



Committee on Professional Ethics

Opinion 924 (5/21/12)

Topic: Attorney as referee in mortgage foreclosure proceeding

Digest: An attorney may accept appointment as a referee in a mortgage foreclosure proceeding where a client of the attorney holds a judgment on the mortgaged property, provided that the attorney complies with obligations of disclosure, recusal, and the revelation or use of information relating to the client.

Rules: 1.6(a); 1.7; 1.8(b); 1.9; 22 NYCRR §§ 100.6(A), 100.3(E)(1).

FACTS

1. The inquirer has been offered appointment as a referee in a mortgage foreclosure proceeding. A credit union client of the inquirer holds a judgment on the property being foreclosed. The inquirer did not represent the credit union in obtaining the judgment and does not now represent the credit union in connection with that judgment. Inquirer does represent the credit union in connection with mortgage loans made by the credit union. The credit union is not the holder of the mortgage being foreclosed in the proceeding in which the inquirer has been offered appointment as a referee.

QUESTION

2. May the inquirer accept appointment as a referee in a mortgage foreclosure proceeding in which a client of the inquirer is a judgment creditor of record, but not the holder of the mortgage being foreclosed?

OPINION

3. The inquirer's proposed service is subject to constraints on the use of client-related information and also to conflict-of-interest rules.

4. All lawyers, including those serving as referees, must comply with confidentiality requirements of the Rules of Professional Conduct (the Rules). One rule provides (subject to certain exceptions including informed consent by the client): "A lawyer shall not knowingly reveal confidential information, as defined in this Rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person...." Rule 1.6(a). Another provides: "A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or

required by these Rules.” Rule 1.8(b)¹. *See also* Rule 1.9(c) (similar rules as to confidential information of former clients).

5. The inquirer may well possess confidential information of the credit union client, or other information relating to representation of that client. The rules quoted above would limit the inquirer’s revelation or use of such information while serving as a referee, unless the credit union were to give informed consent. Limitations on the revelation or use of information would not automatically preclude service as a referee. However, if for some reason the inquirer determined that possessing such information and complying with the resulting restrictions would make it impossible to perform the duties of a referee fully and faithfully, then the inquirer would be bound to decline the appointment unless the credit union client consented to the necessary revelation or use of the information.

6. There are conflict-of-interest rules that limit a lawyer’s ability to represent certain clients. *See* Rule 1.7(a) (“a lawyer shall not represent a client” under specified conditions); Rule 1.9(a) & (b). In serving as a referee in a foreclosure proceeding, the inquirer would not be representing a client, but rather would be performing duties on behalf of the appointing Court. Thus the provisions of Rules 1.7 and 1.9 dealing with conflicts of interest when representing a client are not applicable to the inquirer’s proposed service as a referee.²

7. There is also a conflict provision, however, in the rules of judicial ethics. Those rules are found in Part 100 of the Rules of the Chief Administrative Judge, 22 NYCRR Part 100.³ Their application is not limited to judges: “All other persons ... who perform judicial functions within the judicial system shall comply with such rules in the performance of their judicial functions and otherwise shall so far as practical and appropriate use such rules as guides to their conduct.” 22 NYCRR §100.6(A). It would seem that a person serving as a referee in a mortgage foreclosure proceeding is performing judicial functions and therefore subject to Part 100 in the

¹ Although the heading of Rule 1.8 categorizes it as a conflict-of-interest rule, we are concerned with the portion relating to use of information and accordingly treat the rule here rather than in the following section on conflicts of interest.

² There are also conflict-of-interest provisions that do not limit a lawyer’s ability to represent certain clients but rather limit the lawyer’s relations with existing clients. *See* Rule 1.8. However, except for Rule 1.8(b) as noted above, these provisions are not implicated by the facts submitted.

