

Utah Ethics Opinions

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UTAH STATE BAR

Ethics Advisory Opinion Committee

Opinion No. 01-01

Issued January 26, 2001

¶ 1 **Issue:** Under the Utah Rules of Professional Conduct, may an attorney representing a client in a divorce case assert a statutory attorney's lien under Utah Code Ann. § 78-54-41 against property awarded to the client in the divorce settlement?

¶ 2 **Discussion:** Rule 1.8(a). We first address a threshold question: Does the invocation of a statutory attorney's lien require the attorney to meet the requirements of Rule 1.8(a) of the Utah Rules of Professional Conduct, which generally governs business transactions between lawyers and their clients?

¶ 3 Pursuant to Rule 1.8(a), a lawyer may not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless (1) the transaction and terms of the transaction are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client, (2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction, and (3) the client consents in writing to the transaction.

¶ 4 Rule 1.8(j) provides that "[a] lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, *except that the lawyer may . . . acquire a lien granted by law to secure the lawyer's fee or expenses . . .*" (fn1)

¶ 5 Utah statute provides for an attorney to be granted an attorney's lien on the proceeds of a cause of action in which a lawyer represents a client:

The compensation of an attorney and counselor for services is governed by agreement, express or implied, which is not restrained by law. From the commencement of an action, or the service of an answer containing a counterclaim or at the time that the attorney and client enter into a written or oral employment agreement, the attorney who is so employed has a lien upon the client's cause of action or counterclaim, which attaches to any settlement, verdict, report, decision,

or judgment in the client's favor and to the proceeds thereof in whosoever (fn2) hands they may come, and cannot be affected by any settlement between the parties before or after judgment. Any written employment agreement shall contain a statement that the attorney has a lien upon the client's cause of action or counterclaim. (fn3)

¶ 6 The threshold question is, therefore, whether a lawyer may assert a lien under § 78-51-41 only if she satisfies the conditions of Rule 1.8(a), which govern a "business transaction" with a client and the knowing acquisition of an interest adverse to a client.

¶ 7 We conclude that Rule 1.8(a) is *not* applicable to the statutory lien situation. It is not reasonable to read this rule so narrowly that a statutory lien becomes a "business transaction" subject to Rule 1.8(a)'s conditions. (fn4) The statutory lien in question is a right of public record granted by the Legislature and is not the kind of adverse interest contemplated by Rule 1.8(a). Additionally, statutory attorney liens are specifically authorized by Rule 1.8(j)(1). Therefore, a lawyer does not violate Rule 1.8(a) by entering into a fee agreement with a client and subsequently enforcing that agreement by asserting a claim under § 78-51-41. (fn5)

¶ 8 *Proceeds in Divorce Cases.* Attorneys are granted a lien by statute for their compensation on any settlement, verdict, report, decision or judgment in the client's favor. Acquiring such a lien to secure the lawyer's fee or expenses is expressly authorized by Rule 1.8(j)(1). It is, therefore, generally ethical to assert such lien rights under applicable law.

¶ 9 Does the analysis or conclusion change when the attorney's services are rendered in the context of a family law cause of action? On the one hand, in the 1935 case of *Hampton v. Hampton*, (fn6) the Utah Supreme Court has specifically held that the lien under § 78-51-41 applies to all cases, including divorce actions. The Utah Court of Appeals has recently followed the *Hampton* result in upholding an attorney's lien to collect his one-third contingency fee for representing a parent in recovering delinquent child support. (fn7) On the other hand, in a non-divorce case, *Transamerica Cash Reserves, Inc. v. Dixie Power & Water Co.*, (fn8) the Utah Supreme Court has held that property already belonging to a client in advance of the litigation may not be subject to an attorney's lien, as it is not part of the "proceeds" of the litigation.

¶ 10 If *Transamerica* is applicable to divorce proceedings, it can be argued in good faith that persons who marry own each other's property and that, therefore, an award of property pursuant to a divorce decree does not confer a new

property interest to which a lien may attach. Conversely, it might also be argued in good faith that such an analysis ignores the very nature of divorce proceedings, where the divorce decree extinguishes pre-existing property interests and replaces them with new property interests to which an attorney's lien may properly attach. ⁹

¶ 11 So far as we can tell, the Utah courts have not squarely addressed this question, and this Committee does not have the jurisdiction nor the authority to interpret the applicable statute or the various holdings of the Utah appellate courts on related issues. (fn10)

¶ 12 In cases where property is awarded to one or both parties in a family law proceeding, then it is unclear to us as a matter of law whether an attorney may assert a lien under § 78-51-41 against that portion of the property awarded to her own client in the legal proceeding. For example, if the parties to a divorce or common law marriage proceeding were each to be awarded a 50% interest in a parcel of real property, it appears unsettled whether Utah law allows the husband's lawyer to assert a lien under § 78-51-41 against that 50% of the property awarded to the husband, under whatever terms or conditions and time limits or restrictions govern the husband's interest in the property. To decide this issue, one must have a judicial interpretation of § 78-51-41. The Committee can locate no such interpretation, and we cannot provide it.

