



UPL ADVISORY OPINION
UPL 04 -01
(October 2004)

Preparation of Mechanic's Lien Notices

This is an Advisory Opinion regarding Rule 31 of the Rules of the Supreme Court of Arizona regarding the preparation, service, and recording of mechanics lien notices.¹

Issues:

1. Is the preparation, service, and recording of mechanics lien notices pursuant to A.R.S. § 33-981 et seq. the practice of law? Yes, preparation, service and recording of mechanics lien notices is the practice of law, because lien notices are intended to secure legal rights for the contractor and are filed with the County Recorder.
2. May a contractor prepare, serve, and record mechanics lien notices to secure mechanics liens relating to work the contractor has performed? Yes, if the preparation, service, and recording of the mechanics lien notices are incidental to the contractor's regular business, for use in that business, and are not made available to third parties.
3. May a third party prepare, serve, and record mechanics lien notices for contractors for a fee? No. A third party may not prepare, serve, and record mechanics lien notices for contractors for a fee unless that work is done by a certified document preparer.

Facts:

ARS § 33-981 creates a lien on certain property in favor of the individual or entity that performed services or provided materials relating to the property (a "mechanics lien"). ARS § 33-992 gives mechanics liens a preference over certain other liens that exist. However, a contractor can enforce a mechanics lien "only if" the contractor complies with certain statutory notice requirements. See e.g., ARS § 33-981 (D). Therefore proper compliance with the statutory notice requirements will determine whether or not a contractor can assert his legal right to a preferential lien against the property or if the contractor may assert only contract rights to any amounts due.

¹ Opinions of the Committee are advisory in nature only and are not binding in any disciplinary or other legal proceedings. © State Bar of Arizona 2004

Contractors often find mechanics liens advantageous over contract rights, because mechanics liens may have to be released prior to the property being transferred or the general contractor receiving final payment. Even a small contractor with a legitimate, perfected, mechanics lien can create a significant incentive for a property owner or general contractor to address any outstanding balance due to the contractor.

In Arizona, contractors often prepare, serve, and record mechanics lien notices themselves without retaining an attorney. Additionally contractors have previously hired third party companies to prepare, serve, and record the mechanics lien notices for a fee.

Relevant Authority:

Arizona Supreme Court Rule 31:

Rule 31. Regulation of the Practice of Law

(a) Supreme Court Jurisdiction Over the Practice of Law

1. *Jurisdiction.* Any person or entity engaged in the practice of law or unauthorized practice of law in this state, as defined by these rules, is subject to this court's jurisdiction.

2. *Definitions.*

A. "Practice of law" means providing legal advice or services to or for another by:

- (1) Preparing any document in any medium intended to affect or secure legal rights for a specific person or entity;
- (2) Preparing or expressing legal opinions;
- (3) Representing another in a judicial, quasi-judicial, or administrative proceeding, or other formal dispute resolution process such as arbitration and mediation;
- (4) Preparing any document through any medium for filing in any court, administrative agency or tribunal for a specific person or entity; or
- (5) Negotiating legal rights or responsibilities for a specific person or entity.

B. "Unauthorized practice of law" includes but is not limited to:

- (1) engaging in the practice of law by persons or entities not authorized to practice pursuant to paragraphs (b) or (c) or specially admitted to practice pursuant to Rule 33(d); or
- (2) using the designations "lawyer," "attorney at law," "counselor at law," "law," "law office," "J.D.," "Esq.," or other equivalent words by any person or entity who is not authorized to practice law in this state

pursuant to paragraphs (b) or (c) or specially admitted to practice pursuant to Rule 33(d), the use of which is reasonably likely to induce others to believe that the person or entity is authorized to engage in the practice of law in this state.

C. "Legal assistant/paralegal" means a person qualified by education and training who performs substantive legal work requiring a sufficient knowledge of and expertise in legal concepts and procedures, who is supervised by an active member of the State Bar of Arizona, and for whom an active member of the state bar is responsible, unless otherwise authorized by supreme court rule.

* * *

(b) Authority to Practice. Except as hereinafter provided in section (c), no person shall practice law in this state or represent in any way that he or she may practice law in this state unless the person is an active member of the state bar, and no member shall practice law in this state or represent in any way that he or she may practice law in this state, while suspended, disbarred, or on disability inactive status.

(c) Exceptions. Notwithstanding the provisions of section (b):

* * *

19. Nothing in these rules shall prohibit the preparation of documents incidental to a regular course of business when the documents are for the use of the business and not made available to third parties.

23. Nothing in these rules shall prohibit a certified legal document preparer from performing services in compliance with Arizona Code of Judicial Administration. Part 7, Chapter 2, Section 7-208.

Arizona Code of Judicial Administration § 7-208: Legal Document Preparers.

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F. Role and Responsibilities of Certificate Holders.

