

54**FEEES CHARGED IN FORECLOSURE
OR REDEMPTION**

Undated.

Addendum issued 1995.

Syllabus

1. It is unethical for a lawyer to enter into an agreement for, charge or collect an illegal or clearly excessive fee for services performed in the management of a foreclosure procedure. The lawyer is not relieved from this ethical obligation because the promissory note or security instrument specifies a fee which is excessive, nor is the lawyer relieved from this obligation when the entity paying the fee is one other than the client for whom the service is ultimately performed. The ethical guides for the determination of fees are found in DR 2-106(B) of the Colorado Code of Professional Responsibility.

2. It is unethical for an attorney to enter into an arrangement whereby the debtor upon curing or at redemption, or the purchaser at foreclosure sale, would be charged an attorney fee greater in amount than that which otherwise properly would be charged to the attorney's client.

3. It is unethical for a lawyer to share with the client any portion of a fee received in a foreclosure action.

Opinion

The scope of this Opinion is limited to attorney fees charged in foreclosure proceedings. This Opinion does not consider nor limit fees determined and assessed by a court. Foreclosure proceedings herein considered are those which involve the foreclosure of deeds of trust, mortgages, installment contracts or other obligations or security devices permitting the assessment of attorney fees as a portion of the recovery obtained in the proceeding. In some instances, attorney fees and costs are charged to a debtor who redeems or cures the default, or a redeeming junior lienor or to the purchaser at foreclosure sale without a judicial determination of the amount. Oftentimes the underlying obligation or security instrument prescribes a method of the determination of the fee: "Reasonable attorney fees," a specified attorney fee, a percent of the debt or a combination of these.

Excessive fees are a matter of professional ethics. The Colorado Supreme Court in *People v. Radinsky*, 176 Colo. 357, 490 P.2d 951 (1971), held that excessive fees are the basis of disciplinary action. Each lawyer is reminded of DR 2-106(B), which states:

- (B) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:
- (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.
 - (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
 - (3) The fee customarily charged in the locality for similar legal services.
 - (4) The amount involved and the results obtained.
 - (5) The time limitations imposed by the client or by the circumstances.
 - (6) The nature and length of the professional relationship with the client.
 - (7) The experience, reputation, and ability of the lawyer or lawyers performing the services.
 - (8) Whether the fee is fixed or contingent.

Contractual provisions establishing attorney fees, while a factor to be considered, are not necessarily determinative of the question of reasonableness and cannot be relied upon to set an ethical standard. Thus, provisions in the underlying obligations pertaining to the amount of a fee do not justify an excessive

fee. The Colorado Supreme Court in *Waterman v. Silverman*, 156 Colo. 199, 397 P.2d 739 (1964), states that “. . . the Plaintiff was entitled to recover attorney’s fees only upon a showing that such fees had been paid or incurred *and were reasonable*.” (emphasis supplied)

Occasionally, a statute prescribes the maximum attorney fees which may be assessed. Any amount charged in excess of the statutory maximum is illegal and hence, unethical.

The purpose of payment of attorney fees by a purchaser at foreclosure sale, a redeeming debtor or a debtor who cures a default is to *reimburse* the creditor for its expenses incurred by the default. A purchaser at foreclosure sale, a redeeming debtor or junior lienor, or a debtor curing a default does not by virtue of the foreclosure proceeding become the client of the foreclosing attorney. The law does not contemplate that a lawyer should reap a windfall simply because the individual paying the fee is not his client. The expectation that a client will be reimbursed for attorney fees through redemption is not a proper factor to consider in determining a reasonable fee. It is unethical to enter into an agreement with the client whereby the fee will be increased if it is paid by the foreclosure-purchaser, the redeeming debtor or junior lienor, or a debtor curing a default. It is also unethical to assess, with or without an agreement, a greater fee than the fee which would be charged to the creditor.

It is improper for a lawyer to share a portion of the fee with the client. The lawyer must insist that all fees received to reimburse the client be paid to the lawyer. DR 3-102(A) provides: “A lawyer or law firm shall not share legal fees with a non-lawyer. . .”

1995 Addendum

The Colorado Rules of Professional Conduct became effective on January 1, 1993, replacing the Code of Professional Responsibility. While the language of the Rules is somewhat different from the Code, the Ethics Committee considers this Opinion to continue to provide guidance to attorneys in this area. Attorneys are cautioned to review Tables A & B: Related Sections in the Colorado Rules of Professional Conduct and The Colorado Code of Professional Responsibility (found in the *Colorado Ethics Handbook*), to update the research contained in this Opinion and to conduct any independent research necessary.

Relevant provisions of the Colorado Rules of Professional Conduct, which should be examined together with this Opinion, are Rule 1.5 (requiring that fees be reasonable); and Rule 5.4 (regarding sharing legal fees with a non-lawyer).