Committee Opinion
October 9, 1986

LEGAL ETHICS OPINION 824 CONFLICT OF INTEREST – ATTORNEY AS TRUSTEE.

Subject: Problems arising when an attorney serves as counsel for the maker of a note and subsequently as a trustee pursuant to the underlying deed of trust.

Conclusions: To the extent that this opinion differs from LE Op. 359, LE Op. 528, LE Op. 659 and LE Op. 679, those LE Ops. are vacated.

It is the opinion of the committee that under certain circumstances an attorney may represent a borrower and, in addition, serve as trustee under a deed of trust without first obtaining consent of the borrower. In furtherance of the requirements imposed on the trustee by the lender, the trustee who formerly represented the borrower may foreclose without first obtaining the consent of the borrower. The circumstance which would allow this is that circumstance when the attorney representing the borrower has in no way advised or counseled with regard to any of the terms or conditions contained in the note or deed of trust; and wherein the attorney does not, after closing, continue a relationship with the borrower which may, under DR:5-105(D), be deemed representation "in the same or substantially related matter." In essence, if the only relationship that the attorney has with the borrower is that of preparing legal documents, the content or terms of which are agreed to between borrower and lender, without advice of the attorney preparing the documents, it is the opinion of the committee that the preparation of a deed, note, or deed of trust, shall not prohibit that same attorney/preparer from serving as trustee and subsequently foreclosing. In order to meet the special circumstance, the attorney must have no further relationship post-closing with the borrower which might bring into play DR:5-105(D).

If the foregoing circumstances are met, then disclosure of the future representation is required; however, consent of the buyer to initiate foreclosure proceedings is not required.

Absent these special circumstances, LE Op. 359, LE Op. 528, LE Op. 659 and LE Op. 679 correctly state the opinion of the committee.

If an attorney or any member of his firm should have such relationship with the lender so as to have been involved directly or indirectly in any of the terms embodied in any of the instruments to be prepared, then that attorney may not serve as trustee without both full disclosure and prior consent of the buyer. In some instances, some lenders may require the preparing attorney to serve as trustee. If such be the case, then the attorney shall disclose such fact, as well as the duties of that attorney to be named trustee to the buyer.

LE Op. 659 requires that consent be given after full disclosure in all circumstances. This opinion suggests circumstances where there must be full disclosure, but where consent is not required. LE Op. 659 does not address when such consent is required.

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LE Op. 679 opines that it is not improper for the attorney to obtain written consent after full disclosure. This committee, however, opines that after full disclosure written consent is not required. However, the committee is of the opinion that if an attorney does not meet the specific circumstances first addressed, then some type of written consent to be obtained at closing might be appropriate.

If a written request is utilized, the written consent may be such as the attorney deems under all circumstances to be sufficient. [DR:5-105(D), LE Op. 359, LE Op. 528, LE Op. 659 and LE Op. 679]

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