1. Authorized Services. A certified legal document preparer may:
 - a. Prepare or provide legal documents, without the supervision of an attorney, for an entity or a member of the public in any legal matter when that entity or person is not represented by an attorney;

- b. Provide general legal information, but may not provide any kind of specific advice, opinion or recommendation to a consumer about possible legal rights, remedies, defenses, options or strategies;
- c. Provide general factual information pertaining to legal rights, procedures, or options available to a person in a legal matter when that person is not represented by an attorney;
- d. Make legal forms and documents available to a person who is not represented by an attorney; and
- e. File and arrange for service of legal forms and documents for a person in a legal matter when that person is not represented by an attorney.

Discussion:

1. Is the preparation, service, and recording of mechanics lien notices pursuant to A.R.S. § 33-981 et seq. the practice of law. Yes.

Preparation and service of mechanics lien notices constitutes the practice of law under Rule 31 (a) (2) (A) (1) as it is intended to affect or secure a contractor's legal rights to a preferential lien on property. Preparation, service and recording of mechanics lien notices also constitute the practice of law under Rule 31 (a) (2) (A) (4) as lien notices are prepared for filing with the County Recorder.

Although the language of mechanics liens can be derived directly from the statute, proper preparation of the notice involves a determination when the liens should be served and recorded (when did work begin or when was work completed), on whom the notices should be served (the property owner, property manager, developer, general contractor, or other contractor), and the description of the work performed or to be performed. If a notice is not filed in a timely manner or is served on the wrong individual, the lien may be deemed to be invalid. Whether a contractor prepares and perfects a valid mechanics lien may determine when a contractor gets paid or if a contractor gets paid at all.

2. May a contractor prepare, serve, and record mechanics lien notices to secure mechanics liens relating to work they have performed? Yes.

Rule 31(b) requires that "[e]xcept as hereinafter provided in section (c), no person shall practice law in this state...unless the person is an active member of the state bar..." Therefore, mechanics lien notices may only be prepared and served by an active member of the state bar of Arizona, unless the preparation falls within a specific exception identified in Rule 31 (c).

There is no exception in Rule 31 (c) that would exempt preparation and service of mechanics lien notices under all circumstances. However, Rule 31 (c) (19) provides: “Nothing in these rules shall prohibit the preparation of documents incidental to a regular course of business when the documents are for the use of the business and not made available to third parties.”

Contractors are in the business of providing construction services or materials. They are not in the business of preparing, serving, and filing notices. Contractors are not being paid for preparing, serving, and filing notices, but rather are only doing so to secure payment for the primary services or materials that they are actually providing.

Because preparation, service, and recording of mechanics liens is incidental to the contractors regular course of the contractor’s own business, a contractor may prepare, serve, and record mechanics lien notices relating to the work the contractor has performed.

3. May a third party prepare, serve, and record mechanics lien notices for contractors for a fee? No. A third party may not prepare, serve, and record mechanics lien notices for contractors for a fee unless the individuals performing the work are licensed attorneys or certified legal document preparers performing services in compliance with Arizona Code of Judicial Administration, Part 7, Chapter 2, Section 7-208.

As discussed above, Rule 31(b) requires that “[e]xcept as hereinafter provided in section (c), no person shall practice law in this state...unless the person is an active member of the state bar...” Therefore, mechanics lien notices may only be prepared and served by an active member of the state bar of Arizona, unless the preparation falls within a specific exception identified in Rule 31 (c).

A contractor may prepare, serve, and record the notices itself under Rule 31 (c) (19), because such preparation, service and recording is incidental to the contractor’s regular business. However, a third party cannot prepare, serve, and record such notices for the contractor for a fee, because in such circumstances the preparation, service, and recording is the business of the third party and is not incidental to providing the contractor’s services.

However, a third parties can prepare and serve mechanics lien notices for others for a fee if the third party is a certified legal document preparer pursuant to Rule 31 (c) (23), which provides: “Nothing in these rules shall prohibit a certified legal document preparer from performing services in compliance with Arizona Code of Judicial Administration. Part 7, Chapter 2, Section 7-208.”

Section 7-208 (F) (1) (a) of the Code of Judicial Administration allows a certified document preparer to prepare documents such as mechanics lien notices. That provision, in pertinent part, provides: “A certified legal document preparer may: (a) Prepare or provide legal documents, without the supervision of an attorney, for an entity or a member of the public in any legal matter when that entity or person is not represented by an attorney.”

Section 7-208 (F) (1) (e) allows a certified document preparer to file such notices with the appropriate county recorders office. That provision provides: “A certified legal document preparer may. . . (e) File and arrange for service of legal forms and documents for a person in a legal matter when that person is not represented by an attorney.”

Therefore, a third party may prepare, file, and record mechanics lien notices for contractors for a fee if that third party is a certified document preparer.