

Nebraska Ethics Advisory Opinion for Lawyers  
No. 86-4

AN ATTORNEY MAY ETHICALLY ACT AS TRUSTEE UNDER A TRUST DEED AND CONTINUE TO REPRESENT THE BENEFICIARY (LENDER) AGAINST THE TRUSTOR (BORROWER).

QUESTION PRESENTED

Is it ethically permissible for an attorney to act as trustee under a trust deed and continue to represent the beneficiary (lender) against the trustor (borrower)?

DISCUSSION

The Committee is of the opinion that an attorney may ethically continue to represent the beneficiary (lender) against the trustor (borrower), in an exercise of the power of sale provision of a trust deed, while acting as the "trustee" under a trust deed.

*The Law of Trusts and Trustees*, 2d Edition, by Bogert, is our authority for this position. At Section 29 of this treatise, the author distinguishes "trusts" from the securing relationship created by a deed of trust. *Trusts and Trustees*, at 370. The author compares trust deeds to mortgages and finds them to be analogous in that they create security relationships, characterized by enforceable duties by both parties, but they are not fiduciary duties. At page 371, the author asks:

Since the transferee (of a trust deed) is called a "trustee", the question arises whether the deed of trust creates a true trust, the subject matter of which is title to or a lien upon the described property, or instead is a disguised mortgage and so controlled by rules of security law.

*Id.* The author's analysis follows with:

As far as the trustor under the trust deed is

concerned it would seem clear that he is not intended to be the beneficiary of a trust, but rather to have the rights accorded to a debtor in the case of a security transaction. In addition there is no fiduciary relation between trustor and trustee under a deed of trust. In the course of the administration of the property conveyed the trustee under the trust deed may be found to be a trustee for the trustor of some of the property or its proceeds, but this does not mean that the relationship was a true trust from the beginning.

The relations between the trustor and trustee under a deed of trust would seem to be the same as those between a mortgagor and mortgagee, that is, to be of a business character and not of a fiduciary nature.

*Id.* at 373, 374.

What is made clear by this analysis is that it is the intent and expectations of the parties that controls the true nature of the relationships created by a trust deed. There is no reason to confer fiduciary status to the relationships between the parties of a trust deed merely because the power to sell is held by a so-called "trustee". It is fair to treat the transaction in a manner consistent with what it is in the eyes of the parties--a security transaction. The parties expect that an attorney acting as "trustee" under a trust deed is acting as an agent of the lender. Where an institution is acting as "trustee", it is generally the lending institution itself or a branch of the institution, clearly acting as an agent of the lender.

The "trustee" is nothing more than an agent for the lender, creating the same kind of relationship between a "trustee" and trustor under a trust deed as has always existed between the mortgagee and the mortgagor under a mortgage. That is, the mortgagee/trustee is not bound to exhibit a high degree of good faith or exclude personal interests for the benefit of the

mortgagor/trustor. *Id.* at 371. "Rather, it is a business relationship, in which transactions with regard to property and between the parties are valid in the absence of fraud or some other positive invalidating cause." *Id.*

The Committee concludes that there is no conflict of interest when an attorney/trustee represents the beneficiary/lender against the trustor/borrower in proceedings to exercise the power of sale provision of a trust deed, or any other violation of the Code of Professional Responsibility.

The Committee notes that there is at least one opinion to the contrary. The North Carolina State Bar in its ethics opinion, cited as CPR Opinion 305, decided that a trustee/attorney did owe *fiduciary* duties to both the lender and the borrower, therefore, he could not represent either of them in a "foreclosure" proceeding because to do so would violate his *fiduciary* duty to the other.

The Committee is persuaded by the analysis of the authors of *Trusts and Trustees*, discussed above, that there are no fiduciary duties created under a trust deed. Therefore, as long as the attorney does not mislead the borrower or misrepresent his position in the transaction and the proceedings are carried out according to law and without fraud, there is no prejudice toward or harm done to the borrower when the trustee represents the lender in such proceedings.

The Committee is concerned that by disqualifying the attorney/trustee from representing the lender, we would be placing form over substance and creating a fiction without a purpose. The result could be a trap for the unwary, producing hardship, unfairness, delay and expense for no readily articulable purpose.

## CONCLUSION

An attorney may ethically act as trustee under a trust deed and continue to represent the beneficiary (lender)

against the trustor (borrower).

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