



Committee on Professional Ethics

Opinion 896 (12/12/11)

Topic: Providing lien search services to clients.

Digest: A law firm may subcontract lien search work to a third party but may not bill the client more than the costs incurred by the law firm. A law firm may provide lien search services to a client through the law firm's own employees, but if the lien search services are "not distinct" from the legal services, then the law firm must comply with the Rules of Professional Conduct regarding both the legal and nonlegal services. A law firm may provide lien searches to a client through a lien search firm affiliated with the law firm, but the law firm must comply with the Rules regarding both the legal and nonlegal services unless the law firm has advised its client in writing that the services are not legal services and lack the protection of a client-lawyer relationship. Even then, the law firm must comply with Rule 1.7 because the law firm's financial interest in providing the nonlegal services through an affiliated entity creates a conflict.

Rules: 1.5(d), 1.7(a)-(b), 1.8(a), and 5.7(a)-(b).

BACKGROUND

1. This opinion concerns lien search services. Lien searches are used to determine whether a title owner's interest in property is encumbered, to what extent it is encumbered, and -- in the case of multiple encumbrances -- the priority of the encumbrances. For example, a mortgage lender will conduct a lien search of real property records to determine if there are outstanding senior mortgage liens, tax liens, mechanic's liens or judgment liens affecting the property. A judgment creditor will conduct a UCC lien search to determine if personal property owned by the judgment debtor has been pledged to secured creditors who will have priority in the collateral. A car dealer will conduct a lien search of the Department of Motor Vehicles to assure that his new car customer has paid off the loan on the trade-in vehicle.

2. A lien search is a ministerial function and does not constitute the practice of law. Lien searches thus may be performed by nonlawyers. Lien search companies, like title abstract companies, examine the public record to identify encumbrances affecting real and personal property and provide their search results to lenders, title insurance companies, judgment creditors, and other interested parties. Lien search companies do not sell insurance.

3. Some lawyers and law firms undertake to perform lien searches for clients through their own employees, without engaging a third party lien search firm. Other law firms contract with a third party to perform lien searches. Sometimes the third party is independent of the law firm, but other times the third party is owned by or is otherwise affiliated with the law firm. Law firms that contract for third parties to perform lien searches sometimes pay the third party and then bill the client for those services, and other times instruct the third party to bill the client directly.

QUESTIONS

4. This opinion addresses three related questions:
- A. May a law firm subcontract lien search work to an unaffiliated third party and bill the client more than the law firm pays the third party for those services?
 - B. May a law firm provide lien search services to a client through the law firm's own employees and bill the client for such services?
 - C. May a law firm provide lien searches to a client through a lien search company owned in whole or in part by lawyers in the law firm, and bill the client for such services?

OPINION

Question A: Providing Lien Searches Through an Independent Third Party

5. A law firm may subcontract with an independent (*i.e.*, unaffiliated) third party to perform lien searches, and may bill clients for the cost of such services. However, a law firm may not pass on the expense of a third party lien search to clients under the pretense that the law firm itself performed the services. The law firm must accurately disclose both the fact that third party provided the services and the terms under which such services were provided.

6. Further, a law firm may not charge the client more than the third party search firm's charges unless the law firm incurs additional costs. Rule 1.5 of the New York Rules of Professional Conduct (the "Rules") addresses fees and expenses charged by lawyers. Rule 1.5(b) requires a lawyer to communicate to a client the scope of the representation and the basis or rate of the fees and expenses for which the client will be responsible. Rule 1.5(d)(3) provides that a lawyer "shall not enter into an arrangement for, charge or collect ... a fee based on fraudulent billing." Comment [1A] to Rule 1.5 says that billing is fraudulent if it is "knowingly and intentionally based on false or inaccurate information." Comment [1A] also says that "where the client has agreed to pay the lawyer's cost of in-house services, such as for photocopying or telephone calls, it would be fraudulent knowingly and intentionally to charge a client more than the actual

costs incurred.” *Accord*, ABA 93-379 (1993) (“A lawyer may not charge a client more than her disbursements for services provided by third parties like court reporters, travel agents or expert witnesses, except to the extent that the lawyer incurs costs additional to the direct cost of the third-party services”).

