

You have advised that your firm is engaged in a high volume real estate settlement practice in which the firm is acting in the capacity of settlement attorney and the firm members are designated as trustees on the deeds of trust. In the course of their representation, the settlement attorneys are giving no advice other than a description of the contents of the note and deed of trust and its requirements, as well as closing the loan incident to the deed of trust and note. Once the transaction is executed, the settlement attorney does not continue a relationship with the borrower in any matter which is deemed "substantially related" to the settlement. You have asked several questions with regard to the designation of firm members as trustees on deeds of trusts and the resulting relationship created between the firm acting as settlement attorney on behalf of the purchaser and trustee with the ability to foreclose under the deed of trust. The Committee will address each question in the order in which you presented them in your inquiry.

I. Is disclosure of the relationship as settlement attorney for the borrower and trustee under the deed of trust required?

Yes. The Committee believes that this relationship is governed by DR:5-105(A) and (C). In a real estate transaction where the attorney represents the borrower and may later represent the creditor in the attorney's capacity as trustee under the deed of trust, the lawyer is required to disclose to each client the possible effect of such relationship on the exercise of his independent professional judgment on behalf of each. He must obtain the consent of each client, particularly the borrower, since the attorney may later have to take an adversarial role as trustee if the borrower defaults on the loan under the terms of the deed of trust. Thus, the burden is placed on the lawyer to decline such preferred employment if the exercise of his independent professional judgment on behalf of a client is likely to be adversely affected. (See DR:5-105(A)) As you are aware, the Committee previously opined that in "certain circumstances" as outlined in LE Op. 824 and LE Op. 1022, an attorney may represent a borrower and in addition serve as trustee under a deed of trust without obtaining the borrower's consent. That opinion, however, was rendered in the context of foreclosure as opposed to representation for the transaction of the sale of real property.

II. Is consent by the borrower required prior to the firm designating firm members as trustees, which will allow, if necessary, the firm to proceed against the borrower pursuant to the terms of the deed of trust?

In light of the potential adversarial role that a firm member as trustee under the deed of trust may have to take, the borrower's consent after full disclosure is required when a lawyer may represent another in a subsequent matter that is substantially related and adverse in any material respect to the interests of the former client. (See DR:5-105(D))

III. Does LE Op. 1022 relieve the firm from obtaining borrower's consent prior to designating firm members as trustee as long as disclosure is made?

No. LE Op. 1022 provided that disclosure must be made, but that consent was not necessary in the instance of foreclosure; however, no law firm member should have been designated as trustee prior to the settlement of the real estate transaction without having first obtained the informed consent of the borrower and lender.

IV. Does acting as a settlement attorney for purchaser rise to the level of a full “attorney/client” relationship, thus preventing the settlement attorney's firm from being designated as trustee on the deeds of trust and creating a conflict of interest, or is the settlement attorney's relationship with the borrower of a different nature other than the full “attorney/client” relationship, therefore requiring different guidelines?

The Committee believes that when acting as settlement attorney, the attorney/client relationship may simultaneously exist between attorney and borrower, attorney and lender, and attorney and seller. The Committee knows of no gradations in such a relationship nor does it endorse the concept of varying degrees of this relationship. Under the Code of Professional Responsibility, an attorney may represent multiple clients, even though a possible conflict of interest may exist providing the attorney can adequately represent the interest of each and the clients consent to the multiple representation and any apparent conflict after full and adequate disclosure. (See DR:5-105(C) and (D)) In other words, although a conflict may arise from an attorney/client relationship, this will not automatically preclude the attorney from continuing representation of the clients if disclosure and the informed consent of the client is obtained pursuant to DR:5-105.

Committee Opinion
January 4, 1989