An Attorney's Acceptance of Assignment of Property as Security for Fee

Often it may seem advantageous for an attorney to take an assignment of property from a client as security for the attorney's fee in the case. This assignment of property is different from the contingent fee arrangement whereby an attorney may contract with a client for a reasonable fee in a civil case to be paid only if the suit is successful.[1] An assignment of property for security is considered neither partial payment of a fee nor an outright, absolute conveyance. The assignment of property is merely security that a fee will be paid.

The lawyer who accepts an assignment of property as security has engaged in a business dealing with his client. As a general rule, it is not *per se* improper for an attorney to take security for the payment of a fee earned or to be earned.[2] This agreement, however, is subject to the consent of the client after full disclosure of the situation by the attorney to avoid overreaching or the appearance of overreaching by the attorney.[3]

In some instances, the fairness of the transaction must be proved by showing that there was no undue advantage to the attorney[4] or no undue influence toward the client.[5] The attorney may also need to recommend independent legal counsel to his client since such advice may be utilized to show the absence of self-dealing on the attorney's part to the detriment of his client.[6]

In *In re May,*[7] May had been retained by a former employee to represent her in a divorce action. The client was emotionally distraught, not only because of the divorce proceeding, but because she was afraid of losing her home since she was in default on the con-

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1. BLACK'S LAW DICTIONARY 741 (4th rev. ed. 1968).

2. ABA CODE OF PROFESSIONAL RESPONSIBILITY [hereinafter cited as ABA CODE], Disciplinary Rule 5-103(A)(1) [hereinafter cited as DR]. "A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation he is conducting for a client, except that he may: (1) Acquire a lien granted by law to secure his fee or expenses." *Id.*

3. Goranson v. Solomonson, 304 Ill. App. 80, 25 N.E.2d 930 (1940).

4. *Id.*

5. *In re* Hamaker's Estate, 114 Cal. App. 2d 533, 250 P.2d 637 (1950); Florida Bar v. Welch, 272 So. 2d 139 (Fla. 1972).

6. *In re* Nelson, 79 N.M. 779, 450 P.2d 188 (1969); *In re* Brown, 277 Or. 121, 559 P.2d 884 (1977); Douglas v. Blount, 95 Tex. 369, 67 S.W. 484 (1902).

7. 90 Idaho 858, 538 P.2d 787 (1975).

tract payments. May offered to take an assignment of his client's interests in the property and to assume her obligations in connection with it. He later began making payments on the property which were not necessary to protect his client's interest in an attempt to claim the property as his own. The client testified that at the time of the assignment she was under the impression that she would be able to get the property back if she paid the contract payments.

The Supreme Court of Idaho upheld the Idaho Bar Disciplinary Committee's finding that May had obtained an *absolute* assignment from his client without an explanation of the meaning and consequences of the transaction and without consideration.[8] The court held that May had violated Disciplinary Rules 5-103(A)(1)[9] and 5-104(A)[10] of the ABA Code of Professional Responsibility.

The court construed DR 5-104(A) to be absolute: Absent consent and full disclosure, an attorney shall not enter into a business transaction with a client where their interests differ, and where the client looks to the attorney to exercise his professional judgment on behalf of the client.[11] In *May*, the lack of full disclosure, coupled with the client's emotionally unstable frame of mind and her trust in the attorney, led the court to the conclusion that there had been a violation of DR 5-104(A). This is precisely the type of problem that DR 5-104(A) was designed to avoid.

In finding that May violated DR 5-103(A), the court pointed to evidence that May regarded this assignment as a business transaction rather than a device to secure his fee. Therefore, the court held that May did not fall within DR 5-103(A)(1) which permits an attorney to acquire a lien to secure his fee or expenses.[12]

As a matter of law, the courts appear to have held that before an attorney will be authorized to take an assignment from his client as security for a fee he must (1) fully disclose the purpose and effect of the transaction, (2) obtain unconditional consent from the client, and (3) assert no undue influence over the client or put the client

8. *Id.* at 859, 538 P.2d at 789 (emphasis added).

9. *See supra* note 2.

10. ABA CODE, DR 5-104(A) provides: "A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his professional judgment therein for the protection of his client, unless the client has consented after full disclosure."

11. 90 Idaho at 860, 538 P.2d at 790.

