Attorney Charging Liens: A Primer

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Your client stands to make a lot of money as the result of your able assistance. The client (or the client's creditors), however, might be interested in further increasing that recovery by eliminating an associated cost – your fees. What's a lawyer to do?

In virtually all states, attorneys can protect themselves in such circumstances by asserting a charging lien, ensuring that their fees are paid out of the recovery obtained through their efforts. Charging liens arise out a recognition that a lawyer is entitled to benefit from a judgment obtained as the result of the lawyer's services. *See, e.g., Len-Hal Realty, Inc. v. Wintter & Cummings*, 689 So.2d 1191 (Fla. Dist. Ct. App. 1997). They also frequently provide an expeditious way of resolving claims for unpaid fees. As set forth below, however, effectively employing charging liens typically requires some planning and such liens are subject to important restrictions as a matter of both law and legal ethics – and, to complicate matters, the rules governing exactly how charging liens are imposed and executed vary dramatically between jurisdictions.

I. What We Talk About When We Talk About Charging Liens

An attorney's right to assert a lien against client property to ensure payment of professional fees has been recognized at common-law since the early eighteenth century. *See, e.g., Everett, Clarke & Benedict v. Alpha Portland Cement Co.*, 225 F. 931, 935 (2d Cir. 1915) (summarizing history of attorney liens). In most states, this right is now embodied in statutes. (Appendix A to this article provides a listing of such statutes and, for jurisdictions in which charging liens are a matter of common law, identification of leading cases addressing the common-law right.) While the term "attorney's lien" is sometimes generically used to describe an attorney's right to use client property to secure payment, such liens fall into two distinct categories: retaining liens and charging liens.

The attorney retaining lien is exactly what it sounds like – a right by the attorney to retain property belonging to the client, but in the possession of the attorney, until amounts due to the attorney are paid. Retaining liens are "possessory" liens – they apply to any property in the lawyer's possession, including not only money, but papers and

other documents that may have been entrusted to the lawyer in the course of his employment. These are sometimes described as "passive" liens, since enforcement of retaining liens does not require the attorney to take any action (such as filing court papers) to be effective. The attorney simply refuses to return the client's property until the amounts due are paid; indeed, once the property is returned to the client, the lien vanishes. The monetary value of the property retained is also generally irrelevant – the only value that matters is the value to the client, since the retained property is effectively held hostage until payment is received. *See generally, Brauer v. Hotel Associates, Inc.,* 40 N.J. 415, 422, 192 A.2d 831, 835 (1963) (describing general characteristics of retaining liens and noting that "intrinsic worth or worthlessness" of property retained is immaterial). Perhaps for that reason, retaining liens are sometimes the subject of special ethical scrutiny, with some jurisdictions holding that a lawyer's obligation to take no action prejudicial to the client's interest either limits or eliminates entirely a lawyer's right to assert a retaining lien over client property. *See, e.g., Defendant A v. Idaho State Bar*, 2 P.3d 147 (Idaho 2000); *Ferguson v. State*, 773 N.E.2d 877 (Ind. Ct. App. 2002); Minn. Stat. Ann. Section 481.13, Louisiana Rule of Prof'l Conduct 1.16(d)); North Dakota Rule of Prof'l Conduct 1.19(a); New Jersey Rule of Prof'l Conduct 1.16(d) (2013 amendment).

While sometimes referred to by the same name (and in many instances authorized by the same state statutes), charging liens differ dramatically from their "retaining" cousins. The essential distinction between charging liens and retaining liens arises from the property to which they apply. While retaining liens apply to property belonging to the client but in the possession of the attorney, charging liens address amounts that the client *will* obtain as the result of a judgment or settlement. As a result, charging liens are not passive – to be effective, they require some affirmative action by the attorney, including notice to relevant parties and court enforcement of some kind. Moreover, charging liens generally do not apply to *any* money due a client, but only to judgments or similar rights of recovery obtained with the lawyer's assistance. Finally, charging liens

afford rights to recover, not merely from the client, but from third parties who disregard the attorney's rights to payment.

II. Essential Features: A Massachusetts Model and Multiple Modifications

While charging liens protect an attorney's right to compensation by providing a right in some payment or property due the client, the statutory and common-law descriptions of charging liens differ from state to state. Accordingly, any accurate description of charging liens needs not just to employ terms like "usually" and "generally" but to do so frequently. To provide a better picture of how charging liens work, however, it makes sense to have an example, and a simple one is provided by the Massachusetts charging lien statute:

> From the authorized commencement of an action, counterclaim or other proceeding in any court, or appearance in any proceeding before any state or federal department, board or commission, the attorney who appears for a client in such proceeding shall have a lien for his reasonable fees and expenses upon his client's cause of action, counterclaim or claim, upon the judgment, decree or other order in his client's favor entered or made in such proceeding, and upon the proceeds derived therefrom. Upon request of the client or of the attorney, the court in which the proceeding is pending or, if the proceeding is not pending in a court, the superior court, may determine and enforce the lien; provided, that the provisions of this sentence shall not apply to any case where the method of the determination of attorneys' fees is otherwise expressly provided by statute.

Mass. Gen. Laws Ann. ch. 221, § 50 (West).

A. The Fees Protected

Most basically, the Massachusetts statute provides that the attorney will have a lien "for his reasonable fees and expenses." The reference to "reasonable" fees and expenses hardly qualifies as a limitation, since virtually every jurisdiction prohibits unreasonable fee claims. *See, e.g.,* ABA Model Rule of Prof. Conduct R. 1.5(a) ("A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses.") In most jurisdictions, however, fees can be the subject of a charging lien irrespective of whether they are calculated on an hourly or contingent basis. *See, e.g., Fletcher v. Davis,* 33 Cal. 4th 61, 66, 90 P.3d 1216, 1219 (2004); *D'Urso v. Lyons*, 97 Conn. App. 253, 257, 903 A.2d 697, 700 (2006); *but see*

