

Committee Opinion
March 12, 1991

LEGAL ETHICS OPINION 1390

DOMESTIC RELATIONS - ACQUIRING
PROPRIETARY INTEREST IN
LITIGATION: ATTORNEY TAKING
DEED OF TRUST ON MARITAL HOME
TO SECURE NOTE FOR LEGAL FEES.

You have advised that, in a divorce action, a final decree has been entered which properly reserves jurisdiction in the court to distribute the marital property at a future hearing. Further, you indicate that, prior to the hearing, the attorney for one of the parties is granted a deed of trust by his client on the marital home to secure a promissory note made by the client for the attorney's fees. The marital home is currently held by the ex-spouses as tenants in common, the parties' respective equitable interests in the home are disputed, and you indicate that, if the court were to transfer title to the property to the non-encumbering spouse, the attorney could then foreclose on the property, assuring that legal fees were paid out of the marital estate and not by the client. You point out that the interest granted is, at the time of the conveyance to the attorney, indeterminate and the subject matter of the litigation.

You have asked that the Committee opine as to the propriety of the attorney acquiring an interest in the marital home which interest is to be determined at the equitable distribution hearing.

The appropriate and controlling disciplinary rule to the issue you raise is DR:5-103(A), which precludes a lawyer from acquiring a proprietary interest in the cause of action or subject matter of litigation he is conducting for a client, except that the lawyer may acquire a statutory lien to secure his fee or expenses and may contract with the client for a reasonable contingent fee in a civil case. In addition, Disciplinary Rule 2-105 [DR:2-105] outlines permissible contingent fee procedures, and Ethical Consideration 2-22 [C:2-22] indicates that contingent fee arrangements are rarely justified in domestic relations cases. Further guidance is contained in EC:5-7, which cautions that the exercise of a lawyer's independent judgment may be adversely affected when the lawyer has acquired a proprietary interest in the cause of his client or is otherwise financially interested in the outcome of the litigation. Disciplinary Rule 5-104(A) [DR:5-104] similarly precludes a lawyer from entering 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 for the protection of the client. Such a transaction may be proper, however, if the client has consented after full and adequate disclosure and provided that the transaction was not unconscionable, unfair or inequitable when made.

The Committee has earlier opined that loans made by an attorney to his clients constituted a business transaction that would allow the lawyer's professional judgment to be affected by his own financial interest and, furthermore, would create an improper adverse relationship between the lawyer as creditor and client as debtor. LE Op. 1269; see also LE Op. 1219.

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Under the facts you have presented, the Committee is of the opinion that the acquisition by the attorney of an interest in the marital home, the amount of which interest is to be determined at the equitable distribution hearing, would give the lawyer a proprietary interest in the divorce action and inappropriately interject the lawyer's interests into the issues of the case. Thus, the committee is of the view that such a transaction would create an unacceptable risk on the lawyer's independent judgment on behalf of his client, and an improper adverse relationship between the client/borrower and the lawyer/lender, which may not be cured by the client's consent. Maine Ethics Opinion No. 97 (May 3, 1989).

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