

**ETHICS OPINION NUMBER 244
OF THE MISSISSIPPI BAR
RENDERED SEPTEMBER 11, 1998**

CONFLICTS OF INTEREST; CONDUCT PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE: It is ethically impermissible for an attorney representing one of the parties in a divorce action to present a final judgment to the Court, which includes specific provisions for disposition of jointly held real property, while simultaneously filing a *lis pendens* notice on the same property in an attempt to collect his attorney's fees.

The Ethics Committee of The Mississippi Bar has been requested to render an opinion on the following factual situations:

Attorney X represents a client in a divorce action involving the distribution of real property jointly owned by both parties to the case. The parties negotiate a property settlement agreement which involves transferring title to the property to one party or providing for the sale of the jointly owned real property upon the entry of the final judgment of divorce. Attorney X prepares a final judgment of divorce to present to the Chancery Court Judge for his signature. On the same day, in an attempt to collect fees, Attorney X files a *lis pendens* notice in the Chancery Court on the subject property. This *lis pendens* notice is in the amount of the attorney's fees his client currently owes him.

Although the Chancellor signs the judgment of divorce, the *lis pendens* remains on file. Until and unless the *lis pendens* is removed by payment of the attorney's fees or otherwise, the client is hindered by this action and the subject property cannot be sold or otherwise disposed due to the exception/cloud on the title.

The questions posed are:

May an attorney file a *lis pendens* notice in such an action either before or after the Chancellor signs the Judgment of Divorce in an effort to collect attorney's fees? Is the attorney required to proceed through a normal collection action and file a complaint and obtain a judgment for attorney's fees against the client before taking such action? May the attorney file the *lis pendens* when the complaint for attorney's fees is filed? If

an attorney is allowed to take such action to collect attorney's fees, when is the proper time and what are the proper ethical conditions which allows the attorney to file the *lis pendens* notice?

At the outset, the Committee issues the caveat that the scope of this opinion is limited in general under the mandate of Article 8-15(c) of the Bylaws of The Mississippi Bar which prohibits this Committee from rendering opinions on questions of law. Consequently, the scope of this opinion is limited to whether the proposed course of professional conduct is permissible under the Mississippi Rules of Professional Conduct. Any incidental reference to legal authorities is informational only and should not be taken as any indication of the Committee's interpretation of such authorities, legal issues arising out of the factual situation presented, or legal ramifications of the proposed conduct.

That said, we note that § 11-47-3 of the Mississippi Code of 1972, which addresses circumstances upon which a *lis pendens* notice may be filed, provides:

When any person shall begin a suit in any court, whether by declaration or bill, or by cross-complaint, to enforce a lien upon, right to, or interest in, any real estate, unless the claim be founded upon an instrument which is recorded, or upon a judgment duly enrolled, in the county in which the real estate is situated, such person shall file with the clerk of the chancery court of each county where the real estate, or any part thereof, is situated, a notice containing the names of all the parties to the suit, a description of the real estate, and a brief statement of the nature of the lien, right, or interest sought to be enforced. The clerk shall immediately file and record the notice in the *lis pendens* record, and note on it, and in the record, the hour and day of filing and recording.

The statute is for the benefit of those having a vested interest or lien in real estate. *Aldridge v. Aldridge*, 527 So.2d 96, 99 (Miss. 1988). As noted, we take no position regarding Attorney X's legal right to avail himself of the *lis pendens* statute, that being an issue on which we may not opine. From an ethical standpoint, we begin with reference to Rule 1.8(j) of the Mississippi Rules of Professional Conduct, which deals with conflicts of interest and provides that:

A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

- (1) acquire a lien granted by law to secure the lawyer's fee or expenses, and
- (2) contract with a client for a reasonable contingent fee in a civil case.

Mississippi Bar Formal Interpretative Opinion No. 152 addresses Rule 1.8(j) and its application under circumstances similar to those here. There, the attorney represented the husband in a divorce proceeding in which the husband was to make one-half (1/2) of the monthly mortgage payments on a home owned jointly by him and his ex-wife. The husband could pay only a small portion of the fees the attorney had billed him and offered to convey his one-half undivided interest in the home to the attorney, who would then have to pay the monthly mortgage payments for which the husband was obligated. That opinion concluded that the "subject matter of the litigation" was the property owned by the husband and ex-wife, and that neither exception (lien or contingent fee) embodied in Rule 1.8(j) applied.

