Attorney Liens in Washington:

ATTACHMENT, NOTICE, FORECLOSURE AND ETHICAL CONSIDERATIONS

A Presentation to the Washington State Bar Association
Creditor Debtor Section
Liens: What You Need to Know Today

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I. INTRODUCTION

The attorney's lien derives from a statute passed by the Territorial Legislature in 1863 and codified into the Territory's first legal code in 1881. It is very poorly-worded, very incomplete and sports a jurisprudence that seems unrelated to most other liens. The statute has apparently been amended only one time in its 149 year history, 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 it now provides the lawyer with 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 realization on the charging (non-possessory) lien is accomplished.

There is very little scholarly writing on this statute. Only a couple dozen appellate annotations exist for a law dating back 147 years. The cases afford only slight guidance in terms of the foreclosure process. This paper will serve to get the reader started with the attorney's lien statute and its use. 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.

While the 2004 amendments to the lien statute were not intended in any way to clean up the weaknesses in the ancient statute but rather to attempt to avoid double taxation of fee shifting attorney's fee awards, the 2004 amendments are important in several ways. They give the lawyer's lien priority over other liens; they make clear the lawyer has a property interest in the client's cause of action or judgment; and they give the lawyer the right to enforce the lien against covered assets to the same extent as the client. Any lawyer considering asserting a lien or seeking to avoid a lien must read the statute carefully.

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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.]

II. LIEN TERMINOLOGY

The literature, treatises and case law on lawyer's liens uses various terminology not actually contained in the statute. Common terms that relate to liens in general like vested, perfected, attaches, priority, foreclosure and the like are frequently used in literature, but are not found in the statute. These terms often refer to specific aspects of whether a lien exists, to what it applies to, how it is legally brought to fruition and the like. Their use can be misleading and confusing. I frequently use the term foreclosure of a lien. Most people know what that means generally, including judges. One disgruntled party recently seized on the label as being evidence that an effort to realize on an attorney's lien in state court after a lifting the stay in so way violated the court's order lifting the stay – the term used should have been "determined," not "foreclosed." With a statute as poorly written as this one, language can be a problem.

III. WHAT DOES THE ATTORNEY'S LIEN APPLY TO

A. Creation of the Attorney's Lien – the Lien Statute as Amended.

RCW 60.40.010 provides the subject matter for attorney's liens. There are two kinds of attorney's liens, possessory and charging. This portion of the statute creating the basis for attorney's liens 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.

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

B. The Charging Lien.

The charging lien is created in RCW 60.40.010 sub§§ (1) (c) through (e). This is the lien with the potentially greatest impact for lawyers, and of interest to those with Bankruptcy or creditor-debtor issues. The lawyer terminated by his or her client 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. There are also charging liens under sub§§ (1)(d) and (e) against "actions" and a judgment."

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.

C. The Possessory Lien.

The possessory lien is created by RCW 60.40.010 (1)(a) & (b). Sub§(a) 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," [2] certificates of stock and other corporate papers,[3] books , papers and documents,[4] and negotiable instruments. [5] Sub§ (1)(b) of the first section addresses "money in the attorney's hands belonging to the client."

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.[6] The money need not come into the hands of the lawyer in his professional capacity,

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

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.[7] The money extends to money in the lawyer's trust account,[8] so long as it was not deposited there for a particular purpose or which is subject to another valid claim.[9] 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.[10]

Since the lien is a possessory one, a codification of the common law possessory lien, one must continue to retain possession for the lien to remain in existence. Surrender of the papers or money to the client or a third party is a relinquishment of the lien.[11] Mere agreement to surrender the papers or instruments is a relinquishment of the possessory lien.[12] However, where a lawyer 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.[13]

An issue has arisen in some cases on whether a lawyer can foreclose a possessory lien on money of the client in the lawyer's hands. In a recent case, an attorney asserted an attorney's lien for work done in a dissolution of marriage case. I*n re Marriage of Glick*, 154 Wn. App. 729, 230 P.3d 167 (2009). The lawyer sought to foreclose her lien purportedly against money of the client in the lawyer's hands, and "against a judgment, under RCW 60.40.010(1)(e). The trial court foreclosed the lien and gave the lawyer a judgment against the client. Division II reversed the judgment in favor of the lawyer. On the validity of such a foreclosure, Division II said this:

> McIlwain's attorney lien notice alleged that it was based in part on Glick's papers and money in her possession. As already indicated, these liens are passive and generally not enforceable unless the client seeks the return of property in the attorney's possession. [7] In any event, McIlwain never identified any of Glick's money remaining in her possession. Similarly, although McIlwain also claimed a lien " '[u]pon a judgment,' " she never identified any judgment to which an attorney lien could lawfully attach.

