

DELAWARE STATE BAR ASSOCIATION  
COMMITTEE ON PROFESSIONAL ETHICS

OPINION 1978-5

A member of the Delaware Bar has requested an opinion of this Committee on the following factual framework.

The requesting lawyer represents certain purchasers of Delaware land ("the Purchasers") who financed the purchase by a mortgage from a Maryland Bank ("the Bank"). The Purchasers' counsel performed the title search and handled the settlement. The Bank's counsel, a law firm from Maryland, charged fees of fixed, though not large, sums for (a) preparation of a bond and (b) a review of the loan related documents prepared by the Purchasers' counsel (hereinafter sometimes called "a review fee"). The Bank collected their fees from Purchasers' counsel after describing them simply as applicable to settlement costs. These fees were disclosed to the Purchasers' counsel after collection but in advance of the settlement. The Purchasers do not believe that they should have paid the Bank's counsel fees. The Purchasers' counsel asks whether he should retain certain other fees now payable to the Bank as an offset against the previously collected review fee. He has retained these fees in escrow by the Purchasers' counsel pending our advice.

QUESTIONS

(1) Under the circumstances described above, should the Delaware lawyer seek to rectify what he perceives to be improper charges levied by the Bank by withholding certain proper fees as an offset; and

(2) Is the Bank's collection of a review fee in advance of the settlement on behalf of its lawyers proper?

ANSWERS

(1) No.

(2) The question is one for the Maryland authorities. In this case it appears that the matter was not sufficiently identified to the borrower by the Bank. However, it is not per se improper for the Bank to collect on behalf of its attorneys a fee for reviewing documents if it is reasonable in amount and clearly explained to the borrower.

### DISCUSSION

As a condition of its loans, a bank may make whatever charges it wishes against borrowers so long as such charges are fully disclosed in advance and not prohibited by law. Such charges may include the fees of bank's counsel in preparation of documents and in review of documents prepared by purchasers' counsel but required in the transaction. ABA Informal Opinions #544 and #643. We are not here asked to opine on the reasonableness of the fees charged in this case. Suffice it to say the fees recited in the correspondence we received are prima facie reasonable in amount.

Our attention is drawn to DR2-103, Interpretative Guideline #1 §(b) promulgated by the Delaware Supreme Court. The entire Guideline is an appendix hereto but the part cited to us reads as follows:

"(b) Unless a lawyer has been freely and voluntarily selected by the buyer or mortgagor after he has made to the buyer or mortgagor the statements and disclosures hereinabove required, the lawyer may not ethically:

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(2) Participate in causing the buyer or mortgagor, directly or indirectly, to bear any charge for his legal service; except that the lawyer for a lender may receive from the buyer or mortgagor, directly or indirectly, payment of the lender's reasonable and necessary legal expenses for preparation of documents at the request of the buyer's or mortgagor's lawyer, for attendance at settlement, and for title insurance properly specified by the lender (within the provisions of 18 Del.C. §2317) but unobtainable

by the buyer's or mortgagor's lawyers provided that the buyer's or mortgagor's obligation to Pay each such legal expense is particularized as a term and condition of the loan;"

We note that a fee for reviewing documents prepared by the Purchasers counsel, formerly included in the "except" clause of §(b)(2), was omitted in an amendment made effective in 1975.

The interpretative guideline has no application to this case. It is addressed only to the situation in which the buyer's counsel is referred to him by the seller or other party having an interest in the transaction. Such a referral may result in a conflict in the interests represented by the lawyer. Here, however, both the Purchasers and the Bank are separately represented by freely chosen counsel. But even if the Purchasers' counsel has been referred by the lender, Section (b) would not apply if the buyer's lawyer is freely chosen by the Purchaser after disclosure of the facts delineated in Section (a) as necessary to clarify the situation. Even where the Purchasers have not freely selected their counsel, the "except" clause of (b)(2) would make no sense unless it were read to authorize the shifting of certain itemized settlement related costs. The fact that a review fee may or may not be shifted in the conflict situation envisioned by the interpretative guideline, has no bearing on the right of the lender to exact terms from a buyer who is, as here, represented by counsel not referred by the lender or other "interested" party.

The case put to us is unfortunate in that we are advised that the clients did not understand that they were paying the Bank's counsel fees at the time the sum for settlement costs was received. Since this portion of the transaction occurred in Maryland, whether or not it

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The Purchasers were, in this case, referred to their lawyer by other clients of his office who had assigned their right to purchase the land in question to the Purchasers. In a sense, then, it might be said that the referral came from a party 'interested in the transaction'. The interest referred to in the Guidelines is a financial interest in the settlement and thus, technically, adverse to the purchasers. The precise phrase used is 'seller, lender, real estate agent or other person having an interest in the transaction.' (DR2-103, Interpretative Guideline #1 5(a)). The assignor's interest in the mortgage transaction here discussed was not, in the sense discussed, adverse to the Purchasers and the assignors had no interest whatever in the question of fees.

involves an ethical breach by the Maryland lawyers for the Bank to permit the collection of such fees is a question we leave to Maryland authorities.

It seems to us that it would be unwise for the Delaware lawyer in this case to seek to offset the payment of fees already collected and owing to the Bank on the theory that Maryland would disallow these charges as unethically collected. This is particularly true because the settlement has now been concluded with knowledge of the nature of the fee and the circumstances of its collection.

Since the fees are legitimate charges, at least insofar as the facts we have disclose, we find no ethical bar to a Delaware lawyer participating in the transaction if they are adequately and clearly identified to the borrowers.

It would be desirable for the Bank to disclose its practices more clearly to prospective borrowers so that, before the charges are paid, an informed decision can be made as to whether or not the borrowers wish to accept the terms the Bank seeks to impose.

December 27, 1978