

The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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OFFICE OF SECRETARY

OPINION 88-30

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Withdrawn by Adv. Op. 2020-02

[CPR Opinion-provides advice under the Ohio Code of Professional Responsibility which is superseded by the Ohio Rules of Professional Conduct, eff. 2/1/2007.]

SYLLABUS: An attorney's client has the exclusive authority to make decisions regarding the representation. Where permissible, however, attorneys may exercise their professional judgment to waive or fail to assert a right or position of their clients. Attorneys should keep their clients informed of all information regarding the representation. Attorneys should not allow the desires of third parties to impair their free judgment regarding the representation of a client.

OPINION: We have before us your request for an advisory opinion regarding not-for-profit legal services corporation attorneys and their involvement in representing a client in a real estate transaction. The legal service corporation serves only members, retirees and dependents of a union. One of the union members entered into an agreement to sell some real estate in Ohio. The union member asked one of the legal service corporation's attorneys to review the purchase and sales agreement already executed. The union member/client also instructed the attorney to prepare any required deed as stipulated in the purchase and sale agreement. The agreement called for a good and sufficient warranty deed.

The attorney then receives a letter from his or her client's real estate agent with instructions to prepare a joint and survivor deed for the benefit of the purchaser of the real estate who is not represented by counsel. The written purchase agreement between the parties is not modified. Your questions are as follows:

1. Is the attorney subject to discipline for preparing the requested joint and survivor deed, irrespective of the fact that the contract calls for merely a general warranty deed?
2. Is the attorney subject to discipline by providing the requested joint and survivorship deed by a third party, the real estate agent?

3. Is the real estate agent interfering with the attorney's independence or representation of his or her client?
4. Does the attorney have any potential liability or exposure in drafting joint and survivor deed, if the purchaser is unaware of the legal ramifications of the same?

In regard to your first question, it is our opinion that the attorney should contact his or her client to discuss the different deeds and their effect. However, it is our understanding that a general warranty deed and a joint and survivor deed are not inconsistent. Attorneys have an obligation to exert their best efforts to insure that their clients remain fully informed of all relevant considerations regarding the representation. See, e.g., Code of Professional Responsibility, EC 7-8. If the client agrees that another deed should be executed then he or she may wish to contact or have the attorney contact the purchaser regarding the change. Whether the contract between the parties has to be changed is a legal question we cannot answer. Bear in mind however, that generally the decision-making authority rests exclusively with the client. Code of Professional Responsibility, EC 7-7.

A lawyer is authorized, where permissible, to exercise his or her professional judgment to waive or fail to assert a right or position of his or her client. Code of Professional Responsibility, DR 7-101(B). However, “the boundaries of what is ‘permissible’ are not clarified.” Annotated Model Code of Professional Responsibility, 299 (1979). Ethical consideration 7-7 does state that “in certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a client, a lawyer is entitled to make decisions on his own.” Code of Professional Responsibility, EC 7-7. Therefore, if drafting a joint and survivorship deed instead of a warranty deed does not affect the merits of the cause nor substantially prejudice the rights of the client then the lawyer is permitted to do so.

Although the Code does not specifically address your second question, it does encourage lawyers to avoid being influenced by someone other than their client. See, Code of Professional Responsibility, DR 5-107 and EC 5-21. Therefore, we advise lawyers not to take direction from someone other than their client.

Your third question is asking about the conduct of a realtor. We are only authorized to respond to questions regarding the practice of law. See, e.g., Gov. Bar R. V, §2b.

Your fourth question is a legal question we do not have the authority to answer. However, we do call your attention to DR 7-104(A)(2), which states:

[d]uring the course of his representation of a client a lawyer shall not: ...give advice to a person who is not represented by a lawyer, other than advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of his client.

In conclusion, it is our opinion, and you are so advised that an attorney's client has the exclusive authority to make decisions regarding the representation. An attorney should keep his or her client apprised of any information regarding the representation. An attorney should not allow the desires of a third party to impair his or her free judgment relating to the representation of a client.

This is an informal, non-binding advisory opinion based upon the facts presented and limited to questions arising under the Code of Professional Responsibility.