

ATTORNEY LIENS ON HOMESTEADS

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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 legal waiver of the client's homestead exemption. The homestead exemption waiver must be a written document separate and apart from the fee agreement.

Lawyers Professional Responsibility Board Opinion No. 14, adopted June 15, 1990, attempts to settle some of the questions surrounding the nagging issue of attorney liens on homesteads. The issues have been debated for nearly ten years.

Northwestern National Bank v. Kroll, 306 N.W.2d 104 (Minn. 1981) held that the homestead exemption precludes foreclosure of an attorney lien. *Kroll* suggested, and subsequent cases stated, that "an attorney's lien cannot attach to exempt property." [Ftn 1](#) Some attorneys argued that even though foreclosure was forbidden and the attorney lien could not "attach," still the lien could be filed. A *Bench & Bar* article in November 1982 indicated the Board's and Director's skepticism regarding this practice.

The question of attorney liens on homesteads becomes one of professional responsibility because of two rules of professional conduct: Rule 1.8(j)(1) forbids an attorney to acquire a proprietary interest in the subject matter of litigation except "a lien granted by law"; and Rule 3.1 forbids taking frivolous actions in legal proceedings. Both of these rules harken to the civil law, as do several other rules of professional conduct.

In several of its earlier opinions the Board has interpreted the application of civil law to professional conduct. [Ftn 2](#) Opinions issued by the Board often attempt to address subjects that have produced friction between attorneys and clients. For example, the opinions regulating copying costs and return of the file upon conclusion of representation appear to have successfully regulated these practices so as to reduce complaints.

The practice by some attorneys of filing liens on homesteads in certain circumstances has produced many inquiries and complaints. The problem is particularly acute when an attorney files a lien without notifying the client, often in a marriage dissolution context. Sometime later, when the client attempts to sell the home, a title examination reveals the attorney lien. Often there is no time to litigate the reasonableness of the lien amount and the escrow requirements are beyond the seller's capability. An attorney with a lien that could not be foreclosed and did not even "attach" to the homestead may thus obtain payment of a fee which the client had no realistic opportunity to dispute.

Attorney liens on homesteads, especially in the marriage dissolution context, may be viewed from another perspective. An experienced family court judge and the Family Law Section of the MSBA wrote to

the Board in 1990, as the Hennepin County Bar Association had in 1982, stating their views that forbidding the filing of attorney liens on homesteads would have a very negative effect on the ability of low-income clients to obtain family law representation. Since women were often without resources other than the homestead to secure legal representation, they especially would be adversely affected by a general prohibition against attorney liens. These problems already existed to a certain extent in 1982, when the Lawyers Board first considered the attorney-lien-on-homestead issue, and declined to issue an opinion. Since that time, case law developments have made a middle-ground position more clearly viable. This position involves voluntary waiver of the homestead exemption, with respect to the filing of an attorney lien.

In re Guardianship of Huesman, 381 N.W.2d 73 (Minn. App. 1986) stated,

The owner of a homestead may waive his homestead rights, even though they be constitutional rights, by an act which evidences an unequivocal intention to do so.[Ftn 3](#)

The Board's opinion is that with a proper waiver an attorney lien may be filed against a homestead.

Opinion 14 seeks to put an end to the practice of filing secret liens against homesteads and collecting on them in what amounts to a coercive manner. This heavy-handed collection method could not be justified by any reference to the client's need to obtain legal representation. If clients have such a need, they should decide knowingly and with full information whether they wish to subject the homestead to a lien in order to obtain legal services. The Rules of Professional Conduct generally have advanced the idea of enhancing clients' ability to knowingly consent to what they perceive to be in their interests.

Part of the Board's opinion is that the homestead lien waiver must be written, and in a document separate from the fee agreement. This should enhance the client's awareness that they are surrendering valuable rights in order to obtain legal services.

Opinion 14 does not attempt to address all professional responsibility questions connected with attorney liens on homesteads. For example, the question of what makes a waiver "valid" is left to the civil law.[Ftn 4](#) In *Huesman* the court noted that the attorney apparently did not explain to the client the legal effects of a lien.

Among the duties assigned by the Minnesota Supreme Court to the Lawyers Board are from time to time to "issue opinions on questions of professional conduct." No procedures are prescribed for the opinion-issuing function. It has been suggested that the Board should give formal notice of a proposed opinion and then receive comment over a period of time before adopting an opinion. This practice has never been followed in Minnesota, nor in any other states brought to the Board's attention. The Board considered this procedural recommendation and decided that normally it will issue opinions without a notice and comment period.

The Board's opinion committee, chaired by Minneapolis attorney Rollin Whitcomb, met many times during 1989 and 1990 to try to deal with the difficult subject of attorney homestead liens. The points of view of lawyers, including several family lawyers, and nonlawyers were vigorously presented during a lengthy Board meeting on the subject. The Board recognizes that its opinion may need review in the future if the Court or the Legislature modifies the substantive law.

Because many of the Rules of Professional Conduct thrust toward areas of substantive law, the Board

believes that its opinion-issuing function will sometimes entail consideration of the substantive law. The Board does not intend to create or promulgate laws or rules, but rather to discern what the law is and how it connects with certain of the professional rules.

The Board's other opinions were most recently reprinted in the November 1989 *Bench & Bar*. Opinion 3, regarding part-time judges, may need revision in light of expected changes in the Code of Judicial Conduct.

NOTES

¹ *In re Guardianship of Huesman*, 381 N.W.2d 73, 77 (Minn. App. 1986); *In re Beal*, 374 N.W.2d 715 (Minn. 1985).

² For example, Opinions 11 and 13 interpret Rule 1.16(d) which requires upon termination of representation that an attorney give to the client the documents "to which the client is entitled [by law] . . ."

³ Citing *Argonaut Insurance Co. v. Cooper*, 261 N.W.2d 743, 744 (Minn. 1978). *Huesman* declined to uphold enforcement of an attorney lien against a homestead, but apparently only because the exemption waiver was not unequivocal. The lien waiver referred to "any property we [the clients] may own," without further specificity.

⁴ Clarity and specificity are required for a valid waiver. See *Huesman*, 381 N.W.2d 73 and cases cited therein.