Wilson v. Wilson, 183 N.C. App. 267, 272, 644 S.E.2d 379, 383 (2007) (noting that North Carolina law generally limits lien to contingent recoveries); *Shenango Sys. Sols., Inc. v. Micros-Sys., Inc.*, 2005 PA Super 370, ¶ 11, 887 A.2d 772, 775 (2005) (questioning whether charging lien could be arise absent agreement to pay out of recovery); *Sinclair, Louis, Siegel, Heath, Nussbaum & Zavertnik, P.A. v. Baucom*, 428 So. 2d 1383, 1385 (Fla. 1983) (noting that Florida common law liens require "an understanding, express or implied, between the parties that the payment is either dependent upon recovery or that payment will come from the recovery")

The lien generally protects only those fees incurred in the "proceeding" in which the lawyer appeared and which generated the recovery to which the lien attaches. *See Boswell v. Zephyr Lines, Inc*., 414 Mass. 241, 248, 606 N.E.2d 1336, 1341 (1993) (noting that liens intended to prevent a client "from receiving the fruits of recoveries without paying for the valuable services by which the recoveries were obtained."); *see also Recht v. Urban Redevelopment Auth. of City of Clairton*, 402 Pa. 599, 608, 168 A.2d 134, 139 (1961); *Mitchell v. Coleman,* 868 So. 2d 639, 641 (Fla. Dist. Ct. App. 2004) ("It is not enough to support the imposition of a charging lien that an attorney has provided his services; the services must, in addition, produce a positive judgment or settlement for the client, since the lien will attach only to the tangible fruits of the services"); *Chadbourne & Parke, LLP v. AB Recur Finans*, 18 A.D.3d 222, 223, 794 N.Y.S.2d 349, 351 (2005) (charging lien "enforceable only against the fund created in that action"). This also underscores one of the principal limitations of charging liens: they can be invoked only when the attorney's work generates a fund from which fees can be extracted and do not arise in cases where an attorney provides an effective defense or otherwise generates a savings. *See, e.g., Goldstein, Goldman, Kessler & Underberg v. 4000 East River Road Associates*, 409 N.Y.S.2d 886 (N.Y. App. Div. 1978) (future tax savings from successful challenge to assessment were not "proceeds" to which charging lien could attach).

B. When the Lien Arises and What The Lien Covers

The Massachusetts statute provides that the charging lien arises "from the authorized commencement of an action, counterclaim or other proceeding. . ." and

constitutes a lien upon the client's "cause of action, counterclaim, or claim, upon the judgment decree or other order in his client's favor entered or made or such proceeding, and upon the proceeds derived therefrom." These features are, again, relatively common but point to some significant differences between modern statutory charging liens and those that arose traditionally at common law.

Historically, a charging lien attached to judgments rendered in favor of the client. Indeed, at least one state, Indiana, still limits statutory charging liens to judgments entered by a court. *See* Ind. Code Ann. § 33-43-4-1 (West); *see also State Farm Mut. Auto. Ins. Co. v. Ken Nunn Law Office*, 977 N.E.2d 971, 975-76 (Ind. Ct. App. 2012) (noting that Indiana strictly enforces "judgment" requirement for statutory liens, but that lawyer may seek an equitable lien independently of the statute). The problem with a judgment requirement is obvious: most cases settle prior to a judgment being entered. Unless a charging lien arises prior to the entry of judgment, it will therefore be of extremely limited use (and could potentially create incentives for lawyers to avoid settling cases).

To avoid this result, most charging lien statutes and cases establishing charging liens in common-law states provide that a lien will arise earlier in the litigation process and protect the lawyer's interest, not merely in a judgment, but in the action more generally. So, under the Massachusetts statute, the lien arises upon "authorized commencement of an action, counterclaim or other proceeding" and covers not merely the judgment and its proceeds, but "the cause of action, counterclaim, or claim." *See also, e.g.,* Idaho Code Ann. § 3-205 (West); Mo. Ann. Stat. § 484.130 (West); N.H. Rev. Stat. Ann. § 311:13; N.Y. Judiciary Law § 475 (McKinney) (employing similar formulations). To this many jurisdictions add language specifically noting that the lien cannot be destroyed by a subsequent settlement. *See, e.g. in addition to the statutes cited above,* Haw. Rev. Stat. Ann. § 507-81(g-h) (West).

Even those formulations, however, leave a lawyer at risk. If the lawyer is successful in resolving the client's claim *prior* to filing suit, no lien will arise and the lawyer's claim to fees will be unsecured. To address this problem, jurisdictions

sometimes tie the lien to the time when the lawyer beings work or is retained. In Illinois, for example, the charging lien is imposed on "all claims, demands and causes of action, including all claims for unliquidated damages, *which may be placed in their hands by their clients* for suit or collection, or upon which suit or action has been instituted. . ." 770 ILCS 5/1; *see also* Ky. Rev. Stat. Ann. § 376.460 (West) (similarly applying "claims" formulation without reference to suit being filed). More commonly, however, jurisdictions attach the lien to the actual funds held by the adverse party after the adverse party is furnished with written notice of the lien. *See* Alaska Stat. Ann. § 34.35.430(a)(3) (West) (imposing lien "upon money in the possession of the adverse party in an action or proceeding in which the attorney is employed, from the giving of notice of the lien to that party"); *see also, e.g.,* Iowa Code Ann. § 602.10116 (West); Kan. Stat. Ann. § 7-108 (West); S.D. Codified Laws § 16-18-21. As will be discussed in further detail below, the notice requirement is not unique to such statutes – like any lien, charging liens are effective only against those with actual or constructive notice of them. Under such statutes, however, the full protection provided by the lien will only arise once the required notice is provided.

C. Who is Protected by the Lien

In keeping with the general understanding that charging liens protect the interests an attorney who has generated a recovery, the Massachusetts statue provides that a charging lien is provided to "the attorney who appears for a client in [a] proceeding." In Massachusetts, the requirement that the lawyer "appear for a client" is understood to apply not only to lawyers who have filed a notice of appearance in accord with local practice but also to those who have signed pleadings or motions. *Boswell v. Zephyr Lines, Inc.*, 414 Mass. 241, 249, 606 N.E.2d 1336, 1341 (1993). Merely doing work for the client, however, may not be enough. In New York, for example, a statutory grant of a lien to an attorney "who appears for a party" is expressly reserved to attorneys who are "of record" irrespective of whether they otherwise express an interest in the litigation or have assisted in preparing papers. *Rodriguez v. City of N.Y.,* 66 N.Y.2d 825, 827–28, 489 N.E.2d 238, 240 (1985). Moreover, because an attorney asserting a charging lien must

have a right to seek payment from the client, law firm associates generally cannot assert a charging lien on their own behalf. *See, e.g., Boswell,* 414 Mass. at 249, 606 N.E.2d at 1342.

