Committee Opinion
March 17, 1987

LEGAL ETHICS OPINION 900 REAL ESTATE – WET SETTLEMENT ACT.

Under the Wet Settlement Act, it is not improper for an attorney to distribute funds after delivery of a deed or a deed of trust to the clerk's office as long as some type of written receipt or proof is received.

As a practical matter, an attorney might arrange for a form to be used which sets forth the particulars of a given instrument and could be stamped at the clerk's office as proof of delivery of the instrument(s) described therein. However, such instructions or requirements as imposed on the attorney by the borrower or lender might involve far more than is contained in the act. The certification of the priority of a deed of trust is not required under the act, but may be required by the instructions of the lender. Provided the instructions of the principal of the attorney are lawful, the attorney has a duty to comply with the instructions. Should it be impractical to follow the principal's instructions, the attorney has a duty to notify the lender or principal. The attorney has a duty to comply with the terms of the Wet Settlement Act and to the extent that the instructions of the attorney's principal would necessitate the attorney breaching the act, the attorney must advise the principal and comply with the act.

It is improper for an attorney to disregard instructions by a lender not to disburse until the attorney can certify that the lender has a perfected first lien against the security subject only to current taxes, easements and other permitted encumbrances. If, however, following this instruction would necessitate noncompliance by the attorney with the Wet Settlement Act, the attorney must advise the principal or lender that there is no practical manner by which the legal requirements of the Wet Settlement Act may be met absent the principal or lender revising the instructions.

"Table disbursements" are a matter of ethics. An attorney is not released from ethical conduct because the attorney is covered by "insured closing services" coverage provided by title insurers which guarantee reimbursement of any loss arising from the attorney's failure to record. If it is assumed that an attorney has provided protection against loss of any funds by any party to the transaction as a result of any conduct by the attorney, the committee suggests that the attorney present such to the lender principal and obtain revision of the instructions which would require noncompliance with the Wet Settlement Act.

The passage of amended Senate Bill 536 may revise or moot this opinion. [LE Op. 813; Code of Virginia §§ 6.1-2.13 and 17-79]

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