



## ETHICS ADVISORY OPINION

**12-07**

UPON THE REQUEST OF A MEMBER OF THE SOUTH CAROLINA BAR, THE ETHICS ADVISORY COMMITTEE HAS RENDERED THIS OPINION ON THE ETHICAL PROPRIETY OF THE INQUIRER'S CONTEMPLATED CONDUCT. THIS COMMITTEE HAS NO DISCIPLINARY AUTHORITY. LAWYER DISCIPLINE IS ADMINISTERED SOLELY BY THE SOUTH CAROLINA SUPREME COURT THROUGH ITS COMMISSION ON LAWYER CONDUCT.

### **Factual Background:**

Lawyer represents Client, who is the defendant in a lawsuit alleging breach of contract and fraud and asserting a constructive trust over a piece of real property (the "Property"). Plaintiff has filed a lis pendens over the Property to secure the constructive trust claim. Client has, through Lawyer, filed an answer and counterclaim seeking money damages from the plaintiff.

Client and Lawyer have entered into an hourly rate fee agreement. Client has been unable to pay the Lawyer's fees as agreed, and therefore the Client and the Lawyer have entered into a modified fee agreement whereby the client has executed a promissory note to Lawyer for the unpaid fees, including future advances, and secured the note with a mortgage recorded against the Property.

Before entering into the modified fee agreement, Plaintiff made an offer of judgment offering to dismiss its claims in return for a dismissal of the counterclaims. This offer was rejected.

### **Question Presented:**

Given the arrangement set forth above, would a renewal of the offer of judgment whereby the plaintiff would dismiss its claims in return for a dismissal of the counterclaims create a conflict of interest, because the dismissal of the claims would make the Lawyer's mortgage more valuable and increase the Lawyer's chances of collecting the fees owed?

**Summary:**

Rules 1.5 and 1.8 do not prohibit an attorney from obtaining an interest in property to secure payment of a fee, as long as the requirements of both Rules are met. The fact that a client requires advice regarding a particular course of action and that course of action may impact the amount or collectability of the attorney's fee does not create a conflict of interest, unless the attorney reasonably believes he cannot provide competent and diligent advice to the client under Rule 1.7. Because the lawyer must get the client's written consent to the mortgage transaction pursuant to Rule 1.8 in the first instance, the best practice may be to seek the client's informed consent to the potential conflict created by the creation of a personal interest of the lawyer under Rule 1.7 at the same time.

**Opinion:**

Rule 1.8 permits a lawyer to acquire an ownership, possessory, security or other pecuniary interest in property adverse to a client as long as the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are transmitted in writing in a manner that can be reasonably understood by the client, the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek advice of independent legal counsel on the transaction, and the client gives informed consent in writing as to the essential terms of the transaction. (Rule 1.8(a)). Comment [1] to Rule 1.8 makes it clear that, while this Rule "does not apply" to ordinary fee arrangements between a lawyer and a client, its requirements must be met when the lawyer "accepts an interest in the client's business or nonmonetary property as payment of all or part of a fee." Because a mortgage is an interest in property, the requirements of Rule 1.8 must be met, along with the requirements of Rule 1.5 that the fee be reasonable under the circumstances set forth therein.

Rule 1.8 further prohibits a lawyer from acquiring a proprietary interest in the "subject matter of litigation the lawyer is conducting for a client" but specifically excepts "a lien authorized by law to secure the lawyer's fee or expenses." (Rule 1.8(i)). Comment [17] to Rule 1.8 makes it clear that this exception applies to "liens acquired by contract with the client." Therefore, the granting of a mortgage by the client to secure the lawyer's fees, even though the Property so mortgaged is part of the subject matter of the litigation, does not violate Rule 1.8 or Rule 1.5 as long as the formalities of those Rules are observed.

Given that the mortgage itself is permissible, the analysis turns to whether an offer of judgment wherein the Client is asked to surrender his counterclaims in return for a dismissal of the Plaintiff's causes of action, including the cause of action for constructive trust and removal of the lis pendens, would create a conflict of interest between the client and the attorney because the dismissal of the

constructive trust claim and *lis pendens* would move the Attorney's mortgage into a more secure position and make recovery of the fees then owed more likely.

Virtually every decision made in the course of representing a client, such as whether and how much discovery to engage in, what motions to research and file, and every offer of settlement, potentially impacts either the amount or recoverability of the attorney's fee, whether the case is on an hourly rate or a contingent fee basis. The Rules balance this inherent conflict by allocating the authority with respect to a case between the attorney and the client in Rule 1.2, which reserves to the client the authority to decide whether to make or accept a settlement offer (Rule 1.2(a) and Comment [1]; See *In Re Belding*, 356 S.C. 319, 589 S.E.2d 197 (2003)) and preserves for the attorney, after communication and consultation with the client, authority to make decisions as to tactics used in a case, consistent with the lawyer's duties to the court, opposing counsel, the opposing party and the rule of law. (See, e.g., *Palacio v. State*, 333 S.C. 506, 511 S.E.2d 62 (1999) (decision whether to strike a juror inherently falls within the authority of the lawyer)).

That being said, anytime there is a significant risk that the representation of a client will be materially limited by the personal interest of the lawyer, a potential conflict of interest arises under Rule 1.7(a)(2). In dealing with this potential conflict of interest, the lawyer must determine whether he reasonably believes that he will be able to provide competent and diligent representation to the client in light of the potential conflict. If the lawyer determines that he cannot, then the lawyer must withdraw. (See Rule 1.7, Comment [4]). If the lawyer determines that he can provide competent and diligent representation despite the conflict between the client's interest and the lawyer's personal interest (i.e., the mortgage), then the client must give informed consent, confirmed in writing, to the continued representation. (Rule 1.7(b)(4).)

It is beyond the scope of the Committee's authority to determine for Lawyer whether the potential offer of judgment described in the facts will present a significant risk that Lawyer's representation of Client will be materially limited, or whether, if so, Lawyer reasonably believes that he can nonetheless provide competent and diligent representation to Client despite the conflict. However, because the Lawyer must get the Client's written consent to the mortgage transaction pursuant to Rule 1.8 in the first instance, the best practice may be to seek the client's informed consent to the potential conflict created by the creation of a personal interest of the lawyer under Rule 1.7 at the same time.