The protections of attorney's liens also typically extend to attorneys who previously represented the client, so long as the lawyer has contributed to the recovery and has otherwise taken necessary steps to perfect the lien. *See, e.g., Rudd v. Rudd, 960 So. 2d 885, 888* (Fla. Dist. Ct. App. 2007) ("Charging liens filed during the pendency of a proceeding may be filed before or after an attorney's withdrawal in that proceeding"); *Artache v. Goldin*, 173 A.D.2d 667, 667, 570 N.Y.S.2d 238, 239 (1991); *Rangel v. Save Mart, Inc.*, 140 N.M. 395, 401, 142 P.3d 983, 989, *as revised* (Sept. 25, 2006). This typically includes *quantum meruit* claims made by attorneys previously working under contingency fee arrangements. *See, e.g., Searcy, Denney, Scarola, Barnhart & Shipley, P.A. v. Poletz,* 652 So. 2d 366, 367 (Fla. 1995); *Fire Prot. Res., Inc. v. Johnson Fire Prot. Co.*, 72 Ohio App. 3d 205, 594 N.E.2d 146 (1991). Because charging liens are equitable remedies, however, courts may not recognize them if the attorney either abandons the matter or is discharged for cause or misconduct. *See Klein v. Eubank*, 87 N.Y.2d 459, 464, 663 N.E.2d 599, 601 (1996);); *Mack v. Moore,* 107 N.C. App. 87, 91–92, 418 S.E.2d 685, 688 (1992) ("well established" in North Carolina that no right to charging lien exists if attorney withdraws prior to settlement or judgment); *but see Kushner v. Engelberg, Cantor & Leone, P.A.*, 750 So. 2d 33, 35 (Fla. Dist. Ct. App. 1999) (in assessing amounts due to attorney discharged for cause, lien amount should represent "the *quantum meruit* value of the services rendered less any damages which the client incurred due to the attorney's conduct").

D. Where the Lien is Enforced

The Massachusetts statute finally provides that "[u]pon request of the client or of the attorney, the court in which the proceeding is pending or, if the proceeding is not pending in a court, the superior court, may determine and enforce the lien." Pursuit of a charging lien in the same proceeding generally makes sense, since the court will be best situated to address the attorney's contribution to the recovery. Indeed, to the extent

statutes expressly address the venue for enforcement, it is common for them to make the lien presumptively enforceable in the court in which the related cause of action is pending, while allowing enforcement in other venues. *See, e.g.,* Ark. Code Ann. § 16-22-304(e); N.H. Rev. Stat. Ann. § 311:13 (West); N.J. Stat. Ann. § 2A:13-5 (West); N.Y. Judiciary Law § 475 (McKinney); Utah Code Ann. § 38-2-7(4) (West). Even where charging lien statutes fail to specify a venue, and in common-law jurisdictions, cases generally permit a lien to be enforced either in the underlying action or in an independent action. *See, e.g. In re Marriage of Dixon,* 2015 COA 99, ¶ 12; *Richman Greer Weil Brumbaugh Mirabito & Christensen, P.A. v. Chernak*, 991 So. 2d 875, 879 (Fla. Dist. Ct. App. 2008) (noting "preference" for pursuing lien in original action where work performed). One common-law jurisdiction, New Mexico, has gone yet further, suggesting that a lien may *only* be brought in the same proceeding, and cannot be enforced in a subsequent action. *See Thompson v. Montgomery & Andrews, P.A.,* 112 N.M. 463, 467, 816 P.2d 532, 536 (Ct. App. 1991). By contrast, California has suggested that the charging lien it recognizes at common law can only be enforced in a subsequent action. *Hansen v. Jacobsen,* 186 Cal. App. 3d 350, 356, 230 Cal. Rptr. 580, 584 (Ct. App. 1986).

E. Priority

The Massachusetts charging lien statute does not specifically address the priority of the charging lien over competing claims of other creditors. This is an issue on which state laws differ dramatically.

Many jurisdictions assign charging liens a very high priority. Some statutes establishing charging liens specify that charging liens shall be superior to all other liens – excepting, usually, tax liens. *See, e.g.,* Ala. Code § 34-3-61(b-c); Ga. Code Ann. § 15-19-14(b-c) (West); *see also* Md. Code Ann., Bus. Occ. & Prof. § 10-501(c) (West) (charging lien subordinate only to state tax liens and prior lien for wages due to employee of client for work related to award). In other jurisdictions, properly perfected charging liens are superior to *all* other claims *See, e.g.,* Wash. Rev. Code Ann. § 60.40.010 (West) (statutory attorney lien is "superior to all other liens"); *N. Valley Bank v. McGloin,*

Davenport, Severson & Snow, Prof'l Corp., 251 P.3d 1250, 1254 (Colo. App. 2010) (finding that Colorado statute establishing attorney liens as "first" liens gave them highest priority); *Cuyahoga Cty. Bd. of Commrs. v. Maloof Properties, Ltd.*, 2012-Ohio-470, ¶ 18, 197 Ohio App. 3d 712, 716, 968 N.E.2d 602, 605 (noting that charging liens have been held to have "superpriority" over event tax liens); *Doroshow, Pasquale, Krawitz & Bhaya v. Nanticoke Mem'l Hosp., Inc.*, 36 A.3d 336, 345 (Del. 2012) (rejecting claim that attorneys' liens are subject to "first in time, first in line" rule). The New York Court of Appeals has suggested that this is because charging liens are not "a mere claim against either property or proceeds" but "a vested property right created by law and not a priority of payment"; moreover, because the attorney's service created the fund at issue, "the attorney's charging lien must be given effect, even though a prior lien against the specific fund exists." *LMWT Realty Corp. v. Davis Agency Inc.*, 85 N.Y.2d 462, 467–68, 649 N.E.2d 1183, 1186 (1995); *but see Banque Indosuez v. Sopwith Holdings Corp.*, 98 N.Y.2d 34, 44, 772 N.E.2d 1112, 1118 (2002) (in the event of offsetting judgment, lien could be asserted only against client's net recovery).

