

L.E.I. 83-12

(May 11, 1984)

**PROPRIETY OF A PLAINTIFF-ATTORNEY SERVING  
AS SPECIAL COMMISSIONER IN SALE OF REAL PROPERTY**

The Committee has been asked to give its opinion regarding the propriety of the sale of real property by a special commissioner to his wife when both the commissioner and his wife were parties to a partition suit pursuant to which he was appointed commissioner.

The principal issue here is whether the attorney should have accepted employment as a special commissioner. No question has been presented regarding procedural improprieties in the actual process of advertising, accepting bids and selling the real property.

DR 5-101(A) appears to be on point:

Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property or personal interests.

The attorney here clearly had a personal interest: he was a plaintiff in the action.

A special commissioner appointed to sell real property pursuant to a suit for partition must give bond and proceed according to certain statutory procedures. W. Va. Code §§ 55-12-1 through 55-12-8. Such a commissioner is an appointee or officer of the court before which the suit is pending. Bracken v. Everett, 95

W. Va. 550, 121 S.E. 713, 715 (1924). It is clear that a purchase by a special commissioner at his own sale is voidable. Robertson Consolidated Land Co. v. Paull, 63 W. Va. 249, 59 S.E. 1085 (1907).

A similar matter has already been ruled upon by the Committee. Legal Ethics Case No. 116 (undated) involved a purchase by a special commissioner of real property which he was appointed to sell. The Committee, quoting Ayers v. Blair, 26 W. Va. 558 (1885), held that for an attorney to hold the dual roles of commissioner and bidder is a violation of Canon 10 under the previous Code of Professional Responsibility.

In the matter at hand the attorney was not the actual purchaser of the property but had an even more vital interest prior to his appointment as commissioner: he was himself a plaintiff in the suit for partition and married to the other plaintiff. Clearly, his financial interest as a plaintiff conflicts with his duties as commissioner to ensure that the property is sold at a price advantageous to all parties. Moreover, the sale to his wife brings about the very appearance of impropriety which tends to discredit lawyers and undermine public trust in the entire judicial system. Courts have long recognized the special relationship of husband and wife and have often held voidable transactions between a husband and wife which affect the rights of a third party to whom a fiduciary duty is owed by either husband or wife. See 131 A.L.R. 990.

The relationship established by the appointment as commissioner carries with it a duty to the appointed court which is at least as

high a duty as that owed to a client. Since, in a sense, the attorney here had himself as a client when he became a plaintiff to the partisan action, the provisions of DR 5-105(A), (B) and (C) are clearly applicable:

DR 5-105(A) -- A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C).

DR 5-105(B) -- A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C).

DR 5-105(C) -- In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.

In summary, the conflict here is clearly of the kind DR 5-105 was intended to prohibit. An attorney who is a party to an action should refuse appointment as a special commissioner in that action.

Further, to avoid the erosion of public confidence in the legal profession we conclude that an attorney-commissioner appointed by a court to sell property should not sell that property to his or her spouse, even when that spouse is the highest bidder in a properly conducted sale.