

Committee Opinion
December 19, 1988

LEGAL ETHICS OPINION 1149

COMMUNICATION WITH ADVERSE
PARTY – CONFLICT OF
INTEREST/MULTIPLE
REPRESENTATION – REAL ESTATE:
PURCHASER'S ATTORNEY
OBTAINING A POWER OF ATTORNEY
FROM SELLER.

You have asked the Committee to advise you as to whether it is proper for the buyer's attorney to have the sellers, who are represented by an attorney, sign a specific power of attorney which would allow the buyer's attorney to execute miscellaneous closing documents, with the exception of deeds, on behalf of seller. Additionally, you have asked if it is proper for buyer's attorney to have seller execute the same if seller is an unrepresented party in a real estate transaction.

In the instance where the seller has an attorney to represent him in the sale of real estate, the Committee believes DR:7-103(A)(1) is the appropriate and controlling rule. The rule provides that during the course of his employment, an attorney shall not communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter without the prior consent of that lawyer, unless the said communication has been authorized by law.

If, on the other hand, the seller in a real estate transaction is not represented by an attorney, the buyer's attorney may represent both buyer and seller as long as the attorney has advised the unrepresented party that he may obtain independent counsel and consent is given by both parties to the multiple representation after full disclosure of the possible effect the multiple representation may have on the attorney's ability to exercise his independent professional judgment on behalf of each client. Further, the attorney should advise clients that, if it is likely or if a conflict should arise, he must withdraw from the representation in the matter, and he must decline any employment by either party subsequent to the closing in any matter which is substantially related. (See DR:5-101(A), DR:5-105(C), 5-105(D), EC:5-14 and LE Op. 1000). The Supreme Court of Virginia declared in *Pickus*, 232 Va. 5 (1986), that a closing attorney may represent both buyer and seller in a real estate transaction. In that situation the settlement attorney assumes the duties of a fiduciary and is obligated to handle properly the preparation of documents, settlement of the real estate transaction and disbursements of funds.

The Committee opines that presenting the power of attorney to a seller who is represented by counsel would be improper unless seller's attorney has consented to the same. If seller is an unrepresented party and the buyer and seller have consented to the multiple representation after full disclosure of the possible effect on the closing attorney's ability to exercise his independent judgment for each, and after each has been advised of his right to secure counsel, presenting the power of attorney to the seller, to facilitate the attorney in performing the closing, is not ethically improper.

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