

ADVISORY ETHICS OPINION 87-01

SYNOPSIS:

No ethical issue arises where a lender requires a borrower to pay attorney's fees incurred by the lender in a loan transaction.

FACTS:

The inquiring lawyer relates that, as is the common practice, a lender has made it a condition of its loan commitment that the borrower pay, as a closing cost, the lender's attorney's fees for services rendered for the lender in a loan transaction. The lender has disclosed clearly that the lender's attorney will not be representing the borrower, and that the borrower may retain any of his choice to represent his own interests in the transaction. The inquiring lawyer writes that in identical situations borrowers' attorneys have objected to the fee payment requirement on the grounds of "some conflict of interest," and accordingly asks our opinion on the ethical propriety of the lender's requirement.

OPINION:

It is to us clear that the lender has the right to require that the borrower pay the lender's attorney's fees for services rendered in connection with a loan transaction upon clear disclosure made to the borrower that the lender's attorney will not be representing the borrower in connection with the loan. The problem of dual representation and potential divided loyalties, presented where a lender attempts to require the borrower's attorney to represent the lender as well,¹ does not arise here.

We agree with ABA Committee on Ethics and Professional Responsibility Informal Decision 837 (April 26, 1965), which states on similar facts: "(The bank) has the right to choose an attorney. It is an economic matter as to how he is paid. The cost of such a lawyer obviously is passed, in whole or in part, on to the borrower either directly or indirectly. No ethical problem arises as to how this is passed along. The lawyer . . . is the bank's lawyer no matter how he is paid." The lender's lawyer, we should add, will be bound by the fee strictures of DR 2-106, no matter how or by whom he is paid.

¹ See our Opinion No. 79-23.