

LEGAL ETHICS OPINION 1351

REAL ESTATE TRANSACTION – DUTY
TO CLIENT – NEGLIGENCE:
ATTORNEY'S INADVERTENT ERROR;
PURCHASING JUDGMENT WHICH IS
SUBJECT OF ATTORNEY'S ERROR;
ENFORCING AND COLLECTING
JUDGMENT AGAINST CLIENT.

You have asked the Committee to consider the propriety of an attorney enforcing and collecting a judgment against a former client (1) where the attorney had purchased the judgment at a discounted rate, and (2) the judgment had been a lien against land owned and sold by the client, the sale of which had been handled by the attorney on her behalf. Further, the settlement attorney had not discovered the existence of the judgment. The following is a summary of the pertinent facts as you have stated them in your inquiry upon which the Committee will base its opinion.

An attorney had conducted a real estate settlement in which he represented and was paid by both buyer and sellers as settlement attorney. At that time, the attorney failed to discover two judgments that were recorded against husband and wife, the sellers, which judgments were a lien against the real property that was the subject of the settlement. The lien was not satisfied at the time of settlement. Several months after the real estate settlement, husband and wife filed a law suit against certain individuals who then retained settlement attorney to defend them. Settlement attorney undertook the representation after he received consent from former clients, husband and wife. Three months later, the unsatisfied judgments were discovered by another title examiner and reported to the settlement attorney. The attorney confronted the former client/wife about the need for the judgments to be paid, but was instructed by the wife's husband that the judgments were now the settlement attorney's "problem" and that they had no intention of paying the judgments.

Settlement attorney purchased the judgment at a 50% discount and released the lien on the property that had been the subject of the real estate settlement. Settlement attorney then enforced the judgment against husband and wife. The husband offered to reimburse the settlement attorney in the actual amount he had paid to purchase the judgment; however, the settlement attorney declined the offer and asked for payment in the full amount of the judgment, plus interest and costs. Husband and wife then paid the judgment in full, but under protest.

You have stated that the settlement attorney was not aware of any confidences or secrets which could have been gained during the course of the real estate representation that could now be used to the disadvantage of the former client, nor was the former real estate representation substantially related to the collection of the judgment. You wish to know whether a duty exists for the settlement attorney to negotiate favorable terms on a judgment for the former client, advance the money to pay the clients' judgments, then give the client the benefit of the favorable terms, or, if the settlement attorney has profited from his own negligence.

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The appropriate and controlling Disciplinary Rules are DR:1-102(4) which provides that a lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation which reflects adversely on a lawyer's fitness to practice law; DR:2-108(D) which provides in part that, upon termination of representation, a lawyer shall take reasonable steps for the continued protection of a client's interests; and DR:5-105(D) which provides that a lawyer who has represented a client in a matter shall not thereafter represent another person in the same or substantially related matter if the interest of that person is adverse in any material respect to the interest of the former client unless the former client consents after disclosure.

The Committee directs your attention to LE Op. 1089 in which the Committee previously opined that, while there is nothing within the Code of Professional Responsibility which prohibits an attorney from suing a former client for monies owed, because the law firm previously represented both buyer and seller in the same real estate transaction, it would be improper for the law firm to then represent itself in the suit against the former client/seller for monies (other than legal fees) owed to the firm unless the former client/seller consented after disclosure. Should the former client/seller not consent, the firm then would be required to retain the services of another firm in the collection matter pursuant to DR:5-105(D). The Committee opines that since, in the instant situation, the attorney would be representing himself against his former client in a debt collection matter other than for his legal fees, the basis for which was a result of the attorney's effort to protect himself against a potential malpractice action by former client/buyer, the attorney may not proceed against former client/seller pro se, unless the seller consents.

In addition, whether the attorney was negligent in failing to discover the liens on the property is a legal determination beyond the purview of the Committee. Nevertheless, whether such determination is legal or not, and, while no duty exists for the settlement attorney to attempt to negotiate favorable terms on behalf of former client/seller and her husband on the judgment filed against them, the Committee believes it is improper for the attorney to profit from his own error in derogation of his responsibility to take reasonable steps for the continued protection of a client's interests following the termination of representation, as required by DR:2-108(D).

The Committee is of the opinion that it would have been ethically permissible for the attorney to accept the client's offer of reimbursement for the amount actually paid to acquire the judgment. However, where the client had so offered to reimburse the attorney, it is the opinion of the Committee that it is improper for the attorney to initiate a pro se debt collection action against a former client, other than for the usual collection of legal fees, for any amount which exceeds the actual amount expended by the attorney. The attorney may not attempt to protect himself from his own malpractice for not having discovered the former client's debt by instituting an action against his client for a sum greater than that which the client might otherwise have been required to pay. The Committee opines that such conduct may be violative of DR:2-108(D) and DR:5-105(D).

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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))

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