

Advisory Opinion 1984-6

An attorney has requested an opinion from the Advisory Opinions Committee concerning the propriety of an award for attorneys fees for her services in collection suits on behalf of her client, a bank, where she is a full-time salaried employee of the bank. The courts in her District have routinely allowed such attorneys fees awards. The attorney's letter reads as follows:

"I am writing to ask you your opinion concerning the assessment of certain attorneys fees.

My situation is this: I am presently staff attorney for the . . . Bank In that capacity, I handle the bank's mortgage foreclosure proceedings and Complaints on Promissory Notes. Both the bank's mortgages and promissory note documents contain the standard povisions (sic) regarding the assessment of reasonable attorneys fees in the event the same are placed in the hands of an attorney for collection.

As a matter of routine, I have been including in the prayer for relief on such proceedings a claim for reasonable attorneys fees. The courts in the . . . Judicial District have routinely awarded such fees. Given that I am on salary at the bank, I was concerned as to any possible ethical violations that might be raised. At this time, no one has raised the issue, but it is one that I would like an opinion on.

I was wondering if you would be kind enough to give me your opinion. If you have any questions concerning this matter, I would be happy to talk with you about them."

The attorney has provided the following additional information related to her question: the attorney is a full-time salaried employee of the bank and receives no compensation other than her salary, which is fixed, and which does not vary in any way depending upon attorneys fees awarded in collections and foreclosures; her employer, the bank, gets 100 percent of the "reasonable attorneys fees" collected through the foreclosures and collection actions; the fee is uniformly computed by the percentage of the balance due based upon the provisions in the promissory notes providing for 10 percent attorneys fees; the attorney states that in a substantial majority of the cases (usually where the defendant defaults) the awarded fee is more than what would be her attorney's fee or would be an outside attorney's fee if based upon a reasonable hourly rate times the amount of time the attorney spent on the case; the attorney does, however, keep time records.

Clearly, if the attorney was not on salary, there would be no problem. A question could be raised whether the language of the bank's promissory notes and mortgages necessarily imply a turning over of the documents to an outside independent attorney for collections ("Placed in the hands of an attorney for collection"). While this language is not necessarily inapplicable to in-house counsel, rewording these documents would probably provide greater clarity and would provide better support for the bank's position.

This is especially true because these attorneys fee provisions in promissory notes and mortgages are contractual agreements between parties using forms created by the more powerful of the parties, the bank.

Ethically, the attorney must point out to the court when requesting attorneys fees that the attorney is exclusively on salary by the bank so that the court would be informed and could take that fact into consideration in setting the fees to be awarded.

It would appear to be unethical and improper for the bank to collect any more for "reasonable attorneys fees" in such collections than could be demonstrated to be the reasonable portion of the attorney's salary applicable to the case plus directly applicable overhead. It appears to be improper for the bank to "make a profit" through the contractual fee provision.

The New Mexico Code of Provisional Responsibility provides at Rule 3-102 that a lawyer shall not share legal fees with a nonlawyer. Further, it appears to be the law of New Mexico that a court should not routinely award a contractually stated percentage of the balance of a promissory note as the awarded "reasonable attorneys fees." The court should actually determine what are reasonable attorneys fees based upon the usual factors of time spent, usual hourly rates, ability, the attorney's standing in the professional community, skill, experience of the attorney, the nature and character of the controversy, the amount involved, the importance of the litigation and the benefits derived from the litigation. See *Roger*

vs. Kemp Lumber Company, 18 N.M. 300 ; 137 P. 586 241 (1913); *Exchange Bank of Dallas vs. Tuttle*, 5 N.M. 427; 23 P. 241 (1890); *Elsea vs. Broome Furniture Company*, 47 N.M. 356; 143 P.2d 572 (1944).

The committee has researched this question to find guidance in the common law, statutes and treatises. However, except as cited above, the committee has not been able to find any further guidance and can only offer its opinion based upon the personal professional views of the committee members.