CHAPTER TWO

ATTORNEY LIENS – WHAT YOU CAN AND CANNOT DO TO COLLECT YOUR FEES

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MICHAEL R. CARYL graduated from St. Lawrence University *cum laude* (1969) and received his J.D. from Georgetown University in 1972. He has an LL.M. from George Washington University with Highest Honors (1977). Mr. Caryl served four years active duty with the Army J.A.G.C., including a stint in the Airborne. He is admitted to practice in Washington and the District of Columbia. He is a trial lawyer in Seattle whose practice consists substantially of fee disputes between lawyers and fee disputes between lawyers and clients.

In 1996, Mr. Caryl represented Seattle attorney Fred Zeder and his law firm in an RCW 4.24.005 proceeding, a case where an injured client sought to terminate his attorney in a contingency fee arrangement just before his claim settled, in order to defeat the contingency fee. After a successful 5-day trial, the trial court allowed attorney Zeder his contingency fee based on the doctrine of substantial compliance. Mr. Caryl successfully defended this decision in the Court of Appeals and the Supreme Court in *Taylor v. Shigaki*, 84 Wn.App. 723 (1977), pet. den. 132 Wn.2d 1009 (1997). Fred Zeder was the first lawyer in a published Washington decision to prevail in a dispute with a client over a contingency fee following termination.

In *Barrett v. Freise*, 119 Wn. App. 823, 82 P.3d 1179 (2003), Mr. Caryl prevailed in another contingency fee dispute under RCW 4.24.005 where the client fired the lawyer after obtaining settlement commitments of over $600,000, obtaining the lawyer his contingency fee despite claims of malpractice and that the contingency fee was unreasonable. The trial court's decision in the *Barrett* case was recently affirmed by Division Three in a 3-0 decision, where the Court affirmed the terminated attorney's entitlement to the entirety of the contingency fee, despite claims of legal malpractice, breach of fiduciary duty and conflicts of interest.

Mr. Caryl has an active practice in attorney fee disputes, representing both clients and lawyers. He frequently serves as an expert witness in personal injury and fee disputes, is a frequent arbitrator of fee disputes and personal injury claims, and is a frequent speaker in WSTLA, WSBA and private CLEs on ethics and fee issues, tort issues and trial practice. His website dedicated to attorney's fees and ethics issues is www.michaelcaryl.com.

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I. INTRODUCTION

The attorney's lien is a very highly misunderstood device, both by lawyers and clients. The attorney's lien derives from a statute passed by the Territorial Legislature in 1863 and codifed into the Territory's first legal code some eight years before statehood. It is very poorly-worded, and if there were a legislative history, it would be curious to identify from whence it came. The statute has apparently only been amended one time in 145+ years, that in 2004, and then only for the reason that the legislature was troubled by Federal tax code interpretations that permitted double taxation of attorney's fees in employment cases.[1] The amendments in 2004 intended to give the Washington statute a gloss like that of Oregon, where the lawyer had a property interest in the fee.

The first section of the statute (RCW 60.40.010) spells out what the lien attaches to (with a lot of help from the 2004 amendments), but prescribes no way to perfect the lien, how notice is to be given, and nothing as to priorities with other liens. The second section of the statute (RCW 60.40.020) deals only with procedures for the client compelling production of money or papers held by the lawyer. The last section (RCW 60.40.030) purportedly deals with the manner in which attorney's liens on money/papers and property in the lawyer's hands are resolved. The statute offers no clear procedure on how reduction of the charging lien to judgment is accomplished.

There is very little written on this statute - one of the few recent articles on the attorney's lien is by a young law review student at Seattle University four years ago.[2] Despite the fact that this law dates back nearly 130 years, there have only been a couple dozen appellate cases interpreting the statute. The cases give little guidance in terms of the foreclosure process, although to a large extent that is left up to individual judges, subject to the broad concept of what constitutes due process. This paper is a primer on getting started with the attorney's lien statute and points out what appears obvious to one with a lot of experience with this statute and attorney's fees in general. We will cover what should go into a lien claim, how to give the requisite notice, and some suggestions on how to go about the process of foreclosing the lien. The lack of clear legal guidance is both a boon and the bane when it comes to litigating in this area. There is a lot of room for creativity and there is a good chance you will encounter a judge who knows less about it than you.