¶ 13 A lawyer does not violate the Utah Rules of Professional Conduct to assert a statutory lien under Utah Code Ann. § 78-51-41 so long as there continues to be a good-faith basis for the assertion under existing law. The Committee believes that, under these circumstances, it would not be proper for the Utah State Bar to bring an action against an attorney on the basis that the attorney was violating the law and, therefore, was in violation of Rule 8.4(b), (c) or (d). The lawyer's discretion¹²;and, often, her obligation¹²;to advance vigorously on behalf of a client a legal argument that is within the boundary of Rule 3.1 (fn11) should apply as well to the lawyer when seeking to recover fees under Utah Code Ann. § 78-51-41. For the Bar to undertake disciplinary action against a lawyer for doing so in a circumstance where the underlying law is susceptible of a reasonable interpretation different from the Bar's would deprive the lawyer of the right to represent herself effectively in the recovery of fees.

¶ 14 *Other Considerations.* Obviously, a lawyer in a family law matter is obligated to abide by other provisions of the Utah Rules of Professional Conduct in establishing and collecting attorneys' fees pursuant to any lien provision. For example, her fees must be reasonable under Rule 1.5, and the attorney's lien may be asserted only after a final judgment and decree or order is entered in a divorce case.

(fn12)

¶ 15 Further, an attorney may not attempt to assert a lien under § 78-51-41 against any portion of property awarded to someone other than her own client in the family law proceeding, as this would violate the lawyer's obligation to avoid engaging in conduct prejudicial to the administration of justice under Rule 8.4(d) of the Utah Rules of Professional Conduct. Nor may a lawyer assert a lien under § 78-51-41 in a divorce proceeding against any portion of property not awarded to the lawyer's client, because a lawyer may not assert such a lien where the judgment is against the lawyer's client. (fn13)

¶ 16 Finally, the lawyer should be aware of the written requirement of Rule 1.5(b) (for fees expected to exceed \$750 (the basis or rate is to be communicated to the client in writing) and § 78-51-41 ("[a]ny written employment agreement shall contain a statement that the attorney has a lien upon the client's cause of action or counterclaim").

¶ 17 **Conclusion:** First, the invocation of an attorney's lien under Utah Code Ann. § 78-51-41 does not require the attorney to meet the requirements of Rule 1.8(a) of the Utah Rules of Professional Conduct, which generally governs business transactions between lawyers and their clients. Second, where the Utah courts have not squarely addressed issues concerning the applicability of an attorney's lien on particular types of property awards in domestic-law cases, this Committee does not have the jurisdiction nor the authority to interpret the applicable statute or the holdings of the Utah appellate courts on related issues. Nevertheless, a lawyer is not subject to discipline if she attempts to assert the statutory attorney's lien in a domestic-law situation so long as there continues to be a supportable, good-faith legal basis to do so.

Footnotes

1. Utah Rules of Professional Conduct 1.8(j)(1) (2000) (emphasis added).

2. Use of "whosoever" appears to be the Utah Code compiler's error; older versions of this statute uses the term "whosoever." Utah Rev. Stat. § 6-0-40 (1933).

3. Utah Code Ann. § 78-51-41 (1996).

4. Arguably, if Rule 1.8(a) were read this narrowly, it could also be read to apply to a fee agreement between an attorney and a client. This reading is not reasonable, as it would require the lawyer to prepare a written fee agreement in every case and to suggest that the client seek advice of independent counsel about it¹²;a reading that is not consistent with Rule 1.5.

5. Note: The statute requires that a "written agreement shall

contain a statement that the attorney has a lien upon the client's cause of action or counterclaim." Utah Code Ann. § 78-51-41 (1996).

6. 39 P.2d 703 (Utah 1935) (interpreting Utah Rev. Stat. § 6-0-40 (1933), which is, in relevant part, identical to the current Utah Code Ann. § 78-51-41).

7. *Eastmond v. Earl*, 912 P.2d 994 (Utah Ct. App. 1996).

8. 789 P.2d 24 (Utah 1990).

9. *See Farrey v. Sanderfoot*, 500 U.S. 291 (1991) (Wisconsin divorce decree extinguished undivided interests and created new interests in their place.)

10. *E.g.*, Ethics Advisory Opinion Com. R. Proc. § III(b)(3).

11. Meritorious Claims and Contentions.

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established. Utah Rules of Professional Conduct 3.1

12. Consensual contractual creation of a lien on marital property prior to entry of a final decree or order raises separate ethical issues that we do not address in this opinion. *See, e.g.*, Maine Ethics Comm'n Op. 97 (May 3, 1989).

13. *Flake v. Frandsen*, 578 P.2d 516 (Utah 1978).

Rules Cited:

1.8(a)1.8(j)