

LEGAL ETHICS OPINION 1442

REAL ESTATE PRACTICE - FEES –
PERSONAL INTEREST AFFECTING
REPRESENTATION - COMPETENCE –
ZEALOUS REPRESENTATION:
LENDER'S ATTORNEY CHARGING
RELEASE FEE TO DEBTOR AND
HOLDING DOCUMENTS FROM
RECORDATION UNTIL DEBTOR PAYS
RELEASE FEE.

Settlement Attorney writes to the holder of a note secured by a deed of trust for payoff information. Holder contacts Attorney, who has previously drawn the note and deed of trust for his client, prepared a modification agreement, and otherwise legally represented his client, for assistance. Attorney calculates the amount due and sends that figure to Settlement Attorney with instructions to send the payoff to him, along with an attorney's fee for effecting the release. Neither the note nor the deed of trust references an attorney's fee for the release, and there is no prior agreement between debtor and Attorney that such fee be paid.

Settlement Attorney advises the debtor of these facts, who then informs Settlement Attorney that he objects to the payment of a fee to Attorney for release. Settlement Attorney then tenders to Attorney the amount due for payoff, along with a prepared certificate of satisfaction and a statement that Settlement Attorney will take care of the release.

Attorney forwards the payoff to his client, who accepts the payoff; endorses the certificate of satisfaction prepared by Settlement Attorney; and marks the note "paid in full." Client/Holder then returns these documents to Attorney, who informs Settlement Attorney that he will hold the documents from recordation until the debtor pays him his fee for release.

Attorney claims that he is acting as a lender's agent in this matter; that lenders are entitled by law to charge a reasonable fee for release; that Client is a private lender who does not have the appropriate documents and does not know the requirements; that Client is entitled to have someone else prepare those documents for him; and therefore, that Attorney is entitled to a reasonable fee for securing the release.

Absent a contractual agreement to that effect, it is unethical for an attorney to impose an attorney's fee on a party who is not a client unless there has been prior disclosure and consent to the fee by the non-client. Whether or not such a contractual agreement exists raises a legal question beyond the committee's purview. Since an attorney's fee for the release was not agreed to by the debtor, the imposition of such an involuntary fee on the debtor by the noteholder's attorney is improper.

With regard to Attorney's refusal to forward the release papers provided to him by his client, the Committee was of the opinion that, unless debtor had agreed to pay a fee,

Committee Opinion
November 27, 1991

Attorney was prejudicing his own client and intentionally failing to complete the task for which he was originally employed by placing his personal interest, i.e., receipt of a fee from the debtor, above his duty to exercise his professional judgment on behalf of his client, in violation of DR:5-101(A). In addition, the Committee believed that the conduct described was violative of DR:6-101(B), in that the refusal prevents the completion of the payoff for which Attorney was hired by the client. The client has a legal obligation to have the lien created by the corresponding deed of trust, once satisfied, released of record. By refusing to have the lien released, Attorney may be subjecting his client to potential and unnecessary litigation.

The conduct described constitutes a failure to seek the lawful objectives of the Attorney's client, in violation of DR:7-101(A)(1). Since Client had evidenced his satisfaction with the amount tendered by marking the note "paid in full," Attorney's actions appeared to reflect a disregard for the client's wishes and objectives.

As to whether a distinction can be made, under these facts, between Attorney's services as an attorney and his services as a "lender's agent," the committee referred to LE Op. 1325, which found that if an attorney acting in a fiduciary capacity violates his or her duty in a manner that would justify disciplinary action had the relationship been that of attorney-client, the attorney may be properly disciplined pursuant to the Code of Professional Responsibility. Thus, Attorney's "lender's agent" designation is not determinative of the applicability of the Disciplinary Rules. The Committee opined that regardless of whether Attorney calls himself "attorney" or "lender's agent" in this transaction, he is bound by the Virginia Code of Professional Responsibility. [DR:2-105(A), DR:5-101(A), DR:6-101(B), DR:7-101(A)(1); LE Op. 425, LE Op. 647, LE Op. 878, LE Op. 974, LE Op. 1228, LE Op. 1325, 1346; ABA Informal Op. 1455 (June 4, 1980).]

Committee Opinion
November 27, 1991