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[1] : "The purpose of this act is to end double taxation of attorneys' fees obtained through judgments and settlements, whether paid by the client from the recovery or by the defendant pursuant to a statute or a contract. Through this legislation, Washington law clearly recognizes that attorneys have a property interest in their clients' cases so that the attorney's fee portion of an award or settlement may be taxed only once and against the attorney who actually receives the fee. This statute should be liberally construed to effectuate its purpose. This act is curative and remedial, and intended to ensure that Washington residents do not incur double taxation on attorneys' fees received in litigation and owed to their attorneys. Thus, except for *RCW 60.40.010(4)*, the statute is intended to apply retroactively." [2004 c 73 § 1.]

[2] Elsner, Comment - Rethinking Attorney Liens: Why Washington Attorneys are Forced into Involuntary Pro Bono, 27 Seattle University Law Review 827 (Winter 2004)

II. WHAT THIS PRESENTATION IS NOT ABOUT

This seminar is about bankruptcy issues. The author is more of a neophyte regarding Bankruptcy than the average attendee. He knows enough to refer on to some one who does know. Apparently, the attorney's lien does not play an important role in most Bankruptcy proceedings. The author will not address the attorney's lien in the Bankruptcy context except in the most mundane fashion and is likely to glaze over should any specific Bankruptcy-related questions be directed his way on this subject. The one truly clear answer about attorney's liens in the bankruptcy context is that attorney's liens cannot be asserted against real property and cloud title. More on that later.

III. WHAT DOES THE ATTORNEY'S LIEN APPLY TO

A. Creation of the Attorney's Lien.

RCW 60.40.010 provides the subject matter for attorney's liens. This portion of the statute reads as follows:

Lien created -- Enforcement -- Definition -- Exception

(1) An attorney has a lien for his or her compensation, whether specially agreed upon or implied, as hereinafter provided:

(a) Upon the papers of the client, which have come into the attorney's possession in the course of his or her professional employment;

(b) Upon money in the attorney's hands belonging to the client;

(c) Upon money in the hands of the adverse party in an action or proceeding, in which the attorney was employed, from the time of giving notice of the lien to that party;

(d) Upon an action, including one pursued by arbitration or mediation, and its proceeds after the commencement thereof to the extent of the value of any services performed by the attorney in the action, or if the services were rendered under a special agreement, for the sum due under such agreement; and

(e) Upon a judgment to the extent of the value of any services performed by the attorney in the action, or if the services were rendered under a special agreement, for the sum due under such agreement, from the time of filing notice of such lien or claim with the clerk of the court in which such judgment is entered, which notice must be filed with the papers in the action in which such judgment was rendered, and an entry made in the execution docket, showing name of claimant, amount claimed and date of filing notice.

(2) Attorneys have the same right and power over actions to enforce their liens under subsection (1)(d) of this section and over judgments to enforce their liens under subsection (1)(e) of this section as their clients have for the amount due thereon to them.

(3) The lien created by subsection (1)(d) of this section upon an action and proceeds and the lien created by subsection (1)(e) of this section upon a judgment for money is superior to all other liens.

(4) The lien created by subsection (1)(d) of this section is not affected by settlement between the parties to the action until the lien of the attorney for fees based thereon is satisfied in full.

(5) For the purposes of this section, "proceeds" means any monetary sum received in the action. Once proceeds come into the possession of a client, such as through payment by an opposing party or another person or by distribution from the attorney's trust account or registry of the court, the term "proceeds" is limited to identifiable cash proceeds determined in accordance with *RCW 62A.9A-315(b)(2)*. The attorney's lien continues in such identifiable cash proceeds, subject to the rights of a secured party under *RCW 62A.9A-327* or a transferee under *RCW 62A.9A-332*.

(6) Child support liens are exempt from this section.

B. The Charging Lien.

The charging lien is created in RCW 60.40.010 (3) through (5). This is the lien with the potentially greatest impact for lawyers, and of interest to those with Bankruptcy issues.

Obviously, under RCW 60.40.010(1)(b), the lawyer has a lien on funds of the client held in the trust account, and this is not limited to funds relating to the engagement that is the subject of the lien. The lawyer can obtain a prejudgment lien on money in the hands of an adverse party by giving the required notice under subsection RCW 60.40.010(1)(c), but still the client must obtain a judgment or at least a settlement for the lien to be subject to foreclosure.

