

## Opinion No. 2013-4

### **Synopses:**

- (1) If a seller is represented in a real estate transaction but the seller's attorney does not attend the closing, the purchaser's attorney must obtain the consent of the seller's attorney to communicate with the seller on any issues that pertain to the transaction.
- (2) If the seller was previously represented by an attorney in connection with a real estate transaction but the attorney-client relationship has ended prior to closing, purchaser's attorney must be satisfied that the seller understands that the attorney represents only the purchaser. The purchaser's attorney must also refrain from providing legal advice to the seller except the advice to consult with an attorney.

### **Facts:**

The requesting attorney frequently represents purchasers at real estate closings where the seller's attorney does not attend the closing of the sale. She requests advice as to her ethical obligations in that situation. She also inquires as to the ethical obligations of a seller's attorney who fails to attend the closing. We will respond to the first inquiry but not the second. The rules of the Professional Responsibility Section of the Vermont Bar Association limit our advisory opinions to questions posed regarding the conduct of the requesting attorney. We do not offer advisory opinions on the conduct of other attorneys.

The issues to be addressed are:

- (1) What are the ethical considerations for a purchaser's attorney when dealing with an unrepresented seller at closing?
- (2) What are the ethical considerations for a purchaser's attorney when a seller who is represented in the transaction attends the closing without his or her attorney?

### **Discussion:**

The seller in a real estate transaction may ask an attorney to prepare the seller's closing documents but may not retain the attorney for any further services such as attendance at closing. Other sellers may be represented by an attorney but the attorney has not attended the closing. Either situation creates an ethical dilemma for the Purchaser's attorney.

Real estate closings include a number of documents that must be prepared and signed by the seller. Occasionally, there may be a form presented at closing for the seller's signature that the seller's attorney did not have an opportunity to review prior to the closing. Unless the seller arrives at the closing with all documents properly executed, the

closing documents need to be presented to the seller for signature. This may involve simply showing the seller where to sign but often the seller will have questions and will direct those questions to the purchaser's attorney. In that situation the Purchaser's attorney needs to consider how to proceed. This implicates two specific ethical rules

### **Rule 4.3. Dealing with Unrepresented Person**

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

### **Rule 4.2. Communication with Person Represented by Counsel**

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

In order to determine how to proceed, the purchaser's attorney must determine which of these rules applies at any given closing.

When dealing with an unrepresented person, the strictures of Rule 4.3 apply. At the outset it is important that the purchaser's attorney identify his or her client(s) and explain that the attorney is ethically barred from offering the seller any legal advice. This can be made clear at the commencement of the closing. Thereafter, the purchaser's attorney must refrain from explaining documents or offering any advice to the seller other than the advice to seek the advice of another attorney.

Having in mind that it is incumbent on the purchaser's attorney to be sure that all documents are properly executed, we are not troubled by the purchaser's attorney marking the signature line on the various documents that the seller needs to sign or taking the seller's acknowledgement. These are simply clerical functions and not a meaningful communication with an unrepresented person. Beyond those simple acts, however the purchaser's attorney must take steps to make sure that his or her role is clearly understood by the seller.

The limitations on the conduct of a purchaser's attorney are even more rigid when the seller is represented by an attorney who has opted not to attend the closing. In that circumstance, Rule 4.2 applies. In the absence of consent, the purchaser's attorney cannot communicate with the seller with respect to any matters pertaining to the transaction outside the presence of the

seller's attorney. Once again, we are not troubled by the clerical functions described above but, in the absence of either the presence or consent of the seller's attorney all substantive communications with the seller pertaining to the transaction must be avoided.

The dilemma posed by the represented but unaccompanied seller can be rectified by obtaining the prior consent of the seller's attorney to communications with the seller on matters pertaining to the transaction that arise at the closing. In situations where seller's attorneys and purchaser's attorney know each other well and often represent parties to the same transaction, the purchaser's attorney may be able to obtain consent to deal with multiple sellers represented by the same attorney in different transactions. Whatever the means of obtaining the necessary consent, the purchaser's attorney must be comfortable with the manner in which the consent has been granted. Some purchasers' attorneys may prefer to obtain that consent in writing, electronically or otherwise for each transaction. Other purchaser's attorneys may insist upon all documents being explained to the seller by the seller's attorney prior to closing and the availability of the seller's attorney by telephone during the closing in case unanticipated documents are presented for seller's signature or new issues arise at closing.

The closing of real estate transactions can be stressful for the parties and there may be a great urgency to close the transaction. In such a setting, all of the pressure will be on the purchaser's attorney who has attended the closing and not the seller's attorney who has not. Each attorney who is put in this situation due to a colleague's absence may insist upon the form of consent that he or she finds acceptable prior to proceeding and it is incumbent upon the seller's attorney to either provide the necessary consent or attend the closing.