

You advised that Attorney A was contacted by the beneficiary of a note secured by a deed of trust, was appointed substitute trustee and directed to foreclose on the real property. Attorney A ran an advertisement which stated in part:

All costs of conveyance, which shall be by special warranty deed, including examination of the title, recording charges, notary fees and settlement fees, including preparation of the deed and grantor's tax thereon shall be at the cost of purchaser.

At foreclosure, Purchaser X retained Attorney B to search the title and obtain title insurance, complete the mortgage financing package and close the matter. When Attorney B called Attorney A to confirm figures required to close, Attorney A informed him that, in addition, \$125 for a title examination requested prior to foreclosure by Attorney A and \$250 for Attorney A's settlement fee would also be charged to the purchaser. You wish to know if it is ethically permissible for Attorney A to charge purchaser at foreclosure a fee for a title examination incurred by Attorney A in order to conduct the foreclosure sale and to charge a settlement fee when requested to deliver a deed.

The appropriate and controlling rule relative to your inquiry is DR:2-105(A) which provides that a lawyer's fees shall be reasonable and adequately explained to the client.

The Committee is of the view that the advertisement as stated adequately explains the costs to be charged by the purchaser at foreclosure and obligates the purchaser to pay costs related to the conveyance or foreclosure sale such as the title examination fee imposed by Attorney A. Likewise, if Attorney A's settlement fee is related solely to the drafting of the special warranty deed, then under the terms and conditions of the foreclosure sale, as reflected in the advertisement, the Committee opines that the purchaser would also be responsible for the payment of Attorney A's settlement charges. The Committee recognizes that Purchaser X is entitled to retain independent legal counsel if he chooses. However, even though Purchaser X has retained the legal services of Attorney B as settlement attorney, Purchaser X has been advised in advance of fees assessed to the purchaser by Attorney A as a condition of the sale, and may properly be held accountable for those charges specifically stated in the advertisement. (See LE Op. 878, LE Op. 922, LE Op. 1204)

The Committee is of the opinion that the question of whether Attorney A/substitute trustee is permitted by law to assess charges or expenses to the purchaser in addition to the statutorily authorized trustee's commission constitutes a legal question beyond the purview of the Committee's authority. The Committee is not opining as to whether the controlling statute permits or precludes legal fees payable to an attorney who is also serving as a trustee to be charged to the purchaser in a trustee's sale.

Committee Opinion
September 21, 1989