



Ohio Board of Professional Conduct

OPINION 2020-02

Issued February 7, 2020

Withdraws Adv. Op. 1988-30

Preparation of Deed Upon Direction of Real Estate Agent

SYLLABUS: A lawyer should not draft a deed at the direction of his or her client's real estate agent that is different than the deed required by an executed contract, without the client's consent, if the new deed will affect the ultimate resolution of the matter or the substantive rights of the client. When interacting with an unrepresented party in a real estate transaction, a lawyer must identify himself or herself as the lawyer for either the buyer or seller, refrain from giving the unrepresented party any legal advice, and may only advise the unrepresented party to secure independent legal counsel.

This nonbinding advisory opinion is issued by the Ohio Board of Professional Conduct in response to a prospective or hypothetical question regarding the application of ethics rules applicable to Ohio judges and lawyers. The Ohio Board of Professional Conduct is solely responsible for the content of this advisory opinion, and the advice contained in this opinion does not reflect and should not be construed as reflecting the opinion of the Supreme Court of Ohio. Questions regarding this advisory opinion should be directed to the staff of the Ohio Board of Professional Conduct.



Ohio Board of Professional Conduct

65 SOUTH FRONT STREET, 5TH FLOOR, COLUMBUS, OH 43215-3431

Telephone: 614.387.9370 Fax: 614.387.9379

www.bpc.ohio.gov

HON. JOHN W. WISE

CHAIR

PATRICIA A. WISE

VICE-CHAIR

RICHARD A. DOVE

DIRECTOR

D. ALLAN ASBURY

SENIOR COUNSEL

KRISTI R. MCANAU

COUNSEL

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QUESTIONS PRESENTED: A lawyer works for a not-for-profit legal services corporation that serves only members, retirees and dependents of a union. One of the union members entered into an agreement to sell real estate in Ohio and asked the lawyer to review the already executed purchase and sales agreement. The union member/client also instructed the lawyer to prepare any required deed as stipulated in the purchase and sales agreement. The agreement called for a good and sufficient warranty deed.

The lawyer subsequently received a letter from the client's real estate agent with instructions to prepare a joint and survivorship deed for the purchaser of the real estate who is not represented by counsel. The written purchase agreement between the parties was not modified.

1). May a lawyer prepare and provide a deed, at the request of a real estate agent, rather than at the request of the seller of real property, his or her client, that is different than the deed called for pursuant to the contract of sale?

2). When a real estate agent for a common client/seller of real property requests a lawyer to draft a deed that is different than the deed called for pursuant to the contract of sale, is the real estate agent interfering with the attorney's independence or representation of his or her client?

3). Does a lawyer who prepares a deed different than the deed called for pursuant to a contract of sale have any potential liability or exposure if the purchaser is unaware of the legal ramifications of the same?

APPLICABLE RULES: Prof. Cond. R 1.2, 1.4, 2.1, 4.3 and 5.4

OPINION:

Communication with Client and Allocation of Authority Between Client and Lawyer

In regard to the first question, the lawyer should contact his or her client to discuss the request made by the real estate agent, the difference between the deeds, the legal effect of the deeds, and any potential risks to the client if a deed is prepared different than the deed called for pursuant to the contract for sale. Reasonable communication between a lawyer and client is required in order for the client to participate effectively in the representation. Prof. Cond. R. 1.4, cmt. [1]. Specifically, the communication required includes keeping the client reasonably informed about the status of a matter and *consulting* with a client about the means by which the client's objectives are to be accomplished. Prof. Cond. R. 1.2(a)(emphasis added) and 1.4(a)(2) and (3). The client has the ultimate authority related to decisions about the objectives of the representation. Prof. Cond. R. 1.2(a), cmt.[1]. It can be difficult to distinguish whether a particular decision relates to the objectives of the representation or the means to accomplish the objectives. The Board agrees with the commentary of the ABA, that a good guideline for a lawyer analyzing where the authority rests in a particular matter is focusing on whether a decision directly affects the ultimate resolution of the matter or the substantive rights of the clients versus whether the decision is procedural or tactical in nature. Bennett, Cohen & Gunnarsson, *Annotated Model Rules of Professional Conduct*, 34 (8th ed. 2015). See also Prof. Cond. R. 1.2, cmt.[2].

In order to reach a conclusion as to whether this decision affects the objectives or means of the matter, the lawyer must conduct a legal analysis as to whether the general warranty deed and the joint and survivorship deed are inconsistent and if the execution of the joint and survivorship deed would impact the enforceability of the contract for sale or otherwise prejudice the client's substantive rights. If the lawyer concludes that drafting a joint and survivorship deed instead of a warranty deed will affect the ultimate resolution of the matter or the substantive rights of the client, then the lawyer should not act on the real estate agent's request without the client's consent.

Professional Independence of a Lawyer

In representing a client, a lawyer must exercise independent professional judgment, render candid advice, and may not take direction from someone other than the client. Prof. Cond. R. 1.8(f), 2.1 and 5.4(c). Thus, the legal services lawyer may not take direction from either the legal services corporation or the client's real estate agent, unless the client has previously authorized the lawyer to act on such direction or the lawyer has consulted with the client.

Liability for Preparation of Different Deed

The third question posed as it pertains to the lawyer's exposure to liability is a legal question that the Board does not have the authority to address. See BPC Reg. 15(B)(1). However, assuming the lawyer will have some interaction with an unrepresented purchaser, the lawyer must identify him or herself as the lawyer for the seller, refrain from giving the purchaser any legal advice, and may only advise the purchaser to secure independent legal counsel. See generally Prof. Cond. R. 4.3.

CONCLUSION: A lawyer who receives a request from a client's real estate agent to draft a deed different than the specific deed required by a previously executed contract for sale must contact his or her client to discuss the request and legal ramifications. If the request for a deed different than the deed required pursuant to the contract for sale will affect the ultimate resolution of the matter or the substantive rights of the client, then the lawyer should not draft the deed without the client's consent. A lawyer must always maintain independent professional judgment and should not take direction from a third party, such as the client's real estate agent, rather than his or her own client. In interacting with an unrepresented purchaser, a lawyer must identify himself or herself as the lawyer

for the seller, refrain from giving the purchaser any legal advice, and may only advise the purchaser to secure independent legal counsel.