Not all jurisdictions, however, afford attorney's liens such a preference. Alaska, for example, expressly provides that an attorney's lien is superior only to "all subsequent liens except tax liens." Alaska Stat. Ann. § 34.35.430 (West); *see also* Or. Rev. Stat. Ann. § 87.490 (West) (lien superior to all liens, except "tax liens, prior encumbrances and prior liens of record" on real or personal property and has "same priority as the client's lien" with respect to judgment"). Other jurisdictions (including Massachusetts) apply ordinary "first in time, first in line" rules. *See, e.g., PGR Mgmt. Co. v. Credle*, 427 Mass. 636, 640, 694 N.E.2d 1273, 1276 (1998) (noting that attorney lien on counterclaim protected against setoff because it arose prior to judgment); *Christopher N. Link, P.A. v. Rut*, 165 So. 3d 768, 771 (Fla. Dist. Ct. App. 2015) (attorney charging lien "has priority over judgments obtained against the client subsequent to the commencement of the attorney's services" but is "inferior to judgments entered prior to the commencement of the services"); *Intercity Dev., LLC v. Rose,* No. CV084016602S, 2010 WL 1006098, at *4 (Conn. Super. Ct. Feb. 11, 2010) (claims against client arising before services were

performed will prevail over charging lien). Yet other jurisdictions apply multifactor tests to determine whether the attorney's lien claims are subject to equitable setoff against other claims. *See, e.g., Sunwest Bank of Roswell, N.A. v. Miller's Performance Warehouse, Inc*., 1991-NMSC-085, 112 N.M. 492, 496, 816 P.2d 1114, 1118; *see also* 770 ILCS 5/1 (establishing limits of liens when claims are also made by health care service providers). And, perhaps unsurprisingly, many jurisdictions have yet to address the issue.

The priority of lien claims is not a minor matter. Absent a clear statement of priority, an attorney's right to a charging lien will be worthless – since any recovery obtained on behalf of a client who is already in debt may serve only to benefit other creditors, leaving the attorney unpaid. It is therefore particularly important for attorneys intending to assert a charging lien to examine both the priority rules of their particular jurisdiction and to inquire whether their clients have other established debts that will need to be satisfied before agreeing to a representation.

III. Effectively Employing Charging Liens

An understanding of the rights afforded by charging liens, however, is only half the battle. To be effective, charging liens must be successfully enforced. Unsurprisingly, the specific procedural prerequisites for enforcement again vary from jurisdiction to jurisdiction.

A. What Do I Need to Tell My Client?

To assert a charging lien, an attorney needs to have a valid claim for fees. While the claim must arise out of a contract between the attorney and client, most jurisdictions have recognized that such an agreement need not be express or written except as may be required by applicable rules of professional contract. *See, e.g., Computer One, Inc. v. Grisham & Lawless, P.A.,* 2008-NMSC-038, 144 N.M. 424, 429, 188 P.3d 1175, 1180 (lien required "valid contract between the attorney and the client, although the contract need not be express"). Similarly, as noted above, most charging lien statutes do not specifically require express client agreement to a charging lien but provide instead that such a lien arises upon a specified event – the performance of services, the entry of an

appearance, or the provision of notice. *See, e.g.,* Alaska Stat. Ann. § 34.35.430(a) (West) (establishing lien "whether specially agreed upon or implied" arising upon, among other things notice to adverse party "in an action or proceeding in which the attorney is employed"); *see also Cherpelis v. Cherpelis*, 1998-NMCA-079, 125 N.M. 248, 252, 959 P.2d 973, 977 (rejecting claim that express agreement to common-law charging lien is required, stating "the pertinent inquiry is whether the attorney has earned a fee under the contract. If so, the attorney's lien is available as a means of collection.")

In some common-law jurisdictions, however, a charging lien arises only out of agreement with the client that the proceeds of any recovery may be used to satisfy unpaid fees and expenses. In most jurisdictions, this may arise informally by agreement that the fee may be taken from any award. *See, e.g., Intercity Dev., LLC v. Rose*, No. CV084016602S, 2010 WL 1006098, at *3 (Conn. Super. Ct. Feb. 11, 2010) ("a charging lien may be created by agreement, which may be oral, between the attorney and the client allowing the attorney to take his or her fee from the proceeds recovered"); *Sinclair, Louis, Siegel, Heath, Nussbaum & Zavertnik, P.A. v. Baucom*, 428 So. 2d 1383, 1385 (Fla. 1983) (lien required "an understanding, express or implied, between the parties that the payment is either dependent upon recovery or that payment will come from the recovery"). Elsewhere, however, a charging lien cannot arise *unless* the client expressly agrees to one. California has ruled that "an attorney's lien is created only by contract" and (unlike other liens) "is not created by the mere fact that an attorney has performed services in a case." *Fletcher v. Davis*, 33 Cal. 4th 61, 66, 90 P.3d 1216, 1219 (2004). Similarly, while Texas recognizes a common law retaining lien, a lien "for money received in judgment or settlement of a matter" can only exist by contract. *Rotella v. Cutting*, No. 02-10-00028-CV, 2011 WL 3836456, at *5 (Tex. App. Aug. 31, 2011)

Whether strictly necessary or not, however, a formal written agreement may prove useful to an attorney wanting to establish a later right to a charging lien. In some jurisdictions, the presence of a written agreement to concerning a charging lien may expand the property subject to the lien. In Florida, for example, the presence of an express agreement, while not necessary for a lien on personal property or money, is

necessary to secure a charging lien on real estate. *Riveiro v. J. Cheney Mason, P.A.*, 82 So. 3d 1094, 1097 (Fla. Dist. Ct. App. 2012). At least one decision has also suggested that a lien created pursuant to express agreement could cover fees from an unrelated representation (though reliance on that authority in other jurisdictions poses some risk given the ethical restrictions on liens discussed below). *Intercity Dev., LLC v. Rose*, No. CV084016602S, 2010 WL 1006098, at *4 (Conn. Super. Ct. Feb. 11, 2010). More importantly, establishing the attorney's intent to assert a charging lien may also provide evidence, should any be needed, that the client had notice of the attorney's lien. *See* Nev. Rev. Stat. Ann. § 18.015(3) (West) (providing that lien perfected by serving notice in writing by certified mail upon client and adverse party); *Sowder v. Sowder*, 1999-NMCA-058, 127 N.M. 114, 117, 977 P.2d 1034, 1037 (noting that, to be effective, notice of common-law charging lien must be given to "appropriate parties," which include opposing counsel and opposing counsel's client, as well as the client of the attorney asserting the lien)

