

LOS ANGELES COUNTY BAR ASSOCIATION PROFESSIONAL RESPONSIBILITY AND ETHICS COMMITTEE

OPINION NO. 492: January 26, 1998

SUMMARY OF OPINION

Attorneys must comply with Rule 3-300 of the California Rules of Professional Conduct when accepting a security interest in real property to ensure payment of fees by a client whenever the attorney knows the client has any interest in the property. Rule 3-300 is not limited to situations where the attorney acquires a security interest in property "owned" by the client. Depending upon the facts, a client's interest in property may be sufficient to trigger the provisions of Rule 3-300 even where record ownership to the property is held by a third party.

AUTHORITIES CITED

California Civil Code, Section 654

California Rules of Professional Conduct, Rule 3-300

California Rules of Professional Conduct, Rule 3-310(F)

Read v. State Bar (1991) 53 C.3d. 394; modified at 53 C.3d.1009A

Hawk v. State Bar (1988) 45 C.3d 589;

Brockway v. State Bar of California (1991) 53 Cal.3d 51

Connor v. State Bar of California (1990) 50 Cal.3d 1047

Magee v. State Bar, (1962) 58 Cal.2d 423,431

Eschwig v. State Bar (1969) 1 Cal.3d 8, 15-17

Rodgers v. State Bar (1989) 48 C3d 300, 314

Hunnecutt v. State Bar 1988) 44 C3d 362,372

COPRAC Formal Op.1989-116.

FACTS AND ISSUES

Client retains Attorney pursuant to a written retainer agreement. The agreement provides, in part, that Client's payment of Attorney's fees are to be secured by specific real property "owned" by Client and his wife.¹ The record title to the real property is exclusively held in the name of Client's brother because Client and his wife have been residing out of the country for an extended period of time. Nevertheless, no dispute exists that Client and his wife have, at a minimum, an interest in the subject property being pledged. With Client's knowledge, Attorney prepares and records a deed of trust which is executed by Client's brother.²

During the course of the representation, Client and his wife return to the United States. Thereafter, for reasons reportedly intended to benefit Client, record title to the subject property is transferred from Client's brother to Client's wife alone. Client is again not named on the record title to the subject property, however, it remains Attorney's understanding that Client has an interest in the property. Despite this change in title, no new retainer agreement between Attorney and Client is created. At Attorney's request, and with Client's knowledge, Client's wife executes another deed of trust securing payment of Attorney's fees.

The inquirer has asked the Committee to opine on whether Rule 3-300 of the California Rules of Professional Conduct is applicable to the foregoing circumstances.

DISCUSSION

Rule 3-300 provides in pertinent part that "[a] member shall not . . . knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client" absent compliance with certain specific requirements.³ The issue raised by the inquiry is whether Attorney's interest in the subject real property could be viewed as "adverse to [the] client" triggering the requirements of Rule 3-300.

Significantly, Client asserts that he has an interest in the subject real property. Further, the facts demonstrate that Attorney accepts that assertion and relies upon it in an effort to secure payment of Attorney's fees.⁴

An interest is adverse when an attorney acquires the ability to summarily extinguish a client's interest in property.⁵ It has long been recognized that a deed of trust which secures an attorney's fees is an "adverse interest" for purposes of interpreting an attorney's duties under the California Rules of Professional Conduct.⁶

Under the facts of the inquiry, title to the subject property was held in two different ways during the course of Attorney's representation. In both instances Client has an interest in the real property which was being pledged to secure Attorney's fees. To fully address the inquirer's question it is necessary to examine Client's interests in each of the ways record title was held.

In the first situation presented by the inquiry, while the deed of trust identifies Client's brother as the exclusive record title holder to the real property pledged to Attorney as security for payment of fees, Client and his wife assert in the retainer agreement that they "own" the real property. Thus, the Attorney and Client acknowledge that Client has an interest in the property. Moreover, the Committee notes ownership may involve more than possessory rights. California Civil Code, Section 654, defines ownership as ". . . the right of one or more persons to possess and use [a thing, such as property] to the exclusion of others." Action taken against the property could reasonably be viewed as adverse to Client's interest in possessing, using and/or enjoying the property to the exclusion of others. Further, Attorney's acquisition of a security interest in the property would empower Attorney to unilaterally extinguish Client's interest in said property. If it is reasonably foreseeable that Attorney's interest in the property could result in some detriment to Client, the requirements of Rule 3-300 apply.

