

**DELAWARE STATE BAR ASSOCIATION
COMMITTEE ON PROFESSIONAL ETHICS**

OPINION 1995 - 1

DECEMBER 13, 1995

**This opinion is merely advisory and is not binding on the inquiring attorney,
the courts or any other tribunal.**

A member of the Delaware Bar has inquired about his respective obligations to the Seller and Purchaser of a parcel of real estate, where due to a misunderstanding the deed purported to convey more ground than the parties to the transaction had agreed upon, and where, after corrective deeds had been assented to by both parties, and the Buyer authorized him to record these deeds, the Buyer changed her mind and instructed him not to record.

FACTS

The inquiring attorney was retained by the Buyer of a parcel of real estate containing a house, and through a misunderstanding, the deed which he prepared described a larger parcel of land than that which was supposed to be conveyed. The seller, who is a licensed real estate broker, signed this deed at the settlement table. Some time after settlement, the seller called the attorney and told him that he had intended only to sell a smaller piece of ground (which included the house) and that the buyer was in fact aware of this. When he inquired of the buyer, she assented and agreed that the seller was correct. Subsequently, both parties came to the attorney's office and signed corrective deeds; one deed from the buyer conveying back the excess portion of ground, and another from the seller conveying what was meant to be conveyed in the first place. At this time, both parties authorized the attorney to record the respective deeds. Later the same day on which the Buyer had signed her deed, however, she called him and told him

that she was concerned about some work which was supposed to be completed by the seller after settlement, and she then instructed him *not* to record the deed until the work was completed. A short time later, the buyer came to the attorney's office and told him that after talking with her parents, she was willing to sell back the excess land to the seller for a price to be agreed upon between them. Attorney told his client, the buyer, that based upon the position she was taking, he could no longer represent her and that she should seek the services of another attorney. Subsequently, the seller contacted the attorney and requested that he disregard the instructions from the buyer and record the two deeds. The attorney told the seller that he could not do that, but instead he retained both deeds and continues to hold them.

Inquiring attorney is concerned about his ethical obligations to the respective parties, especially the issue of whether or not he should record the correcting deeds.

CONCLUSION

The attorney was within his rights in refusing to represent the client further; indeed, possibly he had an obligation to do so in order to avoid at least the appearance of assisting in the perpetration of a fraud. Irrespective of this withdrawal, however, he was acting as her agent with respect to the deed, and following her revocation of his authority to record it, he has no authority to do so.

Based on the facts as given, the attorney has no lawyer-client relationship with the seller. Even though the seller is presumably a sophisticated participant in the transaction (being a real estate broker) in order to avoid any possible ambiguity with respect to his obligation to the seller, attorney should suggest to the former that he/she consult counsel of choice.

DISCUSSION

RULE 1.16 DECLINING OR TERMINATING REPRESENTATION provides

inter alia:

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if:

(1) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(2) the client has used the lawyer's service to perpetrate a crime or fraud;

(3) a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent;

(4) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(5) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(6) other good cause for withdrawal exists.

(c) When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interest, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by law.

Regardless of whether buyer's conduct would constitute fraud as contemplated under subsections (1) or (2), at the very least it constituted bad faith, and it seems clear that the attorney was entitled to withdraw under the provisions of (3).

The inquiry does not state whether the seller in this transaction was represented or not, but the inference is that he or she was not, and it will be so assumed. Furthermore, from

the facts given, there appears to be no reason to fault the inquiring attorney on this score. In view of the fact that any authority which the attorney had to record the correcting deed back from the buyer to the seller has been revoked, so that he no longer has authority to record it, such abstention cannot be construed as ethically impermissible. At the same time, and even though the seller would appear to be sophisticated, it would be well for the attorney to advise the seller to obtain counsel. Particularly is this so in the light of the fact that the attorney would now appear to be in the position of a stake holder as to both deeds in the presence of an impasse which can only be resolved by judicial action or by subsequent agreement of the parties.

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