



ISBA Advisory Opinion on Professional Conduct

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This Opinion was **AFFIRMED** by the Board of Governors in January 2010. Please see the 2010 Illinois Rules of Professional Conduct 5.4 and 5.5(a). This opinion was affirmed based on its general consistency with the 2010 Rules, although the specific standards referenced in it may be different from the 2010 Rules. Readers are encouraged to review and consider other applicable Rules and Comments, as well as any applicable case law or disciplinary decisions.

Opinion No. 768
May 12, 1982

Topic: Division of Legal Fees

Digest: It is not improper for a full-time, salaried lawyer to permit his employer to claim a portion of his salary as a legal fee in a mortgage foreclosure.

Ref: Rules 3-101 and 3-102

QUESTION

An attorney is a full-time, salaried employee of a thrift institution. The institution proposes to use the attorney-employee as its attorney in legal actions brought by it for foreclosure of mortgages. The question is whether the institution may claim, as additional indebtedness of the mortgagor, the portion of the attorney's salary that is attributable to his work in the foreclosure suit. The Committee is asked to assume that the court, after being advised that the attorney is a full-time, salaried employee, will approve both the propriety and the amount of the legal fee.

OPINION

The question is whether the attorney is sharing legal fees with a non-lawyer in violation of Rule 3-102. Since the institution is responsible for the lawyer's salary regardless of whether and to what

extent a portion thereof is treated as additional indebtedness of the mortgagor, any such allowed amount is not merely passed on from the institution to the lawyer, as would be the case if the lawyer were not an employee, but is kept by the institution. There is some support for the view that this constitutes the sharing of fees by an attorney with a layman, which would violate Rule 3-102.

On the other hand, it could be argued that since the client, were it represented by outside counsel, would be entitled to claim the fees charged by that counsel and thus incur no legal cost, it ought to be allowed to represent itself through a salaried lawyer and similarly accomplish the foreclosure without legal cost to itself.

In the Committee's view, there is no actual fee sharing since the lawyer never becomes entitled to the fee; rather, the institution claims reimbursement for part of the compensation it pays the attorney. Furthermore, the amount of the reimbursement claimed is only that portion of the attorney's salary that is attributable to the attorney's work on the foreclosure. In this respect, the case differs from National Treasury Employees Union v. U.S. Department of Treasury, 656 F.2d 848 (D.C. Cir. 1981), which held that a union could recover attorneys' fees equal only to its costs and could not recover for such fees based on the market value of the attorney's services. The latter practice, in the court's view, would involve unethical fee splitting, in violation of Rule 3-102, and enable the union to engage in the unauthorized practice of law in violation of Rule 3-101.

It may be that the statute authorizing the allowance of fees would not be construed by the court to cover a "fee" consisting of part of the salary of the in-house lawyer, but assuming it does (as the Committee is asked to assume), the Committee does not regard the arrangement as unethical.