As the Attorney and Client acknowledge in the retainer agreement that Client has an interest in the subject real property, it is the Committee's opinion that Attorney is obliged to comply with the requirements set forth in Rule 3-300(A), (B) and (C). Specifically, compliance requires the Attorney to ensure that:

*"(A) The transaction or acquisition and its terms are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which should reasonably have been understood by the client; and (B) The client is advised in writing that the client may seek the advice of an independent lawyer of the client's choice and is given a reasonable opportunity to seek that advice; and (C) The client thereafter consents in writing to the terms of the transaction or the terms of the acquisition."*⁷

In one of this Committee's previous formal opinions dealing with security agreements for payment of legal fees under Rule 5-101 (Rule 3-300's predecessor)⁸ we observed *"that: '[i]n civil cases, there are no transactions respecting which courts . . . are more jealous and particular, than dealings between attorneys and their clients . . ."* (Cite omitted) Magee v. State Bar, 58 Cal.2d 423,431 (1962); Eschwig v. State Bar, 1 Cal.3d 8, 15-17 (1969)."⁹ This cautionary observation illustrates the judiciary's misgivings about such transactions and its stalwart recognition of an attorney's fiduciary responsibilities to a client.¹⁰ Similarly, the State Bar's Standing Committee on Professional Responsibility and Conduct (COPRAC) has observed that *"Rule 3-300 is intended to address transactions that arise out of the fiduciary relationship between lawyer and client."*¹¹ COPRAC also notes that:

*"[i]n light of the principals on which [Rule 3-300] is founded, it is apparent that the rule is intended to apply to transactions that arise out of the lawyer-client relationship or the trust and confidence reposed by the client in the lawyer as a result of the lawyer-client relationship. See Beery v. State Bar, supra. 43 Cal.3d 802, 813; see also L.A. Cty Bar Assn. Formal Opn. No. 477.)"*¹²

In the second situation presented by the inquiry the subject property has been conveyed to Client's wife and Attorney receives a new deed of trust on the property executed by Client's wife. Client's ownership interest, if any, in the subject property becomes even less clear and Client does not sign a modified retainer agreement referring to real property "owned" by Client and his wife. Never the less, the facts indicate Client still asserts an interest in the real property being pledged to secure Attorney's fees. Further, the facts suggest the primary reason record title is not transferred from Client's brother to Client is to "benefit Client."

13

It is the opinion of the Committee that if Attorney fully satisfied the requirements of Rule 3-300 at the outset of the engagement, compliance with Rule 3-300 a second time when Attorney received a new deed of trust on the same property would ordinarily not be necessary. However, if Attorney did not previously comply with Rule 3-300, or Attorney obtains additional and/or other security, then further compliance with Rule 3-300 is mandated.

If there is any doubt, the most prudent course of action in situations comparable to the foregoing would be for attorneys to comply a second time with Rule 3-300. Ultimately, through compliance with Rule 3-300 attorneys can be more assured of satisfying the ethical and fiduciary duties potentially arising when real property is pledged as security for payment of fees in situations where a client's interest in property is unclear or has changed. Alternatively, attorneys accepting liens on property "owned" by another to secure payment of legal fees can procure written pronouncements from both the client and the owner of record stating that the client does not have any interest in the property being pledged. The Committee notes such a course of action would not relieve the attorney from complying with Rule 3-310 (F), and an Attorney may subsequently need to comply with Rule 3-300 if the existence of a client interest in the property later becomes apparent.

This opinion is advisory only. The Committee acts on specific questions submitted ex parte and its opinion is based on such facts as are set forth in the inquiry submitted.

¹ Rule 3-300 is not per se applicable to the initial attorney-client retainer agreement. However, if the attorney, in obtaining security for payment of fees, acquires an "ownership, possessory, or other pecuniary interest" adverse to the client, then Rule 3-300 will apply. See Read v. State Bar (1991) 53 C.3d. 394; modified at 53 C.3d.1009A Hawk v. State Bar (1988) 45 C.3d 589; Brockway v. State Bar of California (1991) 53 Cal.3d 51; (each interpreting Rule 5-101, the predecessor to current Rule 3-300); and COPRAC Formal Op.1989-116.

²This factual setting raises issues regarding the applicability of Rule 3-310(f). As such issues are beyond the scope of this opinion, the Committee chose not to address them herein.

³ California Rules of Professional Conduct, Rule 3-300

⁴ The Committee does not intend to address in this opinion whether the client has a legally recognizable interest in the subject real property. Instead, the Committee's discussion is intended to highlight that Rule 3-300 is interpreted broadly and may be applicable to this type of factual setting.

⁵ See Hawk v. State Bar of California, *supra*.

⁶ See Read v. State Bar of California and Hawk v. State Bar of California, *supra*.

⁷ California Rules of Professional Conduct, Rule 3-300

⁸ There are some differences between former Rule 5-101 and Rule 3-300; however, both require written disclosure to the client, an opportunity for the client to seek the advice of independent counsel and client consent.

⁹ Los Angeles County Bar Association Formal Opinion No. 398

¹⁰ For a further discussion regarding an attorney's fiduciary duty, see Rodgers v. State Bar (1989) 48 C3d 300, 314; and Hunnecutt v. State Bar (1988) 44 C3d 362,372.

¹¹ COPRAC Formal Opinion No. 1995-141

¹² Id.

¹³ The circumstances which may be inferred from the underlying inquiry raises questions regarding the ethical and legal propriety of the transfer of the subject real property to the client's wife only which this opinion does not address.