Legal and Ethical Issues Raised by an Attorney Acquiring a Lien or Mortgage Against A Client's Real Property

*by David L. Skidmore**

Introduction

You have been consulted by a prospective client regarding a legal matter, but you question whether the person will be able to pay your fees. The prospective client discloses ownership of equity in some real property, which is available as security for payment of legal fees. Relying on the client's agreement to grant you a lien or mortgage against the property, you agree to the representation.

The validity of such lien or mortgage depends on compliance with various provisions of the Michigan Rules of Professional Conduct, Michigan common law, and Michigan statutes. This article will review the legal and ethical rules that govern an attorney's security interest in a client's real property, including a recent ethics opinion by the State Bar of Michigan Professional Ethics Committee that appears likely to cause some confusion in this area.

Michigan Rules of Professional Conduct – Real Property That Is Not The Subject Matter of Litigation Handled by Attorney for Client

Under the Michigan Rules of Professional Conduct, the ethical propriety of a lawyer acquiring a security interest in the client's real property depends on whether the real property is the subject matter of litigation that the lawyer is conducting for the client.

If the real property *is not* the subject matter of litigation being conducted by the lawyer for the client ("*non-litigated real property*"), then the situation is governed solely by MRPC 1.8(a), which prohibits a lawyer from acquiring a security interest adverse to a client *unless* three requirements are satisfied:

> A lawyer shall 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 on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by 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 thereto.[1]

Hence, a lawyer may ethically acquire a security interest in the client's non-litigated real property, provided that the fair and reasonable terms are understandably disclosed to the client in writing; the client has an opportunity to consult with independent counsel; and the client consents in writing.[2]

1 MRPC 1.8(a).

2 See, e.g., *Baily & Smith, PC v Poisson-Brown*, No 288623, 2009 WL 4164744 (Mich App, Nov 24 2009) (reversing trial court's dismissal of law firm's action to foreclose upon attorney's lien against client's non-litigated real property).

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Michigan Rules of Professional Conduct – Real Property That Is The Subject Matter of Litigation Handled by Attorney for Client

If the real property **is** the subject matter of litigation being conducted by the lawyer for the client ("*litigated real property*"), then the situation is governed by *both* MRPC 1.8(a) and 1.8(j).[3] MRPC 1.8(j) provides that "[a] lawyer shall not acquire a proprietary interest in a 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 with a client for a reasonable contingent fee in a civil case[.]"[4]

The phrase "acquire a lien granted by law" leaves room for interpretation. Does it mean that a lawyer, at the beginning of the representation, may enter into an express agreement (or contract) with the client for a lien against the client's real property, provided that the lien granted by the agreement is based on "a lien granted by law"? Or does it mean that a lawyer may merely receive and enforce a lien that subsequently arises by operation of law in the course of the representation?

On the one hand, the drafters of MRPC 1.8(j)(1) chose not to authorize a lawyer to "contract" with a client for a "lien granted by law," in contrast to the authorization granted by MRPC 1.8(j)(2) to "contract with a client for a reasonable contingent fee." If the drafters had intended to authorize a lawyer to "contract" for a lien granted by law, then they could have used the word "contract," rather than "acquire." Moreover, the corresponding provision in the Model Rules of Professional Conduct, Rule 1.8(i), was changed from "a lien **granted** by law" (the same phrase employed in MRPC 1.8(j)(1)) to "a lien **authorized** by law," in order to "clarify that the exception encompasses contractual liens."[5]

On the other hand, MRPC 1.8(j) uses the word "acquire" twice: first, prohibitively as a general rule ("[a] lawyer *shall not acquire* a proprietary interest in a cause of action or subject matter of litigation the lawyer is conducting for a client"), and second, permissively as an exception to the general rule ("the lawyer *may [a]cquire* a lien granted by law to secure the lawyer's fee or expenses"). The word "acquire" should have the same meaning each time it is used. If the first use of "acquire" generally prohibits a lawyer from obtaining a security interest through contractual agreement, then the second use of "acquire" should be read to permit a lawyer to obtain "a lien granted by law" through contractual agreement.

In fact, as discussed *infra*, the State Bar of Michigan Professional Ethics Committee has recently adopted the more narrow interpretation of MRPC 1.8(j)(1).[6] Consequently, it is ethically *permissible* for an attorney to "acquire" (i.e., accept) a lien arising by operation of law against litigated real property, but it is ethically *impermissible* for an attorney to enter into an express agreement or contract with the client for a lien (even a lien that is ultimately granted by law) against litigated real property. The problem is that such interpretation of MRPC 1.8(j)(1) conflicts with Michigan common law on the subject. As a result, an express agreement for a lien against litigated real property appears to be lawful, but not ethical.