³ The Rules in Part 100 are available online at <http://www.nycourts.gov/rules/chiefadmin/100.shtml#01>. These rules of judicial ethics are similar (though not identical) to those in the New York State Bar Association Code of Judicial Conduct (adopted April 13, 1996), which does not have the force of law, and is available online at <http://www.nysba.org/Content/NavigationMenu16/CodeofJudicialConduct/CJC.pdf>. In 2011, the State Bar’s House of Delegates recommended amendments to the judicial ethics rules, but those amendments are still pending before the Courts and will not take effect unless and until the Courts approve them.

performance of those functions.⁴

8. Section 100.3(E)(1) requires a judge to “disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned.” This requirement is followed by a list of such circumstances. None of the listed circumstances appears to apply to the facts of this inquiry, but the list is not exhaustive. *See* §100.3(E)(1) (“including but not limited to” listed circumstances); Code of Judicial Conduct Canon 3(E)1, Cmt. [3.21] (“regardless whether any of the specific rules in Section 3E(1) apply”).

9. Thus the inquirer, in determining whether he may accept the appointment in question, should determine whether his impartiality might reasonably be questioned. In making that determination, the inquirer will need to consider the scope of the appointment. For example, there may be some discretion for a referee to compute amounts, but less discretion for the referee in conducting a sale, and there may be more reason to question impartiality where there is discretion.

10. Thus the inquirer should consider whether there is any dispute as to the amount of the mortgage debt that will be incorporated into the judgment of foreclosure and whether the referee will have any role in resolving that dispute. That is, does the reference include determining the unpaid mortgage principal, the default or penalty interest due to the mortgagee, and any additional expenses that the mortgagee may be entitled to recover and, if so, will the referee be performing a ministerial and undisputed calculation or will he be resolving disputed issues of fact? This issue is relevant because, to the extent that the amount of the mortgage debt (and therefore, the “upset price”) is lowered, the possibility of surplus funds being secured at the foreclosure sale – funds that will be available to all judgment creditors on a pro rata basis – is increased.

11. Another related issue is the amount of the credit union judgment in relation to the likely amount of surplus funds and the number and amount of competing claims to those funds by lienors, taxing authorities, and other judgment creditors. For example, if the credit union judgment is nominal, if there are numerous substantial claims of other lienors and judgment creditors, if the delinquent real property taxes are substantial, and if the underlying mortgage debt is clearly greater than the market value of the property to be foreclosed, the likelihood of the credit union securing anything of value from the foreclosure sale would be remote. In that case it seems doubtful that any reasonable basis for questioning the impartiality of the referee would exist. Even when there is a greater chance of securing value from the sale, there may be little basis for questioning the referee’s impartiality if the appointment involves only ministerial tasks of selling the property.

⁴ *See* Advisory Committee on Judicial Ethics Opinion 10-50 (noting that court attorney referees “are subject to the Rules Governing Judicial Conduct in the performance of their judicial functions”); *cf.* ABA Model Code of Judicial Conduct, “Application” I (B) (defining “judge” within meaning of that Code as “anyone who is authorized to perform judicial functions, including an officer such as a justice of the peace, magistrate, court commissioner, special master, referee, or member of the administrative law judiciary”).

12. If the inquirer determines upon consideration of such factors that disqualification is not required, then he may accept the appointment, but he may still have a disclosure obligation. “A judge should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification.” Code of Judicial Conduct Canon 3(E)1, Cmt. [3.22]. The inquirer should consider whether he needs to advise the Court or the parties to the proceeding that he has represented, and continues to represent, the credit union judgment creditor in matters unrelated to the judgment or the mortgage being foreclosed. Comment [3.22] refers to disclosure “on the record,” but if there are no proceedings on the record then the disclosure might have to be made by some other means such as a letter to the judge or the parties as appropriate.

CONCLUSION

13. An attorney may accept appointment as a referee in a mortgage foreclosure proceeding where a client of the attorney holds a judgment on the mortgaged property, provided that: (a) the attorney makes any necessary disclosures; (b) the circumstances are not such that his impartiality might reasonably be questioned; and (c) in acting as referee, absent client consent, the attorney does not reveal or use any confidential information of the client and does not use to the disadvantage of the client any information relating to the representation.

(10-12)