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## RECOVERY OF ATTORNEY FEE BY LENDER USING IN-HOUSE COUNSEL

Adopted April 19, 1986.

Revised January 19, 1991.

Addendum issued 1995.

### Syllabus

It is ethical in Colorado for an attorney employed by a lender (including the term "holder") on a salaried basis to seek recovery of an attorney fee on behalf of the lender as part of a bid in a public trustee's foreclosure of a deed of trust, or in a legal action seeking recovery on a promissory note, when the attorney employed by the lender in the collection effort claims as a fee only a pro-rata portion of those amounts actually paid in the form of salary or benefits to the attorney.

### Questions Presented

(1) If a promissory note secured by a deed of trust provides for recovery of a reasonable attorney fee, may an attorney employed on a salaried basis by a lender include in the lender's bid as a public trustee's foreclosure sale a reasonable attorney fee for services performed by such attorney in foreclosing the lien?

(2) If a promissory note provides for recovery of an attorney fee, may an attorney employed on a salaried basis by a lender include as part of the amount due and owing under the note a reasonable attorney fee for services performed by such attorney in collecting the note after default?

### Facts

A lender (holder) employs attorneys on a salaried basis ("in-house counsel") who represent the lender in connection with foreclosure proceedings relating to real property securing promissory notes held by the lender, collection proceedings relating to the promissory notes, as well as other legal matters of concern to the lender.

The lender has contractual rights under the notes and security documents to recover costs of collection in the event of default, including a reasonable attorney fee.

Attorney X is employed on a full-time basis by the lender and has inquired whether and to what extent it is ethical to seek recovery of an attorney fee for the benefit of his employer in a foreclosure or other judicial proceeding, to collect amount due the lender under the note and/or security documents.

### Discussion

The issues presented are specifically governed by two disciplinary rules as follows:

DR 2-106 Fees for Legal Services.

(A) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.

DR 3-102 Dividing Legal Fees with a Nonlawyer.

(A) A lawyer or law firm shall not share legal fees with a nonlawyer . . .

The opinion is limited to consideration of the conduct of an attorney employed by a lender (holder) and does not consider the conduct of the lender *per se*.

Further, this opinion only addresses the question of an attorney fee to be collected in connection with a contractual commitment by a borrower. This opinion does not consider claims for recovery of attorney fees which are specifically authorized by statute, *e.g.*, 42 U.S.C. §§ 13-17-101 *et seq.*, or court rule, *e.g.*, C.R.C.P. Rules 11 and 17.

Finally, this opinion does not address the question of whether an attorney engaged in such practice is aiding a nonlawyer in the unauthorized practice of law. The Supreme Court of the state of Colorado

has established a separate committee to consider questions relating to the unauthorized practice of law. However, that issue must not be overlooked by in-house counsel facing this question.

Several other state bar associations have issued opinions relating to the questions set forth above. Two state associations have advised that the request for an attorney fee by a salaried lawyer in a proceeding to collect on a promissory note or in a proceeding to foreclose on a mortgage securing the note is ethical, provided the lawyer does not request, or permit the court to award, a fee in excess of the amount necessary to reimburse the employer for the actual salary and legal expenses paid in obtaining relief.

These committees held that recovery in any amount in excess of a pro-rata portion of the attorney's salary and expenses would constitute an excessive fee and the improper sharing of a fee with a non-lawyer. *See Tennessee Supreme Court Board of Professional Responsibility, Formal Opinion 84-F-67* (1984) (legal action to collect on note by government agency with in-house counsel); *Illinois State Bar Association Committee on Professional Ethics, Opinion No. 768* (1982) (foreclosure proceeding by bank with in-house counsel).

One state bar association appears to approve of recovery of a fee for the services of in-house counsel so long as the institution does not charge the customer (in this case for services rendered to the financial institution in preparation for a mortgage closing) more than the actual, pro-rata costs of the bank of its counsel's services including overhead. *Massachusetts Bar Association Committee on Professional Ethics, Opinion 84-1* (1984).

On the other hand, one state committee has advised that it is unethical for in-house counsel (in this case a full time salaried county attorney) to seek to recover an attorney fee in litigation. Since the lawyer's salary is part of the county's general overhead, payment of a fee would result in the improper sharing of a legal fee with a nonlawyer. *South Carolina Bar Association, Ethics Advisory Committee Opinion 84-9* (1984).

