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Selected Recent Ethics Opinions

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SELECTED RECENT ETHICS OPINIONS

by Lynda L. Butler

The Standing Committee on Legal Ethics of the Virginia State Bar recently issued some opinions affecting the practice of real property law. Those opinions deal with the release of trust, the disclosure obligation of an attorney representing both buyer and seller, and representation of one of several multiple clients against another of the former multiple clients.

With respect to the release of trust matter, the Committee advised, in LEO 982, that it would be improper for a settlement attorney to "sign as noteholder and attach a form affidavit asserting that the note has been lost or destroyed" when the attorney is not in possession of the note. LEO 982. Thus, a prior settlement attorney contacted by a law firm handling a more recent settlement for the same land may not properly sign as the noteholder and attach a lost note affidavit in response to the firm's request for a formal release of record.

LEO 1000 clarifies a lawyer's duty to disclose at the outset of his representation of the buyer and seller in a real estate transaction. Relying on LEO 414, the Committee concluded that a real estate lawyer representing both the buyer and seller has "a duty to inform his clients, at the outset of the transaction, that he will not be able to represent either party against the other if a dispute should arise." LEO 1000. The Committee explained that DR 5-105 allows a lawyer to represent multiple clients if the lawyer can provide adequate representation for each and if each consents to the multiple representation after full disclosure of the possible effects of such representation.

In LEO 1022, another opinion regarding multiple representation, the Committee advised that an attorney could not ethically represent a seller in a foreclosure against the maker of a note when the attorney represented both the buyer and the seller in the transaction leading to the execution of the note and deed of trust. LEO 1022. Nor could the same attorney ethically represent the noteholder in a suit for any deficiency or confession of judgment once foreclosure has occurred unless the maker consents after disclosure. DR 5-105(D) does not allow an attorney who has represented a client in a matter to "thereafter represent another person in the same or substantially related matter" if the interest of that other person is materially adverse to the former client's interest unless the former client consents after disclosure. DR 5-105(D).