necessity of Notice at Closing. Since the title agent must ask the buyer and seller at the settlement if and when they received the mandatory notice, it is recommended that the broker bring the notice signed and dated by the buyer and seller to the closing to avoid any problems.

10. Recommending an Attorney. Although the Court did not impose any new duty on brokers to recommend an attorney, it re-emphasized the existing duty under Real Estate Commission regulations for a broker to recommend an attorney whenever the situation appears to warrant it.

CONCLUSION

NJAR®'s victory in this matter allowed brokers throughout New Jersey to provide assistance to buyers and sellers that historically only had been provided in South Jersey. Indeed, the Supreme Court's decision unquestionably created opportunities for brokers, including increased control over the closing process and the timing of the closing, and permitted certain buyers who choose to save the cost of attorneys fees to purchase homes they otherwise may not have been able to purchase.

Competitive forces and a difficult real estate market may very well necessitate that all brokers in New Jersey be able to assist buyers and sellers who choose not to hire a lawyer. As a result, all brokers should become familiar with the Court's requirements in Opinion 26.