

## **ETHICS OPINION**

**RO-94-07**

### **OFFICE OF GENERAL COUNSEL**

#### **QUESTION:**

**In a recent disciplinary complaint, it was alleged that the charging of an attorney's fee equal to 15% of the value of real estate involved in a foreclosure sale was a clearly excessive fee and, thus, violated Rule 1.5(a) of the Alabama Rules of Professional Conduct. The scenario presented by the complaint involved an individual who had mortgaged a piece of real estate. The terms of the mortgage provided that, in the event of foreclosure, the mortgagor would pay a reasonable attorney's fee. The mortgage was foreclosed and the lawyer subtracted a 15% attorney's fee from the proceeds of the sale.**

**During the course of investigation, it was learned that it is the practice of some foreclosure lawyers to charge attorney's fees of \$400-\$500 if the property is purchased at auction by the foreclosing lawyer's client, usually a financial institution. If the property is purchased at auction by someone other than the foreclosing lawyer's client, e.g., the creditor, a member of the creditor's family or some other individual or institution a percentage fee, sometimes as high as 15%, is charged by the lawyer as an attorney's fee.**

**The question that arises is whether it is proper under Rule 1.5 to charge a percentage fee in a foreclosure sale without relating this percentage to any of the factors for determining a reasonable fee as contained in Rule 1.5(a).**

#### **ANSWER:**

**It is improper for a lawyer to charge a set percentage fee in a foreclosure sale without regard to the factors for determining a reasonable fee as contained in Rule 1.5 of the Rules of Professional Conduct.**

**DISCUSSION:**

At the outset, it should be understood that this is not a contingent fee matter but rather a percentage fee for the performance of legal services. Percentage fees must not be clearly excessive as determined by the factors set forth in Rule 1.5(a) of the Rules of Professional Conduct. These factors are as follows:

**"Rule 1.5 Fees**

- (a) A lawyer shall not enter into an agreement for, or charge, or collect a clearly excessive fee. In determining whether a fee is excessive the factors to be considered are the following:
- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
  - (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
  - (3) the fee customarily charged in the locality for similar legal services;
  - (4) the amount involved and the results obtained;
  - (5) the time limitations imposed by the client or by the circumstances;
  - (6) the nature and length of the professional relationship with the client;
  - (7) the experience, reputation, and ability of the lawyer or lawyers performing the services;

- (8) whether the fee is fixed or contingent; and
- (9) whether there is a written fee agreement signed by the client.”

The above factors are identical to those announced by the Supreme Court of Alabama in *Peebles v. Miley*, 439 So.2d 137 (Ala. 1983), with the exception that Rule 1.5 added an additional factor regarding whether there is a written fee agreement signed by the client. Applying these factors, the Court said:

"As the amount of the recovery increases, the attorney's fee should be prudently reduced. Otherwise, we would have the anomalous situation of a routine collection of a promissory note of \$2,000,000.00 and an attorney's fee of \$400,000.00. The determination of a reasonable attorney's fee should not be done in a wooden, inflexible manner, but should be done so that all factors will be given their proper interplay." supra p.143

The Supreme Court of Alabama in *State v. Brown*, 565 So.2d 585 (Ala. 1990), in remanding the case back to the circuit court to determine the question of excessive fees, reaffirmed the above factors and directed the court to review the following cases in connection with the determination of an attorney's fee: *Reynolds v. First Alabama Bank of Montgomery, N.A.*, 471 So.2d 1238 (Ala. 1985), *Peebles v. Miley*, 439 So.2d 137 (Ala. 1983), *Mashburn v. National Healthcare, Inc.*, 684 F.Supp. 679 (M.D. Ala. 1988), and *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir.1974).

Whether or not a 15% fee was an excessive fee was considered by the United States Bankruptcy Court for the Middle District of Alabama in *Dadeville Lumber*

*Company d/b/a Still Waters Resort v. Unsecured Creditors Committee*, Case No. 85-00406. In this case, a lawyer foreclosed against Still Waters on behalf of SouthTrust Bank. The property was purchased by the second mortgage holder which was another lending institution. The lawyer deducted a 15% attorney's fee from the foreclosure proceeds causing the unsecured creditors to file an objection with the bankruptcy court contending that the attorney's fee was excessive. The Court agreed with the unsecured creditors and awarded a fee on an hourly basis. The lawyer appealed this determination to the United States District Court. That Court determined that in arriving at a reasonable fee the bankruptcy court should have considered the twelve factors set out in *Johnson v. Georgia Highway Express, Inc.*, supra. These *Johnson* factors are essentially identical to the factors adopted by the Supreme Court of Alabama in Rule 1.5(a) and the cases cited above. It should be noted that the *Johnson* case was specifically noted in the Supreme Court of Alabama's remand in *Brown*, supra.

Thus, it seems clear that a fee in a foreclosure sale cannot be determined by application of a standard percentage fee applied in a "wooden, inflexible manner" without regard to the factors enumerated in Rule 1.5 and enunciated in federal and state case law.

RWN/vf

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