



PROFESSIONAL RESPONSIBILITY

REPEAL OF HOMESTEAD LIEN ETHICS OPINION

BY KENNETH L. JORGENSEN

At its April 4, 2003, meeting, the Lawyers Professional Responsibility Board repealed Opinion No. 14, which governed the filing of an attorney lien against a client's homestead. Prior to its repeal, the opinion stated:

It is professional misconduct for a lawyer to file an attorney lien against a client's homestead or the client's interest in the homestead without first obtaining a valid waiver of the client's homestead exemption. The homestead exemption waiver must be a written document separate and apart from the fee agreement.

The homestead lien opinion was adopted in 1990 by the Lawyers Board in response to recurring complaints about abusive use of attorney liens when client homesteads were sold.

ETHICAL REGULATION OF HOMESTEAD LIENS

The problems associated with attorney liens on homesteads came to a head in 1981 with *Northwestern National Bank v. Kroll*, 306 N.W.2d 104 (Minn. 1981). In *Kroll*, the Minnesota Supreme Court addressed the interplay between lawyer lien rights under the attorney lien statute (Minn. Stat. §481.13) and the client's statutory homestead exemption (Minn. Stat. §510.01).¹ *Kroll* held attorney liens, unlike mechanic liens, did not attach to homestead property, even where the lawyer's services had been successfully employed to defend the home against bank foreclosure of a second mortgage. Left unresolved by *Kroll* was whether a lawyer could properly file an attorney lien against a homestead without taking foreclosure action.

After *Kroll* the Lawyers Board announced to the bar that attempting to foreclose an attorney's lien against homestead property was ethically improper. While declining to issue a formal opinion, the board also "expressed substantial doubts about the propriety" of filing a lien against homestead property and indicated it would review complaints about lien filing on a case-by-case basis to determine whether the lien had been used to coerce

payment. Lawyers were warned that "refusing to release an attorneys lien when the homestead [was] sold so that the proceeds of the homestead sale [were] not compromised [was] unethical."²

The ban against foreclosing attorney liens on homesteads was based on the ethical rules prohibiting the advancement of unwarranted or frivolous claims.³ Insisting that a non-judicially determined attorney lien be satisfied from statutorily exempt closing proceeds was frivolous and in bad faith after *Kroll*. However, the rationale for preventing lawyers from merely filing attorney liens against homesteads was less clear. The homestead nature of property can change over time, especially in marital dissolution cases. Questions remained about whether merely filing an attorney lien to secure unpaid fees in the event the property lost its homestead status was "frivolous" or "without merit." This uncertainty undoubtedly played a role in the board's refusal to issue a formal ethics opinion on the subject.

The board's post-*Kroll* informal announcement did little to dissuade lawyers from filing attorney liens against homesteads, nor did it deter a number of lawyers from insisting at closings that their liens be paid from exempt proceeds. When ethics complaints were filed, some lawyers understandably claimed lack of notice concerning the post-*Kroll* informal policy announcement. Others quarreled about the homestead status of the property. Still others continued to file the liens because they were effective in coercing payment at closing due to client ignorance that the proceeds were exempt.

Imperfections in the Minnesota attorney lien statute also played a part in the problem. Although the statute mandated recording of attorney liens on real property, it did not require notice to the client. See e.g., Minn. Stat. §481.13, subd. 4 (2000). Unlike other statutory liens, attorney liens could be asserted and filed at any time, nor were they limited in their duration. These infirmities perpetuated ancient attorney liens that sometimes blindsided clients at, or shortly before, closing. As complaints of this nature continued, the Lawyers Board adopted Opinion No. 14 in 1990.

THE HOMESTEAD LIEN ETHICS OPINION

Very simply, Opinion No. 14 prohibited the filing of an attorney lien on a homestead or a client's interest in a homestead, unless the client executed a waiver of his or her homestead exemption. Waiver of the exemption avoided the foreclosure impediments of *Kroll*, and provided a good faith purpose for filing an attorney lien against the otherwise exempt homestead.

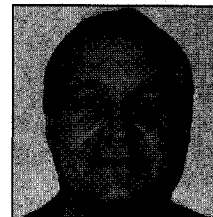
The opinion was initially successful in quelling complaints about attorney liens on homesteads. As lawyers learned of the opinion, fewer ethics complaints arising out of homestead liens were filed. Erudite clients and real estate closers, armed with Opinion No. 14 at closings, could sometimes convince lawyers, who had failed to obtain the necessary waiver, to release their liens without payment. Discipline was imposed against those who chose not to comply with the opinion.⁴ Although the efficacy of any ethical regulation is difficult to gauge, the homestead lien opinion initially appeared to achieve its objectives.