Opinion No. 152 interpreted the lien referred to in Rule 1.8(j)(1) as an attorney's lien. In Mississippi, such liens are of two types: the "retaining" lien and the "charging" lien:

The attorney may have an interest in securing his fee by imposing a lien on property which has already come into the attorney's possession. Mississippi law refers to the attorney's interest as a "retaining" lien. *Collins v. Schneider*, 187 Miss. 1, 9, 192 So. 20, 22 (1939). The Southern District of Mississippi observed that an attorney has a lien on all ... money of his client which come[s] into his possession in the course of his professional employment. This lien entitles the attorney to retain possession ... until all his fees are paid [Citations omitted].

Further, a Mississippi attorney may impose a special or charging lien entitling the attorney to recover his fee from the proceeds of the judgment of a case. *Webster v. Sweat*, 65 F.2d at 110. This lien cannot attach until a judgment is handed down. *Id.* Like the attorney's retaining lien, the charging lien only applies to funds already in the attorney's possession [Citations omitted]. *Tyson v. Moore*, 613 So.2d 817 (Miss. 1992). Both types of liens require the property be in possession of the attorney. Accordingly, neither type of lien is being, or could be, asserted here.

A later opinion, Formal Interpretative Opinion No. 157, dealt with the "contingent fee" exception in Rule 1.8(j)(2) and concluded that it is not a per se violation of the Rules of Professional Conduct for a lawyer to take a lien against land which is the

subject of the litigation for the purpose of securing that lawyer's fee.¹ There, though, the facts were much different from those presently considered. The lawyer had a contingency fee contract related to the real estate at issue and proposed taking a lien on the real estate to secure that contingency fee. In Opinion No. 157, the Committee distinguished the earlier opinion (No. 152) on several bases, including that Rule 1.5(d) of the Mississippi Rules of Professional Conduct prohibits contingent fee contracts in domestic-relations matters.

Accordingly, we find the rationale of Opinion No. 152 applicable here and conclude that its interpretation of Rule 1.8(j) precludes the conduct proposed. In addition, Opinion No. 152 addressed other conflicts rules, specifically Rules 1.7(b) and 1.8(a), MRPC, and found that they, too, precluded the conduct addressed there. We find those rules equally applicable and controlling here. Rule 1-7(b) provides that a lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's own interests, except with the client's consent after full disclosure. Rule 1.8(a) provides that a lawyer shall not knowingly acquire an ownership, possessory, security or pecuniary interest adverse to a client, except with the client's written consent after full disclosure. Attorney X's proposed conduct in attempting to encumber the subject property and thereby intentionally or unintentionally defeat the purposes of the property settlement materially limits Attorney X's obligations to, and is adverse to the interests of, his client. We have no indication that the attorney made any disclosure or sought any consent from his client.² Accordingly, we find Attorney X's proposed conduct violative of those rules.

Finally, it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice. Rule 8.4(d), MRPC. This rule has been given broad interpretation. Attorney X, we assume, represented his client in negotiating the property settlement which has been incorporated in a divorce decree presented to the Court for entry. The property settlement makes specific provision for disposition of the real estate which Attorney X, through the conduct proposed, intends to encumber so that the purposes and intent of the property settlement and the Court's order cannot be fulfilled. Accordingly, we believe that the proposed conduct also runs afoul of Rule 8.4(d). For the foregoing reasons, under the circumstances presented, we cannot envision a situation in which Attorney X, consistent with his obligations under the Mississippi Rules of Professional Conduct,

¹That opinion cautions, though, that the potential for conflicts is "numerous."

²We do not reach the issue whether any consent would or could be valid under these circumstances.

could seek, as a means of collecting his fee, to encumber the property which is part of the subject matter of his representation. At a minimum, the proposed conduct violates Rules 1.7(b), 1.8(a), 1.8(j) and 8.4(d), MRPC.