

NEW HAMPSHIRE BAR ASSOCIATION
Ethics Committee Advisory Opinion #1986-87/4
Fees, Costs and Expenses Secured
by Mortgage Instruments
January 13, 1987

RULE REFERENCES:

- *Rule 1.5
- *Rule 1.8

STATUTORY REFERENCES:

- *RSA 311:13

SUBJECTS:

- *Attorney Liens
- *Business Activities
- *Client Funds and Property
- *Conflict of Interest
- *Contingent Fees
- *Fees

ANNOTATION:

An attorney securing future contingency fees and costs by having the client execute a mortgage in favor of that attorney must proceed carefully to insure, after full disclosure, that the client knowingly consents in writing to that arrangement; and the client should be advised to obtain a second opinion as to understanding the terms of the documents for such arrangement, prior to executing them. (Rule 1.5)

QUESTION:

This opinion addresses the ethical considerations raised when a member of the Bar, secures by mortgage fees earned, future costs of litigation and contingency fees to be earned in pending legal matters.

FACTS:

The inquiring attorney represents family members in two unrelated matters. The first is a worker's compensation claim and personal injury action wherein the attorney has agreed to represent the injured party on a contingency fee plus costs basis.

The attorney also represents the family of the injured party in an estate/trust matter. Efforts have been taken to revoke the provisions of a Dacey Trust and to distribute the trust assets (realty) to the attorney's clients as its beneficiaries. The fee agreement was originally set at an hourly rate plus costs and has been modified to a contingent fee plus costs.

The contingent fee is based on the present value of the clients' remainder in the trust property if the trust is deemed revokable or a percentage of any cash settlement.

The contingency fee agreements are secured by a mortgage imposed upon the clients' realty, potential interest in the trust which is the subject of the litigation, the estates of the clients, if they should die before the mortgage is discharged, awards and settlements which may be forthcoming as a result of the attorney's efforts and the proceeds from the personal injury claims.

This opinion is limited in scope to the ethical questions raised when an attorney attempts to secure fees (contingent or otherwise) and expenses by mortgage deed.

DISCUSSION:

As a general statement, any reasonable business practices available to the attorney can be used in fixing the terms of a fee arrangement, as long as the client is fully aware of the terms and consents to them. N.H.R.P.C. Rule 1.5 Fees, A.B.A./B.N.A. Manual of Professional Conduct, Terms of Payment, Section 41:601.

Fee arrangements must be proposed and drafted to avoid conflicts of interest. The only proprietary interests an attorney may have in a client's case are those that can be related to the contingent fee agreement, costs and expenses of litigation. N.H.R.P.C. 1.8 Conflict of Interest, A.B.A./B.N.A. Manual of Professional Conduct, Conflicts of Interest, Section 41:1501. See also Ethics Committee Formal Opinion, Attorney Lien, 2/17/82 and Inquiry No. 1984-5/15 Attorney's Liens, Informational Analysis of Charging and Retaining Liens.

The practicing attorney should attempt to avoid controversy concerning fees and attempt to resolve fee disputes amicably with clients. A fee agreement must clearly specify arrangements regarding determination of the amount in question and the terms of payment. If the fee agreement addresses how the sum may be collected, the attorney must fully consider whether the collection process or method impinges or effects the client's rights or interest. N.H.R.P.C. 1.5 Fees, A.B.A./B.N.A. Manual of Professional Conduct, Collection, Section 41:2001.

The lawyer who accepts an assignment of property as security has engaged in a business dealing with his client. As a general rule, it is not per se improper for an attorney to take security for payment of fees earned or to be earned. N.H.R.P.C. 1.5 and Comments thereto, A.B.A. Informal Decision 593, Mortgage Note for Security of Future Fees 1962, Michigan State Bar Journal Informal Opinion 273, Special Issue February 1978. Consider also RSA 311:13 Statutory Attorney's Liens; Patterson v. Riley, 105 NH 340 (1964).

The jurisdictions which have addressed the propriety of an attorney's acquisition of a mortgage interest generally have been presented with the issue in the context of collection/foreclosure procedures. The courts appear to have held that before an attorney will be authorized to take an assignment from the client as security for a fee the attorney must (1) fully disclose the purpose and effect of the transaction, (2) obtain unconditional consent from the client, and (3) assert no undue influence over the client or put the client at a disadvantage in and manner which would be unduly beneficial to the lawyer. McFail v. Braden, 19 Ill. 2d. 108, 166 NE 2nd 46 (1960), 9 Maine Bar Bulletin 13 (Sept. 1985); N.Y.S.B.J. 426 (1972) (Opinion 253, June 26, 1972).

What constitutes full disclosure may not always be clear. An attorney may believe that his or her intentions have been made clear, later to find the client did not completely understand the reasons for signing over the interest. It would seem that the attorney must fully disclose orally and in writing the facts and circumstances surrounding the necessity for the security, its purpose, and the methods of collection.

After full disclosure, the attorney must obtain the client's consent to the assignment to insure that the client fully understands and authorizes the assignment. Documentation of the consent by execution of a fee agreement which recites the information provided during the disclosure process would seem necessary and should dove-tail with the mortgage instrument. Documentation of the consent acquired would seem also to be appropriate defensive lawyering to counter any protest which might arise when and if the attorney relies upon the assignment to collect his fee.

Prior to the execution of the fee agreement and mortgage instrument, the attorney should advise the client to acquire a second opinion as to the terms and conditions set forth within the documents. A second opinion would assist the attorney in insuring that the client has been properly informed of the legal consequences of signing the documents and if the client acquires independent legal advice, such would go far to insure that the transaction itself is fair and appropriate.

The inquiring attorney within the documentation presented has clearly attempted to fully inform the clients as to the effect signing the fee agreement and mortgage instrument would have upon their interest. Examples have been given as to the calculation of fees and costs owed, and the inquiring attorney has attempted to the best of his abilities to insure that the clients consent to the assignment is based on full disclosure. The attorney has also recommended independent legal counsel to the clients and it is presumed that any and all questions or inquiries concerning the fee agreement and mortgage instrument have been fully addressed.

CONCLUSION:

It is the opinion of the Ethics Committee that the acquisition of a mortgage interest to secure fees earned or to be earned is not prohibited by the N.H. Rules of Professional Conduct. However, taking into consideration the steps that are recommended to protect both the attorney and client suggest that such a method of securing payment of attorney's fees and costs should be avoided if at all possible because it creates many potential situations in which an ethics violation could be claimed.