Liens for Attorney Fees Granted by Law

The phrase "lien granted by law" in MRPC 1.8(j)(1) raises the question as to what liens for attorney fees are granted by Michigan law. Liens granted by law include attorney liens, statutory or judicial liens, and judgment liens.

Attorney Liens

Michigan common law recognizes two types of attorney liens to secure payment of attorney fees. The first type of attorney lien is called the general, retaining, or possessory lien (the "*retaining lien*").[7] The retaining lien "of an attorney is his right to retain possession of all documents, money, or other property of his client coming into his hands professionally until a general balance due him for professional services is paid."[8] An attorney could not apparently use a retaining lien to obtain a security interest in a client's real property.

3 MI Eth Op RI-354.

4 MRPC 1.8(j) (emphasis added).

5 American Bar Association, *A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982-2005*, at 209 (2006).

6 MI Eth Op RI-354.

7 *Kysor Industrial Corp v DM Liquidating Co*, 11 Mich App 438, 444; 161 NW2d 452 (1968).

8 *Id*, quoting 7 CJS *Attorney and Client* § 207 (1937).

The second type of attorney lien is called the special, particular, or charging lien (the "*charging lien*").[9] The charging lien "of an attorney is an equitable right to have the fees and costs due to him for services in a suit secured to him out of the judgment or recovery in that particular suit."[10] "Michigan recognizes a common law attorney's [charging] lien on a judgment or fund resulting from the attorney's services."[11] Logically, an attorney could use a charging lien to acquire a security interest in a client's real property, where the attorney's services obtain title to, or possession of, such property for the client.

Statutory or Judicial Liens

There are also circumstances when a court may enter an order providing for a lien against a client's real property to secure payment of the client's attorney fees. MCL 552.13 authorizes a court to impose a lien against real property to secure payment of attorney fees in the divorce context. *Wolter v Wolter*[12] and *Tyrrell v Tyrrell*[13] both involved judicial liens imposed by courts to secure payment of attorney fees in the divorce context. This type of lien, arising from a court order, is considered to be a judicial lien rather than an attorney's lien.[14]

Judgment Liens

A lawyer may bring a collection lawsuit against a former client and obtain a money judgment for the unpaid legal billings. However, possession of a money judgment does not automatically give rise to a lien against the judgment debtor's real property. Instead, the judgment creditor is first required to satisfy the judgment through execution against the judgment debtor's personal property. If such personal property is insufficient to satisfy the judgment, then the judgment creditor may seek execution against the judgment debtor's real property. MCL 600.6004 provides: "Executions against realty shall command the officer to whom they are directed to make execution against the realty of the judgment debtor only after execution has been made against the personal property of the judgment debtor that is in the county, and such personal property is insufficient to meet the sum of money and costs for which judgment was rendered."[15]

Pre-1993: Lack of Michigan Case Law Regarding Attorney's Charging Lien Against Client's Real Property

Prior to 1993, Michigan case law did not directly address whether an attorney's charging lien could attach to a client's real property.[16]

This absence of Michigan case law authority was noted by the U.S. district court in *Rubel v Brimacombe & Schlecte, PC*.[17] There, plaintiff initially retained defendant law firm to represent her in a divorce action. Plaintiff discharged defendant while the action was still pending, retaining substitute counsel. In the stipulation and order of substitution, defendant inserted a provision granting itself a lien against trial or settlement proceeds to secure payment of its fees, unbeknownst to plaintiff. Under the judgment of divorce, plaintiff was awarded the marital home. Defendant, not having received full payment from plaintiff, recorded a "notice of claim of interest" against the marital home with the register of deeds. In plaintiff's Chapter 7 bankruptcy proceeding, she sought to discharge defendant's lien, alleging it was a dischargeable judicial lien under the Bankruptcy Code. The bankruptcy court, applying Michigan law, ruled that defendant had an attorney's charging lien, which was based in common law and was therefore non-dischargeable.[18]

On appeal, plaintiff argued that, under Michigan law,

9 *Id*.

10 *Id*, quoting 7 CJS *Attorney and Client* § 207 (1937).

