



**New York State Bar Association
Committee on Professional Ethics**

Opinion 1104 (10/5/2016)

Topic: Legal fees; lien; mortgage; securing legal fees by having client sign promissory note secured by a mortgage against the client's property.

Digest: A lawyer may secure legal fees by having the client sign a promissory note or other instrument, secured by a mortgage against the client's property, provided that (i) the promissory note or instrument and mortgage are fair and reasonable to the client, (ii) the terms of the transaction are fully disclosed to the client in language that the client reasonably can understand, (iii) the client provides informed consent to the essential terms of the note and mortgage and the lawyer's role in the transaction, and (iv) the client is advised in writing to seek independent legal advice and given sufficient opportunity to obtain such advice.

Rules: 1.8(a)

FACTS

1. The inquirer's law firm wishes to secure legal fees for estate planning and Medicaid planning legal services by having the client sign a promissory note secured by a mortgage against the client's property.

QUESTION

2. May a law firm secure legal fees for estate planning and Medicaid planning by having the client sign a promissory note secured by a mortgage against the client's property?

OPINION

3. Rule 1.8(a) of the New York Rules of Professional Conduct (the "Rules") prohibits a lawyer from entering into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise professional judgment for the protection of the client, unless:

(1) the transaction is fair and reasonable to the client and the terms of the transaction are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking, and is given a reasonable opportunity to seek, the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

See also Rule 1.0(j) (explaining “informed consent”).

4. Comment [4C] to Rule 1.8(a) explains that the Rule does not apply to ordinary fee arrangements between a client and a lawyer entered into at the inception of the lawyer-client relationship, but that it will apply “when the lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of the lawyer's fee.” The Comment explains that Rule 1.8(a) applies in this situation because of the risk that the lawyer's judgment will be skewed by the financial interest in a way that may affect the lawyer's professional judgment on behalf of the client. *See also* ABA Formal Op. 02-427 (lawyer who acquires a contractual security interest in a client's property to secure payment of fees earned or to be earned must comply with Rule 1.8(a)), N.Y. City 1988-7 (July 14, 1988) (finding that securing a fee with a mortgage on a client's home was a business transaction governed by DR 5-104(A), the predecessor to Rule 1.8(a)); *cf.* Rule 1.8(i) (prohibiting a lawyer from acquiring a proprietary interest in a cause of action or subject matter of a litigation the lawyer is conducting for a client, but permitting the lawyer to “acquire a lien authorized by law to secure the lawyer's fees and expenses”).

5. Rule 1.8(a) by its terms applies only if the client expects the lawyer to exercise professional judgment for the benefit of the client in the matter. The determination of this issue turns on several factors, including the sophistication and expectations of the client, the complexity of the proposed promissory note and mortgage, and the relationship of those instruments to the estate and Medicaid planning services to be provided (for example, whether the purpose of the planning services is to ensure that the real property passes to the client's heirs). *See* N.Y. State 1051 (2015) (where contingent fee agreement provides for the fee to be calculated on the amount of the recovery “by settlement or judgment” and the lawyer wishes to amend the agreement to allow taking a percentage of an amount loaned to the client by a third party, the amendment would be subject to scrutiny under Rule 1.8(a); N.Y. State 910 (2012) (setting forth factors that determine whether an amendment to a fee agreement warrants scrutiny as a business transaction under Rule 1.8(a)).

6. Here, the client may be looking to the lawyer's professional judgment to understand the significance of the proposed mortgage and promissory note to the services for which the lawyer is being engaged. Further, although the mortgage that will secure the promissory note will not, in the first instance, be relied upon to pay legal fees, the attorney may seek to foreclose on the mortgage in order to recover legal fees if the client fails to make timely and complete payment. The lawyer and client have conflicting interests in the promissory note and associated mortgage because, if the client fails to pay legal fees on a timely basis, the client would want to prevent the lawyer from enforcing rights against the client under the promissory note and mortgage. Accordingly, the lawyer ordinarily will have to comply with Rule 1.8(a) in connection with entering into the promissory note and mortgage.

7. We note also that Rule 1.5(d)(5)(ii) prohibits a lawyer from entering into an arrangement to collect a fee in a domestic relations matter if “the written retainer agreement includes a security interest, confession of judgment or other lien without prior notice being provided to the client in a signed retainer agreement and approval from a tribunal after notice to the adversary.” However, this Rule is applicable only to domestic relations matters, and has no bearing on an engagement to provide Medicaid and estate planning services.

8. Because the inquirer has not asked, we do not in this opinion discuss the ethical considerations with respect to executing on the note and mortgage. *See* Rule 1.5(f) (“Where applicable, a lawyer shall resolve fee disputes by arbitration at the election of the client pursuant to a fee arbitration program . . . approved by the Administrative Board of the Courts”); 22 N.Y.C.R.R. Part 137; N.Y. State 684 (1996) (reporting a client to a credit bureau); N.Y. State 608 (1990) (lawyer may use a collection agent after determining that fee is justly owed and considering other factors); N.Y. State 591 (1988) (before engaging a collection agent, lawyer must first determine that fees billed are justly owed for services properly rendered); N.Y. State 567 (1984) (lawyer may protect the right to retain papers or property until the client pays the fees or provides adequate security with a statutory retaining lien, subject to the need to protect against immediate harm to the client).

CONCLUSION

9. A lawyer may secure legal fees for Medicaid and estate planning services by having the client sign a promissory note or other instrument, secured by a mortgage against the client’s property, provided that (i) the promissory note or instrument and mortgage are fair and reasonable to the client, (ii) the terms of the transaction are fully disclosed to the client in language that the client reasonably can understand, (iii) the client provides informed consent to the essential terms of the note and mortgage and the lawyer’s role in the transaction, and (iv) the client is advised in writing to seek independent legal advice and given sufficient opportunity to obtain such advice.

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