



Committee on Professional Ethics

Opinion #438 - 7/19/76 (47-76) Topic: Attorneys fees; Dividing fees with non-lawyers; Conflicting interests.

Digest: Lawyer representing mortgagee may collect legal fees from mortgagor, so long as fees are not shared with lay corporation; Attorney cannot represent mortgagor and mortgagee without express consent after full disclosure.

Code: DR 5-105(C)(D), 5-107(A), 3-102
EC 2-19

QUESTION

May an attorney who represents a lending institution collect his fees for legal services directly from the borrower?

OPINION

The inquiry relates to procedures established by a lending institution relating to the bank's mortgage lending policies, practices and closing procedures. The bank has established a procedure whereby all mortgage papers are to be prepared by its attorneys. This law firm will represent only the bank at closings, which will be arranged by the bank's law firm working with the attorneys for the buyer and the seller. The borrower will be represented by his own attorney. However, the bank's attorney's fees are to be paid by the borrower. This Committee does not pass upon questions of law or determine what activities constitute the unauthorized practice of law.

Assuming that the above arrangement is legal and agreed upon in the contract between the lending institution and the borrower, it is not improper for a lending institution to employ an attorney to safeguard its interests and to require the borrower to pay attorney's fees directly to its counsel for work actually performed by the attorney. ABA Inf. 837 (1965); N.Y. City 695 (1946); N.Y. City 787 (1954). Cf., ABA 331 (1972); N.Y. County 112 (1917). See generally, DR 5-107(A).

In ABA Inf. 837 it was stated in regard to a similar inquiry:

"We assume from your fact statement that the bank believes that it needs to be represented when it makes loans. It has the right to choose an attorney. It is an economic matter as to how he is paid. The cost of such a lawyer obviously is passed, in whole or in part, on to the borrower either directly or indirectly. No ethical problem arises as to how this is passed along. The lawyer described in your statement of facts is the bank's lawyer no matter how he is paid."

For purposes of this opinion it is assumed that the lawyer will charge the borrower directly only for legal services actually performed.

N.Y. City 752 (1950), and that the attorney retains payments received from the borrower for legal fees and does not turn these fees over to, or divide them with, the lending institution. To do otherwise would be improper under DR 3-102. N.Y. City 878 (1971); N.Y. County 587 (1971). Cf., Thompson v. Chemical Bank, 84 Misc. 2d 721, 375 N.Y.S. 2d 729 (Civ. Ct. 1975).

The attorney should endeavor to disclose to the borrower prior to the consummation of the mortgage agreement the amount or manner in which his fees will be determined. See EC 2-19; ABA Inf. 643 (1963). The borrower should moreover be clearly advised that the counsel retained by the lending institution represents the mortgagee alone. N.Y. City 695 (1946). The borrower must remain free to hire his own attorney to represent his interests.

The foregoing opinion is limited to the facts cited here and does not govern situations where there is multiple representation. The attorney for the lending institution may represent both the mortgagee and the mortgagor only if the requirements of DR 5-105(C) are met. If such multiple representation is to occur, there must be express consent of all concerned following full disclosure of relevant facts. ABA Inf. 837 (1965); ABA Inf. 643 (1963); N.Y. State 162 (1970); N.Y. State 199 (1971); N.Y. County 615 (1973). Cf., N.Y. State 351 (1974). See also, DR 5-105(D) and N.Y. State 426 (1976).
