

Nebraska Ethics Advisory Opinion for Lawyers  
No. 76-16

AN ATTORNEY IN A DIVORCE ACTION REPRESENTING THE HUSBAND WHO IS WITHOUT CASH FUNDS TO PAY ATTORNEY FEES MAY NOT ETHICALLY TAKE A MORTGAGE ON THE HUSBAND'S HOME EXECUTED BY THE HUSBAND AS SECURITY FOR FUTURE LEGAL SERVICES.

FACTS

You state that you represent a husband in a divorce action who is without cash funds to pay attorney's fees. You contemplate requesting him to sign a mortgage on his home in your favor as security for future legal services in the amount of \$1,500.00. His wife will not sign the mortgage, and the value of the house will undoubtedly be taken into consideration in property settlement negotiations and award of alimony by the Court.

DISCUSSION

At the outset, we presume that the house in question is the homestead of the parties. A homestead cannot be conveyed or encumbered, unless the instrument by which it is conveyed or encumbered is executed and acknowledged by both husband and wife. See Section 40-104, R.R.S. Neb., 1943. By taking such a mortgage without the signature and acknowledgment of the wife, you would in fact be counselling your client to commit an illegal act in contravention of the Statutes of Nebraska, thereby violating DR 7-102(A)(7) of the Code of Professional Responsibility which states: "In his representation of a client, a lawyer shall not . . . (7) counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent."

DR 5-103(A) of the Code provides: "A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation he is conducting for a client .

..."

The possibility of an adverse effect upon the exercise of free judgment by a lawyer on behalf of his client during litigation, generally makes it undesirable for the lawyer to acquire a proprietary interest in the cause of his client, or otherwise to become financially interested in the outcome of the litigation. See EC 5-7.

#### CONCLUSION

It is the opinion of the Committee that the execution of a mortgage under the circumstances outlined in your inquiry and acceptance of same by you would probably be illegal but definitely a violation of the Code of Professional Responsibility.

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