



Committee on Professional Ethics

Opinion #253 - 6/26/72 (32-72)

Topic: Mortgage to secure fee.

Digest: Circumstances under which
lawyer may accept mortgage
to secure payment of fee.

Code*: EC 2-17; 2-23; 5-7; 9-2.
DR 2-106; 5-103(A)(1); 5-105.

QUESTION

Where a mortgage specifies no interest on principal and that payment would be required only on the sale of the property, may a lawyer, whose clients are planning to sell their home, take and record a mortgage on that property to secure payment for both unpaid prior legal services and for current legal services?

OPINION

EC 5-7 permits "a lawyer to protect his right to collect a fee for his services by the assertion of legally permissible liens". If the lien covers the subject matter of litigation the lawyer is conducting for his client, it can only be one granted by law. DR 5-103 (A)(1).

EC 9-2 provides, inter alia:

Where explicit ethical guidance does not exist, a lawyer should determine his conduct by acting in a manner that promotes public confidence in the integrity and efficiency of the legal profession.

Such confidence is promoted by the avoidance of practices which tend towards an undue commercial emphasis. Cf. ABA 151 (1936). Thus excessive fees are condemned and lawyers are admonished to make zealous efforts to avoid controversies over fees with clients and to resolve amicably any differences on the subject. EC 2-17; EC 2-23 and DR 2-106. Similarly a lawyer "should not sue a client for a fee unless necessary to prevent fraud or gross imposition by the client". Provisions for interest on unpaid fees and discounts for prompt payment are likewise improper. N.Y. State 87 (1968); N.Y. State 193 (1971); ABA 151 (1936); ABA Inf. 741 (1964).

OVER-----

NEW YORK STATE BAR ASSOCIATION
Professional Ethics Committee Opinion

Opinion #253

-2-

Applying these guidelines, we hold that it would not be improper for the lawyer to take and record a mortgage to secure payment of a specific fee, reasonable in amount and without interest, agreed to by the client either in advance or upon conclusion of the services, where the client also agrees to the mortgage arrangement. Cf. N.Y. City 547 (1940). Any lawyer who asks a client for such a mortgage would have an obligation to assure himself that the client fully understood all provisions of the mortgage. Of course, the lawyer could not thereafter represent the client on the sale of the property, absent full disclosure and the client's informed consent. DR 5-105.

Such a mortgage arrangement would, however, be improper in cases where the fee arrangements are on a quantum meruit basis, since the lawyer might then be able to use the mortgage as "a bargaining weapon ... in reaching agreement as to the amounts of the fees". See, ABA Inf. 741 (1964).
