

Final

**Rhode Island Supreme Court Ethics Advisory Panel
Opinion No. 2012-05
Issued June 7, 2012**

FACTS

The inquiring attorney proposes to accept a note and a mortgage as payment of his/her attorney's fee. The inquiring attorney's client is a homeless military veteran. The client has been living in a self-made structure on real property owned by another individual, and has asked the inquiring attorney to represent him in an adverse possession claim. The inquiring attorney believes the claim has merit but the inquiring attorney is concerned about the client's ability to pay his/her attorney's fee. The inquiring attorney states that the case would be beyond the cost and time that he/she could justify taking on a pro bono basis.

The inquiring attorney proposes to have the client sign a note and a mortgage on the property that is the subject of the adverse possession claim. The inquiring attorney would value his/her fee at one-third the fair value of the property's tax assessment, or on an independent appraisal, and charge a fair interest rate. He/she states that the mortgage would not be recorded unless the client prevailed on the adverse possession claim; and that he/she will not require the mortgage to be paid unless the client sells the property or the client dies. The inquiring attorney will require the client to execute a contingency agreement in the event that the client accepts an offer to settle the claim. The inquiring attorney states that he/she does not want to seek payment through litigation.

ISSUES PRESENTED

The inquiring attorney asks whether he may accept from his/her client as payment for his/her attorney's fee a mortgage on property that is the subject of an adverse possession claim in which the inquiring attorney will represent the client.

OPINION

Rule 1.8(i) permits the inquiring attorney to provide for a contingent fee which consists of the inquiring attorney's acquiring a mortgage on property that is the subject of the client's adverse possession claim. In acquiring the mortgage, the inquiring attorney must comply with the requirements of Rule 1.8(a) concerning disclosure, fairness, client consent, and the client's opportunity to seek independent counsel. The inquiring attorney must comply with the requirements of Rule 1.5.

REASONING

The Rules of Professional Conduct permit lawyers to accept non-monetary property as payment for legal services. Comment [4] to Rule 1.5 states:

[4]A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8(i). However, a fee paid in property instead of money may be subject to the requirements of Rule 1.8(a) because such fees often have the essential qualities of a business transaction with the client.

In accepting non-monetary property as payment, a lawyer must comply with Rule 1.8 entitled “Conflicts of interest: Current clients; Specific rules,” specifically Rule 1.8(a) and Rule 1.8(i). Rule 1.8(a) sets forth requirements that an attorney must meet when entering into a business transaction with a client or when acquiring a security interest adverse to a client. Rule 1.8(i) prohibits a lawyer from acquiring a proprietary interest in the subject matter of litigation subject to two exceptions related to securing legal fees and costs. The threshold question in this inquiry is whether Rule 1.8(i) permits the inquiring attorney to provide for a contingent fee which consists of the inquiring attorney’s acquiring a mortgage on property that is the subject of the client’s adverse possession claim. The Panel believes that it does. Rule 1.8(i) states:

- (i) 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 authorized 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.

Comment [16] to Rule 1.8 explains:

[16] Paragraph (i) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. Like paragraph (e), the general rule has its basis in common law champerty and maintenance and is designed to avoid giving the lawyer too great an interest in the representation. In addition, when the lawyer acquires an ownership interest in the subject of the representation, it will be more difficult for a client to discharge the lawyer if the client so desires. The Rule is subject to specific exceptions developed in decisional law and continued in these Rules. The exception for certain advances of the costs of litigation

is set forth in paragraph (e). In addition, paragraph (i) sets forth exceptions for liens authorized by law to secure the lawyer's fees or expenses and contracts for reasonable contingent fees.

In South Carolina Bar Ethics Advisory Committee Opinion 12-02 (2012), the South Carolina Ethics Advisory Committee concluded that acquiring a contingent interest in real property that was the subject of the litigation was not prohibited by Rule 1.8(i). The issue presented was whether an attorney could provide for a contingent fee in a quiet title action in which the contingency fee consisted of the attorney's partial ownership of the subject property. Id. The Committee stated that the contingent ownership interest in the property was a contingent fee that was consistent with the exception in Rule 1.8(i)(2). Id.

In the instant inquiry, the inquiring attorney proposes a contingent fee which consists of his/her acquiring a mortgage on the property that is the subject of the client's adverse possession claim. The proposal is a contingent fee arrangement. The Panel is of the opinion that the contingent security interest in the subject property is consistent with the exception set forth in Rule 1.8(i)(2), and therefore concludes that the inquiring attorney may accept a mortgage on the property that is the subject of the client's cause of action as payment for his/her attorney's fee. See Connecticut Bar Association Committee on Professional Ethics Op. 97-4 (1997) (to secure a fee, attorney may take security interest in client property which is subject to litigation in which lawyer represents the client); Ohio Supreme Court Board of Commissioners on Grievances and Discipline Op. 2004-8 (2004) (attorney may acquire mortgage on client's home to secure legal fee where the home is the subject of litigation).

Having concluded that Rule 1.8(i) permits the inquiring attorney to acquire a contingent security interest in the subject property, the Panel turns now to Rule 1.8(a). Acquiring a mortgage on a client's property is a business transaction governed by Rule 1.8(a). The Rule states:

Rule 1.8. Conflict of interest: Current clients: Specific rules.

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role

in the transaction, including whether the lawyer is representing the client in the transaction.

Rule 1.8(a) does not apply to ordinary fee arrangements between a lawyer and client, but when a lawyer acquires an interest in a client's business or other non-monetary property as payment of all or part of a legal fee, the requirements of the Rule must be met. Rule 1.8, Comment 1. Arrangements for fees to be paid in non-monetary property have the essential qualities of a business transaction with a client. Rule 1.5, Comment 4. Thus, a lawyer taking a security interest in a client's property must comply with the requirements of Rule 1.8(a) concerning disclosure, fairness, client consent, and the client's opportunity to seek independent counsel.

To comply in the instant inquiry with the requirements of disclosure and fairness of Rule 1.8(a)(1), the mortgage must include the terms of the arrangement including that its purpose is to secure the inquiring attorney's fees if the client prevails in the adverse possession claim; that the mortgage will be recorded only if the client prevails in the adverse possession matter; and that even if the client prevails, no payments are due until the client sells the property or the client dies.

In addition to Rule 1.8, the inquiring attorney must comply with the written fee requirements of Rule 1.5 ("Fees.") Additionally, the fee agreement is subject to the requirement of reasonableness. See Rule 1.5. Finally, the inquiring attorney must determine that the client has the present mental capacity to understand and to enter into the proposed arrangement.

The Panel concludes (a) that Rule 1.8(i) permits the inquiring attorney to provide for a contingent fee which consists of the inquiring attorney's acquiring a mortgage on property that is the subject of the client's adverse possession claim; (b) that in acquiring the mortgage, the inquiring attorney must comply with the requirements of Rule 1.8(a) concerning disclosure, fairness, client consent, and the client's opportunity to seek independent counsel; and (c) that the inquiring attorney must comply with the requirements of Rule 1.5