

2013 Formal Ethics Opinion 5

Disclosure of Confidential Information to Lawyer Serving as Foreclosure Trustee

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Opinion rules that a lawyer/trustee must explain his role in a foreclosure proceeding to any unrepresented party that is an unsophisticated consumer of legal services; if he fails to do so and that party discloses material confidential information, the lawyer may not represent the other party in a subsequent, related adversarial proceeding unless there is informed consent.

Inquiry:

Lender requests that Lawyer's Firm serve as the substitute trustee under a note and deed of trust to commence foreclosure proceedings based on an alleged event of default. Borrower under the note and deed of trust is a limited liability company. While Firm is acting as substitute trustee, Borrower's member-manager meets with Lawyer and explains to Lawyer why he believes Borrower is not in default. Borrower is a small business and its member-manager is inexperienced in matters requiring legal representation.

During the meeting with the member-manager, Lawyer did not explain the role of the trustee or the trustee's relationship to the borrower and lender in a foreclosure. The member-manager informed Lawyer that Borrower's theory is that the note required the subject property to be cleaned and cleared, and Borrower does not believe this condition was met. Borrower's member-manager shows Lawyer pictures and other documents supporting Borrower's theory of the case during this meeting.

The foreclosure proceeding is subsequently dismissed and superior court litigation between Borrower and Lender ensues. A new substitute trustee is appointed under the deed of trust. The primary issue in the lawsuit is the same issue Lawyer and the member-manager of Borrower discussed at their meeting while Firm was substitute trustee, i.e. whether Lender fulfilled its obligations under the note to clean and clear the property.

Now that Firm is no longer the substitute trustee, may Lawyer represent Lender in the lawsuit?

Opinion:

RPC 90 provides that a lawyer who as trustee initiated a foreclosure proceeding may resign as trustee after the foreclosure is contested and act as lender's counsel. The opinion notes that former service as a trustee does not disqualify a lawyer from subsequently assuming a partisan role in regard to foreclosure under a deed of trust or related litigation. *See also* RPC 64 (lawyer who served as trustee may after foreclosure sue the former debtor on behalf of the purchaser).

The facts of RPC 90 contemplate that the trustee resigns "when it becomes apparent that the foreclosure will be contested." In the instant matter, it appears that Lawyer continued to participate as trustee in the foreclosure after he knew that it was contested. Lawyer met with the member-manager of Borrower and discussed Borrower's theory as to the issue of default. Lawyer obtained information from the member-manager specifically related to the issue in controversy.

The responsibilities and limitations of a lawyer acting as trustee on a deed of trust arise primarily from the lawyer's fiduciary duties as trustee as opposed to any client-lawyer relationship. RPC 82. As a fiduciary, a lawyer/trustee has a duty to act impartially as between the parties and to ensure that the foreclosure is prosecuted in accordance with the law and the terms of the deed of trust. *See* RPC 82. However, the trustee's role may be unclear to an unsophisticated consumer of legal services who is unrepresented in the foreclosure. This may lead this party to make uncounseled disclosures to the lawyer/trustee on the erroneous assumption that the lawyer represents the party and has a duty of confidentiality to the party. Therefore, it is the lawyer/trustee's duty to explain the following to any party to a foreclosure that is unrepresented by counsel and inexperienced in the employment of lawyers or the mechanics of a foreclosure proceeding:

- the trustee's role is to insure that the correct procedures are impartially followed in the prosecution of the foreclosure proceeding;
- the trustee does not represent either the lender or the borrower; and
- communications made by the lender or the borrower to the trustee will not be held in confidence and may be used or disclosed in subsequent actions between the lender and the borrower.

Lawyer failed to explain these limitations on the trustee's role to the member-manager of the L.L.C. which was unrepresented and apparently inexperienced in the mechanics of a foreclosure proceeding. The member-manager reasonably assumed that the disclosures he made to Lawyer would be held in confidence. Because Lawyer, in his fiduciary capacity, encouraged or allowed Borrower to confide in him without explaining the trustee's role or warning Borrower that the information could be disclosed or used, Lawyer may not subsequently represent Lender in a subsequent substantially related matter if the information Lawyer received from Borrower is material to the matter. Such a practice would constitute conduct that is prejudicial to the administration of justice. *See* Rule 8.4(d). However, Borrower's informed consent, confirmed in writing, would permit Lawyer to proceed with the representation. *See* Rule 1.7(b).

A lawyer/trustee may represent a lender against a borrower in a subsequent proceeding if the lawyer resigns as trustee upon recognizing that the foreclosure will be contested and the lawyer has not received information that may be used to the disadvantage of Borrower in the subsequent matter.