C. The Possessory Lien.

The possessory lien is created by RCW 60.40.010 (1) & (2). This addresses "papers of the client, which have come into the attorney's possession in the course of his or her professional employment" [sub§ (1)(a)], which clearly covers papers given by the client to the lawyer. Rombauer, 27 Washington Practice – Creditors' Rights and Debtors Remedies, §4.22. It includes the file created by the lawyer, as within papers which "have come into the attorney's possession," [3] certificates of stock and other corporate papers, [4] books , papers and documents, [5] and negotiable instruments. [6] Sub§ (1)(b) of the first section addresses "money in the attorney's hands belonging to the client." Prof. Rombauer's treatment of the possessory lien is the most extensive by far of any Washington resource of which I am aware.

Since the lien is a possessory one, a codification of the common law possessory lien, the maintenance of possession is critical to the validity of the lien. Surrender of the papers or money to the client or a third party is a relinquishment of the lien.[7] Mere agreement to surrender the papers or instruments is a relinquishment of the possessory lien.[8] However, where a lawyer

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[3] *Hudson v. Brown*, 179 Wash. 32, 35 P.2d 756 (1934).
[4] *State ex. rel Park v. Superior Court*, 141 Wash., 584, 251 P. 863 (1927).
[5] *State ex. rel Robinson Co. v. Gilliam*, 94 Wash. 243, 161 P. 1194, (1917)
[6] *Gottstein v. Harrington*, 25 Wash. 508, 65 P. 753 (1901).
[7] *Gottstein v. Harrington, supra.*
[8] *Jensen v. Kohler*, 93 Wash. 8, 159 P. 978 (1916).

surrendered a promissory note belonging to his client to secure payment of fees, for the purpose of cancelling the note after acquiring payment, the court determined in the Bankruptcy context that the lawyer's lien shifted to the proceeds. Because the receipt by the lawyer took place outside the preference period, the lien was determined to be valid and was upheld.[9]

The lien on money belonging to the client in the hands of the lawyer is discussed extensively by Prof. Rombauer at §4.26, 27 Washington Practice – Creditors' Rights and Debtors Remedies.[10] The money need not come into the hands of the lawyer in his professional capacity, as is the case with the possessory lien on "papers of the client." The money of the client need not result from the legal work done by the lawyer in that matter.[11] The money extends to money in the lawyer's trust account,[12] so long as it was not deposited there for a particular purpose or which is subject to another valid claim.[13] The Court of Appeals has determined that where an attorney had obtained the proceeds of a personal injury settlement and placed them in a blocked account where his signature was required to access those funds, he had a retaining lien on the funds in the blocked account.[14]

D. Proceedings to Compel Delivery of Money or Papers.

RCW 60.40.020 provides:

> When an attorney refuses to deliver over money or papers, to a person from or for whom he has received them in the course of professional employment, whether in an action or not, he may be required by an order of the court in which an action, if any, was prosecuted, or if no action was prosecuted, then by order of any judge of a court of record, to do so within a specified time, or show cause why he should not be punished for a contempt.

One can see the 1863 handwriting in the statute – few details as far as procedure. The statute makes clear that the client has a remedy for return of his money or papers in the hands of the lawyer. The procedure is the archaic "show cause" process. Here is where the only remaining part of the lien statute comes in to play. RCW 60.40.030 provides:

> **Procedure when lien is claimed.** If, however, the attorney claim a lien, upon the money or papers, under the provisions of this chapter, the court or judge may: (1) Impose as a condition of making the order, that the client give security in a form and amount to be directed, to satisfy the lien, when determined in an

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[9] *In re Dungeness Timber Co.,* 50 F. Supp. 370,372 (W.D. WA, 1942).

[10] Prof. Rombauer conducts an erudite academic discussion about whether the lien under RCW 60.40.010 (2) is a charging or possessory lien at §4.26 of her treatise. She traces earlier case law that seemed to treat this as a charging lien and the impact of the Supreme Court's decision in *Ross v. Scannell,* 82 Wn. 2d 598, 647 P.2d 1004 (1982), where the court in dicta seemed to limit charging liens to liens on judgments only, under the then RCW 60.40.010(4). This issue seems a bit to picayune for the purposes of this presentation. The author treats subsection (1) and (2) liens as possessory liens.