Question B: Providing Lien Searches Through the Law Firm’s Own Employees

7. If the law firm itself provides lien search services through its own employees, the applicable rule is Rule 5.7 (“Responsibilities Regarding Nonlegal Services”), which covers a law firm’s provision of both legal and nonlegal services. Rule 5.7(a) provides, in pertinent part:

(1) A lawyer or law firm that provides nonlegal services to a person that are ***not distinct*** from legal services being provided to that person by the lawyer or law firm is subject to these Rules with respect to the provision of both legal and nonlegal services. [Emphasis added.]

8. Thus, if the legal and nonlegal services provided by the law firm are “not distinct” from each other – as when a law firm renders both legal services and lien search services related to the same transaction – the Rules of Professional Conduct apply both to the legal services and the nonlegal services. For example, the mandates of Rule 1.5 with respect to fees (see above), as well as the mandates of Rules 1.7 and 1.8 covering conflicts of interest, apply both to the legal services and the lien search services when those services are not distinct from each other.

9. Regarding conflicts, Comment [5] to Rule 5.7 notes that “the lawyer may have a financial interest in the nonlegal services that would constitute a conflict of interest under Rule 1.7(a)(2), which governs conflicts between a client and a lawyer’s personal interests.” In addition, Comment [5A] to Rule 5.7 notes that if the legal representation involves exercising judgment about whether to recommend nonlegal services and which provider to recommend, or if the representation involves overseeing the provision of the nonlegal services, then a conflict with the lawyer’s own interests under Rule 1.7(a)(2) is likely to arise on that ground as well.

10. Under Rule 1.7(a)(2), a lawyer may not represent a client if “a reasonable lawyer would conclude that ... there is a significant risk that the lawyer’s professional judgment on behalf of a client will be adversely affected by the lawyer’s own financial, business, property, or other personal interests” unless the lawyer complies with Rule 1.7(b). To comply with Rule 1.7(b), the lawyer must reasonably believe that the lawyer can provide competent and diligent legal representation despite the conflict, and the lawyer must obtain the client’s informed consent, confirmed in writing. In obtaining the client’s informed consent under Rule 1.7(b), the lawyer should disclose the advantages and risks of obtaining legal and nonlegal services from the same provider in a matter, including the effect of the lawyer’s financial interest in providing the nonlegal services. For example, if the payment of legal fees is contingent upon closing the transaction, the

lawyer may have an incentive not to perform an exhaustive lien search or not to reveal information that might prevent the closing from occurring.

11. A lawyer or law firm providing both legal and lien search services in the same matter must also comply with Rule 1.8(a), which governs business transactions between lawyers and their clients. See Rule 5.7, cmt. [5A]. As Comment [6] to Rule 5.7 explains, when a law firm provides both legal and nonlegal services to a client in the same matter (or in substantially related matters), Rule 1.8(a) requires that: (i) the nonlegal services be provided on terms that are “fair and reasonable” to the client, (ii) the terms on which the nonlegal services will be provided are fully disclosed to the client in writing in understandable form, (iii) the client is advised to seek the advice of independent counsel about the lawyer’s provision of the nonlegal services, and (iv) the client gives informed consent, in a writing signed by the client, to the terms of the transaction in which the nonlegal services are provided and to the lawyer’s inherent conflict of interest. If the lawyer provides nonlegal services on terms generally available to the public in the marketplace, Rule 1.8(a)’s “fair and reasonable” requirement is ordinarily met. But if the lawyer charges above-market prices for the nonlegal services, then the “fair and reasonable” requirement of Rule 1.8(a) might not be met. In addition, Comment [7] to Rule 5.7 notes that “in the context of providing legal and nonlegal services in the same transaction, Rule 1.8(a) requires a full disclosure of the nature and extent of the lawyer’s financial interest or stake in the provision of the nonlegal services.”