The Court also offered this dicta:

> Under chapter 60.40 RCW, Washington's attorney lien statute, an attorney has a lien for compensation upon the client's papers and money that have come into the attorney's possession. [2] Our Supreme Court has noted that these provisions are

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60.40.010(4). This issue seems a bit to picayune for the purposes of this presentation. The author treats subsection (1)(a) and (b) liens as possessory liens.

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

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

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

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

[11] *Gottstein v. Harrington, supra.*

[12] *Jensen v. Kohler*, 93 Wash. 8, 159 P. 978 (1916).

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

> based on the common law retaining lien. Because such liens are possessory and passive, they are generally not enforceable by foreclosure and sale. (Citing *Ross v. Scannell, supra*)

The *Ross* dicta that *McIlwain* refers to is this:

> The statute in part is merely declaratory of the general or retaining lien recognized at common law. This possessory and passive lien gives an attorney the right to retain papers and documents which come into the attorney's possession during the course of his professional employment. It is a possessory and passive lien and is not enforceable by foreclosure and sale. See Gottstein v. Harrington, 25 Wash. 508, 65 P. 753 (1901); Stevens, Our Inadequate Attorney's Lien Statutes--a Suggestion, 31 Wash. L. Rev. 1 (1956).

Ross, supra, 94 Wn.2d at 604. That it is dicta is clear because the Supreme Court in Ross ruled that this was a charging lien, and it could not charge real property. The dicta in both cases is problematic. Even if the rule was correct in 1901, under existing interpretations of possessory liens elsewhere, it is bad policy today. If a client who has entrusted money to the lawyer, and then fails or refuses to pay attorney's fees due, the lien against the client's money in the lawyer's had should be capable of being foreclosed as a charging lien. In fact, I have successfully done so. This is another task for the legislative redrafting of the lien statute.

IV. ASSERTING ATTORNEY'S LIENS; NOTICE AND FORMAT OF NOTICE

A. Is Notice actually Required?

It would seem that the hallmark of an attorney's lien would be the giving of notice of the claiming of the lien, to both the client against whom it is asserted and to the stakeholder or opponent who holds the assets liened. Without notice, how would the client against whom the lien is asserted know of the lien? How would the stakeholder – i.e. the adverse party in whose hands the money is held, against whom the action lies, and in the case of judgments, against whom the judgment is taken, even know of the obligation to hold funds subject to the lien? In addressing the language of the original subsection (1)(c) ("money in the hands of an adverse party") , 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. Clearly, RCW 60.40.010(1)(e)(liens on judgments) requires a very specific

form of notice, the filing of the lien with the clerk.[14]

B. Subsection (1)(d) Liens – No Notice Seems Required.

Notice however, that the new section added in the 2004 amendments, sub§ (1)(d)(liens upon an action . . ., etc) does not contain the word "notice" anywhere. For years, wise practitioners would always give notice to the client and to the adverse party where there was an action pending, even before the statute made reference to liens against a client's "action." Division I recently decided a case, *Smith v. Moran and Windes*, 145 Wn. App. 459, 471, 187 P.3d 275 (2008) where the court stated:

> We note further that the lien that Moran claims does not require any affirmative acts other than commencing the lawsuit. Unlike *subsection (1)(e)* that requires filing of a notice with the clerk of the court where a lien against a judgment is sought, **no such notice is required by *subsection (1)(d)***, establishing a lien against an action and its proceeds.

This may be dicta since the opponent did not challenge the lien on that basis. Nonetheless, it is hard to believe that the legislature has wiped out the element of notice for this portion of the statute, but that is the way the recently-amended statute appears to read.

C. How is Notice Given; What Should it Consist of?

Again, the lien statute, even as recently amended, offers practitioners not a clue on how notice is given [(other than in sub§(1)(e) (on a judgment)] or what the notice should contain. Where notice is required, 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, common sense dictates that it should be in writing (although the statute does not so mandate) and at the very least, and the notice should be given to the client whose fees owing are to be secured by the lien.

