

Committee Opinion
May 12, 1989

LEGAL ETHICS OPINION 1228

FEES – REAL ESTATE PRACTICE:
PROPRIETY OF SETTLEMENT
ATTORNEY IMPOSING FEE ON
SELLERS.

You have asked the Committee to consider whether a settlement attorney representing the purchasers in a real estate transaction may perform the following acts on behalf of sellers who are represented by independent counsel and from whom the settlement attorney receives no compensation except as indicated:

1. Preparation filing of the 1099B form for the IRS for which a \$20 charge is made to the seller for this service.
2. Obtaining from sellers' lender figures to pay, satisfy and release liens encumbering the property.
3. Actual holding of and remittance of sellers' money to sellers' lenders in order to pay and satisfy the liens encumbering the property.
4. Preparation and filing of sellers' release documents for entry into the land records.
5. Payment to realtors for their commission.
6. Payment to taxing authorities of any overdue/back taxes owed by the sellers.
7. Payment to miscellaneous vendors connected with the sellers' obligations under the contract, such as termite inspectors, septic system inspectors, surveyors, etc.

In your opinion, the purchasers' attorney is ultimately responsible for the transfer of property to his client, free of any liens or encumbrances, even though the usual contract states that the sellers are under a duty to deliver a deed "free of all liens and encumbrances." However, there have been a number of real estate transactions in which the sellers' attorney has performed all of the aforementioned tasks pursuant to the terms of the closing statement, for which he would charge something more than just a fee for the preparation of the deed. You wish to know which is the proper method of conducting a residential real estate transaction.

It has been the view of the Committee, and the Committee still opines, with the exception noted below, that in a residential real estate transaction in which the buyers' attorney is also the closing or settlement attorney, it is not improper for the settlement attorney to impose a charge upon the sellers for the release of deeds of trust, the preparation and filing of the IRS form 1099B (see below), or performing any of the ministerial functions enumerated in your inquiry, provided the sellers are notified of the amount of the charge and the basis for making the charge in advance of closing so that seller may avoid such a charge should he desire. (See DR:2-105 and LE Op. 878, LE Op. 911 and LE Op. 922) In light of applicable provisions of the Technical Corrections and

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Miscellaneous Reserve Act of 1988, the Committee has withdrawn LE Op. 911. The Act now prohibits a separate charge for the preparation of a 1099-S form. In the view of the Committee, the issue is not the determination of whether the sellers' or buyers' attorney will perform the ministerial functions relative to consummating the residential real estate transaction; either attorney may, with the consent of his client, perform those functions. The problem arises when the buyers' attorney undertakes those obligations and subsequently imposes a charge on the seller for services without having first adequately explained to the seller or his attorney the arrangement and the fees that he expects to charge, and without having first obtained the seller's and/or his attorney's consent thereto. In other words, absent a prior agreement with the seller and/or the seller's attorney it is improper for a closing attorney engaged by the purchaser to impose a fee upon the seller in a residential real estate transaction. (See LE Op. 425)

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