

LEGAL ETHICS OPINION 1653

FEES; EMPLOYMENT AGREEMENTS;
ASSIGNMENT OF PROCEEDS
EXPECTED FROM SALE OF PROPERTY
IN DIVORCE TO PAY ATTORNEY'S
FEE.

You have presented a hypothetical situation in which it is proposed that a client sign a written employment agreement to pay fees on an hourly rate within 30 days of billing. Litigation has been more expensive than contemplated and client has been unable to keep current on payments. The client and the client's spouse own, as tenants by the entirety with rights of survivorship, the marital domicile with equity far in excess of attorney's fee. Opposing party wishes to purchase client's share of equity in the property, and client is agreeable. Client wants to pay the attorney from proceeds received for client's share of the marital domicile. Attorney would like to have client sign an assignment of those funds directing that payment be made directly to attorney at closing.

Your second hypothetical involves a client signing an employment agreement agreeing to pay fees on an hourly basis. Litigation costs have exceeded expectations and the bill now amounts to several thousand dollars. The client has been unable to keep current and advised attorney she will pay the fee when the marital domicile, which is currently on the market, is sold. Under a property settlement agreement, the client will receive all proceeds from the sale and there is equity in the real estate in excess of the amount of the attorney's fee. The attorney proposes to have the client execute an assignment for the amount of the fee to be presented to the settlement agent directing that payment be made directly to the attorney from sale proceeds at closing. Since a final decree is not yet entered, Attorney inquires as to whether the assignment may be executed prior to entry of the final decree or whether Attorney must wait until after a final decree has been entered incorporating the property settlement agreement.

Under the facts you have presented, you have asked the committee to opine as to the propriety of these agreements to pay attorney's fees and whether either situation constitutes taking an interest in marital property.

The appropriate and controlling disciplinary rules relative to your inquiry are DR:5-103(A) prohibiting a lawyer from acquiring a proprietary interest in the cause of action or subject matter of litigation; and, DR:5-104(A) prohibiting a lawyer from entering into a business transaction with a client where the client expects the lawyer to exercise his professional judgment, unless the client has consented after full and adequate disclosure and only if the transaction is not unconscionable, unfair or inequitable when made.

The policy embodied in DR:5-103(A) is that:

The possibility of an adverse effect upon the exercise of free judgment by a lawyer on behalf of his client in litigation generally makes it undesirable for the lawyer to acquire a proprietary interest in the cause of his client or otherwise to become

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financially interested in the outcome of the litigation. However, it is not improper for a lawyer to protect his right to collect a fee for his services by the assertion of legally permissible liens, even though by doing so he may acquire an interest in the outcome of litigation . . . EC:5-7.

The committee has previously opined that the acquisition by the attorney of an interest in the marital home, the value of which is not yet determined and is the subject of an equitable distribution hearing, would give the lawyer a proprietary interest in the divorce action. Such a financial interest would inappropriately interject the lawyer's personal interests into the issues of the case. Thus, such a transaction would create an unacceptable risk on the lawyer's independent judgment on behalf of the client and create an improper adverse relationship between the client/borrower and lawyer/lender, which may not be cured by the client's consent. LE Op. 1390.

In the facts you present under hypothetical #1, the opposing party wishes to purchase Client's share of the equity in the marital home, and Client wishes that to happen. However, it is not clear whether Client and opposing party have reached agreement as to the value of, or their respective interests in, the marital property. Therefore, unresolved issues exist relative to the marital property which may be the subject matter of litigation. Therefore, the committee believes that it would be improper, under DR:5-103(A) and DR:5-104(A), for Attorney to have client execute an assignment of Client's share of the proceeds from the sale of Client's interest in the marital home to opposing party. In addition, the client's consent to such a transaction does not cure the conflict. Such transactions between attorney and client are grounds for discipline. *People v. Franco*, 690 P.2d 230 (Colo. 1985) (violation of DR:5-103(A) where attorney, to secure payment of fees, took deed of trust in marital home about to be sold under court order with proceeds to be divided equally between husband and wife); *In re May*, 96 Idaho 858, 538 P.2d 787 (1975) (violations of DR:5-103 and DR:5-104 where attorney prepared and had client execute assignment of interest in marital home to secure payment of fees in divorce matter).

In the facts you present under hypothetical #2, the parties have executed a property settlement agreement under which Client will receive all proceeds from the sale of the marital home. However, a final decree of divorce has not been entered. Under this scenario, one could assert that the marital home is no longer the subject matter of litigation. Nevertheless, the committee believes that DR:5-103(A) and DR:5-104(A) require that a final decree or order be entered, incorporating the property settlement agreement, before the attorney may acquire any interest in the marital property or proceeds from the sale of such property. This is particularly important in divorce cases where issues involving marital property can be so volatile and personal that matters stipulated by the parties one day may become contested on the next. Maine Ethics Opinion 117 (June 7, 1991) (lawyer may acquire mortgage on client's home to secure attorney's fees provided divorce judgment is final and all residual disputes regarding marital property are concluded); Massachusetts Bar Assoc. Opinion 91-1 (June 7, 1991) (if the divorce proceeding is complete, lawyer may take assignment of interest in marital property as security for payment for services rendered, provided client consents after full

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and adequate disclosure, transaction is reasonable, and consideration is given to client's sophistication, ability to pay and other methods of fee payment).

In summary, as a means to secure payment of legal fees in a divorce matter, an attorney may not enter into an arrangement with a client wherein the attorney acquires an interest in the marital property, or proceeds from the sale thereof, unless a final order or decree has been entered, conclusively adjudicating all issues with respect to the use, possession, division and sale of such property. In addition, the attorney may not enter into such an arrangement unless the following requirements are met:

1. The client consents after full and adequate disclosure to the client of the consequences of entering into such an arrangement;
2. The transaction is fair and reasonable, giving consideration to the client's sophistication, ability to pay, and feasibility of other methods of fee payment; and
3. The client is advised that he or she may seek independent counsel to review the transaction and is afforded an opportunity to do so, if the client so elects.

This opinion is advisory only, based only on the facts you presented and not binding on any court or tribunal.

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Legal Ethics Committee Notes. – Under Rule 1.8(a), a lawyer may not enter into a “business transaction” with a client unless the client is given an opportunity to seek independent advice, and there has been full disclosure and consent in writing.