[11] *Price v. Chambers,* 148 Wash. 170, 268 P. 143 (1928)

[12] *Crane Co. v. Paul,* 15 Wn. App. 212, 548 P.2d 337 (1976)

[13] Rombauer, *supra,* 27 Washington Practice at §4.26, p. 327.

[14] *Krein v. Nordstrom,* 80 Wn. App. 306, 908 P.2d 889 (1995).

action; (2) summarily to inquire into the facts on which the claim of a lien is founded, and determine the same; or (3) to refer it, and upon the report, determine the same as in other cases.

In attorney's lien foreclosures, the term "summary proceeding" is thrown around loosely. Nonetheless, the only place in the statute where any authority exists for a "summary proceeding" is as to the possessory lien. This statute is rather ambiguous. Sub§ (1) merely provides for other security to be posted, and the determination of the lien postponed to a later time. Sub§ (2) allows the court to summarily inquire, presumably into the validity of the lien, and "determine the same." Sub§ (3) makes reference to a "report," after "referring it" which may involve appointing a master or referee to make a factual determination back to the court. Unfortunately, no reported case addresses this.

Only a few cases interpret this subsection of the statute. The Supreme Court determined that this section does not apply to personal property delivered to an attorney as security for fees. *Golden v. Hyde,* 117 Wash. 677, 202 P. 272 (1921). The court may order attorney to deliver property to client or be held in contempt. *Buck v. Bailey,* 82 Wash. 398, 144 P. 533 (1914). The court may make summary investigation and determination when attorney refuses to deliver papers because of lien. *State ex rel. Trumbull v. Sachs,* 3 Wash. 371, 28 P. 540 (1891). In my attorney's lien practice, I have never had occasion to use this part of the lien statute.

E. To What does the Lien Attach?

Under the revised version of RPC 1.8(i) [formerly RPC 1.8(j)], the general rule is that lawyers are prohibited from acquiring a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for the client. However, the exception under RPC 1.8(i)(1) has been changed from liens "granted by law" to liens "authorized by law" to secure the lawyer's fee or expenses. The effect of this change is to permit liens acquired by contract with the client (in addition to liens authorized by statute and originating in the common law). *See* RPC 1.8 cmt. [16]; ABA Comm. on Prof'l Ethics and Grievances, Formal Op. 427 (2002).

Moreover, as discussed above, the scope of the statutory attorney's lien has been expanded by the amendment to RCW 60.40.010 in 2004. The lien can now be asserted, under RCW 60.40.010(1)(d), "[u]pon an action, including one pursued by arbitration or mediation, and its proceeds after the commencement thereof to the extent of the value of any services performed by the attorney in the action, or if the services were rendered under a special agreement, for the sum due under such agreement[.]" RCW 60.40.010(d) further states that the lien continues in "identifiable cash proceeds" as defined in RCW 62A.9A-315(b)(2), subject to rights of secured parties under Chapter 62A.9A RCW.

IV. ISSUES INVOLVING NOTICE

The original charging lien before the 2004 amendments provided a lien against "money in the hands of an adverse party." Although the statute does not clearly so state, most lawyers have considered this language as including the value of a ***claim*** against an adverse party which would eventually result in a fund against which the lien would attach. Prof Rombauer agrees:

> This subsection does not require that the client's money, in order to be subject to the lien, be literally in the hands of the adverse party. Essentially the lien attaches to the subject of the action, that is, the claim for money.

27 Washington Practice, §4.27 at p. 331. In addressing the language of the original subsection (1)(c), citing *Kern v. Chicago M & P.S. Ry.*, 201 Fed 404 (W.D. Wa 1912). Prof. Rombauer states,

> The subsection requires the attorney to give notice, to the adverse party, and expressly provides that the lien does not attach until that notice is given. Failure to give the required notice defeats a lien on money in the hands of the adverse party even if the plaintiff has contracted for such a lien.

Id, §4.27 at p.331. The 2004 amendments removed any question whether the attorney's lien attached to the underlying cause of action.

