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# Attorney Liens: Proceed with Caution

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> "The average attorney has little interest in, nor does he realize the inadequacy of, the attorney's lien laws of his state—until he finds himself personally involved."
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> ~George Neff Stevens,
> *Our Inadequate Attorney's Lien Statutes—A Suggestion*,
> 31 Wash. L. Rev. 1,1 (1956)

Attorney liens haven't changed much since the then-Dean of the University of Washington School of Law wrote his incisive critique over a half-century ago. Neither has the average lawyer's familiarity with attorney liens. An ambiguous statute and most lawyers' infrequent use of liens is a potentially dangerous combination from the perspective of law firm risk management.

Attorney liens come in two forms in Washington under RCW 60.40.010.[1] The first, often called a "retaining" lien and codified at RCW 60.40.010(1)(a)-(b), places a lien for fees over a client's file and funds in the lawyer's possession. The second, usually called a "charging" lien and created by RCW 60.40.010(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 creating a fund for the client or the resulting judgment in the client's favor. Each variant has its own risks.

***Retaining Liens***

Under RCW 60.40.010(1)(a)-(b), retaining liens encumber, respectively, client papers or money in the lawyer's possession. "Papers" are usually the client's file and "money" is usually an advance fee deposit or other funds held in the lawyer's trust account. Retaining liens are most often triggered when the lawyer and client go their separate ways in an ongoing matter—with the lawyer still owed money for legal services provided to the client.

***Papers***. This aspect of the lien statute has not changed fundamentally since it was adopted by the Territorial Legislature in 1863. Writing over a 100 years ago, the Washington Supreme Court in *Gottstein v. Harrington*, 25 Wn. 508, 511-12, 65 P. 753 (1901), described liens over client files in terms that remain accurate today:

> "It seems apparent that the statute did not intend to confer an enforceable lien against papers in possession, as it provides no method for the enforcement of such lien. This, indeed, is but a recognition of the general law that a retaining lien may not be enforced, but may merely be used to embarrass the client, or, as some cases express it, to 'worry' him into the payment of charges . . . The lien of an attorney upon the papers of his client is personal to the attorney, and is not subject to assignment. Possession is of the essence of this lien, and, once parted with, the right is waived and relinquished." (Citations omitted.)

RPC 1.16(d), which addresses a lawyer's duties on withdrawal, notes that a lawyer "may retain papers relating to the client to the extent permitted by other

law." While seemingly broad, WSBA Advisory Opinion 181, which was initially adopted in 1987 and was updated in 2009, tempers this right significantly:

> "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.
>
> "A client's need for the files will almost always be presumed from the request for the files. But this need does not mean that in every case the assertion of a lien will prejudice the client. If there is no dispute about fees and the client has the ability to pay the outstanding charges, it is proper for the lawyer to assert the lien. In this situation, it is the former client's refusal to pay that will cause any injury. When, however, there is a dispute about the amount owed, or the client does not have the ability to pay, the lawyer cannot assert lien rights if there is any possibility of interference with the former client's effective self-representation or representation by a new lawyer."

The practical risks are twofold if a lawyer improperly withholds a file the client needs. First, the lawyer may be exposed to regulatory discipline for an alleged violation of RPC 1.16(d). Second, if the client's position in an ongoing matter was compromised by the lawyer improperly withholding the file, the lawyer may also be at risk of a civil damage claim for breach of fiduciary duty.

***Money***. Less frequently, a client may have money in the lawyer's trust account—such as a remaining advance fee deposit—when a dispute over the lawyer's bill arises. Although RCW 60.40.010(1)(b) gives a lawyer a lien for fees "[u]pon money in the attorney's hands belonging to the client," the lawyer's ability

to enforce this lien is not automatic. RPC 1.15A(g) governs the disposition of disputed funds held in trust:

> "If a lawyer possesses property in which two or more persons (one of which may be the lawyer) claim interests, the lawyer must maintain the property in trust until the dispute is resolved. The lawyer must promptly distribute all undisputed portions of the property. The lawyer must take reasonable action to resolve the dispute, including, when appropriate, interpleading the disputed funds."

