



Committee on Professional Ethics

Opinion #550 - 4/15/83 (15-83)

Topic: Mortgage or deed as security for payment of lawyer's fee.

Digest: Lawyer may take a mortgage but not a deed as security for payment of fees. Guidelines respecting foreclosure or participation in sale of mortgaged property.

Code: DR 5-104(A);
EC 2-19, 2-23, 5-7.

QUESTIONS

1. May a lawyer take a mortgage to secure payment of the lawyer's fee?
2. May a lawyer take a deed to secure payment of the lawyer's fee?

OPINION

It has long been accepted that, as a general proposition, a lawyer may with ethical propriety receive security for payment of a fee, including a mortgage on real estate. N.Y. State 253 (1972) (whether fee is agreed to in advance or after services are rendered); ABA Inf. 593 (1962) (a lump sum fee agreed to in advance); ABA 29 (1930); N.Y. City 547 (1940) (after fee was earned); compare EC 5-7 ("it is not improper for a lawyer to protect his right to collect a fee for his services by the assertion of legally permissible liens. . . ."). If a lawyer may require payment of a retainer in advance of rendering services, the Committee sees no reason why the lawyer cannot receive security in lieu of a retainer. In the opinion of the Committee, receipt of such security is proper whether the subject of the representation is a civil matter or a criminal one.

There are, however, in the opinion of the Committee a number of ethical restrictions upon the conduct of the lawyer with respect both to the fee and to the mortgage:

- (1) The fee must be in an ethically appropriate amount, and the agreement with respect to the basis of the fee should be clear and explicit and clearly communicated to the client, preferably in

writing. See EC 2-19.

(2) If a fee to be earned in the future is to be secured, the fee arrangement should not be on a quantum meruit basis, since this might allow the lawyer at a later date to use the mortgage as a bargaining weapon in reaching agreement on the amount of the fee. N.Y. State 253, supra.

(3) If the fee has already been earned, the lawyer may not threaten collection action in order to obtain the mortgage except when such action would be justified under EC 2-23, and may not otherwise exert undue pressure to obtain the mortgage.

(4) The lawyer should act with restraint and indulgence in electing to foreclose the mortgage, or in exerting influence on the client to sell the mortgaged property in order to raise funds to pay the lawyer's fees. If, for example, the real estate market is particularly depressed -- as has been true in the recent past because of unusually high interest rates -- the lawyer should defer for a reasonable time either foreclosing the mortgage or urging the client to sell the mortgaged property, so that the client may realize a fair amount on the sale.

(5) If the lawyer participates in any way in the voluntary sale of the mortgaged property by the client, the lawyer's interest in the transaction, and the risk of the lawyer's putting pressure on the client with respect to price, bring the transaction within DR 5-104(A) as a business transaction between the lawyer and the client, where the burden is on the lawyer to show that there was no overreaching and that a full and fair price was received for the property.

(6) The lawyer should in no event be the purchaser of the mortgaged property unless the client has independent legal advice with respect to the sale.

Although we find no impropriety in taking a mortgage to secure payment of a fee, subject to compliance with the conditions listed above, we reach a different conclusion where the lawyer takes a deed to secure payment of a fee. With a mortgage, the law gives the mortgagor important protections in the event of foreclosure. Where a deed is received by the lawyer as security, the client is not only deprived of the legal protections that accompany foreclosure, but is also potentially more subject to later overreaching. Thus we hold that a lawyer may not properly accept a deed as security for payment of the lawyer's fee.

We recognize that some lawyers, in good faith reliance on EC 5-7, in the past may have accepted a deed as security for the payment of a fee and not been guilty of any overreaching or unfairness.

made possible thereby. While it is our opinion that the ethical standards of the Code make it improper to accept a deed as security, we do not believe that our interpretation should be applied retroactively as a basis for discipline, absent evidence of actual abuse.

For the reasons stated, the first question is answered in the affirmative, subject to the foregoing ethical restrictions, and the second question is answered in the negative.