Obviously, in order to perfect the lien, the lawyer must give notice of the lien claim to the adverse party. Although the statute is silent regarding the manner and content of the notice, it should be in writing (although the statute does not so mandate) and at the very least, it **should** contain the lawyer's name, the name and address of the client, a statement that the lawyer performed legal services for the client, the basis for the fee (e.g., written fee agreement), the subject matter that is to be liened, the name and address of the stakeholder (the person holding the res or subject to which it attaches), the amount of the lien in dollar amount or descriptively, if possible (e.g., one-third of the last offer of settlement that the client has authorized the lawyer to accept), or *quantum meruit*, i.e. the reasonable value of the legal services), including costs advanced. The lawyer claiming the lien should have his or her signature on the claim of lien notarized.

The notice must be given to all interested parties and of course, the adverse party or stakeholder. If there is a lawsuit pending, it should be filed with the clerk, and notice served on all parties of record. Proof of service is essential.

V. ETHICAL LIMITATIONS ON THE USE OF ATTORNEY'S LIENS

The attorney's lien was originally intended to provide lawyers with means of security for unpaid fees. The lien statute provides attorneys with protections and security not existing at common law. The common law possessory lien probably did not afford much protection to the lawyer, since if the client was unable or unwilling to pay counsel's fees, he/she was unlikely to place valuable papers or money in the hands of the lawyer. The charging lien created not only those protections and security but the opportunity for lawyer mischief.

We lawyers are governed by the Rules of Professional Conduct. The Rules are disciplinary as well as establishing the minimum standard of conduct for lawyers in their civil relationships with clients. First and foremost, lawyers who breach ethical duties may lose all or part of their fees by the process of disgorgement or fee forfeiture. *Ross v. Scanell*, 97 Wn.2d 598, 647 P.2d 1004 (1982). Thus, if an attorney breaches a fiduciary duty to a client, such as by

renegotiating the fee agreement with the client after the initial retainer is agreed upon, without providing the client with a reasonable opportunity to seek the advice of independent counsel, the new agreement may be in breach of the attorney's fiduciary relationship to the client if the new agreement is more favorable to the lawyer. *See, e.g. Perez v. Pappas*, 98 Wn.2d 835, 659 P.2d 475 (1983); *Cotton v. Kronenberg*, 111 Wn. App. 258, 44 P.3d 878 (2002), *review denied,* 148 Wn.2d 1011 (2003). If an attorney enters into an engagement with a client with no clear fee arrangement, the lawyer cannot begin negotiating fee arrangements as the lawyer's efforts are nearing fruition. Creating a fee arrangement months or years after the fiduciary relationship takes effect, without affording the opportunity for independent counsel to the client, will void any later fee agreement and likely result in fee forfeiture or disgorgement. If it is determined that the fee is not earned, in whole or in part, the security of the lien will provide little solace. If an attorney withdraws on a contingency fee case, as a rule, he or she forfeits the fee, unless the withdrawal is "for good cause." *See Ausler v. Ramsey*, 73 Wn. App. 231, 868 P.2d 877 (1994). Nonetheless, in my practice, I actually see lawyers asserting attorney's liens where no fee may be owing.

Even more frequently is an attorney asserting a fee that is grossly excessive or is unearned. By the terms of the statute, the lien is limited "to the extent of the value of any services performed by the attorney in the action, . . ." The Supreme Court has observed, "As noted above RCW 60.40.010(4) is in derogation of the common law and therefore must be strictly construed. See *A.A.C. Corp. v. Reed,* 73 Wn.2d 612, 440 P.2d 465 (1968)." *Ross v. Scannell*, 97 Wn.2d 598, 605, 647 P.2d 1004 (1982). The assertion of an attorney's lien for an excessive amount, such as one third of the last offer of settlement made, before a lawyer is terminated, is a violation of RPC 8.4(c) and (d). The Bar is currently prosecuting disciplinary claims against a lawyer who asserted liens in several cases for fees that were excessive and unreasonable. In a recent case of mine, a terminated law firm asserted an attorney's lien claim for over $2.1 million in fees. At the trial of the attorney's lien/reasonableness determination, the trial court determined that the lien was more than double what was a reasonable fee. The Court held that the assertion of the excessive lien was a violation of RPC 8.4(c) and (d), a breach of fiduciary duty and with other fiduciary duty breaches found, the trial court forfeited some $400,000 in otherwise earned fees.