What should the notice contain? Again, the statute provides no guidance, but it **should** contain the liening 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.

D. How Should the Notice be Served?

The statute is silent on how notice is given or served. Nonetheless, it is imperative that the client and the stakeholder at least receive actual notice. Personal service is not required but is

[14] While lawyers routinely file claims of lien with the clerk and there is no harm in doing so, only a lien on a judgment must be so filed.

certainly sufficient. Mailing of the notice is adequate so long as the fact of mailing can be proved. Registered or certified mail is appropriate. The notice should be given to all interested parties and of course, the adverse party or stakeholder. Proof of service is essential if the goal is to make the lien enforceable, although it seems that any means of service that creates actual notice is acceptable.

E. Filing the Notice?

Except in liens on a judgment, the statute does not require the filing of the notice with the clerk. Indeed, in the case of sub§(1)(c) liens (money in the hands of an adverse party, there is no action pending so there is no clerk with whom the notice can be filed. In the case of a sub§(1)(d) lien, notice is not required but it is in my opinion advisable. There is no harm at all in filing with the clerk and filing proof of service. In the case of a sub§(1)(e) lien on a judgment, filing is absolutely mandatory.

F. Do not File the Notice of Claim of Lien with an Auditor's or Recorder's Office!

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). Recording against a particular piece of real property belonging to the client constitutes a slander of title. The Supreme Court has stated, "The dangers of allowing attorneys to file liens for unadjudicated, unliquidated claims thus clouding title are especially clear in the instant case." *Ross v. Scannell, supra* at 607. There is no rule relating to attorney's liens than this – attorney's liens asserted directly against real property are unlawful and unethical.

V. FORECLOSURE OR REALIZING ON THE LIEN

A. The Statute Barely Addresses "Foreclosure" or Realizing on an Attorney's Lien.

If one carefully reads the entire statute, very little addresses how one realizes on the lien. RCW 60.40.030 in very ambiguous form provides several ways to resolve a possessory lien. No where does the statute address how a charging lien is realized upon, and the word foreclosure is not mentioned in the statute. The case law does provide some guidance and skilled judges have no problems formulating a process.

B. 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 – very 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 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, this section is the only place in the statute where any authority exists for a "summary proceeding." This statutory section is limited to the possessory lien. The lien statute is rather ambiguous in its wording. 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 (here a diamond stick pin) delivered to an attorney as security for fees. *Golden v. Hyde,* 117 Wash. 677, 202 P. 272 (1921). The court may order the attorney to deliver property to client or be held in contempt. *Buck v. Bailey,* 82 Wash. 398, 144 P. 533 (1914). This section only applies to money or papers of the client entrusted by the client to the lawyer. 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.

Remember – this part of the statute relates only to possessory liens on money or papers in the lawyer's hands – **it does not apply to charging liens**.

C. To What does the Charging 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.

D. The Remainder of the Statute as Amended in 2004

Important provisions relating to the charging lien were added in the 2004 amendments:

> (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.
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> (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.
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> (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.
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> (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*.

E. How Does the Lien Statute Address Foreclosure (or Not)

1. What the Statute does Provide regarding Foreclosure?

The entirety of the procedure for foreclosing **any** 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 possessory liens created by sub§§ (1)(a) and (b), upon papers and money in the hands of the lawyer. [15] 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*. 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.[16]

2. What the Statute does not Provide.

As for foreclosing charging liens, the statute is entirely silent. However, we cannot allow the vacuum of no remedy to stand where there is a clear statutory right created. The appellate courts have stepped forward where the legislature has slept. 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. This is debatable.

F. Suggestions on Foreclosing Charging Attorney's Liens

Obviously, a charging lien that cannot be foreclosed is essentially worthless. The law abhors a vacuum. The courts fashion remedies. 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 and failed to do so. The

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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 . . ."

[16] Nonetheless, the court did allow a "summary" form of foreclosure process in the case of charging liens. See the discussion of *Seawest Investors* below.

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. A stakeholder aware of the lien claim ignores it at his peril yet no case law supports these obvious conclusions.

