

# *The Supreme Court of Ohio*

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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## **OPINION 2004-8** Issued October 8, 2004

***[CPR Opinion-provides advice under the Ohio Code of Professional Responsibility which is superseded by the Ohio Rules of Professional Conduct, eff. 2/1/2007.]***

**SYLLABUS:** Acquiring a mortgage on a client's home to secure a legal fee is a business transaction governed by DR 5-104(A). Thus, an attorney may acquire a mortgage on a client's home to secure a legal fee; however, full disclosure by the attorney and consent by the client is required by DR 5-104(A).

Acquiring a mortgage on a client's home to secure a legal fee when the home is the subject matter of litigation or related to the cause of action is not only a business transaction but also is a proprietary interest subject to DR 5-103(A). Thus, an attorney may acquire a mortgage on a client's home to secure a legal fee when the home is the subject of litigation or related to the subject of the representation, if the attorney is asserting a legally permissible lien as required by DR 5-103(A) and if there is full disclosure by the attorney and client consent as required by DR 5-104(A).

If an attorney acquires a mortgage on a client's home to secure a legal fee, any interest or charges on the mortgage must be disclosed to and consented to by the client and must comply with any applicable state or federal law.

Attorneys are not encouraged to secure legal fees with a mortgage on a client's property. Acquiring a mortgage on a client's home to secure a legal fee does not foster the attorney-client relationship and may evolve into legal disputes with the client that may affect a client's ability to maintain a roof overhead.

**OPINION:** This opinion addresses whether an attorney may acquire a mortgage on a client's home to secure a legal fee.

Is it proper for an attorney to acquire a mortgage on a client's home to secure a legal fee?

A mortgage is "[a] lien against property that is granted to secure an obligation (such as a debt) and that is extinguished upon payment or performance according to stipulated terms." *Black's Law Dictionary* 1030 (8<sup>th</sup> ed. 2004). A mortgage is "[a] conveyance of title to property that is given as security for the payment of a debt or the performance of a duty and that will become void upon payment or performance according to the stipulated terms." *Id.*

Is it ethical or unethical for an attorney to acquire a mortgage on a client's home to secure a legal fee? No doubt, this has been an area of ethical uncertainty for Ohio attorneys.

### Opinions from other states and the American Bar Association

The issue of whether it is ethical for an attorney to acquire a mortgage on a client's home to secure a legal fee has been addressed by ethics committees advising upon rules based upon the ABA Model Code of Professional Responsibility and committees advising upon rules based on the ABA Model Rules of Professional Conduct. The predominant view in both code states and rules states is that it is ethical, although this view is not uniform.

#### *1. Opinions interpreting rules based upon the ABA Model Code of Professional Responsibility*

Some states, advise that an attorney may take a mortgage on a client's home to secure payment of fees. See e.g., Massachusetts Bar Assn., Op. 81-7 (1981); Oklahoma Bar Assn., Op. 297 (1980); Bar of City of New York, Op. 88-7 (1988); Vermont Bar Assn., Op. 87-13 (undated). In domestic relations matter, the taking of a mortgage as security for legal fees sometimes is viewed as proper and sometimes not. See e.g., State Bar of Georgia, Op. 86-7 (advising that a security interest in marital property to secure fees in a domestic relations case is ethical); Massachusetts Bar Assn., Op. 91-1 (1991) (advising that in a divorce proceeding, a promissory note secured by a mortgage on a marital home is considered improper, but if the proceeding is complete, the lawyer may take assignment of a promissory note if certain conditions are met); Virginia State Bar, Op. 1653 (1995) (advising that a lawyer may not enter an agreement assigning a share of a divorce client's profits from the sale of the marital residence to secure payment of the lawyer's fee, but when the decree is final such agreement may be proper if certain conditions are met).

#### *2. Opinions interpreting rules based upon the ABA Model Rules of Professional Conduct*

Some states advise it is proper for an attorney to obtain a mortgage on a client's property to secure payment of fee. See e.g., State Bar of Michigan, Op. RI 40 (1989); Maine Bd. of Overseers of the Bar, Op. 144 (1994)(advising as to a mortgage on property unrelated to litigation). Some states advise that the taking of a mortgage is proper when the property the mortgage secures is the subject of litigation. See e.g., Connecticut Bar Assn., Op. 97-4 (1997). As to divorce actions, there is conflicting advice. See e.g., Maine Bd. of Overseers of the Bar, Op. 97 (1989) (advising that the taking of mortgage on the marital property is improper); Maine Bd. of Overseers of the Bar, Op. 117 (1991) (advising that after a divorce judgment is final, the taking of a mortgage on marital property may or may not be appropriate depending upon the factual circumstances); South Carolina Bar, Op. 96-25 (1996) (advising that a lawyer may not take a security interest in property that is the subject of matter of domestic litigation) Cf.

Connecticut Bar Assn., Op. 87-3 (1987) (advising that the taking of a mortgage on a client's marital home as security for legal fees is proper.)

In Formal Opinion 02-427, the American Bar Association, interpreting the ABA Model Rules of Professional Conduct, advises that a contractual security interest in a client's property to secure payment of fees is proper.

A lawyer who acquires a contractual security interest in a client's property to secure payment of fees earned or to be earned must comply with Model Rule 1.8(a). A lawyer may acquire such a security interest in the subject matter of litigation in which the lawyer represents the client; however, the acquisition of such a security interest must be authorized by law as required by Model Rule 1.8(i).

