

May 2003 *Multnomah Lawyer Ethics Focus*

Attorney Liens: Are They Worth It?

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In difficult economic times, lawyers are certainly not immune to the problem of not getting paid. ORS Chapter 87 provides two types of liens to secure the payment of legal fees. The first is a possessory lien on a client's file under ORS 87.430. The second is a monetary lien for a claimant's counsel on litigation proceeds under ORS 87.445. Both kinds of liens potentially offer tools for lawyers to get paid. At the same time, using those lien rights is not without risk.

Possessory or "file" liens are the most common. With these, the lawyer is generally entitled to keep a client's file until the lawyer's fees are paid. They usually come into play when a lawyer and a client part company with the client owing the lawyer money. ORS 87.435-.440 provide a mechanism for a client to post a bond to recover the file. But, file liens are typically resolved directly between the lawyer and the client.

While simple in theory, file liens are often more dicey in practice. The Oregon State Bar noted in Legal Ethics Opinion 1991-90 that the lien rights created by ORS 87.430 are subservient to a lawyer's continuing fiduciary duty under DR 2-110(A)(2) to avoid "foreseeable prejudice" to a client when the lawyer withdraws. In short, if the client really needs the file, the lawyer has to give it to the client notwithstanding the lawyer's lien rights. The danger to the

lawyer in this situation is that if the lawyer keeps the file, the client may claim that the client was damaged in the underlying matter by not having access to the file. Although a violation of the DRs does not give rise to civil liability in and of itself, the Oregon Supreme Court held in *Kidney Association of Oregon v. Ferguson*, 315 Or 135, 843 P2d 442 (1992), that it may be used in proving a lawyer's breach of fiduciary duty. A lawyer, therefore, may be buying into more trouble than it's worth in attempting to hang onto a client's file to enforce payment.

Monetary or "charging" liens on litigation proceeds have both their own utility and risks. On the positive side of the ledger, ORS 87.445-.490 create a comprehensive system for a claimant's counsel to perfect and foreclose a lien against litigation proceeds "to the extent of fees and compensation specially agreed upon with the client, or if there is no agreement, for the reasonable value of the services of the attorney." ORS 87.445. Moreover, the Oregon Supreme Court recently held in *Potter v. Schlessor Co., Inc.*, 335 Or 209, 63 P3d 1172 (2003), that in the event of a settlement short of trial, a claimant counsel's lien may be foreclosed against either the client *or the defendant*. On the negative side, a risk in any suit to collect fees is the possibility of a counterclaim for malpractice or breach of fiduciary duty as a tactic by the former client seeking leverage against the lawyer.

With either type of lien, a lawyer will want to carefully consider how aggressively the lawyer should assert the rights involved. While many times very

useful in getting paid, attorney liens have the potential for very unpleasant surprises for lawyers, too.

ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP focuses on legal ethics, product liability defense and condemnation litigation. In his legal ethics practice, Mark handles professional responsibility, regulatory and attorney-client privilege matters and law firm related litigation for lawyers, law firms and legal departments throughout the Northwest. He is a past member of the Oregon State Bar's Legal Ethics Committee, is a past chair of the Washington State Bar Rules of Professional Conduct Committee, is a member of the Idaho State Bar Professionalism & Ethics Section and is a co-editor of the OSB's Ethical Oregon Lawyer and the WSBA's Legal Ethics Deskbook. Mark also writes the monthly Ethics Focus column for the Multnomah (Portland) Bar's Multnomah Lawyer, the quarterly Ethics & the Law column for the WSBA Bar News and is a regular contributor on risk management to the OSB Bar Bulletin, the Idaho State Bar Advocate and the Alaska Bar Rag. Mark's telephone and email are 503.224.4895 and Mark@frllp.com.