

Committee Opinion
May 8, 1989

LEGAL ETHICS OPINION 1216

ATTORNEY-CLIENT RELATIONSHIP:
BUSINESS TRANSACTION –
MISCONDUCT – MULTIPLE
REPRESENTATION – REAL ESTATE
PRACTICE: ATTORNEY/SETTLEMENT
AGENT REPRESENTING TO SELLERS
TO BE PURCHASER AND LATER
LISTING DIFFERENT PURCHASERS ON
THE DEED.

You have asked the Committee to consider whether an attorney/purchaser/settlement agent represented the sellers' interest as well as his own. You have further asked the Committee to determine whether the actions by the attorney/purchaser/settlement agent violated Virginia's ethical rules governing the conduct of attorneys. As noted in your inquiry, the situation involves an attorney who, as buyer, executed a contract to purchase real estate from a husband and wife. Under the terms of the contract, the attorney/purchaser was also named as settlement agent. In addition to the standard form real estate contract, the attorney added the following provisions:

- (1) No portion of the subject property may be resold or improved prior to the payment of the note or upon written permission of both sellers;
- (2) The sale would be financed by the sellers, and the promissory note would be secured by a first deed of trust requiring five annual installment payments;
- (3) Buyer had the right to survey the property prior to closing; if there were any differences between the survey and the number of acres stated in the contract, the selling price would be adjusted at the rate of \$865.00 per acre;
- (4) The purchaser was a licensed real estate agent; and,
- (5) The contract would expire on June 5, 1988, if closing had not taken place by the date.

Subsequent to the execution of the contract and prior to closing, the attorney had the property surveyed, which survey reflected 80 acres, more or less, and not 104 acres as set forth in the contract. Prior to the expiration date of the contract, the attorney prepared and tendered a deed in which he was not named as the purchaser. Rather, the deed reflected a Virginia corporation, the surveyor, and the attorney's law partner as the purchasers. The attorney also prepared the deed of trust naming another law partner and local attorney as trustees under the deed of trust. In addition, the attorney demanded in writing that the sellers accept approximately \$16,000 less than the originally agreed upon purchase price of \$90,000. As a result, the sellers refused to close and thereafter, the attorney filed suit for breach of contract.

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This Committee has previously opined that simultaneous representation of a real estate purchaser and seller is not improper provided that consent is received from both parties after full and adequate disclosure, as required by DR:5-105. (See LE Op. 414, LE Op. 437.) However, the November 30, 1988 letter (provided with your inquiry) from a partner of the attorney/purchaser states that at no point did either he or the attorney/purchaser represent the sellers and that this matter was made clear to the sellers. Based on these facts, the Committee is of the view that the attorney/client relationship with the sellers may not have been created. The resolution of any factual dispute as to the claim propounded by the attorney/purchaser relative to non-representation of the seller is beyond the purview of the Committee. The Committee believes that the designation of the place of settlement or of a settlement attorney does not automatically create an attorney/client relationship between that attorney and the sellers or the opposing parties to a real estate transaction. The Committee is also of the opinion that the mere tendering of a deed on behalf of a party, here, the purchasers, does not necessarily create an attorney/client relationship with the sellers.

With regard to that part of your inquiry related to the ethical propriety of the attorney/purchaser's conduct, the Committee is of the opinion that the conduct described should be evaluated in light of the prohibitions of DR:1-102(A)(4). That Rule prohibits a lawyer from engaging in conduct involving dishonesty, fraud, deceit or misrepresentation which reflects adversely on a lawyer's fitness to practice law. Whether the conduct described in your inquiry, including the attorney/purchaser's preparation of a deed naming purchasers other than the one originally presented to the sellers, rises to that level is a factual matter for determination by the appropriate District Disciplinary Committee of the Virginia State Bar. The Standing Committee on Legal Ethics does not resolve factual disputes. Furthermore, if an attorney/client relationship is found to have existed between the attorney/purchaser and either the sellers or the ultimate purchasers, the attorney/purchaser is bound by the requirements of Canon 5, and particularly by DR:5-101(A), which governs personal conflicts between a lawyer and his client; DR:5-104(A), which addresses the judicious limiting of business transactions between a lawyer and his client; and DR:5-105, which speaks to the factors involving permissible representation of multiple clients. As noted above, since the facts as to the establishment of an attorney/client relationship between the attorney/purchaser and the sellers are in dispute, the Committee will not attempt to address the resolution of that dispute. If no attorney/client relationship is determined to have existed, the provisions of Canon 5 are inapposite.

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