B. What Notice Needs to Be Provided to the Rest of the World

Like mortgages and security interests under the Uniform Commercial Code, charging liens become truly effective only upon notice. As set forth in the Restatement (Third) of the Law Governing Lawyers, a charging lien "becomes binding on a third party when the party has notice of the lien." Restatement (Third) of the Law Governing Lawyers § 43 (2000). As such, a charging lien may appropriately be enforced, not only against the client, but against (i) a third party who has taken the proceeds of a judgment or settlement with knowledge of the lien, (ii) a defendant who still possesses the proceeds, or (iii) a defendant who has paid the proceeds to the client with knowledge of the lien and thereby deprives the attorney of a fee. *See Kaplan v. Reuss*, 113 A.D.2d 184, 186–87, 495 N.Y.S.2d 404, 406 (1985), *aff'd,* 68 N.Y.2d 693, 497 N.E.2d 671 (1986); *see also Heller v. Held*, 817 So. 2d 1023, 1027 (Fla. Dist. Ct. App. 2002) (noting that client and defendant could be held jointly liable for amount of attorneys fees lost by settlement that failed to honor charging lien claim). Notice is thus critical to the effective enforcement of charging liens. Absent proper notice, a lien is no more effective than the

bare right to recover fees, since it creates no serious obstacle to the dissipation of the fund from which fees would be paid.

The manner of notice required to make a lien effective, however, varies substantially from jurisdiction to jurisdiction. Some charging lien statutes effectively establish constructive notice from the court or other public file. Most simply, notice may deem to have arisen from the name of an attorney appearing in the public court record. Ala. Code § 34-3-61; Ky. Rev. Stat. Ann. § 376.460 (West). Other jurisdictions similarly provide that notice shall be filed with the clerk of court, but provide more specific requirements. In Oklahoma, for example, notice of the lien may properly be provided by serving a notice on the defendants setting forth its nature and the amount claimed, but such notice will be unnecessary if the attorney files a complaint or counterclaim in a court of record with the attorney's name and the words "lien claimed." Okla. Stat. Ann. tit. 5, § 6(A) (West*); see also* Ga. Code Ann. § 15-19-14 (West) (filing of lien assertion within 30 days of recovery binding); Haw. Rev. Stat. Ann. § 507-81 (West) (filing of notice with court or arbitrator). Colorado deems a notice of the attorney's claim as lienor, setting forth specifically the agreement of compensation with the client, to be "notice to all person and to all parties" including judgment creditors, persons against whom a claim is asserted, and any person having a demand in suit or judgment. Colo. Rev. Stat. Ann. § 12-5-119 (West). Utah provides for the filing in the action (or recorder, in the case of personal or real property on which a lien is asserted) of a detailed notice setting forth the contact information of the attorney, the name of the client, a verification that the lien claims property connected with the work performed, that a demand for payment has been made unsuccessfully or that the notice is in accordance with a written agreement with the client, and the date on which services were first performed; the notice is then to be sent to the client by certified mail. Utah Code Ann. § 38-2-7 (West)

Yet other statutes require notice to be delivered directly to the defendant. In some jurisdictions, notice arises upon the service of the action itself. Ala. Code § 34-3-61. Other states require service of a notice, identifying the nature of the claim, by certified or registered mail. *See* 770 ILCS 5/1; Wyo. Stat. Ann. § 29-9-102 (West); *see also* Ark.

Code Ann. § 16-22-304 (certified mail and notice signed by both attorney and client). Kansas requires a written notice that is served in the same manner as a summons. Kan. Stat. Ann. § 7-108 (West). In yet other jurisdictions, notice must be both provided to the defendant in writing and filed after judgment (*see, e.g.,* N.D. Cent. Code Ann. § 35-20-08 (West); S.D. Codified Laws § 16-18-21) or notice may be provided either by a court filing or by serving the defendant. Tenn. Code Ann. § 23-2-103 (West).

In short, while actual or constructive notice is uniformly required for a charging lien to be effective, the nature of the notice required is state specific. Given the significance of notice to the enforcement of attorney's liens, it is obviously a good idea for an attorney to carefully examine the notice requirements imposed by the jurisdiction in which an action is pending, as well as those in which any property subject to the lien may be located, and follow those requirements to the letter.

C. Lien Enforcement Proceedings

While (as noted above) an attorney can pursue a lien by means of a separate action, enforcing an attorney's lien ordinarily takes place in the court where the action is pending. Enforcement proceedings generally consist of a summary determination of the claimant's lien rights pursuant to a motion or petition. *See, e.g., Baker & Hostetler, LLP v. Swearingen*, 998 So. 2d 1158, 1161 (Fla. Dist. Ct. App. 2008); Minn. Stat. Ann. § 481.13(1)(c) (West) ("a lien. . . may be established, and the amount of the lien may be determined, summarily by the court under this paragraph on the application of the lien claimant or of any person or party interested in the property subject to the lien.") Lien statutes may specify the particular notice to be provided to party in possession of the fund or impose additional obligations as a prerequisite to bringing a claim. S*ee, e.g.,* 770 ILCS 5/1 and Nev. Rev. Stat. Ann. § 18.015 (West) (lien to be adjudicated "[o]n petition filed by such attorneys or their clients . . . on not less than 5 days' notice to the adverse party"); Utah Code Ann. § 38-2-7 (West) (attorney may either intervene in action or file separate suit only if client did not pay amounts owed within 30 days after the attorney made demand for payment).