The American Bar Association Committee on Ethics and Professional Responsibility has considered several related issues. That committee has advised that an attorney improperly shares his or her fee with a layperson or corporation when he or she is employed by a mortgage lender to perform duties for the bank relating to the closing of a mortgage loan and the customer pays the mortgage lender a legal fee based on a set fee schedule unrelated to the salary of the attorney. *ABA Informal Decision 544* (1962).

The ABA Committee has also advised that it is unethical for an attorney to accept less for his or her services than is awarded and paid to the client as an attorney fee in a suit brought to collect on a promissory note. *ABA Formal Opinion 157* (1936). Accord, *In re the Matter of Chemical Bank*, 84 Misc.2d 721 (1975) (lending institution collected an attorney fee based on a set percentage or schedule as opposed to an amount related to actual work performed by salaried attorneys).

Colorado law has been consistent and clear that in order to recover an attorney fee in a note collection case, there must be a showing that the fee is reasonable and that it has in fact been incurred. *Waterman v. Silverman*, 397 P.2d 739 (1964); *Rockwell Insulating Company v. Huston*, 346 P.2d 576 (Colo. 1959). The note-holder has the burden of proof as to the fee incurred. *Metro National Bank v. Roe*, 675 P.2d 331 (Colo. App. 1983).

Formal Opinion No. 54 of the Ethics Committee of the Colorado Bar Association [8 *The Colorado Lawyer* 741 (April 1979)] identifies three proscribed practices with respect to attorney fees in a foreclosure proceeding. They are: (1) charging an excessive fee; (2) charging the debtor a higher fee than would be charged to the client; and (3) sharing any part of their fee with the client. Opinion No. 54 states that the purpose of permitting the collection of an attorney fee in this context is to reimburse the creditor for its expenses.

CBA Ethics Committee Informal Opinion U addresses, in part, the question of fees assessed by a lending institution for the services of an attorney including in-house counsel. It states that "the attorney could not properly authorize any practice by the lending institution of assessing legal fees to the borrower, except to the extent that such fees are, in fact, paid by the institution to the attorney (Canon 3)." (Emphasis added.)

Thus, an attorney employed on a salaried basis by a lender may only participate in the collection from a defaulting debtor of a proportionate amount of the attorney's salary and paid benefits. To permit the recovery of other costs in excess of those amounts would constitute a division of an attorney fee with the lender and would violate DR 3-102. In this respect, this Committee follows the decisions of the bar associations of Tennessee and Illinois.

Other costs may have been incurred as a general business expense separate and apart from the collection effort by the note holder and its in-house counsel. While these costs may be incurred by the lender for the benefit of employing the attorney, they are not amounts paid to the attorney and are therefore not properly recoverable. The attorney cannot acquiesce in the sharing or splitting of the "fee" with his or her lender-employer.

It is the opinion of this Committee that an in-house attorney may ethically participate in the collection of an attorney fee by a lender if the lender can establish with certainty that the fee was incurred solely due to foreclosure or other collection proceeding and paid in full to the attorney. This would require a reasonably precise determination of the pro-rata portion of the salary and benefits paid to the attorney which is allocated to the particular collection matter. This would not include the costs of overhead or support personnel.

In addition, the lender should bear the burden of establishing the appropriate proportion of the salary and benefits paid to the attorney and attributable to the matter in question based preferably on accurate time records. *See, e.g.*, Legal Rule 105(a) of the U.S. District Court, District of Colorado. Any such fees are still subject to the limitations and reasonableness set forth in DR 2-106.

### ***Conclusion***

An attorney fee based on the cost of the salary and benefits of in-house counsel and which is incurred as a direct result of the collection action is properly recoverable by the lender (holder). The attorney must be certain the fee is a direct cost of the foreclosure or of the suit on the note, and the attorney must maintain adequate time records. The fee must be reasonable. Payment of the recovered fee to the lender as reimbursement of the salary and benefits paid to the attorney is not deemed to be fee sharing in violation of DR 3-102(a).

### ***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(a) (requiring that a lawyer's fees be reasonable); and Rule 5.4(a) (prohibiting lawyers from sharing fees with non-lawyers with exceptions that do not apply to fees charged for services rendered by salaried lawyers which are the subject matter of this Opinion).