NEW YORK STATE BAR ASSOCIATION
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Committee on Professional Ethics

NYSBA

Opinion 553 - 11/8/83 (34-83)

Topic: Loan by attorney to client

Digest: Attorney may not lend funds to client to permit client to bid on matrimonial property ordered to be sold pursuant to equitable distribution decree

Code: DR 5(103)(A) and (B)

QUESTION

May an attorney lend funds or guarantee a loan to a client in a matrimonial matter in order to permit the client to bid on matrimonial property ordered to be sold pursuant to an equitable distribution decree?

OPINION

The inquiring attorney proposes to lend money or guarantee a loan to his client in a matrimonial matter in order to enable the client to bid competitively against the client's spouse for purchase of the marital home under the following circumstances: (i) the loan would be made after issuance of an equitable distribution decree directing that the marital home be sold, (ii) the real estate market is unfavorable and (iii) the non-client spouse, who is in a superior financial position, has the opportunity to purchase the property at a bargain price. The loan or guarantee by the attorney would permit the client either (i) to bid up the price paid by the wealthier spouse for the home, with the result that the client would receive a greater sum for the client's equitable share of the marital home, or (ii) to purchase and remain in the marital home, and possibly to resell the property in a more favorable market. In our opinion such a loan by the attorney would violate DR 5-103(A) and (B) of the Code of Professional Responsibility.

DR 5-103(B) reads as follows:

> "While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to his

> client, except that a lawyer may advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence, provided the client remains ultimately liable for such expenses."

A loan to enable purchase of the marital home could not be viewed as an expense of litigation. Therefore, such a loan would constitute financial assistance prohibited by DR 5-103(B), because the sale of the marital home is an integral part of the proceedings for enforcement of the equitable distribution decree and, therefore, part of the litigation. Until the terms of the decree have been fulfilled, the litigation has not concluded, either in a technical or practical sense.

Numerous ethics opinions have held that it is improper for an attorney to lend funds to a client for living expenses pending the outcome of litigation. E.g., N.Y. State 133 (1970) and 464 (1977); ABA 288 (1954); ABA Inf. 1170 (1970) and 1426 (1978). The same reasoning which supports these opinions, that an attorney should not in essence be a joint venturer with the client, applies with even more force in the circumstances under consideration, where the loan would be made not simply to enable the client to cover living expenses until the judgment, but to increase directly the amount of the client's recovery by exertion of financial pressure, without regard to legal or factual entitlement or perhaps even fair market value.

Concerning the latter factor, it has been held improper for an attorney for an estate executor/administrator to bid on real property of the estate unless the presiding judge conducts the sale, "and there [is] no opportunity for the attorney of the estate to in any way influence the sale and the other bidders." ABA Inf. 804 (1964). In the factual situation which gave rise to that opinion the American Bar Association Committee observed that:

> "The attorney was in position to affect the appraisal of the property and influence prospective bidders in one manner or another and . . . therefore, he should not bid on the property."

An attorney's lending money to his client for use in bidding is the substantive equivalent of the lawyer's bidding himself. The same prohibited result, the attorney's injection of his own

funds to affect materially the outcome of the litigation, would obtain. It would be particularly improper for the attorney to provide funds to enable a bid if the attorney's fee were contingent on the amount his client ultimately recovered.

The loan under discussion would also appear to violate DR 5-103(A), which provides as follows:

> "A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation he is conducting for a client, except that he may:
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> "1. Acquire a lien granted by law to secure his fee or expenses.
> "2. Contract with a client for a reasonable contingent fee in a civil case."

There is no question that the marital home is part of the "subject matter" of the litigation in a matrimonial case, and an attorney who lent money and acquired a security interest in the property would therefore acquire a proprietary interest in the subject matter of the litigation. And even if the attorney had no security interest, since he has extended the loan in order to increase the price of the property, the loan constitutes a kind of financial investment in the outcome of the lawsuit which, especially if his fees are contingent, is the practical equivalent of a proprietary interest.

This Committee has recently stated that, within certain guidelines, a lawyer may accept a mortgage from a client (but not a deed) as security for payment of a fee. N.Y. State 550 (1983). The permissibility of such a mortgage should be contrasted with the prohibition of a mortgage in the circumstances under consideration. A mortgage securing an attorney's fee, unlike the latter mortgage, does not violate either DR 5-103(A) or (B), because the lawyer takes the mortgage not to grant financial assistance to the client, but to grant legal assistance to a client who otherwise might not be able to hire a lawyer at all. Furthermore, the lawyer is not necessarily acquiring an interest in the subject matter of the litigation when he takes a mortgage to secure his fee.

Under certain circumstances, such as where a client sought legal advice on the understanding that the client would receive a loan to enable purchase of the property in dispute, the loan might violate Section 488 of the Judiciary Law and Section 603.18 of the Rules of the Appellate Division, First Department. It is not the province of this Committee, however, to pass upon legal issues; we address in this opinion only the ethical propriety of the loan or guarantee under discussion.

For the reasons stated, the question posed is answered in the negative.