A lien claim is nominally a claim, not against the client or the person who owes the attorney money, but against the proceeds of the settlement or judgment itself. *See Ferraioli ex rel. Suslak v. Ferraioli,* 8 A.D.3d 163, 164, 779 N.Y.S.2d 72, 73 (2004) (identifying distinction between summary lien adjudication and plenary relief sought against client); *Argentena Consol. Min. Co. v. Jolley Urga Wirth Woodbury & Standish*, 125 Nev. 527, 532, 216 P.3d 779, 783 (2009) (court has in rem jurisdiction to resolve a fee dispute between an attorney and client, which arises from a charging lien, because the attorney's fee "is recovered on account of the suit or other action"); *Rhoads v. Sommer*, 401 Md. 131, 157, 931 A.2d 508, 523 (2007) (attorney's lien provides *in rem* action against asset); *see also Trickett v. Laurita,* 223 W. Va. 357, 368, 674 S.E.2d 218, 229 (2009) (noting that nature of action usually required court to address the charging lien in the final order distributing the judgment or fund to which the lien will attach; though later suit could be brought against "whatever property said proceeds may now have become.") Some courts have held that client's claim for malpractice, as a personal claim, therefore does not qualify as a compulsory counterclaim to a lien enforcement proceedings, and may need to be separately litigated. *See Computer One, Inc. v. Grisham & Lawless, P.A., 2008-NMSC-038,* 144 N.M. 424, 432, 188 P.3d 1175, 1183; *but see Coughlin v. SeRine,* 154 Ill. App. 3d 510, 514, 507 N.E.2d 505, 509 (1987) (addressing malpractice counterclaim to action asserting charging lien). To the extent the client asserts that the attorney's fee claim should be denied because of lawyer malpractice, however, a ruling in favor of the attorney may bar a subsequent suit. *Carson v. Gibson*, 638 So. 2d 79, 81 (Fla. Dist. Ct. App. 1994) (malpractice claim subject to estoppel, though not res judicata, because same issues interposed as a defense to enforcement of the lien). New York recognizes a harsher black-letter rule: the imposition of a charging lien bars a subsequent claim of malpractice as a matter of law. *See Smira v. Roper, Barandes & Fertel, LLP.,* 302 A.D.2d 305, 754 N.Y.S.2d 872, 873 (2003); *Nat Kagan Meat & Poultry, Inc. v. Kalter*, 70 A.D.2d 632, 632, 416 N.Y.S.2d 646, 647 (1979) ("A judicial determination fixing the value of a professional's services necessarily decides that there was no malpractice").

In general, the defenses to a charging lien focus on the propriety of the fees assessed and the validity of the lien itself. With respect to the fees, the "client may challenge the reasonableness of the value assigned to the attorney's fees, or the basis for that value. Similarly, a client may attack the validity of the fee agreement itself upon which the charging lien was based." *Computer One*, 144 N.M. at 433, 188 P.3d at 1184. This may impose some burden on the attorney, since – in some jurisdictions – the reasonableness of the fee must be established by expert testimony. *Robin Roshkind, P.A. v. Machiela*, 45 So. 3d 480, 482 (Fla. Dist. Ct. App. 2010) (charging lien properly denied when firm it did not provide independent expert testimony that either the rate or the hours expended were reasonably necessary). A lien may also not extend to the costs incurred by experts, at least where the attorney is not separately liable to the experts for their fees. *Zutrau v. Jansing*, No. CV 7457-VCP, 2014 WL 7013578, at *4 (Del. Ch. Dec. 8, 2014), aff'd, 123 A.3d 938 (Del. 2015), reargument denied (Sept. 17, 2015), cert. denied, 136 S. Ct. 1198, 194 L. Ed. 2d 182 (2016).

Another question commonly litigated is whether lien is genuinely imposed on the fruits of the attorney's efforts. This can be complicated by considerations of public policy. While charging liens are commonly sought in domestic relations actions, issues like child custody and visitation do not produce "tangible fruits" to which a lien may attach and child support or maintenance payment may not be subject to a lien as a matter of public policy. *See, e.g., Glickman v. Scherer,* 566 So. 2d 574, 575 (Fla. Dist. Ct. App. 1990) (no lien against child support payments given custody and visitation award) *but see Cohen v. Cohen*, 160 A.D.2d 571, 572, 554 N.Y.S.2d 525, 526 (1990) (although charging lien did not attach to maintenance, it attached to any other award in the action).

Finally, a charging lien may be denied as untimely. Some statutes expressly set forth limitations periods for the assertion of charging lien claims. *See, e.g.,* Minn. Stat. Ann. § 481.13(3)(West) (establishing limitations period for enforcing claim against real property). Laches is also a nominal defense to enforcement of a charging lien, and might arise if an attorney, with knowledge of a disbursement of proceeds to which the lien attached, took no action. *Zaldivar v. Okeelanta Corp.*, 877 So. 2d 927, 931 (Fla. Dist. Ct.

App. 2004). Timeliness usually becomes a barrier to enforcement in common-law jurisdictions for other reasons. If an attorney fails to file a timely notice of lien before final judgment is entered, ordinarily the right to assert a lien is forfeited. *Weiland v. Weiland,* 814 So. 2d 1252, 1253 (Fla. Dist. Ct. App. 2002); *Thompson v. Montgomery & Andrews, P.A.,* 1991-NMCA-086, 112 N.M. 463, 466, 816 P.2d 532, 535.

IV. Ethical Concerns Associated with Charging Liens

Like everything else lawyers do, charging liens implicate legal ethics concerns. Lawyers are, of course, entitled to charge and collect reasonable fees in exchange for their services. *See, generally,* Model Rule of Professional Conduct (hereinafter "Model Rule") 1.5. Attempts to collect unreasonable fees are, however, strictly prohibited by Rule 1.5(a) ("A lawyer shall not make an agreement for, charge, or collect and unreasonable fee or an unreasonable amount for expenses.") While Rule 1.5 (and its many state counterparts) place limits on the fees that may properly be collected by a lawyer (including requirements that contingency agreements be in a writing signed by the client and prohibitions against contingent fees in certain contexts), and although the reasonableness and propriety of attorney's fees generally furnish a defense in charging lien enforcement proceedings, charging lien disputes rarely result in disciplinary charges being brought against attorneys on grounds that they have charged unreasonable fees. With that said, courts that deny lien claims on grounds that the fees at issue are unreasonable or improper are not gentle in their descriptions of the improper conduct. *See, e.g., Kalla v. Progressive Michigan Ins. Co.,* No. 323416, 2016 WL 191999, at *3 (Mich. Ct. App. Jan. 14, 2016) ("[counsel's] alleged agreement . . . is not only a direct violation of the requirement that such agreements be written, MCR 8.121(F), but it is also an ethical violation under MRPC 1.5(c). As such, the circuit court did not abuse its discretion by refusing to enforce the agreement. On the contrary, [counsel] cannot expect a court sitting in equity to help her enforce a fee agreement that is specifically prohibited by both the court rules and the rules of professional conduct.")