11 *Miller v Detroit Auto Inter-Insurance Exchange*, 139 Mich App 565, 568; 362 NW2d 837 (1984).

12 332 Mich 229; 50 NW2d 771 (1952).

13 107 Mich App 435; 309 NW2d 632 (1981).

14 *George v Sandor M Gelman, PC*, 201 Mich App 474, 478 fn 1; 506 NW2d 583 (1993).

15 See *U.S. Leather, Inc v Mitchell Mfg Group, Inc*, 276 F3d 782 (6th Cir 2002) (applying Michigan law).

16 Cf *Bain v State Land Office Board*, 303 Mich 666; 7 NW2d 101 (1942) (affirming trial court's decision that litigation attorney who had taken mortgage against client's real property that was subject matter of prior litigation had superior claim to tax sale deed to real property than client/former fee holder, where client had defaulted on taxes, property had reverted to state, and attorney had purchased property at tax sale); *Kilbourne v Wiley*, 124 Mich 370; 83 NW 99 (1900) (affirming trial court's imposition of equitable lien in favor of plaintiff attorney against real property, where attorney's services established legal title to real property in client, and client promised to grant mortgage against real property to attorney to secure payment of attorney fees, but rather than executing mortgage, client sold property to defendant, who had knowledge of agreement between plaintiff attorney and client).

17 86 BR 81 (ED Mich 1988).

18 *Id* at 82-83.

an attorney's charging lien for fees could not attach to the client's real property. The district court noted that Michigan case law had not yet addressed the issue: "The courts of Michigan have not ruled directly on the issue of whether an attorney's charging lien may attach to real property."[19] The court then concluded that Michigan courts would adhere to the rule followed by a majority of other states: "[I] conclude that in Michigan courts would follow the majority rule disallowing attorney's liens on real property unless there is an express contract between the parties or special equitable circumstances exist."[20] Applying that rule to the case at hand, the district court held that defendant did not have a valid lien against the marital home and reversed the bankruptcy court's ruling.[21]

George v Sandor M Gelman, PC

Five years after the district court's *Rubel* decision, the Michigan Court of Appeals addressed whether an attorney's charging lien could attach to the client's real property, in *George v Sandor M Gelman, PC*.[22]

Like *Rubel*, *George v Gelman* involved a plaintiff who retained defendant law firm to represent her in a divorce action. There was no written fee agreement between the parties. Under the judgment of divorce, the plaintiff was awarded a condominium unit. Plaintiff disputed the amount of defendant's fees and did not pay defendant's invoices in full. Subsequently, defendant recorded an attorney's lien against the condominium unit with the register of deeds.[23]

The plaintiff brought suit against defendant, seeking to discharge the lien on the ground that "defendant's charging lien could not attach to her real property without an express agreement between the parties providing for such a lien."[24] On the parties' competing summary disposition motions, the trial court ruled for defendant and against plaintiff, concluding that Michigan law "authorizes an attorney to impose a lien on work product that he is responsible for bringing about through the use of his services[.]"[25] The plaintiff appealed.

The Court of Appeals framed the issue on appeal as "whether an attorneys' lien can attach to a client's real property."[26] Initially, the court identified the retaining lien and the charging lien as the types of attorney liens recognized by Michigan law, and described the general nature of each type of lien.[27] Regarding the charging lien, the court noted that it attaches to "a judgment, settlement, or other money recovered as a result of the attorney's services," and that "[c]ase law acts as the sole guide with regard to these liens."[28] The court specifically found that the defendant's asserted lien was a charging lien: "In this case, defendant is asserting the right to a charging lien."[29] So the precise issue before the court was actually whether an attorney's charging lien can attach to a client's real property.

The Court of Appeals then described the process by which a creditor may obtain and execute a judgment against a debtor, including a debtor's real property, under Chapter 60 of the Revised Judicature Act.[30] "A creditor may execute against real property owned by a debtor only after attempting to execute against the debtor's personalty and determining that the personal property is insufficient to meet the judgment amount."[31]

Regarding the attachment of a charging lien, the Court of Appeals acknowledged that "these liens automatically attach to funds or a money judgment recovered through the attorney's services," but that no Michigan authority permitted such lien to attach to the client's real property.[32] The court rejected the defendant's suggestion that *Wolter v Wolter*[33] and *Tyrrell v Tyrrell*[34] authorized attachment of an attorney's lien to real property, finding

19 *Id* at 84.

20 *Id*.

