

You have advised that, in a real estate transaction, where buyer and seller are each represented by independent counsel, the buyer's attorney informed seller prior to closing that it was customary for the buyer's attorney to procure and record a certificate of satisfaction if a mortgage lien on the subject property existed which needed to be released. The buyer's attorney advised that it was also customary to charge a \$25.00 fee which would be placed under a general heading such as "Release/Processing" on the HUD-I form. In addition, you have advised that seller's attorney advised his client that the buyer's attorney may ethically impose a fee on the seller for such service, but only if advance notice of the fee is given in order to allow the seller to avoid the charge.

You have stated that, consequently, seller informed his attorney that he believes it is inappropriate for buyer's attorney to charge anything to the seller and indicated that he will not pay the fee. As a result, buyer's attorney has refused to conduct the real estate closing unless the seller agrees to pay him the fee. Furthermore, you have stated that buyer's attorney will not allow seller's attorney to procure and record the certificate of satisfaction as it is "too much trouble" to ascertain whether it has been accomplished. Finally, buyer's attorney also admits that he has a duty to both his client and the title insurer to pay off the loan and to release the lien.

You have asked the Committee to opine as to whether the seller should have sole discretion over whether he/she will pay any fee imposed by the buyer, and furthermore, whether it is improper for the buyer's attorney to hold up a closing, delay paying off a mortgage lien, and otherwise cause other economic hardship to seller who has sought to "avoid" a charge, in an attempt to persuade seller to agree to the charge.

The appropriate and controlling disciplinary rules relative to your inquiry are DR:2-105(D) regarding division of fees between lawyers not in the same firm; DR:7-101(A) and (B)(1) regarding representing a client zealously; and DR:7-102(A)(1) regarding representing a client within the bounds of the law.

Under the facts as you have presented them, this Committee is in agreement with your conclusion that the seller has the sole discretion to "avoid" the charge imposed by the buyer's attorney by allowing and paying his own attorney to perform the ministerial function of procuring and recording the certificate of satisfaction to release the mortgage lien and satisfy the title company. If the seller, as you have indicated, has not consented to the additional employment of other counsel, or the terms of the division of the fee, or, if both counsel have not expressly assumed responsibility to the seller, then imposing such an involuntary fee on the seller is improper and violative of DR:2-105(D).

The Committee has previously opined in LE Op. 1228 that the issue is not whether the seller's or purchaser's attorney may perform the ministerial functions relative to consummating a real estate transaction, since either attorney may do so. Instead, the issue is, if purchaser's attorney undertakes to perform those functions on behalf of the seller, the fees for the services first must be adequately explained to the seller who must then, after consulting with his own attorney, consent to the charge before it can be imposed on the seller. (See also LE Op. 425, LE Op. 647, LE Op. 878 and LE Op. 1204)

Likewise, the Committee is in agreement with your conclusion that the holding up of a real estate closing or the delaying of a payoff of a mortgage lien by the buyer's attorney, for the sole purpose of obtaining a separate fee from seller, is improper and inconsistent with DR:7-101 and DR:7-102(A)(1). Disciplinary Rule 7-101(A) provides that a lawyer shall not intentionally fail to seek the lawful objectives of his client through reasonably available means permitted by law or the Disciplinary Rules, except that, with the client's expressed or implied authority, he may limit or vary his client's objectives and waive or fail to assert a right or position of his client. In addition, the rule provides that a lawyer may not fail to carry out a contract of employment entered into with a client for professional services, nor may he prejudice or damage his client during the course of the professional relationship. Disciplinary Rule 7-102(A)(1) provides that during the course of the representation of a client, a lawyer shall not file a suit, initiate criminal charges, assert a position, conduct a defense, delay a trial, or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another.

The Committee is of the view that the buyer's attorney's position that he will not conduct the closing unless the seller agrees to pay a separate fee may prejudice his own client and may also constitute intentional failure to complete the tasks for which the attorney was originally employed by his client/buyer. The Committee is of the opinion that a lawyer may not place a fee from a third party above his loyalty to his client.

The Committee further opines that an attorney may not impose a fee for his services for which an individual will not consent; therefore, an attorney who undertakes any action in an attempt to induce or coerce an individual to enter into an employment contract against his will, may also be in violation of DR:7-102(A)(8). The Committee declines to opine as to the validity or enforceability of any contractual obligation that may seem to affect these circumstances.

Finally, the Committee directs your attention to DR:1-103(A) which mandates reporting to the appropriate authority by an attorney having knowledge that another attorney has committed a violation of the Disciplinary Rules that raises a substantial question as to that lawyer's fitness to practice law in other respects. Whether an attorney's conduct is such that it raises a "substantial question as to that lawyer's fitness to practice law in other respects" is a subjective decision which should be made after consideration of the facts and analysis of the impact on the offending lawyer's fitness to practice law. (See LE Op. 1308 and *In re Himmel*, 125 Ill.2d 531, 533 N.E.2d 790 (1988))

Committee Opinion
May 24, 1990

Editor's Note. – Overruled in part by L E Op. No. 1528. See footnote 1 of the opinion for scope.