Model Rule 1.8, which addresses specific conflicts of interests with current clients, is of greater importance to charging lien claims. Model Rule 1.8(i) provides that

a lawyer "shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client," with two exceptions: (1) a reasonable contingent fee in a civil case and (2) "a lien authorized by law to secure the lawyer's fee or expenses."

This provision might be read to suggest that a lien that secures the lawyer's fee or expense, but which is not properly "authorized by law," constitutes a *per se* ethical violation. In fact, cases that deny enforcement of charging liens that fail to comply with procedural requirements rarely end by referring the lawyer to disciplinary authorities. There are disciplinary cases, however, that reject "charging lien" defenses to claims of "improper proprietary interest" or conversion of client funds absent any effort to comply with charging lien requirements. In *In re Fisher*, 202 P.3d 1186 (Colo. 2009), for example, the Colorado Supreme Court rejected the suggestion that an attorney could secure his fees in a matrimonial action by obtaining a promissory note secured by a deed of trust in the marital residence (an interest that the lawyer failed to disclose in subsequent financial affidavits submitted to the court by his client). The court rejected the claim that this was properly a charging lien, subject to the "authorized by law" exception, noting that the liens claimed by the attorney did not meet the statutory requirements for such liens. *See also People v. Razatos*, 636 P.2d 666, 669 (Colo. 1981) (attorney disciplined for taking undisclosed interest in property that was the subject of transaction; noting that attorney had "no legal basis for the assertion of a lien to secure a fee obligation even if any such obligation existed"). Similarly, in *In re Haar*, 698 A.2d 412 (D.C. 1997), an attorney accused of converting client funds by retaining a portion of a settlement to satisfy a disputed fee claim claimed a charging lien. While accepting that the improper retention of funds may have been merely a negligent misappropriation based upon a mistaken understanding of lien requirements, the court imposed a suspension, noting that even where a charging lien is created "the right to self-help is strictly limited by law and, in the lawyer's case, by the rules of professional conduct." *Id.* at 424.

Other potential ethical problems may arise out of the improper issuance of lien notices to third parties. Attorneys may be tempted to tell other creditors that they have a lien, whether or not they do, to ensure their bills are paid. In a North Carolina disciplinary matter, a reprimand was issued to a lawyer who did just that – filing a notice of charging lien based on an improper contingency agreement following her discharge – finding that it violated the North Carolina version of Rule 3.1 regarding the assertion of frivolous claims. *See In re Ilonka Howard*, Grievance Comm. of the North Carolina State Bar, Case No. 06G0496 (2008). In a Massachusetts case, a lawyer was similarly sanctioned for telling insurance companies that he had a statutory lien when he did not; even though no harm to the client resulted, the court found that the action constituted fraud and dishonesty and adversely reflected on his fitness to practice law under the state corollary to Model Rule 8.4. *See also* State Bar of Michigan Ethics Op. CI-758 (2000) (an attorney may notify an insurer of a charging lien only when her right to such a lien is clear, and then only for the amount to which she is clearly entitled)

Finally, attorneys can run into ethical difficulties by ignoring the lien interests of other attorneys. In *People v. Egbune*, 58 P.3d 1168 (1992), the office of the Presiding Disciplinary Judge of the Supreme Court of Colorado considered the case of an attorney who disbursed settlement funds (less a contingency fee retained for himself) after being placed on notice that his predecessor counsel claimed an interest in the fees. The attorney had been hired while prior counsel was negotiating a settlement agreement; following termination, that lawyer promptly sent a letter asserting a lien to both the insurer who was offering a settlement and to the disciplined attorney. *Id.* at 1171. The attorney thereafter failed to respond to requests from prior counsel concerning the status of the matter or to disclose his receipt of a settlement from the insurer. *Id.* at 1172. The disciplinary tribunal determined that, at a minimum, the disciplined attorney had failed to comply with the Colorado version of Model Rule 1.15, which requires an attorney to segregate funds that were the subject of a dispute from his own funds, and that the lawyer's failure to disclose information concerning the settlement constituted conduct rising to the level of dishonesty as prohibited by Model Rule 8.4. *Id.* at 1173. For good measure, the

tribunal found that the claim of a full contingency fee when the discharged attorney had done most of the work violated Rule 1.5's prohibition on unreasonable fees.

V. Conclusion

This article necessarily provides only a general overview of the issues that may arise when attorneys attempt to secure their fees by imposition of a charging lien. A review of the authorities in the appendix that follows (as well as the cases that further interpret them) will point to yet others. With luck, however, even this general overview of the essential features of charging liens underscores the most basic rule of thumb needed to employ them successfully: that the practictioner should carefully consult the law of his particular jurisdiction to make sure that all lien requirements have been satisfied.