12. *Id.*

at a disadvantage in any manner which would be unduly beneficial to the lawyer.[13]

Full Disclosure

What constitutes full disclosure may not always be clear. The attorney may think he has made his intentions clear, and later he may find that the client did not completely understand the reason for signing over property to him. *In re Brown*[14] suggests that an attorney should be aware of dangers that could arise and should protect himself by fully disclosing the facts and circumstances of the situation to the client in writing. If an attorney-client relationship exists and a contract is entered into between the parties, the burden of proof is on the attorney to show that the contract was entered into fairly and that the client has been advised fully with respect to his rights and duties in the matter.[15] Thus, it may not only be wise for an attorney to fully disclose the nature of the assignment to the client in writing, but it may also be necessary for him to do so to carry his burden of proof. Another preventive measure would be to provide a periodic accounting to the client.[16]

Consent of Client

It is important that after full disclosure the attorney obtain his client's consent to the assignment to counter any protests which might arise if the attorney must rely on the assignment to collect his fee.[17] One peculiar situation arises where the client has been fully informed and has consented to an assignment, but the attorney fails to follow proper procedures in utilizing the assignment. In this situation the attorney may be unable to collect his fee and may be subject to discipline.

In *In re Israel,*[18] the client retained an attorney after being advised that a realty company was about to initiate mortgage foreclosure proceedings against her since she was three payments be-

13. *See, e.g.*, McFail v. Braden, 19 Ill. 2d 108, 166 N.E.2d 46 (1960).

14. 277 Or. 121, 559 P.2d 884 (1977).

15. McFail v. Braden, 19 Ill. 2d 108, 166 N.E.2d 46 (1960); Goranson v. Solomonson, 304 Ill. App. 80, 25 N.E.2d 930 (1940).

16. Florida Bar v. Thomson, 344 So. 2d 552 (Fla. 1976).

17. ABA CODE, DR 5-104(A). *See* Comment, *Full Consent: An Invitation to Conflicts of Interests in the Attorney-Client Relationship,* 1972 LAW. & SOC. ORD. 435.

18. 327 So. 2d 12 (Fla. 1975).

hind. At a meeting with her attorney, the client executed an agreement with the attorney wherein the attorney agreed to advance money to the client so that the mortgage could be brought up to date. The client also signed a quitclaim deed of her property to the attorney as security for the attorney's fees and advances. As part of the agreement the client agreed to pay the attorney $200 per month, the balance above her $158 per month mortgage payment to be applied to the attorney's fee and advances. The attorney brought his client's mortgage payments current and continued making monthly payments thereafter.

Several months later, the client became delinquent in her payments to the attorney. The attorney recorded the quitclaim deed, and filed a complaint in ejectment demanding that the client vacate the property she had deeded to the attorney as security, despite the fact that he knew that a quitclaim deed held as security for funds advanced is a mortgage and the proper procedure to be followed is a foreclosure suit.[19]

The Florida Supreme Court held that the attorney violated Disciplinary Rule 5-104(A),[20] and was subject to public reprimand. The court's holding was based on the grounds that the client consented to the assignment as a device to secure legal fees and expenses, but did not consent to an absolute assignment.[21]

In another mortgage foreclosure suit, *Matter of Geyler,*[22] the client's property was foreclosed, and on the last day for statutory redemption, the client offered the attorney a $2000 fee if he would obtain an extension of time in which to permit the client to redeem her property. After the client's unsuccessful attempt to borrow the funds, the attorney suggested that he had a friend who could finance the funds necessary to redeem the property. The court found that at no time did the attorney intend for his friend to advance the necessary funds, but rather, the attorney intended to advance the funds from his own bank account.[23]

The attorney prepared a quitclaim deed from his client to the attorney's friend. Sixty days later the attorney obtained a quitclaim deed of the client's property to himself from his friend. When the client received notice to vacate the property, she filed a complaint

19. *Id.*
20. *See supra* note 10.
21. *Id.* at 13.
22. 144 Ariz. 321, 560 P.2d 1228 (1977).
23. *Id.* at 322, 560 P.2d at 1229.

with the Arizona Bar Association. The Supreme Court of Arizona held that the attorney violated DR 5-104(A) on the grounds that the client never consented to the use of her assigned property in that manner.

Geyler is a clear example of the situation where an attorney has taken advantage of the client's reliance on his knowledge and skill. *Geyler, Israel* and *May* illustrate the interplay of full disclosure and consent. In these cases, each client had consented to the assignment of his or her property, but none had consented to the manner in which the property was ultimately used.[24]

Undue Influence and Need for Independent Counsel

An attorney is not permitted to take advantage of his position or superior knowledge against the interests of his client; nor is the attorney allowed to deceive his client in any way without being held responsible.[25] When the attorney enters into a business transaction with his client, the burden of proof is on the attorney to show the fairness of the transaction and that it did not proceed from undue influence.[26] In addition to showing consent after full disclosure, another important factor in determining whether a transaction is fair is a showing by the attorney that the client had independent legal advice before completing the transaction.[27]

In *In re Hamaker's Estate,*[28] an attorney was found to have exerted undue influence where his client, in poor health, assigned stock to him for the purpose of selling the stock. Later the attorney procured an agreement from the client that one-half of the sales proceeds of the stock should be turned over to the law firm for attorney's fees. The court found a presumption of invalidity which, while rebuttable, could only be overcome by clear and satisfactory evidence that the transaction was fair and equitable, that the client was fully informed as to all matters involved, that she acted voluntarily and of her own free will, and that no advantage had been taken of the confidential relationship which existed. The court held that this presumption was not rebutted by the attorney and that the

24. *See also* Yokozeki v. State Bar, 11 Cal. 3d 436, 521 P.2d 858, 113 Cal. Rptr. 602 (1974).