ABA, Formal Opinion 02-427 (2002).

### Ohio Advisory Opinions

Over twenty years ago an ethics committee of the Bar Association of Greater Cleveland advised that an attorney may secure payment of a legal fee by obtaining from the client a mortgage on real property, but the committee discouraged attorneys from so doing.

An attorney may secure payment of his fee by obtaining from the client a mortgage on real property which is the subject matter of litigation which he is conducting for the client. However, such method of securing payment should be avoided, if at all possible, because it creates the potential for possible claims of ethical violations. In addition, the attorney must disclose to the court the existence of his lien.

Bar Assn. Greater Cleveland, Op. 151 (1983).

The Board of Commissioners on Grievances and Discipline is addressing the issue for the first time. The Board must consider whether the taking of a mortgage to secure legal fees is a proprietary interest governed by DR 5-103(A), a property interest governed by DR 5-101(A)(1), a business transaction governed by DR 5-104(A), or a fee agreement governed by DR 2-106?

Is the taking a mortgage on a client's home to secure legal fees constitute a business transaction?

It is this board's view that DR 5-104(A) governs the issue presented. A transaction with a client to secure a fee constitutes a business transaction.

This view is consistent with the approach taken by the ABA Standing Committee on Ethics and Professional Responsibility in Formal Op. 02-427 (2002). "A

lawyer who acquires a contractual security interest in a client's property to secure payment of fees earned or to be earned must comply with Model Rule 1.8(a) [the rule governing business transactions with clients.]

This view is also consistent with the commentary to ABA Model Rule 1.8(i): "When a lawyer acquires by contract a security interest in property other than that recovered through the lawyer's efforts in the litigation, such an acquisition is a business or financial transaction with a client and is governed by the requirements of paragraph (a) [the rules governing business transactions with clients]."

Under Ohio's DR 5-104(A), an attorney may not enter a business transaction with a client if they have differing interests to the client unless the client gives consent after full disclosure.

DR 5-104 (A) A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his [her] professional judgment therein for the protection of the client, unless the client has consented after full disclosure.

Thus, the acquiring of a mortgage to secure legal fees is a business transaction with a client, requiring client consent after full disclosure by the attorney.

Is the taking of a mortgage on a client's home to secure legal fees when the property is the subject matter of litigation (or related to the cause of action) a proprietary interest?

It is the Board's view that when an attorney acquires a mortgage on a client's home to secure a legal fee and the home is the subject of litigation or related to the cause of action, the attorney is not only entering a business transaction with a client but also is acquiring a proprietary interest subject to DR 5-103(A). As an example, the taking of a mortgage on a client's home in a domestic relations matter is the acquiring of a proprietary interest.

Under DR 5-103(A), an attorney may not acquire a proprietary interest in the cause of action or subject matter of litigation, unless he or she meets one of two narrow exceptions—a lien granted by law or a contingent fee.

DR-5-103 (A) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that a lawyer may:

- (1) Acquire a lien granted by law to secure the lawyer's fee or expenses.
- (2) Contract with a client for a reasonable contingent fee in a civil case.

The assertion of a legally permissible lien is ethical under the Ohio Code of Professional Responsibility. Ethical Consideration 5-7 guides that “it is not improper for a lawyer to protect his right to collect a fee for his services by the assertion of legally permissible liens, even though by doing so he may acquire an interest in the outcome of litigation.

When the taking of a mortgage to secure legal fees is the assertion of a legally permissible lien, the DR 5-103(A)(1) exception is met.

Is the acquisition of a mortgage to secure legal fees a property interest?

Under DR 5-101(A)(1), an attorney with a property interest that would or might affect the lawyer’s independent professional judgment may not represent a client unless the client gives consent after full disclosure.

DR 5-101 (A)(1) Except with the consent of the client after full disclosure, a lawyer shall not accept employment if the exercise of professional judgment on behalf of the client will be or reasonably may be affected by the lawyer’s financial, business, property, or personal interests.

Having determined that the taking of a mortgage on a client’s home to secure legal fees is a business transaction governed by DR 5-104(A) and, when the property is related to the representation, also a proprietary interest subject to DR 5-103(A)(1), it is not necessary to apply DR 5-101(A)(1).

Is an agreement to secure legal fees with a mortgage an improper fee agreement?

Under DR 2-106(A), illegal or excessive attorney fee agreements are prohibited.

DR 2-106(A) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.

Assuming that the underlying fee is not excessive or illegal, DR 2-106(A) would not be violated by an agreement to secure legal fees with a mortgage on a client’s home.

## Conclusion

Acquiring a mortgage on a client’s home to secure a legal fee is a business transaction governed by DR 5-104(A). Thus, an attorney may acquire a mortgage on a client’s home to secure a legal fee; however, full disclosure by the attorney and consent by the client is required by DR 5-104(A).

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**Advisory Opinions of the Board of Commissioners on Grievances and Discipline are informal, nonbinding opinions in response to prospective or hypothetical questions regarding the application of the Supreme Court Rules for the Government of the Bar of Ohio, the Supreme Court Rules for the Government of the Judiciary, the Code of Professional Responsibility, the Code of Judicial Conduct, and the Attorney's Oath of Office.**