21 *Id* at 86.

22 201 Mich App 474; 506 NW2d 583 (1993).

23 *Id* at 475.

24 *Id* at 476.

25 *Id*.

26 *Id*.

27 *Id*.

28 *Id* at 476-77.

29 *Id* at 476.

30 MCL 600.6001 *et seq*.

31 201 Mich App at 477, citing MCL 600.6004.

32 *Id* at 477-78.

33 332 Mich 229; 50 NW2d 771 (1952).

34 107 Mich App 435; 309 NW2d 632 (1981).

that the liens in those cases were judicial liens imposed by courts to secure payment of attorney fees in the divorce context.

The Court of Appeals next recognized the *Rubel* district court's description of the majority rule in other states, "disallowing attorney liens upon real property owned by clients unless there is an express written contract between the parties providing for such a lien or unless special equitable circumstances existed."[35]

Combining the majority rule in other states with Michigan law allowing a judgment creditor to (potentially) execute against the debtor's real property, the Court of Appeals formulated and adopted the following rule for imposition of an attorney's charging lien against a client's real property:

> [A]n attorney's charging lien for fees may not be imposed upon the real estate of a client, even if the attorney has successfully prosecuted a suit to establish a client's title or recover title or possession for the client, unless
>
> (1) the parties have an express agreement providing for a lien,
>
> (2) the attorney obtains a judgment for the fees and follows the proper procedure for enforcing a judgment, or
>
> (3) special equitable circumstances exist to warrant imposition of a lien.[36]

Applying this newly adopted rule to the facts of the case, the Court of Appeals ruled that the defendant had not employed any of the three methods for imposition of a charging lien. First, the parties did not have an express agreement for a lien. Second, the defendant had not sought or obtained a judgment against plaintiff. Third, there were no special equitable circumstances to support imposition of a lien: "Plaintiff has not attempted to evade paying for defendant's services. Rather, an ongoing dispute exists between the parties regarding the total fee charged by defendant, and the parties have been unable to resolve it."[37] Finding that the defendant did not have a valid charging lien against plaintiff's property, the court reversed the judgment of the trial court, because summary disposition should have been rendered for the plaintiff.[38]

Scope of *George v Sandor M Gelman, PC*

By its terms, the holding of *George v Gelman* is limited to the imposition of "an attorney's **charging lien** for fees" upon "the real estate of a client."[39] The appellate court defined a charging lien as the right of an attorney to impose a lien on something of value "recovered as a result of the attorney's services" or "through the attorney's services."[40] Similarly, the trial court recognized the right of "an attorney to impose a lien on work product that he is responsible for bringing about through the use of his services."[41] Hence, this decision governs an attorney's ability to assert a lien against litigated real property of a client, to the extent that the attorney has "successfully prosecuted a suit to establish a client's title [to such property] or recover title [to such property] or possession [of such property] for the client."[42] By its terms, *George v Gelman* does not purport to govern the ability of a lawyer to acquire a mortgage or lien against the client's non-litigated real property.

The holding of *George v Gelman* does not preclude the ability of a court to order a lien against a client's real property to secure payment of the attorney's fees. While the Court of Appeals intentionally excluded a court order as a possible basis for imposition of an attorney's charging lien, it did so because a court order gives rise to a judicial lien, not an attorney's lien.[43]

35 *Id* at 478.

36 *Id*.

37 *Id* at 479.

38 *Id*.

39 *Id* at 478 (emphasis added).

40 *Id* at 476-77.

41 *Id* at 476.

42 *Id* at 478. Accord *In the Matter of Thomas Curt Stephens and Kelley Marie Stephens*, Case No 10-12704, 2010 WL 4286186, *9-*10 (WD Mich, Oct 26 2010) ("Michigan law and the agreement between [attorney] Budzynski and the Stephens stand for the proposition that Budzynski is entitled to [a lien against] assets obtained by, or which belong to, the Stephens as a result of Budzynski's legal services. [H]ere, however, the Stephens' rental property was not obtained as a result of Budzynski's representation. [T]hus, the rental income was not earned as a result of Budzynski's services and Budzynski cannot establish an attorney's lien against it.").