25. Smoot v. Lund, 13 Utah 2d 168, 369 P.2d 933 (1962).

26. McFail v. Braden, 19 Ill. 2d 108, 117-18, 166 N.E.2d 46, 52 (1960).

27. *Id.*

28. 114 Cal. App. 2d 533, 250 P.2d 637 (1950).

29. *Id.* at 543, 250 P.2d at 642.

client's signature on the documents was obtained by undue influence.[29]

In *Florida Bar v. Welch,*[30] the attorney induced his client, an upset, distraught, and confused woman, to execute a deed of the client's homeplace to the attorney's wife. The value of the property was $14,000 and the attorney paid only $700. The court sustained the referee's finding that the attorney was guilty of overreaching and undue influence.

In the cases mentioned the attorney intended to take advantage of a client. Membership in the Bar, however, requires more than a mere absence of such intent. In *In re Nelson,*[31] the attorney made an agreement with his client, an elderly lady, to the effect that he would perform legal services for her and manage her property if she would convey certain real estate to him with the condition that the client would receive the rents of the property and its use for life. At the commencement of the attorney-client relationship, the client had an estate in excess of $30,000, but at the conclusion of the relationship the client's income was less than $100 a month. The attorney contended that he intended no harm to the client and felt he was performing a service for her in freeing her from the duties of managing her estate. The court held that an absence of intent to do wrong did not justify this placing of the attorney's own interest over those of his client.[32] In this case, as well as in the others mentioned above, the attorney probably could have avoided his problems if he had advised his client to seek independent legal advice before proceeding with the assignment of the property.

Certain factors may enter into a court's decision as to whether an attorney should be disciplined, and if so, how severely. In most cases these factors will not be considered as absolute defenses, but they may lighten the sanction. Reimbursement of funds or restitution of property will not absolve the attorney,[33] but these actions may convince the court that a sentence should be reduced or suspended.[34]

The good faith defense may apply in those situations where the attorney exercises his best judgment believing his decision to be in

30. 272 So. 2d 139 (Fla. 1972).

31. 79 N.M. 779, 450 P.2d 188 (1969).

32. *Id.* at 785, 450 P.2d at 192.

33. State *ex rel.* Okla. Bar Ass'n v. Bishop, 556 P.2d 1276 (Okla. 1976).

34. *See, e.g.,* Yokozeki v. State Bar, 11 Cal. 3d 436, 521 P.2d 858, 113 Cal. Rptr. 602 (1974).

the best interest of the client.[35] The absence of fraudulent intent will at least partially protect the attorney from charges of fraud, dishonesty, deceit, and willful misconduct which are a part of Disciplinary Rule 1-102(4).[36] In some instances, the inexperience and immaturity of an attorney may be considered.[37] In others, the old age and previous good character of the attorney may be advanced as a reason for leniency.[38]

Conclusion

In the majority of situations where an attorney accepts an assignment of property as security for a fee, there probably will be no controversy. A controversy arises where the attorney allows his private interests to conflict with the interests of his client. The attorney should be mindful that he is the guardian of his client's rights, and that he owes the client his undivided loyalty.

The attorney who accepts an assignment of property as security has engaged in a business dealing with his client and should ascertain whether their interests differ, and if so, whether the client has consented to this arrangement after full disclosure by the attorney of the matters involved. An attorney who cannot withstand a temptation to misappropriate property or otherwise deceive his client should not be allowed to continue in such capacity.

Brenda Childs See

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35. State v. Baker, 539 S.W.2d 367 (Tex. Civ. App. 1976).

36. *In re* May, 96 Idaho 858, 538 P.2d 787 (1975). ABA CODE, DR 1-102(4) provides that "a lawyer shall not [e]ngage in conduct involving dishonesty, fraud, deceit, or misrepresentation."

37. Reznik v. State Bar, 1 Cal. 3d 198, 460 P.2d 969, 81 Cal. Rptr. 769 (1969); Akron Bar Ass'n v. Hughes, 46 Ohio St. 2d 369, 348 N.E.2d 712 (1976).

38. *In re* Leder, 28 App. Div. 2d 903, 281 N.Y.S.2d 560 (1967).