Lawyers may not hang on to the client file when they withdraw or are terminated, as security for the payment of fees, when to do so would harm the client's ongoing case. WSBA Formal Opinion #181 states, "A lawyer cannot exercise the right to assert a lien against files and papers when withholding those documents would materially interfere with the client's subsequent legal representation." Upon termination of the attorney-client relationship, a lawyer is obligated to "take such steps to the extent reasonably practicable to protect a client's interest. . ." RPC 1.16(d). The rule gives a number of examples. Seeking to harm the client's ongoing case under the guise of asserting a possessory lien against the file is both unlawful and unwise.

VI. HOW DOES THE STATUTE ADDRESS FORECLOSURE (OR NOT)

The entirety of the procedure for foreclosing attorney's liens is contained in the few lines of RCW 60.40.030. However, the section of the statute, often cited for the so-called "summary foreclosure" process to be used for charging liens, by its own express language, applies only to

the liens created by sub§§ (1)(a) and (b), papers and money in the hands of the lawyer. [15] In *Golden v. Hyde*, 117 Wash. 677, 680, 202 P. 272 (1921), the Court ruled:

> As we read it, the statute refers only to those moneys or papers which an attorney may receive in trust for his client, and has no reference to an article like a diamond stick pin which was delivered to the attorney not to be used in his client's interests, but as payment or security for his fees, especially where no fraud or overreaching is charged.

A recent case in the Court of Appeals so held. In *King County v. Seawest Investors*, 141 Wn. App. 304, 170 P.3d 53(2007), the court stated:

> Seawest further argues that *RCW 60.40.020* and *60.40.030* must be read together because prior to codification they were not separated into sections. Read together, the plain meaning of *section .030*--"If, however, the attorney claim[s] a lien, ***upon the money or papers*** ... the court or judge ..."--suggests that the procedures of *RCW 60.40.030* are limited to when an attorney claims a lien upon the "money or papers" of the client under *RCW 60.40.020*. [FN12] Thus, the words of these two sections indicate that the procedures of *RCW 60.40.030* are not available where the attorney claims a lien on something other than the money or papers of the client. In this case, that something is the judgment in the underlying condemnation proceeding. As *RCW 60.40.010(e)* indicates, a lien on a judgment is distinct from that on money or papers.

Sub§.030 provides that the court or judge is authorized "summarily to inquire into the facts on which the claim of a lien is founded, and determine the same," or "to refer it, and upon the report, to determine the same as in other cases." The language is archaic and unhelpful. If the court requires that the lawyer surrender papers or money of the client in his hands to the client, the court can impose an obligation on the client to provide security. *See* RCW 60.40.030(1).

In *Krein v. Nordstrom*, 80 Wn. App. 306, 908 P.2d 889 (1995), which involved the assertion of an attorney's lien against settlement funds in a personal injury lawsuit, the Court of Appeals affirmed a trial judge's decision to permit a half-day trial on the short calendar where the court entertained affidavits and some live testimony to resolve the lien claim. Expert testimony by declaration was permitted. This "summary process" was upheld as meeting the requirements of procedural due process and was affirmed. In all probability, the trial court will be upheld in whatever manner it allows the litigants to determine the validity of the lien, as long as each party has the opportunity to offer evidence and to be heard on the issue. Prof. Rombauer sees *Krein* as a case involving money in the hands of the attorney, where the signature of the lawyer here seeking fees was required to access the funds. See 27 Washington Practice at §4.22, p.323.

As for foreclosing charging liens, the statute is entirely silent. The statute gives virtually no guidance as to how the lien is to be foreclosed.

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[15] "If, however, the attorney claim a lien, ***upon the money or papers***, under the provisions of this chapter, the court or judge may . . ."

VII. SUGGESTIONS ON FORECLOSING (CHARGING) ATTORNEY'S LIENS

Obviously, a charging lien that cannot be foreclosed is essentially worthless. Nonetheless, charging liens do have real value, and are used frequently for security, although court foreclosures of charging liens are relatively rare. Where proper notice is given, the adverse party or stakeholder can ignore the lien at his or her peril. In a recent case, I sued three insurers who disregarded attorney's liens on the oral assurance of the opposing party that he would satisfy the liens out of the settlement funds. The newly enacted sub§(2) of RCW 60.40.010 provides that "Attorneys have the same right and power over actions to enforce their liens under subsection 1(d) of this section and over judgments to enforce their liens under subsection 1(e) of this subsection as their clients have for the amount due thereon." Obviously, the lawyer can pursue the stakeholder or the adverse party for their fees where the lien is disregarded.