Within several years, however, changes in the law chipped away at the authority and accuracy of the opinion. In 1993, the Minnesota Homestead Exemption Statute was amended to limit the value of the exemption to \$200,000.⁵ To the extent a client's homestead equity exceeded \$200,000, waiver of the exemption was not necessary, nor was filing an attorney lien improper.

In 2000, litigation over an attorney lien, where the client had signed a homestead waiver, resulted in a Court of Appeals' opinion that further clouded the subject. Although the subject was

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not central to the issue before it, the Court of Appeals announced that homestead waivers were invalid unless signed by both spouses.⁶ This decision, juxtaposed against the homestead lien opinion, made compliance with the Opinion No. 14 even more problematic. To expect a family law practitioner to be able to obtain waivers from divorcing spouses was unrealistic, if not inane.

The homestead opinion became more suspect in 2001 when the Minnesota Supreme Court decided that Lawyers Board Opinions could not serve as the sole basis for imposing lawyer discipline.⁷ For opinions whose nexus to the Rules of Professional Conduct was tenuous or strained, the decision raised serious doubt about their authority. Opinion No. 14, to the extent it prohibited even filing attorney liens, clearly fell into this category.

Finally, during the 2002 legislative session, the Minnesota Attorney Lien Statute was amended to provide notice to clients, a deadline for filing attorney liens, and the expiration of liens that are not pursued to judgment within a one-year period.⁸ The statutory amendments, as much as any of the other changes, caused the Lawyers Board to repeal the homestead lien opinion in April 2003.

ATTORNEY LIENS ON HOMESTEADS NOW

With the repeal of the homestead lien opinion, ethical restrictions upon filing attorney liens against homesteads no longer exist. Attempts to foreclose attorney liens upon homesteads are still ethically prohibited unless the client's interest exceeds the statutory \$200,000 exemption amount.

Lawyers intending to file attorney liens against real property should familiarize themselves with the recent statutory changes. Like other statutory liens, attorney liens must now be filed within 120 days of when the last legal service was performed for the client. Other changes include:

- Within 30 days of filing, written notice of filing must be served personally or by certified mail upon the property owner.
- To avoid expiration of the lien, an action to reduce the lien to judgment must be commenced within a year of the lien's filing.
- All attorney liens recorded prior to August 1, 2002 (the effective date of the 2002 amendments), will expire by operation of law unless an action is commenced before August 1, 2003.⁹

Although the amendments require

initiation of civil suits to avoid expiration of liens, lawyers should be mindful of the availability of fee arbitration through their local bar associations. The Rules of Professional Conduct encourage lawyers to "conscientiously consider submitting to" procedures established by the bar for resolution of fee disputes.¹⁰ During these times of limited judicial resources, it is incumbent upon lawyers to do their part to avoid further burdening the system with disputes otherwise capable of being resolved through alternative forums. Fee arbitration can be useful for those fee disputes that necessarily end up in the court system. Oftentimes courts can summarily review and affirm fee arbitration rulings in which the client participated and appropriate arbitration procedures were employed.

Lawyers have a right to be fairly compensated for their services and to use the means provided by law to secure that compensation. Only time will tell whether recent changes in Minnesota attorney lien law will help or hinder what has historically been a difficult issue. For the time being, lawyers who secure fees with real property are obliged to handle any underlying fee dispute with diligence, dispatch and discretion. □

NOTES

1. Minn. Stat. §510.02 now limits the value of homestead exemptions to \$200,000, or if the homestead is primarily for agricultural purposes to \$500,000. The statute extends this exemption to homestead sale proceeds for one year after the date of sale. See Minn. Stat. §510.07.
2. See Hoover, "Attorneys Liens on Homesteads," *Bench & Bar* (November 1982), 25.
3. Former Code of Professional Responsibility DR 7-102(A)(2) prohibited lawyers from knowingly advancing a claim that is unwarranted under existing law. This prohibition was carried forward for the most part in Rule 3.1, Minnesota Rules of Professional Conduct.
4. See e.g. *In re Oberhauser*, 508 N.W.2d 521 (Minn. 1993).
5. *Supra* note 1.
6. *Peterson v. Hinz*, 605 N.W.2d 414 (Minn. App. 2000).
7. See e.g. *In re Panel File 99-42*, 621 N.W.2d 240 (Minn. 2001).
8. 2002 Minn. Laws, Ch. 403, Sec. 2.
9. Minn. Stat. §481.13, subds. 2 and 3 (2002).
10. See *Comment to Rule 1.5, Minnesota Rules of Professional Conduct*.