

LEGAL ETHICS OPINION 1401

COMMUNICATION WITH ADVERSE
PARTY — CONFLICT OF INTEREST —
MULTIPLE REPRESENTATION —
REAL ESTATE: PURCHASER'S
ATTORNEY REQUESTING A SPECIFIC
POWER OF ATTORNEY NAMING
PURCHASER'S ATTORNEY AS
ATTORNEY IN FACT.

You have presented a hypothetical situation in which an attorney represents a buyer in a real estate closing. The attorney for the purchaser requests that a specific power of attorney be executed by the seller in order that various documents that require the seller's signature may be approved and signed by the purchaser's attorney.

You have asked the Committee to opine whether, under the facts of the inquiry, it is proper for the purchaser's attorney to have the seller execute a specific power of attorney naming buyer's attorney as the attorney in fact. You have not stated whether or not the seller was represented by counsel at the time of the requested power of attorney.

The appropriate and controlling disciplinary rules related to your inquiry are DR:5-101(A), DR:5-105(C), DR:5-105(D), DR:7-103(A)(1) and DR:7-103(A)(2).

Disciplinary Rule 5-101(A) provides that a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client may be affected by his own financial, business, property, or personal interests, except with the consent of his client after full and adequate disclosure under the circumstances. Disciplinary Rule 5-105(C) states that a lawyer may represent clients if it is obvious that he can adequately represent the interests of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each. Disciplinary Rule 5-105(D) 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.

Disciplinary Rule 7-103(A)(1) provides that during the course of representation, a lawyer 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 unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so. Under Disciplinary Rule 7-103(A)(2), it is unethical for an attorney to, during the course of representation, give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are, or have a reasonable possibility of being, in conflict with the interests of his client.

The Committee has previously opined that in the instance where the seller has an attorney to represent him in the sale of real estate, it is not proper for the buyer's attorney

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to present the seller with a specific power of attorney which would allow the buyer's attorney to execute miscellaneous closing documents on the behalf of the seller. Under DR:7-103(A)(1), it would be unethical for an attorney to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless the party's counsel has consented to such communication. (See LE Op. 1149.)

The Committee has also previously opined, under the above-mentioned facts, that it is not improper for an attorney to present a specific power of attorney to a seller who is *not* represented by counsel. (See DR:5-101(A), DR:5-105(C), DR:5-105(D), DR:7-103(A)(2), LE Op. 1000, and LE Op. 1149.)

The Committee also directs your attention to *Pickus v. Virginia State Bar*, 232 Va. 5 (1986), which found in pertinent part that a closing attorney may represent both buyer and seller in a real estate transaction. The Supreme Court stated that, 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.

Therefore, the Committee would opine that in the instance where the seller has an attorney to represent him in the sale of real estate, it is not proper for the purchaser's attorney to request the seller to execute a specific power of attorney in order that various documents that require the seller's signature may be approved and signed by the buyer's attorney. Under DR:7-103(A)(1), it would be unethical for an attorney 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.

The Committee would also opine that in the instance where the seller is *not* represented by an attorney, it is not improper for the purchaser's attorney to request that seller execute a specific power of attorney naming buyer's attorney as the attorney in fact. Since buyer's attorney, in this instance, would be representing both purchaser and seller, the lawyer must first advise the unrepresented party (seller) that he may obtain independent counsel. Consent must then be 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. The purchaser's attorney should advise both buyer and seller that, if it is likely or 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. Finally, the Committee also adds that the power of attorney must be specific as to what activities are authorized to be performed by the buyer's attorney.

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