So how should the foreclosure be accomplished? Many 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 as the foreclosing counsel should want depends 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 may be desired. 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 attorney 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 one case allowed only oral argument and the presentation of evidence by declaration, but included expert testimony and the right to take a few depositions. Some judges would entertain lien foreclosures on a six day motion calendar, solely on paperwork. My view is that such would fall short of the requisite due process in cases where there is a large sum at stake. 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 only that $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 foreclosure hearing must consist of. I quote at length from the opinion because at present, other than *Krein* discussed above, it contains the only real court guidance on how such a foreclosure of a charging lien should be conducted. The *Seawest* 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:

> 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 clearly must 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 substantial. 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.

VI. WHERE DOES THE ATTORNEY'S LIEN FIT INTO BANKRUPTCY COURT?

Bankruptcy can often be the 800 pound gorilla in the room, particularly for non-bankruptcy lawyers like me. Presumably, many attendees either deal in bankruptcy as part of their practice or will do soon, so there should be 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 any

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, although recently, a local Federal trial judge simply declined to foreclose an attorney's lien in Federal court, which forced the law firm to file suit in state court. 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.

Nonetheless, there is authority in the Bankruptcy Code for lifting the stay in bankruptcy for the realization upon pre-petition security and this certainly would apply to the attorney's lien. Indeed, I recently was successful in lifting the stay to pursue the foreclosure of an attorneys' lien in superior court. Nonetheless, the Bankruptcy court would seem to have jurisdiction to decide the validity of the lien and to foreclosure the lien and award funds based on it.

Attorney's liens are of the "first in time, first in right" variety. *Spokane Security v. Bevan*, 172 Wash. 418, 20 P.2d 31 (1933); *Barney v. Kreider*, 32 Wn. App. 904, 650 P.2d 1130 (1982). As a rule, lien rights are determined according to state law. Accordingly, a Bankruptcy court should accord lien priorities according to state law. Consult your favorite Bankruptcy pro for further details.

VII. 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 also the opportunity for lawyer mischief.

As lawyers, we 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). This is very uncommon and forfeiture/disgorgement of fees for breach of fiduciary duty requires extremely serious ethical wrongs, usually (but not always) accompanied by pecuniary loss. 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 the situation where an attorney is 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) (the pre-2004 statute) 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, may be determined to be a violation of RPC 8.4(c) and (d). The Bar has recently disbarred a lawyer for many ethical wrongs, one of which was the assertion of attorney's 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.

In a recent disciplinary decision, the Supreme Court disbarred an attorney for demanding additional attorney's fees in a flat fee case, the asserting an attorney's lien, where the client refused to accept a settlement insisted on by the lawyer. The court found this conduct violated RPC 1.5(a), 8.4(a) and 8.4(c). *In re Marshall*, 167 Wn.2d 51, 217 P.3d 291 (2009). In another disciplinary case, *In re Stansfield*, 164 Wn.2d 108, 187 P.3d 254 (2008), a lawyer was disciplined in part for claiming attorney's fees in a case where he had not been retained and compounded his wrong by asserting an attorney's lien for those fees, which lien delayed payment of a settlement to the client.

And remember – do not assert an attorney's lien directly against real property of the client, whether or not your efforts brought about the client's recovery of the property in the very case you were litigating for the client. That is the fastest route to bar discipline and fee forfeiture/.disgorgement I know.

VIII. CONCLUSIONS

Attorney's liens will continue to play an important part in the process of insuring just compensation for lawyers. They will also afford opportunities for lawyers to engage in mischief at their 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 expanding litigation. It is important for lawyers to use the lien process wisely and according to the law (to the extent it is clear), in order to realize all fees to which the lawyer is entitled and to avoid ethical accusations by clients over the claimed misuse of attorney's liens.

The Washington attorney's lien statute, in largely the same form now as it was when it was enacted 147 years ago, is an anachronism whose need for re-writing is long past due. The supplemental materials that accompany these materials discuss current plans to redraft the attorney's lien statute for legislative action. In the lien statute, 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 as a result of the development of common law.

Some things are clear, nonetheless. The statute contains clear limitations in its application which must be studied. The requirements of notice (in most situations) must be given if the liens are to be perfected. As a creature of statute, the attorney's lien will be strictly construed. Procedural failings may 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.