

ALASKA BAR ASSOCIATION

Ethics Opinion 88-2

RE: May an attorney participate in consummating a real property conveyance transaction where the client is attempting to avoid obtaining consent required under a "due on sale clause" from the original creditor?

In preparing the opinion the Committee has assumed that no issues concerning the construction of the terms of the first deed of trust would support a claim concerning the validity of the "due on sale" clause.

DR 7-102(A)(7) of the Code of Professional Responsibility provides that a lawyer shall not ". . . Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent." Rule 1.2(d) of the ABA Model Rules of Professional Conduct provides that "A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law."

It is the opinion of the Committee that an attorney representing an owner desiring to avoid the obligations of a due on sale clause must advise the client of the consequences of a breach of the provisions of the original deed of trust.

In essence the attorney's participation would amount to concealing a breach of contract. The lawyer's participation does not amount to illegal, criminal or fraudulent conduct. "Fraud" is defined as "An intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right." Black's Law Dictionary, Fifth Edition. The Model Rule, Rule 1.2(d), provides, as noted above, that a lawyer not counsel a client to engage, nor assist a client, in fraudulent conduct. Under the facts as presented to the Committee, it is the Committee's opinion that circumventing a contract term under these circumstances is not fraud nor fraudulent conduct.

Adopted by the Alaska Bar Association Ethics Committee on March 8, 1988.

APPROVED BY THE BOARD OF GOVERNORS: March 12, 1988