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**Attorney Liens:
Tool or Trap?**

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Although attorney liens have existed in statutory form in Washington since 1863, the recent economic climate has renewed focus on them as a collection tool. RPC 1.8(i)(1) allows lawyers to “acquire a lien authorized by law to secure the lawyer’s fee or expenses[.]” Statutory attorney liens come in two varieties in Washington. The first, called a “retaining lien” and codified at RCW 60.040.010(1)(a)-(b), places a lien for fees over a client’s file and funds in the lawyer’s possession. The second, called a “charging lien” and created by RCW 60.040.010(1)(c)-(e), places a lien for fees on, respectively, the client’s money held by an adverse party in a proceeding in which the lawyer was involved, an action the lawyer handled successfully for the client or the resulting judgment in the client’s favor. While charging liens in particular can be a useful collection device, both also come with deceptively dangerous traps for lawyers. In this column, we’ll look at both the “tools” and the “traps.”

The Tools

Retaining liens are a comparatively modest collection tool. They cannot be “foreclosed” (see, e.g., *Glick v. McIlwain*, 154 Wn. App. 729, 732, 230 P.3d 167 (2010)). Rather, as the Supreme Court put it in *Gottstein v. Harrington*, 25 Wn. 508, 511, 65 P. 753 (1901), “a retaining lien . . . may merely be used to

embarrass the client, or, as some cases express it, to ‘worry’ him into the payment of the charges.” Further, a retaining lien is personal to the lawyer (or firm) who did the work that remains unpaid and cannot be assigned. Again, the Supreme Court in *Gottstein* aptly summarized these limitations (at 512):

“Possession is of the essence of this lien, and, once parted with, the right is waived and relinquished.” Similarly, the companion provision granting a lien over client funds in the lawyer’s possession is often of little practical utility precisely because the client may not have the money to pay the lawyer. Moreover, under RPC 1.15A(g), if the lawyer is holding an advance fee deposit in trust and the client is disputing the bill, the disputed portion must generally remain in trust until the disagreement is resolved. In short, a retaining lien is an automatic, but not overly effective, remedy.

By contrast, charging liens are a potentially powerful collection tool—at least for a lawyer who represented a successful litigant (see *Suleiman v. Cantino*, 33 Wn. App. 602, 606-07, 656 P.2d 1122 (1983) (noting the prerequisite that the lawyer’s work has to create the fund over which the lien is asserted); accord *Department of Labor and Industries v. Dillon*, 28 Wn. App. 853, 858-59, 626 P.2d 1004 (1981)). RCW 60.40.010(2) allows lawyers to pursue their lien claim against adverse parties who paid the client on a settlement or judgment without first satisfying the lawyer’s lien. RCW 60.40.010(3), in turn, makes attorney liens over an action or judgment “superior to all other liens.” RCW 60.40.010(4)

provides that an attorney lien over an action “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.” RCW 60.40.010(5) defines “proceeds” broadly to include “any monetary sum received in the action” and generally allows the lien to follow “identifiable cash proceeds[.]” Charging liens under RCW 60.40.010(1)(c) and (e) require notice (*see Jones v. International Land Corp., Ltd.*, 51 Wn. App. 737, 755 P.2d 184 (1988)), while those asserted against the action itself under RCW 60.40.010(1)(d) arise with the filing of the action by operation of law (*see Smith v. Moran, Windes & Wong, PLLC*, 145 Wn. App. 459, 187 P.3d 275 (2008)). Charging liens may be foreclosed either through a supplemental equitable proceeding in the matter giving rise to the lien or through a separate action. The lien statute, however, does not specify a particular method for foreclosure. The Court of Appeals in *King County v. Seawest Inv. Associates, LLC*, 141 Wn. App. 304, 315, 170 P.3d 53 (2007) (citation omitted) summarized the procedural discretion available: “[RCW Chapter 60.40] places the question of how to properly adjudicate the lien with the court, requiring it to fashion ‘some form of proceeding by which the matters might be properly adjudicated.’”

