

# ATTORNEY LIENS ON HOMESTEADS

By

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## INTRODUCTION

Since *Northwestern National Bank of South St. Paul v. Kroll*, 306 N.W.2d 104 (Minn. 1981), there has been considerable interest in the status of attorneys liens against homesteads. After requests from numerous attorneys, the board has studied the ethical implications of *Kroll*.

## CODE PROVISIONS

Several provisions of the Code of Professional Responsibility are applicable to attorneys liens. DR 5-103(A)(1) provides:

- (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 by law to secure his fee or expenses.

A lawyer claiming an attorneys lien is in effect advancing a claim in his or her own behalf. Thus, general disciplinary rules prohibiting the advancement of unwarranted claims also apply. *See, e.g.*, DR 7-102(A).

## MINNESOTA ATTORNEYS LIEN PROVISIONS

Statutes and common law determine whether a lien to secure payment of fees and expenses is valid under DR 5-103(A)(1). MINN. STAT. § 481.13(1) (1980) provides:

An attorney has a lien for his compensation whether the agreement therefore be expressed or implied:

- (1) Upon the cause of action from the time of the service of the summons therein, or the commencement of the proceeding, and upon the interest of his client in any money or property involved in or affected by any action or proceeding in which the client may have been employed, from the commencement of the action or proceeding, and, as against third parties, from the time of filing the notice of such lien claim, as provided in this section.

In general, MINN. STAT. § 481.13(1) would permit an attorney to assert a lien against any client property which is the subject of litigation. Thus, prior to *Kroll*, attorneys involved in real estate litigation and in marriage dissolution proceedings often asserted liens against any client property affected by the

proceeding, including the homestead.

## THE KROLL DECISION

In *Kroll* the bank sought to foreclose a second real estate mortgage on homestead property. The action was ultimately settled. When a fee dispute arose, the attorney filed his notice of attorneys lien against the homestead. The district court relying upon MINN. STAT. § 481.13(1), held for the attorney.

The Supreme Court reversed, declining to extend previously recognized limitations on the homestead exemption to encompass attorneys liens. See MINN. STAT. §§510.01, 510.05 (1980); MINN. CONST., art. 1, § 12. In holding against the attorney, the Court noted:

The claimant's contention that the attorneys lien should attach is persuasive for it is arguable that without his representation, the property might have been lost by the defendants. However, we must recognize that the exemption statutes promulgated in response to a constitutional mandate are to be strictly construed and any apparently conflicting legislation must be subordinated to the clear intent of those statutes. 306 N.W. 2d 105.

After *Kroll*, many attorneys requested guidance from my office. Although the board had a lengthy discussion of the issues involved at its September meeting, it declined to issue a formal opinion encompassing this subject. Instead, it requested that I communicate the board's consensus in this article.

## FORECLOSURE PROHIBITED

Virtually everyone concedes that attempts to foreclose attorneys liens against homestead property are prohibited by *Kroll*. This is perhaps the most easily resolvable ethics issue raised by *Kroll*. The Board's consensus was that attempts to foreclose an attorney's lien against homestead property would amount to the advancement of a claim unwarranted under existing law in violation of DR 7-102.

## OTHER ISSUES RAISED

One commentator argued that *Kroll* allows good-faith filing, or imposition of attorney homestead liens, when attorney services "involve more than the mere defense of the homestead." *Miller, The Attorney's Lien in Minnesota after Northwestern National Bank v. Kroll*, 1 Fam. L.J. 24, 25 (1982). In my view this position is untenable. In *Kroll* the attorney defended the client's home from a foreclosure action. Without the attorney's services, the property might have been lost. It would seem that other attorney services related to the homestead would have lesser claims to security. Miller apparently argues that non-defense work by an attorney would be more apt to be excepted from the homestead exemption because such work, like that of a mechanic, creates new value. This attempt to narrowly construe *Kroll* seems very risky in light of the decision's very broad language making clear that statutory limitations on the constitutional homestead exemption must be strictly construed. For purposes of its consideration of the ethics issues raised, the board made no distinction with respect to the services rendered by lawyers.

Perhaps the most important issue raised after *Kroll* is whether the mere filing of a notice of lien against a homestead is unethical. This is a problem of some practical impact, particularly in family law settings, because property can obviously lose its homestead nature at some later date. Thus, it is argued that an attorney should be able to file a notice of lien against the homestead so long as he or she refrains from any foreclosure efforts unless and until the property loses its homestead nature either by action of the clients or by operation of law. It is argued further that the filing of the notice should be permitted at the

time the services are rendered because it is impractical to require the attorney to continually monitor the property to determine whether it has lost its homestead nature.

There is, however, division on this issue and others argue that if a lien cannot be foreclosed, filing a notice of lien is inherently coercive and amounts to the advancement of a claim unwarranted under existing law. It must also be recognized that such a lien may be an effective cloud on title.

Since, *Kroll* dealt with attempted foreclosure, it did not explicitly deal with the filing issue. Nevertheless, the language in the opinion is quite broad:

The sole question is whether § 481.13(1) contemplates the imposition of an attorney's lien against a homestead otherwise exempt. Pursuant to MINN. STAT. §§ 510.01 and 510.05 (1978). *Id.* at 105.

Even though the court found the argument that an attorneys lien should attach to the homestead "persuasive," it concluded that any law conflicting with the homestead exemption must be subordinated to that exemption. *Id.* MINN. STAT. § 510.01 (1980) exempts the homestead "from seizure or sale." The imposition or filing of the attorneys lien against the homestead is arguably such a "seizure." Finally, the "mere filing" of a homestead lien may effectively compromise the exemption of homestead sale proceeds under MINN. STAT. § 510.07 (1980).

The board recognized that the filing question is essentially one of law. Bodies rendering ethics opinions have generally refrained from deciding questions of law in deference to the legislature and the courts. For this reason, the Board declined to issue a formal opinion deciding whether mere filing is permissible.

Although it declined to issue a formal opinion, the Board expressed substantial doubts about the propriety of filing notice of lien against the homestead. It expressly left open for decision on a case-by-case basis the question whether discipline will be imposed. Although it did not decide that the mere filing is *per se* unethical, the board identified several situations in which discipline would be appropriate. As noted above, any attempt to foreclose an attorneys lien against homestead property is unethical. Similarly, any coercive use of the attorneys lien against homestead property is improper. For example, refusing to release an attorneys lien when the homestead is sold so that the proceeds of the homestead sale are not compromised is unethical.

## SUMMARY

For purposes of considering the issues raised by *Kroll*, the board made no distinction as to the types of attorneys' services rendered. This assumption recognizes that if an attorneys lien was improper in a case involving a defense of a mortgage foreclosure action against the homestead, there are few if any circumstances in which attorney services would present a more compelling reason for holding that an attorneys lien may be enforced against the homestead.

Foreclosure of any attorneys lien against homestead property is ethically impermissible. This includes any efforts to use the attorneys lien against the homestead to coerce payment. It also includes conditioning the release of a lien against the homestead at the time of sale upon payment of the underlying fees. In short, the protections afforded the homestead extend to the homestead sale proceeds.

The board declined to formally resolve the issue of whether the mere filing of a lien notice is itself unethical. There was a consensus, however, that *Kroll*, suggests extreme caution in this area. The board also indicated that discipline would be appropriate where filing is coercive either in itself or in relation to all relevant facts and circumstances.