



Ohio Board of Professional Conduct

OPINION 2025-02

Issued April 4, 2025

Withdraws Adv. Op. 2004-08

Acquiring Mortgage Against Client's Real Property to Secure Legal Fee

SYLLABUS: A lawyer may acquire a mortgage against a client's real property to secure the payment of legal fees provided the terms of the agreement satisfy the requirements of Prof.Cond.R. 1.8(a).

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Ohio Board of Professional Conduct

THOMAS J. MOYER OHIO JUDICIAL CENTER
65 SOUTH FRONT STREET, 5TH FLOOR, COLUMBUS, OH 43215-3431
614.387.9370
www.bpc.ohio.gov

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APPLICABLE RULES: Prof.Cond.R. 1.5, 1.8

QUESTION PRESENTED:

May a lawyer secure legal fees by having a client sign a promissory note secured by a mortgage against the client's residence?

ANALYSIS:

Background

The inquiring lawyer wishes to secure her legal fees by having the client sign a promissory note secured by a mortgage against the client's real property. Under the arrangement, the lawyer can foreclose on the mortgage to satisfy the promissory note if the client fails to pay the fees.

Security Interest as a Business Transaction

A lawyer is permitted to acquire a security interest adverse to the client to secure the lawyer's fee or expenses. Prof.Cond.R. 1.8, cmt.[16]; ABA Formal Op. 02-427. When a lawyer acquires a security interest in a client's property, other than that recovered by the lawyer's efforts in litigation, the acquisition is considered a business transaction that must comply with the requirements of Prof.Cond.R. 1.8(a). Prof.Cond.R. 1.8(a), cmt. [16]. The rule does not apply to ordinary fee arrangements between a lawyer and a client, but

only to those instances when a lawyer “accepts an interest in the client’s business or nonmonetary property as payment of all or part of a fee.” Prof.Cond.R. 1.8(a), cmt.[1].

Prof.Cond.R. 1.8(a) requires that the terms of a business transaction between a lawyer and client be 1) fair and reasonable; 2) that the client be advised in writing of the opportunity to seek independent legal counsel; and 3) the client give informed consent, in a writing signed by the client, to the transaction. Prof.Cond.R. 1.8(a)(1)-(3). In order for the client to give his or her informed consent, the lawyer should discuss any material risks related to the transaction, the lawyer’s role, the existence of other payment alternatives, and an explanation why the advice of independent counsel may be desirable. Prof.Cond.R. 1.8(a), cmt. [2]. *See also* Prof.Cond.R. 1.0(f),(i),(p) (definitions of *informed consent*, *reasonable*, and *writing*.)

Conflict of Interest

Prof.Cond.R. 1.8(a) governs a lawyer’s business transactions with clients due to the risk that the lawyer’s personal and financial interest could interfere with the lawyer’s professional judgment on behalf of the client. N.Y. Ethics Adv. Op. 1104 (October 5, 2016). Based on the proposed transaction, “the client may be looking to the lawyer’s professional judgment to understand the significance of the proposed mortgage and promissory note to the services for which the lawyer is being engaged.” *Id.* In addition, the lawyer may seek to foreclose on the mortgage if the client fails to pay under the terms of the promissory note. This arrangement gives rise to a conflict of interest, as the client, in the event of nonpayment, would have an interest in preventing the lawyer from enforcing his or her rights under the promissory note and mortgage. *See* Prof.Cond.R. 1.7(a)(2).

Case Law

The failure to follow the enumerated requirements of Prof.Cond.R. 1.8(a) in business transactions involving real property has led to the imposition of disciplinary sanctions imposed against Ohio lawyers. For example, the lawyer in *Lake Cty. Bar Assn. v. Davies*, 2015-Ohio-4904, agreed to a promissory note secured by a mortgage from his client to pay for a flat fee for completed legal services. The lawyer’s client later died, and the lawyer agreed to help the executor to administer the estate to secure proceeds from the sale of the home to satisfy the client’s debt to the lawyer. The Supreme Court found

that the lawyer violated Prof.Cond.R. 1.8(a)(2) when he had failed to advise the client in writing about the opportunity to obtain independent legal counsel before entering into the business transaction. Similarly, in *Disciplinary Counsel v. Bucio*, 2017-Ohio-8709, the lawyer's client transferred farmland to a real-state company owned by the lawyer's law firm. Before entering into the transaction with the client, the lawyer failed to comply with Prof.Cond.R. 1.8(a) by not fully disclosing to the client in writing the terms of the transaction, the desirability of seeking independent counsel, or obtaining the client's informed consent.

Reasonable Fee

In addition to the requirements of Prof.Cond.R. 1.8(a), lawyers must comply with Prof.Cond.R. 1.5(a) regarding the reasonableness of the fee when accepting an interest in a client's property to secure the payment of the lawyer's fees. Prof.Cond.R. 1.8, cmt.[1]. In *Disciplinary v. Bucio*, the lawyer later sold the farmland for \$127,767 and retained the sale proceeds without any distribution to the client. The lawyer later admitted that he had spent only 40 hours working on the client's case and would have been entitled to \$9,000 at his standard hourly rate. The lawyer stipulated that by accepting the land as payment through a business transaction, he had collected a clearly excessive fee in violation of Prof.Cond.R. 1.5(a).

Interest in Property at Issue in Litigation

A lawyer is also permitted to acquire a security interest in property that is the subject of litigation in which the lawyer represents the client when the lien is authorized by statute, common law, or contract and is obtained to secure the lawyer's legal fee or expenses. Prof.Cond.R. 1.8(i). An interest obtained under this division of the rule is not subject to the requirements of Prof.Cond.R. 1.8(a) and may be acquired before, during, or after the representation. ABA Formal Op. 02-427.