43 *Id* at 478 fn 1. Accord *Dinu v Dinu*, No 253014, 2004 WL 1779060, *12-*14 (Mich App, Aug 10 2004) ("[P]laintiff argues that the trial court's award of a lien to her former lawyer was an error of law because no retainer agreement had

Subsequent Michigan Case Law Applying *George v Sandor M Gelman, PC*

The rule from *George v Gelman* has been applied in a handful of subsequent Michigan decisions. As will be seen, courts have sometimes applied the *George v Gelman* rule (limited to attorney's charging liens) even where there was no plausible basis for an attorney's charging lien (i.e., the real property was not litigated and/or recovered through the attorney's efforts).

According to *Blaha v Faupel & Associates, PC*,[44] in order to establish "an express agreement providing for a lien," the agreement must be between the lawyer and the party against whom the lawyer seeks to execute the lien. Hence, where defendant lawyer represented the wife in a divorce proceeding, and the wife agreed to a mortgage against the marital residence (titled in her sole name) to secure payment of legal fees, but the residence was subsequently awarded to plaintiff husband "free and clear" under the judgment of divorce, there was no "express agreement" for imposition of an attorney's charging lien upon the residence. "[U]nder the facts of this case, 'the parties' do not have an agreement for the lien. That is, the negotiation occurred with plaintiff's spouse, and defendant does not seek to recoup or execute upon property under the control of plaintiff's spouse. Rather, defendant seeks to execute a lien against plaintiff, a party who did not agree to the lien."[45]

In retrospect, the *George v Gelman* rule, governing imposition of an attorney's charging lien, had no apparent application to the situation presented in *Blaha*. Defendant lawyer's services did not result in client becoming the owner of the real property: "The consent judgment of divorce awarded plaintiff [client's ex-husband] the marital home 'free and clear' of any claim by his ex-wife."[46] Therefore, defendant lawyer had no basis for asserting an attorney's charging lien against the marital residence.

An express agreement between attorney and client does not extend to real property owned by a corporate entity that is partially owned by the client. In *Sherwood Development, Inc v Barnett*,[47] defendants lawyer and law firm performed legal services for a client and his wife, under a retention agreement that granted the lawyer an "Attorney's Lien on Client's real and personal property should payment of attorney fees and costs not be promptly paid to attorney upon entry of the Judgment in this Case[.]"[48] When defendants were not paid for their legal services, they asserted a lien against real property owned by plaintiff corporation, one-half of which was owned by the client. Because the corporation had no agreement with, and was not a client of, defendants, there was no "express agreement" for imposition of an attorney's charging lien upon the real property. "Defendant[s'] client was [Mr.] Constable, not plaintiff [corporation]. The agreements did not grant defendants [lawyer and law firm] the right to place a lien on plaintiff [corporation]'s property."[49]

As with the *Blaha* decision, the *George v Gelman* rule had no apparent application to the situation presented in *Sherwood Development*, because the lawyer's legal services did not result in the client becoming the owner of the real property: "Defendants concede that their liens were filed against property that was not the product of any litigation involving plaintiff or Constable."[50] Therefore, defendants had no basis for asserting an attorney's charging lien against the real property.

The "express agreement" must specifically provide for a lien on real property. In *Transnation Title v Atty*,[51] the defendant retained an attorney to represent him in a divorce action. The fee agreement provided that "ATTORNEYS shall have general, possessory or retaining CLIENT'S liens, and all special or charging liens known to law[.]"[52] When the client did not pay the attorney's invoices, the attorney recorded a lien against the client's real property, which had been awarded to the client under the judgment of divorce. (Because the real property was obtained as the result of the attorney's services, it was plausible for the attorney to assert an attorney's charging

been submitted in evidence. We disagree. Here, [p]laintiff's former attorney obtained the lien through a court order, which George and Tyrrell both recognize is proper.").

44 No 250241, 2004 WL 2754679 (Mich App, Dec 2 2004).

45 *Id* at *2-*3 (affirming trial court's permanent injunction against foreclosure upon lien by defendant).

46 *Id*.

47 No 275594, 2008 WL 747075 (Mich App, Mar 20 2008).

48 *Id* at *1-*2.

49 *Id* at *4 (affirming trial court's order granting summary disposition to plaintiff on its quiet title claim).

50 *Id* at *4.

51 No 273218, 2008 WL 400692 (Mich App, Feb 14 2008).

52 *Id* at *2.

lien against such property.) The defendant's title insurance company paid the lien and sued defendant to recoup the amount of the lien. The trial court ruled for the defendant, and the title insurance company appealed.[53]

The Court of Appeals found that the lien was not valid, because the provision in the fee agreement "did not constitute an express agreement for a lien upon real property."[54] "It is clear from context that *George*, in stating that a lien against real estate would be valid if 'the parties have an express agreement providing for a lien,' [w] as indicating that the parties must have an express agreement specifically providing for a lien on real property."[55] Therefore, the title insurance company paid the lien in error and was not entitled to judgment against defendant.

