

Liening on Clients

by Keith A. Call

Attorney's liens are fraught with potential problems. An attorney's lien has the potential to give the lawyer too much leverage in an already-unequal attorney–client relationship. It can make it difficult for the client to fire the lawyer and can give the lawyer too great an interest in the representation. Yet, Utah is actually a lawyer-friendly state when it comes to liens.

The Rules

Utah Rule of Professional Conduct 1.8(a) prohibits a lawyer from entering into a business transaction with a client or acquiring a security interest adverse to the client, unless (1) the transaction is fair and fully disclosed in writing; (2) the client is advised in writing to seek independent legal counsel; and (3) the client gives informed consent, again in writing. Utah R. Prof'l Conduct 1.8(a) (2013).

Rule 1.8(i) specifically provides that a lawyer shall not acquire an interest in the cause of action or subject matter of the litigation, except that the lawyer may (1) “acquire a lien authorized by law to secure [his] fee,” and (2) enter into a reasonable contingent fee arrangement in civil cases. *Id.* R. 1.8(i).

The Statutory Attorney's Lien

A “lien authorized by law” as described in Rule 1.8(i)(1) includes the statutory attorney's lien found in Utah Code section 38-2-7. By statute, a lawyer automatically receives a lien on any money or property that is the “subject of or connected with the work performed.” Utah Code Ann. § 38-2-7(2) (LexisNexis 2010). This includes real or personal property, funds held by the attorney, and any settlement, judgment, and proceeds thereof. *Id.* The statute includes limitations on pending criminal

and domestic relations matters. *Id.* § 38-2-7(9).

The statutory attorney's lien is not a “business transaction” with the client and is therefore exempt from the requirements of Rule 1.8(a). *See* Utah State Bar, Ethics Advisory Op. Comm., Op. 01-01 (2001). The Ethics Advisory Opinion Committee has further opined that, given a lack of clarity in the extent of an attorney's statutory lien rights, lawyers should not be subject to discipline for asserting lien rights according to a good faith interpretation of the statute. *See id.*

“As a profession, if we cannot properly regulate ourselves, then we should expect others to seek to impose more stringent regulations upon us.”

The statutory “attorney's lien commences at the time of employment.” Utah Code Ann. § 38-2-7(3). Notice of the lien can be given by filing a notice of lien in a pending legal action in which the attorney performed services or, in the case of real

property, by filing a notice of lien with the county recorder. *Id.* § 38-2-7(5).

To enforce the statutory lien, a lawyer must first demand payment from the client. If the client fails to pay within thirty days, the lawyer can move to intervene in the case in which the attorney performed services or the lawyer may file a separate legal action to enforce the lien. *Id.* § 38-2-7(4)–(5).

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Contractual Liens

A “lien authorized by law” also includes contractual liens that may be negotiated with your client. *See* Utah Rule Prof'l Conduct 1.8 cmt. [16]. This seems to presume that the lawyer and client may negotiate liens on money or property that is *not* the “subject of or connected with the work performed.” Utah Code Ann. § 38-2-7(2).

Because of the grave risk of overreaching by the lawyer, contractual liens are subject to the requirements of Rule 1.8(a). *Id.* Thus, all contractual liens with clients must be fair and reasonable, fully disclosed in writing and consented to in writing, and the client must be advised to seek independent counsel.

Common Law Liens

Another form of “lien authorized by law” is a common law lien. *See* Utah R. Prof'l Conduct 1.8 cmt [16]. The most common form of such lien is the lien on the client's files and papers. These liens warrant separate treatment, so watch for further discussion in a future edition of “Focus on Ethics and Civility.”

So What About Protections for the Client?

Utah's lien laws give lawyers significant leverage. Are there any protections for clients? The answer lies in several other places in the Utah Rules of Professional Conduct and the common law.

For example, the lawyer's fee must always be reasonable. *Id.* R. 1.5(a). Liberal lien rights do not allow the lawyer to charge an excessive fee. A lawyer always has a fiduciary duty of loyalty to the client and must zealously represent his or her interests. This includes the general prohibition against conflicting interests, including a “personal interest of the lawyer.” *Id.* R. 1.7(a)(2). Lawyers should avoid dealings with clients that are – or even appear to be – overreaching or unfair.

Lawyers should also invoke a strong measure of self-restraint when it comes to attorney's liens. As a profession, if we cannot properly regulate ourselves, then we should expect others to seek to impose more stringent regulations upon us. This certainly applies to the field of attorney's liens.



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