
**E-85-4 Conflict of interest: Defendant law firm
represents plaintiff in foreclosure action**

Facts

A lawyer commences a mortgage foreclosure action for the first mortgage holder on a certain property. The complaint requests a deficiency judgment in the event that the sheriff's sale proceeds are insufficient to cover the total amount owed to the plaintiff mortgagees. The lawyer's law office has a second subordinate mortgage on the same property covered by the first mortgage. The lawyer lists his or her firm as a defendant and intends as second mortgage lienholders to assert a claim against any surplus proceeds that may arise from a sheriff's sale of the property.

Question

Under the above circumstances, is it proper for the lawyer to continue representation of the first mortgage holder in the foreclosure action?

Opinion

The Wisconsin Code of Professional Responsibility, codified in Chapter 20 of the Wisconsin Supreme Court Rules, states the general rule that except with the consent of the client after full disclosure, a lawyer may not accept employment if the exercise of his or her professional judgment on behalf of the client will be or reasonably may be affected by his or her own financial, business, or property interests. SCR 20.24(1); *see* SCR 20.23(1). SCR 20.23(2)(b) states that the self-interest of a lawyer resulting from his or her ownership of property in which his or her client also has an interest may interfere with the exercise of free judgment on behalf of the client. Even if the property interests of a lawyer do not presently interfere with the exercise of his or her independent judgment, but the likelihood of interference can reasonably be foreseen by him or her, a lawyer should explain the situation to his or her client and withdraw unless the client consents to the continuance of the relationship after disclosure. SCR 20.23(2)(b).

In Formal Opinion E-83-9, 57 Wis. Bar Bull. 83 (June 1984), the Committee on Professional Ethics stated that the Code of Professional Responsibility clearly prohibits “a lawyer from representing one client in litigation against another client the lawyer simultaneously represents, without at least, the consent of both clients after a full and frank disclosure of the possible consequences of the dual representation.” Although that opinion involved multiple clients, it is nonetheless similar to the present situation in that the basic, underlying concern is the possibility for adverse affect on the lawyer’s professional judgment. In Formal Opinion E-83-9, *supra*, the committee found the proposed dual client representation improper because it was likely that the lawyer would suffer “some” adverse affect on the exercise of his or her independent professional judgment. However the committee stated that the conflict could be resolved with client consent.

In the situation posed, all lienholders on the property appear to have the same interest—to see the sheriff’s sale bring the highest possible bid for the property. In light of the possibility for little adverse affect on the lawyer’s professional judgment, the conflict could probably be resolved with client consent. Nonetheless, continued representation in the matter would be improper. A lawyer should strive to avoid not only professional impropriety, but also even the appearance of impropriety. SCR 20.48(6); *Ennis v. Ennis*, 88 Wis. 2d 82, 98, 276 N.W.2d 341 (1979). A lawyer should promote public confidence in our legal system and in the legal profession. SCR 20.48(1). In order to avoid misunderstandings and to maintain confidence, in our legal system, a lawyer should be aware that on occasion, ethical conduct of the lawyer may appear to laypersons to be unethical. SCR 20.48(2). The present situation appears to fall within this realm of improper appearances. A layperson, or even a lawyer unfamiliar with the facts of the case, could easily suspect improper conduct when the plaintiff’s lawyer in a matter names the lawyer’s firm as a defendant.

In light of the above, although the lawyer and his or her client may be able to resolve conflicts in this matter, the high probability that appearances of impropriety would surround this representation necessitates withdrawal from continued representation. See [SCR] 20.16 (rules for withdrawal from employment).