

Proposed 2008 Formal Ethics Opinion 11
Representation of Beneficiary on Other Matters While Serving as Foreclosure
Trustee
October 22, 2009

Proposed opinion rules that a lawyer may serve as the trustee in a foreclosure proceeding while simultaneously representing the beneficiary of the deed of trust on unrelated matters and that the other lawyers in the firm may also continue to represent the beneficiary on unrelated matters.

Inquiry #1:

Attorney A is employed by Law Firm. The lawyers of the firm routinely represent various bank clients including Bank Z. Bank Z is one of the firm's largest clients and all of the lawyers in the firm perform some work for the bank.

Attorney A has been asked to serve as the substitute trustee for the foreclosure of a deed of trust securing a loan (the Loan) made by Bank Z to the grantor (the Borrower) of the deed of trust. Bank Z is the named beneficiary of the deed of trust. The lawyers at the firm did not represent Bank Z on the negotiation or securitization of the Loan. The lawyers have not previously represented the Borrower.

Attorney A and the other lawyers in Law Firm want to continue to represent Bank Z on unrelated legal matters throughout the course of the foreclosure proceeding. Bank Z does not object. Borrower has not been notified that Attorney A and the other lawyers of the firm represent Bank Z on other unrelated matters.

May Attorney A continue to represent Bank Z on matters unrelated to the Loan and serve as substitute trustee for the foreclosure?

Opinion #1:

Attorney A may serve as trustee and continue to represent the bank on other matters because it is unlikely that his impartiality as trustee will be impaired by his duty of loyalty to and advocacy for the bank on other unrelated matters. Even when the proceeding is contested, Attorney A may serve as trustee and continue to represent the bank on other matters.

There are a number of ethics opinions that hold that a lawyer serving as trustee in a contested foreclosure proceeding may not act as the advocate for the beneficiary or the grantor in an adversarial proceeding arising from or connected with the deed of trust because the trustee is a fiduciary and, when exercising his discretion in the foreclosure, must play an impartial role relative to both parties. RPC 3, RPC 64, RPC 82, RPC 90, 04 Formal Ethics Opinion 3. *See also* N.C. Gen. Stat. §45-21.16(c)(7)b. (notice to the

debtor must contain a statement that a trustee is “a neutral party and, while holding that position in the foreclosure proceeding, may not advocate for the secured creditor or for the debtor in the foreclosure proceeding”). None of the ethics opinions, however, consider whether a lawyer is disqualified from serving as trustee if he continues to represent the lender on unrelated legal matters.

RPC 3, which rules that a lawyer may serve as a foreclosure trustee after representing the beneficiary of the deed of trust in the negotiation of the loan, explains the basis for prohibiting the lawyer from acting as an advocate in a contested foreclosure proceeding in the following passage:

[T]he Trustee owes a duty of impartiality to both parties which is inconsistent with representing one of the parties in a contested proceeding....Generally, when an attorney is required to withdraw from representation or from a fiduciary role, it is either because of concerns [for the] confidences of the client under Rule 4 [now Rule 1.6] and its predecessors or because of conflicts of interest under Rule 5.1 [now Rule 1.7] or its predecessors where the attorney would be put in the position of inconsistent roles or obligations at the same time or in the same proceeding. Since neither of those circumstances exist, and the rules do not appear to be directly relevant by their terms or with regard to their purposes, Attorney A is not ethically prohibited from continuing to serve as Trustee in a contested foreclosure matter, despite his prior representation of [beneficiary of the deed of trust], where he does not currently represent [beneficiary] in the foreclosure or related proceedings.

To clarify these earlier opinions, a foreclosure proceeding is contested when the grantor, or anyone else with standing, seeks to enjoin the proceeding or contests any of the following issues at the foreclosure hearing: jurisdiction, service of process debt, default, notice, power of sale, and, in the case of residential mortgages, certification regarding subprime loans¹. A borrower’s motion to continue the proceeding or request to postpone the sale does not render the foreclosure contested. As with the trustee’s own motion for a continuance or decision to postpone, these are procedural matters to which the trustee may respond within his or her discretion without impairing his or her ability to foreclose on the property consistent with the statutory requirements and the deed of trust.

If Attorney A represents Bank Z in other matters and the foreclosure is contested, Attorney A can maintain his impartiality as trustee if the bank represents itself or hires a lawyer to represent it in the foreclosure proceeding. Nevertheless, if Attorney A determines that he cannot protect and advance the interests of the bank in the unrelated matters while remaining impartial in a contested foreclosure proceeding where a substantial interest of the bank is at stake, Attorney A would have a conflict of interest requiring him to decide whether to continue to represent the bank on the unrelated matters and relinquish the trustee role to someone who will not be similarly compromised or to fulfill the role of trustee by withdrawing from the representation of the bank in all other matters. *See also* Rule 1.7(a)(1)(concurrent conflict of interest exists if representation of one or more clients may be materially limited by the lawyer's responsibilities to a third person).

