

**ETHICS OPINION NUMBER 152
OF THE MISSISSIPPI BAR
RENDERED JUNE 2, 1988**

CONFLICT OF INTEREST - Where attorney represents husband in a divorce, and husband and wife own home jointly, and husband has been ordered to pay one-half of monthly house payment, attorney may not accept a deed conveying husband's interest in the home to the attorney as his fee.

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

An attorney has represented a client for a number of years, most recently in a divorce proceeding. Under the terms of the client's divorce from his wife, the husband-client was to make one-half of the monthly mortgage payments on the home that is owned jointly by the client and his ex-wife. The client was cited for contempt by the ex-wife, and the Chancellor found him to be in contempt for failure to make the mortgage payments on the home, and awarded a judgment to the ex-wife for the amount of this arrearage and for past due child support payments.

The husband has paid his attorney only a small portion of the fees billed to him. In an effort to pay his attorney, the client has offered to convey his one-half undivided interest in the home of the parties to his attorney, and in return, the attorney would have to pay to the ex-wife the amount of the arrearage for the mortgage payments that the husband has failed to pay. The attorney would also begin making one-half of the monthly mortgage payments on the home that the husband was ordered by the Court to make. If and when the house were ever sold, the ex-wife and the husband's attorney would divide the proceeds from the sale, which would then be the means of paying the attorney's fees owed by the husband. The attorney wants to know if he may accept the deed from the husband in payment of his fees.

This case is governed by the following ethical rule:

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...

Rule 1.8(j) Mississippi Rules of Professional Conduct

The subject matter of the litigation in this instance would be the home owned by the husband and ex-wife. The two exceptions to this rule, for attorney's liens and for contingent fee contracts, do not apply here. The lawyer is not claiming an attorney's lien on the home, and there is no contingent fee contract involved.

This case also comes within the contemplation of Rule 1.7(b) of the Mississippi Rules of Professional Conduct, which 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. Also coming into play here is Rule 1.8(a) of the Mississippi Rules of Professional Conduct, which 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. All of the above provisions come under the general heading of "conflict of interest".

The Committee has been unable to find any reported decisions or ethical opinions that deal with this specific question. However, it has been decided elsewhere that a lawyer may not acquire a mortgage on his client's property in order to secure his fee for representing the client with respect to an existing mortgage on the property. By obtaining a mortgage on his client's property, the lawyer would obtain a personal interest in the litigation, so that his independent professional judgment would be impaired. Maryland Bar Association, Ethics Opinion No. 86-40 (1985). It has also been held that a lawyer may not purchase his client's judgment against an out-of-state defendant in exchange for cash, as a lawyer may not acquire a proprietary interest in the subject matter of the litigation that he is conducting for a client. North Carolina Bar Association, Ethics Opinion No. 364 (1985).

The factual summary states that the husband has been ordered by the Chancellor to make one-half of the monthly mortgage payments on the parties' home, and he has already been found by the Court to be in contempt for his failure to do so. But even if the husband conveyed his one-half undivided interest in the home to his lawyer, the husband would still be under the court decree requiring him to make the mortgage payments. As long as the lawyer made the mortgage payments, there might not be a problem. However, if the lawyer ever defaulted on his agreement to make the house payments, the husband could be cited for contempt by the ex-wife. The husband would then be looking to his lawyer to make the delinquent payments, which would place the husband and his lawyer in opposition to one another. This lawyer would then have a conflict of interest in his representation of the husband, in violation of the above cited rules.

Furthermore, if the husband were to convey his interest in the home to his lawyer, then the ex-wife and her husband's lawyer would be joint owners of the property. At some point after that, there is a good possibility that the property would be sold, and the husband's lawyer and the ex-wife would be having to reach an agreement on such matters as the sales price, the payment of closing costs and the like. The lawyer and the ex-wife would be thrust into a joint venture, in which they would have to make business decisions jointly. This situation may tend to soften the lawyer's adversarial attitude toward the ex-wife, and thereby dilute his loyalty to his client. In view of the foregoing, the Committee is of the opinion that the proposed arrangement to convey the husband's interest in the house to the lawyer would create serious conflict of interest problems for this lawyer to such an extent that said arrangement should not be allowed.

The obvious legal question presented here is whether the ex-wife has a homestead interest in the husband's one-half undivided interest in the home, so as to require her signature on the deed conveying the husband's interest to his lawyer. In accordance with established policy, the Committee declines to answer legal questions.