APPENDIX –STATE AUTHORITIES ESTABLISHING CHARGING LIENS

Alabama --

Ala. Code § 34-3-61

Arizona

Charging liens established by common law. *See, e.g., Nat'l Sales & Serv. Co. v. Superior Court of Maricopa Cty. Arizona*, 136 Ariz. 544, 545, 667 P.2d 738, 739 (1983)

Alaska

Alaska Stat. Ann. § 34.35.430 (West)

Arkansas

Ark. Code Ann. § 16-22-304 (West)

California

Charging liens established by common law. *See, e.g., Fletcher v. Davis*, 33 Cal. 4th 61, 66, 90 P.3d 1216, 1219 (2004)

Colorado

Colo. Rev. Stat. Ann. §§ 12-5-119, 12-5-120 (West)

Connecticut

Charging liens established by common law. *See, e.g., Olszewski v. Jordan*, 315 Conn. 618, 624–25, 109 A.3d 910, 913 (2015)

Delaware

Charging liens established by common law. *See, e.g., Doroshow, Pasquale, Krawitz & Bhaya v. Nanticoke Mem'l Hosp., Inc.*, 36 A.3d 336, 342 (Del. 2012)

District of Columbia

Charging liens established by common law. *See, e.g., Wolf v. Sherman*, 682 A.2d 194, 197–98 (D.C. 1996)

Florida

Charging liens established by common law. *See, e.g., Sinclair, Louis, Siegel, Heath, Nussbaum & Zavertnik, P.A. v. Baucom*, 428 So. 2d 1383, 1384–85 (Fla. 1983)

Georgia

Ga. Code Ann. § 15-19-14 (West)

Hawaii

Haw. Rev. Stat. Ann. § 507-81 (West)

Idaho

Idaho Code Ann. § 3-205 (West)

Illinois

770 ILCS 5/1

Indiana

Ind. Code Ann. §§ 33-43-4-1, 33-43-4-2 (West). Indiana also recognizes common law liens applicable to proceeds other than enforceable judgments. *See State Farm Mut. Auto. Ins. Co. v. Ken Nunn Law Office*, 977 N.E.2d 971, 975–76 (Ind. Ct. App. 2012).

Iowa

Iowa Code Ann. § 602.10116 (West)

Kansas

Kan. Stat. Ann. §§ 7-108, 7-109 (West)

Kentucky

Ky. Rev. Stat. Ann. § 376.460 (West)

Louisiana

La. Stat. Ann. § 9:5001

Maine

Maine has an indirect statutory reference to "an attorney's lien for services performed." *See* Me. Rev. Stat. tit. 14, § 2602-A; *see also* Me. Rev. Stat. tit. 14, § 5006 (noting rights

of execution versus amounts "due to the attorney in the action for his fees and disbursements"). Maine courts, however, have declined to confirm when and whether a charging lien will be recognized. *See Libner v. Maine Cty. Comm'rs Ass'n*, 2004 ME 39, ¶ 11, 845 A.2d 570, 573, *Gilbert & Grief, P.A. v. Blackmer*, No. CIV. A. CV-04-82, 2005 WL 2725568, at *4 (Me. Super. May 19, 2005).

Maryland

Md. Code Ann., Bus. Occ. & Prof. § 10-501 (West)

Massachusetts

Mass. Gen. Laws Ann. ch. 221, § 50 (West)

Michigan

Charging liens established by common law. *See, e.g., George v. Sandor M. Gelman, P.C.*, 201 Mich. App. 474, 477, 506 N.W.2d 583, 585 (1993).

Minnesota

Minn. Stat. Ann. § 481.13 (West)

Mississippi

Mississippi recognizes a "charging lien" at common law; however, that lien, like a retaining lien, applies only to property in the client's possession. *See Tyson v. Moore*, 613 So. 2d 817, 826 (Miss. 1992).

Missouri

Mo. Ann. Stat. § 484.130, 484.140, (West)

Montana

Mont. Code Ann. § 37-61-420 (West)

Nebraska

Neb. Rev. Stat. Ann. § 7-108 (West)

Nevada

Nev. Rev. Stat. Ann. § 18.015 (West)

New Hampshire

N.H. Rev. Stat. Ann. § 311:13

New Jersey

N.J. Stat. Ann. § 2A:13-5 (West)

New Mexico

Charging liens established by common law. *See, e.g., Computer One, Inc. v. Grisham & Lawless, P.A.*, 2008-NMSC-038, 144 N.M. 424, 428–29, 188 P.3d 1175, 1179–80.

New York

N.Y. Judiciary Law §§ 475, 475-a (McKinney)

North Carolina

Charging liens established by common law. *See, e.g., Wilson v. Wilson*, 183 N.C. App. 267, 272–73, 644 S.E.2d 379, 383 (2007)

North Dakota

N.D. Cent. Code Ann. §§ 35-20-08, 35-20-09 (West)

Ohio

Charging liens established by common law. *See, e.g., Cuyahoga Cty. Bd. of Commrs. v. Maloof Properties, Ltd.*, 2012-Ohio-470, ¶¶ 13-19, 197 Ohio App. 3d 712, 715–16, 968 N.E.2d 602, 604–05

Oklahoma

Okla. Stat. Ann. tit. 5, §§ 6-7 (West)

Oregon

Or. Rev. Stat. Ann. §§ 87.445-475 (West)

Pennsylvania

Charging liens established by common law. *See, e.g., Shenango Sys. Sols., Inc. v. Micros-Sys., Inc.*, 2005 PA Super 370, ¶ 7, 887 A.2d 772, 774 (2005)

Rhode Island

9 R.I. Gen. Laws Ann. §§ 9-3-1, 9-3-2, 9-3-3 (West)

South Carolina

Charging liens established by common law. *See, e.g., Lester v. Dawson*, 327 S.C. 263, 269–70, 491 S.E.2d 240, 243 (1997)

South Dakota

S.D. Codified Laws § 16-18-21

Tennessee

Tenn. Code Ann. §§ 23-2-102, 23-2-103 (West)

Texas

Charging liens established by common law. *See, e.g., Rotella v. Cutting*, No. 02-10-00028-CV, 2011 WL 3836456, at *5 (Tex. App. Aug. 31, 2011); *Tarrant Cty. Hosp. Dist. v. Jones*, 664 S.W.2d 191, 196 (Tex. App. 1984)

Utah

Utah Code Ann. § 38-2-7 (West)

Vermont

Charging liens established by common law. *See, e.g., Button's Estate v. Anderson*, 112 Vt. 531, 28 A.2d 404, 406–07 (1942)

Virginia

Va. Code Ann. § 54.1-3932 (West)

Washington

Wash. Rev. Code Ann. § 60.40.010 (West)

West Virginia

Charging liens established by common law. *See, e.g., Trickett v. Laurita*, 223 W. Va. 357, 364–66, 674 S.E.2d 218, 225–27 (2009)

Wisconsin

Wis. Stat. Ann. §§ 757.36-757.37 (West)

Wyoming

Wyo. Stat. Ann. § 29-9-102 (West)