Further, the Court of Appeals in *Glick v. McIlwain*, 154 Wn. App. 729, 230 P.3d 167 (2009), found that a possessory lien against money cannot simply be foreclosed. Rather, Advisory Opinion 181 notes that the lawyer's entitlement to the fee must be litigated and a judgment entered in the lawyer's favor:

> "Since the retaining or possessory lien cannot be foreclosed, any funds held pursuant to the lien must be held in the lawyer's trust account. The lawyer can apply those funds against what is owed only by obtaining a judgment against the client and enforcing the judgment by the normal judgment enforcement processes."

Again, the practical risks are twofold. First, if the lawyer does not follow the procedure set out in RPC 1.15A(g), the lawyer runs the risk of regulatory discipline. Second, if the lawyer simply takes the money and a court determines later that the lawyer was not entitled to the amount involved, the lawyer may also be exposed to a civil damage claim.

***Charging Liens***

Charging liens are a potentially powerful collection tool if a lawyer's work has resulted in the creation of a fund for the client. RCW 60.40.010(1)(c), for example, allows a lawyer to pursue a lien claim against adverse parties holding money due the lawyer's client from an "action or proceeding" that the lawyer handled for the client. RCW 60.40.010(1)(d), in turn, provides a lien over the proceeds of an action "to the extent of the value of any services performed by the attorney in the action[.]" Finally, RCW 60.40.010(1)(e) grants a lien over a judgment "to the extent of the value of any services performed by the attorney in the action[.]"

Nonetheless, three practical risks remain.

First, a lawyer asserting a charging lien should carefully review RCW 60.40.010 to make sure that the lawyer has properly perfected the lien involved and is asserting it against an available asset. On the former, for example, notice is required for liens under RCW 60.40.010(c) and (e). On the latter, the Supreme Court in *Ross v. Scannell*, 97 Wn.2d 598, 647 P.2d 1004 (1982), concluded that attorney liens cannot be recovered against real property.

Second, a lawyer who improperly asserts a charging lien is at disciplinary risk. *In re Vanderbeek*, 153 Wn.2d 64, 86-88,101 P.3d 88 (2004),

offers a telling illustration.[2] The lawyer in *Vanderbeek* recorded attorney liens on real property owned by several clients contrary to *Ross*. She was disciplined both under the fee rule—RPC 1.5—and under RPC 8.4(d) for conduct prejudicial to the administration of justice.

Third, because attorney fees are subject to reduction or denial for breach of fiduciary duties, a lien may be invalidated if the attorney claiming the lien was in breach. In *Gustafson v. City of Seattle*, 87 Wn. App. 298, 941 P.2d 701 (1997), for example, a lawyer who successfully resolved a case for a client argued that a prior lawyer's lien was invalid because the earlier lawyer had a conflict. The Court of Appeals sent the case back to the trial court for further review of the first lawyer's conduct and, in doing so, observed that the trial court had the discretion to invalidate the lien.

***Summing Up***

The Court of Appeals in *King County v. Seawest Inv. Associates, LLC*, 141 Wn. App. 304, 312, 170 P.3d 53 (2007), noted both the ambiguity of the lien statute and that "Washington case law sheds little light on the correct interpretation[.]" An attorney lien can be a useful collection device. But, there are enough traps for the unwary that lawyers should proceed with caution when using them.

## ABOUT THE AUTHOR

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[1] *See also* RPC 1.8(i)(1) and accompanying Comment 16—which permit lawyers to acquire liens "authorized by law" to secure their fees and associated expenses.

[2] *See also In re Koehler*, 110 Wn.2d 24, 750 P.2d 254 (1988) (disciplining lawyer for failure to promptly remove attorney lien from real property following the *Ross* decision).