So how should the foreclosure be accomplished? Most judges have never been through this process, and very few counsel have ever prosecuted a foreclosure against a cause of action, settlement or judgment. How formal and extensive a process you want should depend ultimately on the amount at stake. In cases where there are significant sums of money at stake, you do not want the process to be handled "quick and dirty." Where fees are in the six and seven figures, something like a real trial with discovery, expert testimony, motions, live testimony and cross-examination is essential. If the amount of fees is $50,000 or less, something less than a trial makes a lot of sense. I have tried six or more lien cases to judgment, three of which were treated like an actual trial. Others involved an evidentiary hearing with some limited discovery. One judge allowed only oral argument and the submission of affidavits, while a case I just settled recently would have allowed only oral argument and the presentation of evidence by declaration, but including expert testimony and the right to take depositions. Some judges would entertain lien foreclosures on a six day motion calendar. My view is that such would fall short of the requisite due process. At the very least, a client should have a real opportunity to examine and challenge the lawyer's claim for fees.

This issue actually came up in the *Seawest Investors* case mentioned above, in the context of a lien on a judgment. A large Seattle law firm represented a client in a condemnation proceeding and a judgment was entered for some $7.6 million. The client balked at paying the law firm its claimed fees and the law firm asserted a claim of lien in the amount of almost $325,000. The client conceded that only $85,000 was owed and the balance was placed in the registry of the court. The law firm sought to foreclose its lien by motion in the underlying cause. The clients objected and insisted that the lien dispute could only be determined in an action separate and apart from the condemnation proceeding. The appellate court correctly noted that none of the prior cases interpreting the lien statute addressed whether the foreclosure of a lien on a judgment could be done "summarily" under RCW 60.40.030. After ruling that the summary process of RCW 60.40.030 only applied where the claimed lien is asserted against money or property of the client in the hands of the lawyer, the court tackled the issue of what the hearing must consist of.

I quote from the opinion because at present, it contains the only real court guidance on how such a foreclosure of a charging lien should be conducted. The court opened with the following:

> Notwithstanding our conclusion in the prior portion of this opinion, there is still an unresolved question: whether the attorney lien statute requires the adjudication of an attorney lien against a judgment in a separate action. For the reasons that follow, we conclude that the statute does not require a separate action.
>
> Where an attorney lien is claimed against a judgment, the court has a right to determine all questions affecting the judgment in some form of proceeding. A proceeding to enforce a lien is an equitable proceeding. Courts have broad discretion when fashioning equitable remedies, and we review those remedies for an abuse of discretion. A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds. (Footnotes omitted)

Seawest Investors, supra, 141 Wn. App. at 314. The Court concluded that the process utilized by the trial court, described in the opinion, was sufficient:

> Like the version of Washington's statute that existed when *Angeles Brewing* was decided, the current version of the statute does not set out a procedure for adjudicating a lien against a judgment. Although the 2004 amendments mention an action to enforce a lien on a judgment in *RCW 60.40.010(2)*, the statute does not set out a procedure for enforcement. Significantly, the statute does not require that such an action be separate from the underlying proceeding. Thus, it places the question of how to properly adjudicate the lien with the court, requiring it to fashion some "form of proceeding by which the matters might be properly adjudicated." Cases since *Angeles Brewing* have cited this principle with approval. Thus, we conclude that the trial court here was authorized to fashion an appropriate remedy, which it did.
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> The trial court's decision to adjudicate the attorney's lien by the evidentiary hearing in this case was a tenable choice. Here, the only persons asserting interests in the judgment were before the court. The parties had three months, which was ample time, to conduct discovery and otherwise prepare for the evidentiary hearing. Finally, the hearing gave them ample opportunity to present evidence, bring counterclaims, and argue their theories of the dispute. In short, Seawest was given an opportunity to contest the lien asserted by Graham & Dunn by raising whatever issues it chose to raise. While it now complains on appeal that it did not assert Consumer Protection Act, *chapter 19.86 RCW*, and other claims that it would have, there is nothing in the record to support the conclusion that it was denied the opportunity to assert such claims at the hearing.
>
> At the same hearing, the trial court also determined that the written fee agreement was enforceable and that the fees were reasonable. In *Krein*, this court considered whether the lack of a full adversarial hearing in adjudicating an attorney's lien was error. We held that considering the fee involved, the statutory requirements, and the hearing actually held, that the procedure comported with due process. The procedure followed here also fully complies with due process.

