

ALASKA BAR ASSOCIATION

ETHICS OPINION NO. 88-6

Contingent fee or lien on real property
in quiet title litigation

The Committee has been asked whether it is unethical for an attorney to enter into an agreement with a client to secure the attorney's fees by means of a lien on real property which is the subject matter of litigation brought by the attorney on behalf of the client. Further, and as an alternative, the Committee has been asked if a contingent fee arrangement can be negotiated with the client under which the client would agree to assign an interest in real property subject to the litigation to the attorney as a contingent fee.

The attorney represents the former owner of a large parcel which was subsequently subdivided and sold to a number of purchasers. None of the subsequent transactions were recorded, and many of the purchasers have ceased making payments due to misrepresentations. The former owner has retained the attorney to bring suit to set aside the original conveyances. The former owner is unable to afford the fees, and the attorney wishes to either secure the fees through an attorney's lien on the property or negotiate an assignment of an interest in the property, in the event the property is recovered from the purchasers.

DR 5-103 of the Code of Professional Responsibility proves that:

- (A) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation he is conducting for a client, except that he may:
 - (1) Acquire a lien granted to secure his fee or expenses.
 - (2) Contract with a client for a reasonable contingent fee in civil case.

EC 5-7 recognizes that 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. It further recognizes that although a contingent fee arrangement gives a lawyer a financial interest in the outcome of litigation, a reasonable contingent fee is permissible in civil cases because it may be the only means by which a layman can obtain the services of a lawyer of his choice.

Based on the above, and subject to subsection (B) of DR 5-103 which prohibits an advance or guarantee of financial assistance other than the expenses of litigation, it appears that either arrangement could be made between the attorney and the client. Such an arrangement is subject to Canon EC 2-19 and Bar Rule 35(c).

The legal effect of any lien which might be asserted or created is a matter of law, rather than a matter of ethics, and is beyond the scope of this opinion.

American Bar Association Informal Opinion No. 1461 should be taken into account in determining whether or not to assert an attorney's lien. By analogy to Opinion 1461, when determining whether to secure the payment of fees by a statutory or contractual lien, the lawyer should take into account the financial situation of the client, the sophistication of the client in dealing with lawyers, whether the fee is reasonable, whether the client clearly understands and agrees to pay the fee, whether imposition of a lien would prejudice important rights or interests of the client or of other parties, whether the failure to impose the lien would result in fraud or gross imposition by the client, and whether there are less stringent means by which the matter can be resolved or the amount which is owed or will be owing can be secured.

Submitted by the Alaska Bar Association Ethics Committee this 20th day of October, 1988.

Adopted by the Board of Governors this 22nd day of October, 1988.