Question C: Providing Lien Searches Through an Affiliated Third Party

12. When a lawyer or law firm refers a client to a company owned in whole or in part by the lawyer or law firm, Rule 5.7(a)(3) and (4) are relevant. They provide as follows:

(3) A lawyer or law firm that is an owner, controlling party or agent of, or that is otherwise affiliated with, an entity that the lawyer or law firm knows to be providing nonlegal services to a person is subject to these Rules with respect to the nonlegal services if the person receiving the services could reasonably believe that the nonlegal services are the subject of a client-lawyer relationship.

(4) For purposes of paragraphs (a)(2) and (a)(3), it will be presumed that the person receiving nonlegal services believes the services to be the subject of a client-lawyer relationship unless the lawyer or law firm has advised the person receiving the services in writing that the services are not legal services and that the protection of a client-lawyer relationship does not exist with respect to the nonlegal services, or if the interest of the lawyer or law firm in the entity providing nonlegal services is *de minimis*.

13. Thus, Rule 5.7(a)(3) provides that the law firm is subject to the Rules with respect to the lien search services if the person receiving those services could reasonably believe that they are the subject of a client-lawyer relationship. If the law firm's interest in the affiliated entity is more than *de minimis*, Rule 5.7(a)(4) establishes a presumption that the person receiving nonlegal services believes the services to be the subject of a client-lawyer relationship *unless* the law firm advises the client in writing that the services are not legal services and lack the protection of an attorney-client relationship. Even if the law firm has informed the client in writing that the lien search services are not subject to the Rules of Professional Conduct and lack the protection of an attorney-client relationship, Rule 5.7(b) reminds the affiliated law firm not to allow the nonlegal entity to undermine the lawyer's independent professional judgment and not to compromise the lawyer's own duty of confidentiality. Rule 5.7(b) states:

Notwithstanding the provisions of paragraph (a), a lawyer or law firm that is an owner, controlling party, agent, or is otherwise affiliated with an entity that the lawyer or law firm knows is providing nonlegal services to a person shall not permit any nonlawyer providing such services or affiliated with that entity to direct or regulate the professional judgment of the lawyer or law firm in rendering legal services to any person, or to cause the lawyer or law firm to compromise its duty under Rule 1.6(a) and Rule 1.6(c) with respect to the confidential information of a client receiving legal services.

14. Providing lien search services to a client through a lien search company owned in whole or in part by the law firm or by lawyers in the firm also raises the same conflict of interest concerns under Rule 1.7(a)(2) that we discussed above in answering Question B. However, if the lawyer or law firm has advised the client in writing pursuant to Rule 5.7(a)(4) that the lien search services are not legal services and lack the protection of an attorney-client relationship, then referring a client to a lien search company wholly or partly owned by the lawyer or law firm does not constitute a business transaction with a client and Rule 1.8(a) does not apply. See N.Y. State 755 (2002) ("A lawyer owning or operating a separately incorporated or distinct non-legal business who adequately informs the client that the non-legal business is not subject to the protections of the attorney-client relationship ... may refer clients to the non-legal business without complying with" the rule governing business transactions between lawyer and client).

CONCLUSION

15. A law firm may subcontract lien search work to a third party but may not bill the client more than the law firm pays the third party for those services, except to the extent that the law firm incurs additional costs.

16. A law firm may provide lien search services to a client through the law firm's own employees, but if the lien search services are "not distinct" from the legal services the

law firm is providing to the client, then the law firm must comply with the Rules of Professional Conduct – including Rule 1.5 (governing fees and expenses), Rule 1.7 (governing conflict of interest), and Rule 1.8(a) (governing business transactions with clients) – with respect to both the legal and nonlegal services.

17. A law firm may provide lien searches to a client through a lien search firm owned in whole or in part by the law firm or its lawyers, and bill the client at cost for such services, but the law firm must comply with the Rules of Professional Conduct with respect to both the legal and nonlegal services unless the law firm has advised the client in writing that the lien search services are not legal services and that the protection of a client-lawyer relationship does not exist with respect to the lien search services. Even then, the law firm must obtain the client's informed consent pursuant to Rule 1.7(b) because the law firm's financial interest in providing the nonlegal services through an affiliated entity creates a personal conflict of interest.

(41-10)