Seawest Investors, supra, 141 Wn. App. at 315-316.

There must clearly be an adversarial process. The *Seawest* court spoke approvingly of its earlier decision in *Krein* and seemed to judge the amount of due process to be afforded to be proportional to the amount at stake. The fee in *Krein* was small while the fee in *Seawest* was around $325,000. The *Seawest* court identified some discovery as appropriate, and even seemed to countenance counterclaims, even ones involving the Consumer Protection Act. While I question the legal basis for this latter comment by the court about "counterclaims," the appellate court came down on the side of the trial court's sound discretion in allowing a meaningful adversarial evidentiary hearing with live testimony, discovery, cross-examination and presumably the right to expert testimony.

VIII. WHERE DOES THE BANKRUPTCY COURT FIT IN?

A. Generally.

Since this is a Bankruptcy seminar, there is presumably some curiosity as to how attorney's liens operate in Bankruptcy Court and what the jurisdiction of the court is. With the filing of a petition for Bankruptcy, a debtor can stay activities to collect debt in State Court and vest the Bankruptcy Court with jurisdiction to deal with the debtor's assets and liabilities. Before the Bankruptcy filing, a creditor lawyer could certainly have asserted a claim of attorney's lien against an asset of the bankrupt-to-be. I am unaware of any law that would prevent the Court in Bankruptcy from adjudicating the rights of the liening lawyer in Bankruptcy court, any more than there would be obstacles to enforcing rights in a mortgage, deed of trust or a lien by judgment in Bankruptcy Court. In fact, the filing of attorney's liens in Federal court by a former lawyer seeking to get paid, is not uncommon and it is certainly possible that the debtor's lawyer who filed the petition might file and serve a claim of lien in the Bankruptcy court for services rendered in the Bankruptcy. Presumably, the Court in Bankruptcy would treat the lien as any other lien and litigate the validity and value of the lien as would any state court judge, if necessary.

B. Attorney's Lien may not be Asserted Against Real Property

The lien statute does not grant any rights against real property of the client or other assets of the client. *Ross v. Scannell,* 97 Wn.2d 598, 647 P.2d 1004 (1982). The 2004 amendments do not change this rule. The Supreme Court has held that violation of the established rule that attorneys may not file liens on real property under RCW 60.40.010 constitutes "a violation of practice norms 'prejudicial to the administration of justice' under RPC 8.4(d)." *In re Disciplinary Proceeding Against Vanderbeek,* 153 Wn.2d 64, 88, 101 P.3d 88 (2004).

IX. CONCLUSIONS

Attorney's liens will continue to play an important part in the process of insuring just compensation for lawyers. They will afford opportunities for lawyers to engage in mischief at

the clients' expense, and will undoubtedly serve as a fertile ground for lawyer discipline, both by the Bar and by courts in fee disputes. With the increasing assertiveness and litigiousness of clients and the inexorable process of more regulation of the profession by the Bar, lawyer-client litigation over fees is likely to increase and the attorney's lien will probably play an important part in that process.

This statute, in largely the same form now as it was when it was enacted 145 years ago, is an anachronism whose need for re-writing is long past due. There are more unanswered questions about attorney's liens, their application, assertion and determination than clear answers. If the statute is not repealed and entirely re–worked, it will probably take another 50 years before the process of using and foreclosing these liens will be modestly clear and straightforward. Some things are clear, nonetheless. The statute contains clear limitations in its application which must be studied. The requirements of notice must be given if the liens are to be perfected. As a creature of statute, the statute will be strictly construed. Procedural failings will derail the lawyer's efforts to get paid. And the discretion of trial judges to fashion procedures for the determination of the lien disputes will be like be upheld, so long as there is a minimal level of due process. Nonetheless, for the average practitioner, the process will undoubtedly be overshadowed with uncertainty for a long time into the future.