

Receiving Client Property as a Fee or Security for a Fee

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Lawyers may take property other than cash as payment of a fee or as security for payment of a fee. (See "Mortgages to secure fees" in the Dec. 27, 1999, issue of *Minnesota Lawyer*.) Even beyond a mortgage on the client's house to secure a fee, however, whenever a lawyer takes client property as payment, or an interest in client property to secure payment, a lawyer must comply with more requirements than if she simply took cash. Rule 1.8(a), Minnesota Rules of Professional Conduct, governs such transactions.

The rule provides that 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:

- the client is notified in writing by the lawyer that independent counsel should be considered and is given a reasonable opportunity to seek the advice of independent counsel in the transaction;
- 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 to the client in a manner which can be reasonably understood by the client; and
- the client consents to the transaction in a document separate from the transaction documents that specifies whether the lawyer is representing or otherwise looking out for the client's interests in the transaction; the nature of the lawyer's conflicting interests, if any; and the reasonably foreseeable risks for the client from any conflict.

An admonition recently issued by the Director of the Office of Lawyers Professional Responsibility illustrates the point.

The cousin of a criminal defendant contacted the lawyer to determine if the lawyer would represent the defendant in the sentencing phase of a criminal case. The defendant had already been found guilty. The lawyer and the defendant's cousin discussed whether the lawyer would undertake representation in exchange for an interest in an automobile the defendant owned. The lawyer ultimately required payment of a cash retainer. Soon thereafter, the defendant retained the lawyer, and the defendant's cousin paid the retainer.

Sometime later, the defendant assigned his interest in the automobile to the lawyer. The lawyer stated that the assignment occurred because after an initial appearance regarding sentencing, the defendant became concerned that an appeal would be necessary because of items contained in the probation officer's report, and the assignment was to ensure the lawyer would handle the defendant's appeal.

Unfortunately, the transaction and the terms involving transfer of title as a retainer were not reduced to writing. In addition, before the lawyer received the assignment, the lawyer did not notify the client in writing that independent counsel should be considered. The lawyer did not have the client consent to the transaction in a document separate from the transaction documents that specified whether the lawyer

represented or otherwise protected the client's interests in the transaction, the nature of the lawyer's conflicting interests, if any, or the reasonably foreseeable risks for the client from any conflict.

Ultimately, the lawyer did not receive the car nor enforce the assignment. Thus, there was no substantial harm from the misconduct, and the Director issued an admonition.

A lawyer receiving cash as a fee can have a signed receipt, and that is enough. But when the lawyer receives client property as a fee, or an interest in client property as security for a fee, a document simply memorializing the transfer of title or the security interest is not enough.

The lawyer must comply with the requirements of Rule 1.8(a). The requirements are neither onerous nor complex. Doing so will allow the lawyer to be compensated for her services and comply with the Rules of Professional Conduct.