Inquiry #2:

Perceiving that he has a personal conflict of interest, Attorney A withdraws from the representation of Bank Z on all unrelated matters in order to continue to serve as trustee. Are the other lawyers in Law Firm required to withdraw from the representation of Bank Z on matters unrelated to the Loan if Attorney A serves as the substitute trustee for the contested foreclosure?

Opinion #2:

No, the other lawyers in the firm may continue to represent Bank Z on unrelated matters.

Rule 1.10(a) provides that a disqualification based upon a personal interest of a lawyer that does not present a significant risk of materially limiting the representation of a client by the remaining lawyers in a firm is not imputed to the remaining lawyers in the firm. Comment [3] to Rule 1.10 specifies that “[t]he rule in paragraph (a) does not prohibit representation where neither questions of client loyalty nor protection of confidential information are presented.” Serving in the role of trustee does not raise questions of client loyalty or protection of confidential information because the lawyer/trustee does not represent either party in the foreclosure. Therefore, Attorney A’s disqualification from the representation of Bank Z to maintain his impartiality is not imputed to the other lawyers in the firm who are representing the bank on matters unrelated to the Loan and the foreclosure.

Inquiry #3:

Attorney B, another lawyer in Law Firm, intends to act as the lawyer for Bank Z in connection with the Loan including representation in the foreclosure proceeding. May Attorney B represent Bank Z on all matters related to the Loan, including the foreclosure, if another lawyer in his firm is serving as the trustee?

Opinion #3:

No, if the foreclosure is contested, Attorney B may not represent Bank Z at the foreclosure proceeding or on any matter related to the Loan. Attorney A’s impartiality may be impaired if another lawyer from his firm appears in the foreclosure or related matters on behalf of the bank. To preserve the integrity of the process and the impartiality of the trustee, Attorney A’s disqualification from serving as an advocate for one of the parties to a contested foreclosure in any matter related to the Loan is imputed to the other lawyers in the firm. *See* Rule 1.10(a).

Inquiry #4:

May another lawyer in the firm represent Attorney A in his capacity as trustee for the foreclosure?

Opinion #4:

Yes, and the lawyer may continue to do unrelated legal work for the bank while representing Attorney A as trustee. *See* opinion #1 above. However, if Attorney A determines that he has a conflict of interest in serving as the trustee while continuing to represent the bank on unrelated matters and withdraws from the representation of the bank on unrelated matters to continue to serve as trustee, a lawyer representing Attorney A as trustee would be similarly disqualified. *See* Rule 1.10(a).

Inquiry #5:

Law Firm has set up a separate entity, Firmco, to serve as trustee on deeds of trust. Law Firm or its lawyers have a controlling ownership interest in Firmco. Firmco is substituted as trustee on the deed of trust securing the Loan made by Bank Z. May a lawyer in the firm represent Firmco in its capacity as trustee for the foreclosure? May the lawyer continue to do unrelated legal work for the bank?

Opinion #5:

Yes, the lawyer may represent Firmco as trustee and the lawyer representing Firmco may continue to do unrelated legal work for the bank. *See* opinion #4. However, a lawyer for the firm may not simultaneously provide representation to Firmco and advocate for the lender in a contested foreclosure proceeding. *See* opinion #1.

Inquiry #6:

Should the Borrower be informed that Attorney A and the other lawyers in Law Firm will continue to represent Bank Z on matters unrelated to the foreclosure?

Opinion #6:

Yes. The role of the trustee in a foreclosure proceeding is similar to the roles of arbitrator or mediator which are addressed in Rule 2.4. Rule 2.4(b) provides that when a lawyer serving as a third-party neutral knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third party neutral and a lawyer's role as one who

represents a client. Similarly, explaining the role of the trustee and the role of the other lawyers in the firm (who continue to represent the bank) to a borrower in a foreclosure proceeding will help to avoid confusion and will allow the borrower to pursue his legal remedies to remove the trustee if he objects.

Inquiry #7:

If Borrower informally objects to Attorney A serving as the trustee because Attorney A and the other lawyers in the firm represent Bank Z on unrelated matters, is Attorney A required to withdraw from service as trustee?

Opinion #7:

No, Attorney A is not required to withdraw unless ordered to do so by a court.

Inquiry #8:

Do the responses to any of the preceding inquiries change if Bank Z is not one of the largest clients of Law Firm?

Opinion #8:

No.

¹ G.S. §45-105 allows the Commissioner of Banks (COB) to delay the time within which a lender can file a foreclosure proceeding on a subprime loan for a period of up to 30 days and to suspend a foreclosure on a subprime loan based upon its review of loan information that the lender must file with the Administrative Office of the Courts pursuant to G.S. §45-103. The clerk of court must find that the loan is not subprime or, if subprime, that the COB has not delayed the time for filing the foreclosure proceeding or suspended the foreclosure based its review of the loan information.

