

LEGAL ETHICS OPINION 1588

CONFLICT OF INTEREST –
COMPENSATION FROM THIRD
PARTIES: ATTORNEY RECEIVING
COMMISSION FOR ASSISTING CLIENT
IN PURCHASE OF RESIDENTIAL REAL
ESTATE.

You have presented a hypothetical situation in which an attorney, who does not have a real estate broker or salesman's license in the Commonwealth of Virginia, is approached by clients for legal services pertaining to the purchase of real estate. The attorney advises his clients that he must first assure himself the he is legally able to provide the services they request. You state that he calls the Virginia State Bar, asking if he is permitted to represent his clients in the purchase of real estate and whether he is eligible for compensation based on the purchase price. You state that the Bar informs him that his question appears to be answered by § 54.1-2103 of the Code of Virginia (1950) as amended, which establishes an exception to the real estate licensing laws for the "service rendered by an attorney-at-law in the performance of his duties as such". In order to provide more assurance, the attorney performs a diligent search of all Virginia case law to determine if this statute has been limited in any way. You state that he finds no such indication and that he then drafts a contract for services in which he agrees to represent his clients, stating that his fee will be 3% of the purchase price.

You further indicate that the contract states, in part, that in "the event of a cooperative sale, [Attorney] agrees to waive any claim to compensation from [Client] if he is compensated by the seller of real property that [Client] purchases." Client agrees to the terms of the contract for services and Attorney assists his clients in finding a house on which they decide to make an offer. Attorney then assesses the house's marketability, advises the clients on price, and drafts a contract for purchase. The contract identifies Attorney as representing the buyers and states:

Seller represents that he has agreed that the Listing Broker will be paid a fee for service of 6%. In the event this is a cooperative sale, the Selling Attorney is to receive 3% of the fee to be paid the Listing Broker. Seller hereby authorizes and directs the settlement agent to disburse to the Listing Broker and the Selling Attorney from the Seller's proceeds the respective proceeds of the fee at settlement.

The contract states further:

The parties confirm that in connection with the transaction contemplated by this Contract, [Listing Broker's name] (the Listing Broker), and its salespersons, have acted on behalf of Seller as Seller's agent, and [Attorney's name] (the Purchaser's Attorney), and its salespersons, by agreement, have acted on behalf of Purchaser as Purchaser's agent.

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You advise that the contract was signed by both the Seller and the Buyer. However, as a condition of sale, the Seller asked that "the standard board contract [to] be executed and [will] supercede [sic] this contract".

You state that Clients agreed to this stipulation and that the contract is transferred to the standard Northern Virginia Association of Realtors forms provided by the broker representing the Seller. Among these forms are the "Buyer and Seller Agency Disclosure" , and the "Sales Contract (Northern Virginia)". On the disclosure form, Attorney writes his name, identifying himself as an attorney, over the line marked "Firm Name", disclosing that he represents the buyer. Instead of checking the box marked "Buyer's Agent", Attorney crosses out the word "Agent" and substitutes the words "Attorney for Purchase and Agent" and checks the box.

You indicate that, on the sales contract form, Attorney is listed as the settlement agent "to act for both parties unless either party specifically requests otherwise". Sellers subsequently decide to obtain separate counsel for the settlement. Attorney also holds his clients' earnest money deposit until settlement as identified in paragraph four of the contract, which states "The Legal Purchaser has made a deposit with the Selling Company [vice Listing Company] of [amount] ... " Also, the contract states that "The Listing Company and its salespersons are acting on behalf of the Seller as the Seller's agent, and the Selling Company and its salespersons, by agreement, are acting on behalf of the Purchaser as the Purchaser's agent ... "

You advise that, at closing, on the HUD-1 settlement sheet, the Listing Company and Attorney are each listed as due a real estate commission, and such commissions are paid from the proceeds of the sale. In addition, the buyer pays Attorney a separate amount for his settlement services.

You state that at no time during negotiations or at settlement was Attorney's claim to compensation from the proceeds of the sale ever challenged. Also, at no time during negotiations did Attorney ever identify himself as a real estate broker or a real estate agent.

Finally, you indicate that, several weeks after closing, Attorney receives a letter from the Listing Company's corporate attorney alleging that Attorney has acted improperly in this transaction. Specifically, the Listing Company alleges that § 54.1-2103 of the Code of Virginia is to be interpreted narrowly to only "facilitate real estate related activities by the court-appointed commissioner in a partition suit or the Executor of an estate, for example". Thus, the Company concludes that Attorney has "acted as a Real Estate Broker when [he was] not licensed to do so." Orally, the Company further alleges that Attorney has violated DR:5-105(A) and DR:5-106(A).

You have asked the committee to opine, under the facts of the inquiry:

- (1) whether Attorney has violated § 54.1-2103 of the Code of Virginia;

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- (2) whether Attorney has violated DR:5-105(A);
- (3) whether Attorney has violated DR:5-106(A); and
- (4) whether there has been the appearance of impropriety on the part of Attorney.

The appropriate and controlling Disciplinary Rules related to your inquiry are DR:5-105(A) which provides that a lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, except to the extent permitted under DR:5-105(C); DR:5-106(A) which states that except with the consent of his client after full and adequate disclosure under the circumstances, a lawyer shall not accept either compensation for his legal services, or anything of value related to his representation of or his employment by his client, from one other than his client; DR:3-102 which prohibits a lawyer or law firm from sharing legal fees with a non-lawyer; and DR:2-105(A) which requires that a lawyer's fees shall be reasonable and adequately explained to the client.

The committee responds to your inquiries relative to the facts presented as follows:

- (1) Whether or not Attorney has violated § 54.1-2103 of the Code of Virginia raises a legal rather than an ethical question, the determination of which is beyond the purview of the committee.
- (2) The committee is of the opinion that Attorney has not violated DR:5-105(A) since the facts indicate that Attorney represented the buyer only. The facts further show that the sellers subsequently decided to obtain independent counsel for the settlement. Thus, the committee is of the view that Attorney has not attempted to represent multiple clients with adverse interests.
- (3) The committee believes that Attorney has not violated DR:5-106(A) since the Rule provides that a lawyer shall not accept compensation from one other than his client, except with full and adequate disclosure to the client. The facts indicate that Attorney made the buyer aware, in both the contract for services and the contract for purchase of real estate, that his fee would be 3% of the purchase price. The facts also state that client agreed to the terms of the contract for services and signed the contract for purchase. Therefore, the committee opines that Attorney has made the requisite disclosures.
- (4) The committee is of the view that Canon Nine's exhortation against the "appearance of impropriety" is inapposite to the facts posited since that language applies only in the limited context of DRs 9-101(A), (B), (C) [DR:9-101], i.e., former judges, former government attorneys, and attorneys' improper influence upon a tribunal, legislative body, or public official.

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Despite concluding that the lawyer has not engaged in conduct which is per se violative of the Code of Professional Responsibility, the committee cautions, however, that, in the circumstances you describe, the lawyer must be mindful of the prohibition of DR:3-102 against a lawyer's sharing legal fees with a non-lawyer. In addition, the committee further cautions that since the receipt of a percentage commission of the sale price may constitute legal fees, the lawyer must be cognizant of the ethical requirement (as found in DR:2-105(A)) that a lawyer's fee be reasonable.

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