Requirements for Express Mortgage/Lien Agreement

An agreement granting the lawyer a mortgage or lien against the client's real property must be in writing to satisfy the Michigan statute of frauds.[56] A written mortgage or lien should be recorded with the register of deeds for the county in which the real property is located, in order to protect the lawyer's priority. To be recorded, the mortgage or lien must be in recordable form, complying with the formalities imposed by MCL 565.201(1), stating the marital status of a male mortgagor as required by MCL 565.221, and providing the name and business address of the drafter of the instrument as required by MCL 565.201a. The written mortgage or lien should also include a sufficient and certain description of the real property being mortgaged or liened.[57]

Equitable Liens

Equity may intervene to protect an attorney who has failed to get the client's lien or mortgage agreement in writing. Under Michigan law, "an equitable lien arises from an agreement that both identifies property and evidences an intention that such property serve as security for an obligation."[58] "In the absence of a written contract, an equitable lien will be established only where, through the relations of the parties, there is a clear intent to use an identifiable piece of property as security for a debt."[59] A lawyer may assert an equitable lien against a client's real property, based on an agreement with the client that such real property would serve as security for payment of the attorney's fees.[60]

Michigan Ethics Opinion RI-40

In 1989, the State Bar of Michigan Professional Ethics Committee considered whether it was ethical for a lawyer to acquire an interest in the client's **non-litigated** real property, in Michigan Ethics Opinion RI-40. The committee opined that a lawyer may take a mortgage against the client's real property in order to secure payment of anticipated legal fees, provided that the real property is not the subject matter of litigation in which the lawyer represents the client, and provided that the requirements of MRPC 1.8(a) are satisfied. "A lawyer may obtain a mortgage on a client's property provided the lawyer complies with MRPC 1.8(a), and the property which the mortgage secures is not the subject matter of litigation the lawyer is conducting for the client[.]"[61] "If the interest charged is usurious, the terms of the transaction are not fair and reasonable to the client and violate MRPC 1.8(a)(1)."[62]

Michigan Ethics Opinion RI-354

In 2012, the State Bar of Michigan Professional Ethics Committee considered whether it was ethical for a lawyer to acquire an interest in the client's **litigated** real

53 *Id* at *3.

54 *Id* at *7.

55 *Id* at *6.

56 MCL 566.106, 566.108. See *Aetna Mortgage Co v Dembs*, 13 Mich App 686, 690; 164 NW2d 771 (1968) (holding that a mortgage falls within the statute of frauds and must therefore be in writing); *Cheff v Haan*, 269 Mich 593, 598; 257 NW 894 (1934) (holding that a lien upon real property, other than one created by operation of law, may be created only by a writing).

57 See *Stead v Grosfield*, 67 Mich 289; 34 NW 871 (1887) (holding conveyance void for lack of sufficient description of property being conveyed).

58 *Warren Tool Co v Stephenson*, 11 Mich App 274, 281; 161 NW2d 133 (1968).

59 *Senters v Ottawa Savings Bank*, FSB, 443 Mich 45, 53; 503 NW2d 639 (1993).

60 *Schrot v Garnett*, 370 Mich 161; 121 NW2d 722 (1963) (reversing trial court's dismissal of lawyer's action to impress equitable lien upon client's residence, based on client's agreement to grant mortgage upon residence, in part to secure payment of attorney fees, and remanding for entry of equitable lien in favor of lawyer).

61 MI Eth Op RI-40 (1989).

62 *Id*.

property.[63] Unfortunately, this opinion seems to reach a conclusion that is contrary to *George v Gelman*.

