Committee Opinion
April 20, 1990

LEGAL ETHICS OPINION 1335

REAL ESTATE PRACTICE – CONFLICT OF INTERESTS – MULTIPLE REPRESENTATION: ATTORNEY/TRUSTEE'S DUTY TO EXECUTE DEED OF RELEASE WHEN NOTE HAS BEEN PAID IN FULL.

You have advised that you were the settlement attorney and served as trustee under a deed of trust which arose from an owner take-back financing. You indicate that the purchaser of the property has subsequently refinanced the property and paid off the deed of trust lien in full, at which closing you also presided. A separate dispute has arisen, however, regarding the seller's demand for interest on an escrow which you held and subsequently disbursed upon written instructions from both parties. Because of that dispute, the seller who took the owner financing originally has advised that he refuses to release the lien even though the debt has been paid in full.

You have asked the committee to consider the propriety of your signing a deed of release when you know that the loan has been paid off but the actual noteholder refuses to execute a certificate of satisfaction because he has another claim against the notemaker.

The Committee has earlier opined that the simultaneous relationship of settlement attorney for the borrower and as trustee under a deed of trust is governed by DR:5-105(A) and (C) which requires that the lawyer disclose to both the borrower and the lender/creditor (in this case, also the seller) the possible effect of such relationship on the exercise of his independent professional judgment on behalf of each. The settlement attorney/trustee must obtain the consent of each, particularly the borrower, since, as trustee, he may be required to take an adversarial role in the future event of a default. (See LE Op. 1153) It appears that such an adversarial role has also arisen in the circumstances you describe, *albeit* in this case adversarial to the lender/creditor/seller.

Furthermore, the Committee has recently opined that the Code of Professional Responsibility is equally applicable to an attorney who is acting in the capacity of a fiduciary although not necessarily engaged in an attorney-client relationship with the person for whom he is so acting. (See LE Op. 1325; ABA Formal Opinion No. 336) Thus, the committee is of the opinion that, whether acting in an attorney-client relationship or in the capacity of fiduciary, a lawyer may not conceal or knowingly fail to disclose that which he is required by law to reveal. (See DR:1-102(A)(4) and DR:7-102(A)(3)) The Committee further directs your attention to DR:2-107(A)(1) and DR:7-102(A)(1) which instruct, in pertinent part, that a lawyer shall not assert a position or take other action on behalf of his client merely for the purpose of harassing or maliciously injuring any person.

The Committee is cognizant that the Virginia Code provides legal procedures for the determination of whether a "holder of a mortgage or deed of trust which has been fully paid or discharged has unjustifiably and without good cause failed or refused to release such mortgage or deed of trust". Va. Code § 55-66.5(c). The plain language of the statute

refers to the “holder” and makes no reference to the trustee. The determination of whether or not the creditor's refusal to release the lien based on a separate dispute with the debtor is justifiable and with good cause, and the determination of whether the trustee is held to the same standard, however, are legal determinations beyond the purview of this committee.

Thus, the Committee opines that if, after a full investigation, the lawyer who served as settlement attorney and now serves as trustee on the deed of trust concludes factually that the noteholder is unjustified in refusing to release the lien based on a separate dispute with the debtor and is doing so merely to harass or maliciously injure the debtor, it would be ethically proper for the lawyer to sign a deed of release in his capacity as trustee.