With both retaining and charging liens, it is important to note that the Supreme Court in *Ross v. Scannell*, 97 Wn.2d 598, 605-06, 647 P.2d 1004 (1982), held that *statutory* attorney liens do not attach to real property. To

pursue a fee claim against a client's real property (absent separate contractual security interests discussed in Comment 16 to RPC 1.8), *Ross* found that the lawyer must instead reduce the claim to a judgment and then seek enforcement of the judgment against the property involved.

The Traps

Both retaining and charging liens contain potential traps. Lawyers need to be especially wary of these traps because they are almost always encountered after the attorney-client relationship has already broken down—either through withdrawal for nonpayment by the lawyer or discharge by the client. Assertion of lien rights, therefore, can be a particular flashpoint between the lawyer and a former client.

With retaining liens, RPC 1.16(d) governs a lawyer's duties upon termination of a representation. In doing so, it recognizes two competing interests. On one hand, it requires a lawyer to protect the client upon withdrawal or termination by, in relevant part, "surrendering" the client's file. On the other hand, it also recognizes a lawyer's retaining lien. If the two conflict, the WSBA in Ethics Advisory Opinion 181 concluded that a client's need for the file "trumps" the lawyer's possessory lien rights:

"A lawyer cannot exercise the right to assert a lien against files and papers when withholding these documents would materially interfere with the client's subsequent legal representation. . . . If assertion of the lien would prejudice the former client, the duty to protect the former client's interests supersedes the right to assert the lien."

Accordingly, if the client needs the file the lawyer must give it to the client (or the client's new lawyer) notwithstanding an otherwise valid retaining lien.

A lawyer who wrongfully withholds a client's file may face regulatory discipline under RPC 1.16(d) (see, e.g., *In re Eugster*, 166 Wn.2d 293, 310, 209 P.3d 435 (2009)). Moreover, as the Supreme Court noted in *Eriks v. Denver*, 118 Wn.2d 451, 457, 824 P.2d 1207 (1992), the professional rules reflect our underlying fiduciary duties to our clients. Therefore, wrongfully withholding a file may also expose the lawyer to a civil claim for breach of fiduciary duty if the client was damaged as a result.

With charging liens, lawyers also face regulatory and civil risk.

On the former, lawyers who improperly assert a charging lien are at disciplinary risk under RPC 8.4(d), which governs conduct prejudicial to the administration of justice. As discussed earlier, for example, statutory attorney liens cannot be asserted directly against a client's real property under *Ross v. Scannell*, 97 Wn.2d 598. In *In re Vanderbeek*, 153 Wn.2d 64, 88, 101 P.3d 88 (2004), the Supreme Court disciplined a lawyer for improperly filing a charging lien on a client's real property in spite of *Ross*.

On the latter, charging liens may be invalidated both if they are asserted against assets not subject to the lien *and* if the underlying fee is improper. *Gustafson v. City of Seattle*, 87 Wn. App. 298, 941 P.2d 701 (1997), illustrates this last point. A lawyer represented both an injured passenger and the

potentially at-fault driver in a motor vehicle accident case. The lawyer later withdrew and asserted a lien for the services he provided (based on quantum meruit). When the injured passenger retained new counsel and settled the claim, the new lawyer moved to invalidate the first lawyer's lien based on a conflict. The trial court agreed and invalidated the lien. Although the Court of Appeals reversed for further factual findings on the conflict, it made clear that courts have the authority to invalidate liens. Relying on *Eriks*, the Court of Appeals in *Gustafson* reasoned that because courts can refuse to enforce fee agreements that breach ethical duties (as contracts that violate public policy), they also have the related ability to invalidate resulting liens.

Summing Up

Although both retaining and charging liens offer collection tools, they both come with potential traps. Releasing a retaining lien will not affect a more effective charging lien and can often avoid making a bad situation even worse.

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