In Michigan Ethics Opinion RI-354, the lawyer was representing a client in a contested divorce case. The marital estate consisted of one asset: the equity in the marital home. The husband and wife owned the marital home as tenants by the entireties. The lawyer desired to take a lien against the marital home in order to secure payment of legal fees. The lawyer anticipated that his client would receive, under the judgment of divorce, and as the result of the lawyer's services, either sole or joint interest in the marital home.[64]

The lawyer proposed a two-step transaction. First, the client would execute a warranty deed conveying the client's interest in the marital home to the lawyer. Second, upon entry of the judgment of divorce, the lawyer would re-convey title to the marital home to the client, in exchange for the client's execution of a promissory note and mortgage against the home. (There is no indication in the opinion that the unique structure of this transaction was relevant to the committee's decision.) Before consummating this transaction, the lawyer submitted an ethics inquiry to the Professional Ethics Committee.[65]

The committee initially noted that the proposed lien would have to satisfy the three requirements of MRPC 1.8(a) (i.e., fair and reasonable terms; opportunity to consult independent counsel; and client's written consent). The committee then referenced MI Eth Op RI-40 (1989), which had opined that a lawyer may take a mortgage against the client's non-litigated real property in order to secure payment of anticipated legal fees.[66] (Given that Opinion RI-354 involved litigated real property, the relevance of Opinion RI-40, which presented the opposite factual scenario, is unclear.)

The committee next asserted that Opinion RI-40 was supported by the decision in *George v Gelman*: "This conclusion [in Opinion RI-40] was buttressed by the Court of Appeals in *George v Gelman*, which held that a lawyer may claim a charging lien against a client's real property if an express agreement for the lien exists."[67] In fact, Opinion RI-40 was not supported by *George v Gelman*, because the ethics opinion and the judicial decision dealt with two distinct situations. Opinion RI-40 dealt with the situation where the attorney sought to acquire an express mortgage against non-litigated real property (i.e., not a charging lien situation). *George v Gelman* dealt with the situation where the attorney sought an attorney's charging lien against litigated real property.

Moving on, the committee noted that the proposed lien in question would have to satisfy not only MRPC 1.8(a) but also 1.8(j). Again, MRPC 1.8(j) permits an attorney to "(1) acquire a lien granted by law to secure the lawyer's fee or expenses; and (2) contract with a client for a reasonable contingent fee in a civil case[.]" After quoting the rule, the committee stated that "[t]he question at hand does not involve a contingent fee. Nor is the lawyer being granted a lien by law in a homestead to secure his or her fees or expenses."[68] Here, the committee apparently interpreted MRPC 1.8(j)(1) narrowly, so that a lawyer is only permitted to acquire a lien by operation of law, and not by a contractual agreement with the client.

Ultimately, the committee concluded that the proposed lien was not permitted by MRPC 1.8(j). "[T]he marital home is, quite obviously, the subject matter of the litigation and, hence, the lawyer may not ethically seek to obtain any interest, including a lien to secure payment of his fees, in it. Accordingly, it would be unethical for the lawyer to obtain the lien he proposes."[69]

The problem with this opinion is that it declares one of *George v Gelman*'s three methods for imposing an attorney's charging lien against a client's real property–i.e., "express agreement providing for a lien"–to be unethical. The attorney, through his or her efforts and services, had the prospect of obtaining title to the marital home for the client, which would entitle the attorney to an attorney's charging lien in the real property if one of the three *George v Gelman* methods of obtaining such lien were followed. The first such method is that "the parties have an express agreement providing for a lien[.]" The attorney's proposed transaction with the client would have apparently constituted an express agreement for a lien. But

63 MI Eth Op RI-354 (2012).

64 *Id.*

65 *Id.*

66 *Id.*

67 *Id.*

68 *Id.*

69 *Id.*

the committee declared such agreement to be unethical. Hence, Opinion RI-354 problematically seems to conclude that a transaction expressly authorized by *George v Gelman* to be unethical.

Conclusion

It is clear that a lawyer and client may enter into an agreement for a lien against the client's non-litigated real property to secure payment of the lawyer's fees, subject to MRPC 1.8(a), the Michigan statute of frauds, and the requirements for recording an instrument with the register of deeds.

As for a lawyer's lien against a client's litigated real property, MRPC 1.8(j) provides that a lawyer may ethically acquire a lien granted by law, such as a charging lien, a judicial lien, or a judgment lien. And the Michigan Court of Appeals has ruled that a lawyer may acquire a charging lien against a client's litigated real property based on an express agreement, a judgment lien, or special equitable circumstances. But the Professional Ethics Committee seems to have opined that it is ethically impermissible for a lawyer to enter into an express agreement with a client for a lien against litigated real property.

If this outcome was unintended by the committee, then it should be clarified. If this outcome was intended by the committee, then the most efficient and practical means for a lawyer to perfect a charging lien under *George v Gelman* has been non-judicially nullified.