

**ALASKA BAR ASSOCIATION
ETHICS OPINION 2012-1**

**MAY A LAWYER RECORD
AN ATTORNEY'S LIEN (AS 34.35.430)
AGAINST A CLIENT'S REAL PROPERTY**

Question Presented

Under the Alaska Rules of Professional Conduct, may a lawyer record a statutory attorney lien?

Facts

A client is represented by a lawyer in a divorce action. As a result of a fee dispute, the attorney is terminated. Following termination, the attorney records an attorney lien pursuant to AS 34.35.430. After the completion of the divorce, the recorded lien is discovered several years later when the client seeks to sell real property unrelated to the divorce.

Conclusion

Recording a lien for attorneys' fees pursuant to AS 34.35.430 violates Alaska Rules of Professional Conduct 1.5, 1.8 and 1.16.

Discussion

Alaska Statute 34.35.430 sets out the procedure for asserting an attorney lien for fees against client papers or money in possession of the lawyer or an adverse party. Unlike other lien statutes of Chapter 35, AS 34.35.430 does not reference recording. One court has specifically held that AS 34.35.430 does not authorize the recording of an attorney lien.¹ In re Rodvik, 367 B. R. 148 (D. AK 2007). For a general discussion of the procedure for asserting, perfecting, and enforcing a statutory attorney's lien, the reader is referred to Sheehan v. Estate of Gamberg, 677 P.2d 254 (Alaska 1984). See also Miller v. Paul, 615 P. 2d 615 (Alaska 1980)(statutory lien rights must be balanced against harm to client). Even if recording a lien was statutorily permissible, it is our conclusion that doing so would violate the Alaska Rules of Professional Conduct as further discussed.

¹ Real property whose title is effectively clouded by the recordation of the attorney lien claim cannot be fairly considered to be the papers of a client, money in the possession of a client or lawyer; see also AS 34.35.430(a)(2) and (3), or part of a judgment for costs.

A lien that has been recorded remains recorded indefinitely. This potentially harms the client in a number of ways. For example, the recorded lien adversely affects the title of all real property owned by the clients, whether the subject of litigation or not. Because the recorded lien may only become known at the time that the former client is seeking to sell real property, it circumvents the principle that all claimed attorney fees are always subject to review by a court or Fee Arbitration Panel. See Ethics Opinion 2009-1.

Recording the lien also creates the potential for a lawyer overreaching with respect to fee collection at a time when there is the greatest pressure on the client to resolve the fee dispute in favor of the attorney, i.e., at the time of sale of real property when the client wants to complete the transaction and is expecting to receive money. As a practical matter, title companies will not complete a real estate transaction if an issue exists as to a potential lien. In such circumstances, the client is required to resolve the matter or place the amount in dispute in trust.

Rule 1.8(a) of the Alaska Rules of Professional Conduct prohibits a lawyer from acquiring a security interest adverse to a client unless there is specific compliance with the procedure of Rule 1.8(a), including but not limited to, full and reasonable terms, full disclosure, the recommendation that the client seek independent representation, and the requirement of informed consent by the client. See Alaska Bar Association [Ethics](#) Opinion No. 88-6 (propriety of securing attorney's fees by means of a lien on real property). For that reason, even if an attorney were to argue that recording a lien was permissible under statute, doing so would create a security interest adverse to the client that would be improper without complying with the procedure required by Rule 1.8.

The prior termination of the attorney-client relationship provides further reason why a lawyer should not record a lien. Rule 1.16(d) of the Alaska Rules of Professional Conduct requires a lawyer "to take steps to the extent reasonably practicable to protect a client's interests" with Rule 1.16(d) indirectly addressing attorney liens by referencing the retention of client property "only to the extent permitted by law." Recording a lien does not reasonably protect a client's interests and, as previously discussed, does not appear to be permitted by law.

Finally, whether before or after termination of representation, Rule 1.5(f) of the Alaska Rules of Professional Conduct encourages a lawyer to be zealous in efforts to avoid controversies over fees with clients and attempt to resolve amicably any differences on the subject. Recording a lien without resolving the dispute makes no effort to avoid controversy.

Published ethics opinions support the conclusion that recording of the lien is ethically improper. ABA Informal Opinion 1461,² addressed the specific issue of an attorney lien in the context of a divorce proceeding, stating:

Mere existence of a legal right does not entitle a lawyer to stand on that right if ethical considerations require that he forego it. For instance, EC 2-23 exhorts lawyers to forego a legal right to “. . . . sue a client for a fee unless necessary to prevent fraud or gross imposition by the client.” The same standard should be applied in determining whether or not to exercise an attorneys’ lien.

. . . .

The burden is on the lawyer to determine whether the circumstances justify withdrawal before pending matters are concluded and whether, in addition, they justify assertion of an attorney’s lien to which he may be entitled under law.

Colorado Bar Association Ethics Opinion 110 also addresses the issue of recording a lien in the context of divorce representation, observing that “until the lien is reduced to judgment, funds held by a lawyer remain the property of a client” and the “mere assertion of the lien in most situations will be insufficient to give the lawyer the right to record the notice of lien against real property.” In doing so, the Colorado Bar Association cited Colorado’s counterpart to Alaska’s Rule 1.8 and 1.16.³

Alaska Bar Association Ethics Opinions have repeatedly affirmed the principle that the lawyer must, to the extent reasonably practicable, protect the interests of both existing and former clients even if doing so means yielding leverage as to payment of fees. See Ethics Opinion 2004-01 (Lawyer must not withhold expert reports even if client refuses to pay); Ethics Opinion 2003-03 (Client entitled to entire file, even if lawyer unfairly discharged; “the lawyer's interest in getting paid must be subordinate to the rights of the client.”); Ethics

² See Alaska Bar Association Ethics Opinion No. 88-6, citing Informal Opinion 1461 for the proposition that a lawyer should take into account the financial situation of the client, the sophistication of the client in dealing with lawyers, whether the fee is reasonable, whether the client clearly understands and agrees to pay the fee, whether imposition of a lien would prejudice important rights or interests of the client or of other parties, whether the failure to impose the lien would result in fraud or gross imposition by the client, and whether there are less stringent means by which the matter can be resolved or the amount which is owed or will be owing can be secured.

³ Similar cautions are contained in Section 43 of the Restatement of The Law Governing Lawyers and the commentary following the section.

Opinion 95-6 (Upon discharge, client entitled to return of complete file; lawyer entitled to assert a lien against the file; however lawyer's interest in getting paid must be subordinate to the rights of the client and lawyer may not prejudice a client's rights by withholding property of the client which is essential to the client's case); Ethics Opinion 83-2 (return of client's papers required upon termination). The same policy considerations lead to the conclusion that an attorney lien should not be recorded.

If an attorney wishes the security of a recordable lien on real property, the attorney has the ability to do so notwithstanding this opinion. The attorney can reduce the fees claimed in the lien to judgment with the final judgment being recorded. Because this procedure requires that the client be advised of the fee arbitration procedure and affords the client a full opportunity to respond to the fee claim, this is the appropriate procedure to accomplish this goal.

Approved by the Alaska Bar Association Ethics Committee on November 3, 2011.

Adopted by the Board of Governors on January 27, 2012.