

**THE PROFESSIONAL ETHICS COMMITTEE
FOR THE STATE BAR OF TEXAS
Opinion No. 610**

August 2011

QUESTION PRESENTED

Under the Texas Disciplinary Rules of Professional Conduct, is a lawyer permitted to acquire, by agreement with his client, a security interest in the subject matter of litigation that the lawyer is conducting for the client in order to secure payment of the lawyer's fee with respect to the litigation?

STATEMENT OF FACTS

A lawyer and the lawyer's client enter into a contingent fee agreement with respect to a litigation matter being handled by the lawyer which provides for the client to grant to the lawyer, as a means of securing payment of the fee due to the lawyer in the matter, a security interest in the cause of action that is the subject of the litigation. The cause of action relates to a claim for damages arising from an injury sustained by the client.

DISCUSSION

The facts considered in this case relate to a lawyer's acquisition of one type of proprietary interest – a security interest – in a matter that the lawyer is handling for his client. Rule 1.08(h) of the Texas Disciplinary Rules of Professional Conduct prohibits a lawyer from acquiring a proprietary interest in a cause of action or subject matter of litigation that the lawyer is handling for a client, with two limited exceptions:

“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:

- (1) acquire a lien granted by law to secure the lawyer's fee or expenses;
- and
- (2) contract in a civil case with a client for a contingent fee that is permissible under Rule 1.04.”

Thus under Rule 1.08(h), a lawyer may not acquire a security interest or other proprietary interest in a matter being handled by the lawyer unless the particular proprietary interest is either a contingent fee permitted under Rule 1.04 or “a lien granted by law to secure the lawyer's fee or expenses.”

Comment 7 to Rule 1.08 explains the underlying philosophy of Rule 1.08 as follows:

“This Rule embodies the traditional general precept that lawyers are prohibited from acquiring a proprietary interest in the subject matter of litigation. This general precept, which has its basis in common law champerty and maintenance, is subject to specific exceptions developed in decisional law and continued in these Rules, such as the exception for contingent fees set forth in Rule 1.04 and the exception for certain advances of the costs of litigation set forth in paragraph (d) [of Rule 1.08].”

Although the fee agreement between the lawyer and the client provides for a contingent fee for the services to be provided in the litigation matter, the contingent fee and the security interest are two different types of proprietary interest in the client’s litigation matter. A security interest in a litigation matter is not an essential part of a contingent fee agreement that is permitted under Rule 1.04, and the fact that a contingent fee is permissible does not make a security interest to secure such a fee also permissible. The security interest must itself satisfy the requirements of Rule 1.08(h).

Since a security interest to secure a contingent fee is not itself a contingent fee, the security interest here considered will be permissible under Rule 1.08(h) only if the security interest qualifies as “a lien granted by law to secure the lawyer’s fee or expenses.” Under Texas law, there is no general statutory attorney’s lien but a lawyer has a right to claim a common law possessory lien against a client’s property, money and papers for the payment of amounts due the lawyer for services and expenses. See Professional Ethics Committee Opinion 395 (May 1979, corrected June 1980) and Opinion 411 (January 1984). A leading Texas case on the attorney’s lien under Texas common law is the decision of the Supreme Court of Texas in *Thomson v. Findlater Hardware Co.*, 205 S.W. 831, 109 Tex. 235 (Tex. 1918), which recognized (quoting *Mechem on Agency*) that “[a]n attorney has a general lien upon all the papers, deeds, vouchers, and other documents of his client, which come into the possession of the attorney while he is acting for his client in a professional capacity.” 205 S.W. at 832, 109 Tex. at 237. It should be noted that this lien on a client’s documents is subject to the important limitation set forth in Rule 1.15(d) of the Texas Disciplinary Rules of Professional Conduct that a lawyer “may retain papers relating to the client to the extent permitted by other law only if such retention will not prejudice the client in the subject matter of the representation.”

In the circumstances considered in this opinion, the proposed security interest is not an attorney’s lien granted under Texas law within the meaning of Rule 1.08(h)(1). Instead the proposed security interest is to be created by contractual agreement between the lawyer and his client. The proposed security interest is thus a proprietary interest in a litigation matter being handled by the lawyer who is seeking to acquire the security interest, but this security interest is not within the scope of the exceptions stated in Rule 1.08(h). Accordingly, under Rule 1.08(h), acquisition by the lawyer of the proposed security interest is prohibited.

CONCLUSION

Under the Texas Disciplinary Rules of Professional Conduct, a lawyer representing a client in litigation may not acquire, by agreement with his client, a lien upon the subject matter of the litigation as a means of securing payment of the lawyer's fee with respect to the litigation.