

Your Court Street Lawyer's Quick Reference Guide

Attorney's Liens and Legal Fee Enforcement

By Richard A. Klass, Esq.

This Quick Reference Guide is intended on providing attorneys with information relating to the attachment and enforcement of retaining liens and charging liens; methods of enforcement of these attorney's liens; steps to be taken to pursue legal action for the recovery of legal fees; and risk management and ethical issues relating to the enforcement of attorney's liens and actions.

A. Attorney's Liens: There are two types of attorney's liens.

1. Retaining lien (or 'possessory' or 'general' lien):

The retaining lien is a right granted to an attorney to hold on to the property of a client until the legal fees due have been paid. It can be compared to a car mechanic who does work on a customer's car and may hold on to the car until the bill for repairs has been paid. Even though today, most of a case file may be filed online and, thus, the client's file is not needed as much as in the past, this lien is still very effective when dealing with either large quantities of documents, original papers/evidence or property other than papers that cannot be easily obtained or replicated.

- A retaining lien attaches to all property, papers, and money coming into the hands of the attorney. *Butler, Fitzgerald & Potter v. Gelmin*, 235 AD2d 218 [1 Dept. 1997].
- As opposed to a charging lien, it is not assignable. *People v. Keefe*, 50 NY2d 149 [1980].
- Generally, an attorney may not be required to surrender the property belonging to the client until an expedited hearing has been held to ascertain the amount of his fee. *Andreiev v. Keller*, 168 AD2d 528 [2 Dept. 1990].
- Absent evidence of discharge for cause, the attorney cannot be compelled to give up a client's file or receive adequate security for payment. 7 NY Jur., *Attorneys* §243; *Goldman v. Rafel Estates*, 269 AD 647 [1 Dept. 1945].
- Lien does not extend to property beyond the client's interest in it. *Jackson v. American Cigar Box Co.*, 141 AD 195 [1 Dept. 1910].
- Alimony/maintenance/child support is not subject to a retaining lien. *Schelter v. Schelter*, 206 AD2d 865 [4 Dept. 1994].
- The retaining lien exists both for charges due in the particular case in which the lienable item came into the attorney's hands and for any general balance due for services unconnected with that matter. *Matter of Weldon v. De Martini*, 35 Misc.2d 710 [Sup. Queens 1962].
- Unlike an artisan's or mechanic's lien, an attorney's retaining lien may not be enforced through foreclosure; it is merely a passive right to hold onto the property until the fees are paid or adequate security is given. *In re Wilson*, 12 F. 235 [SDNY 1882]; *In re Makames*, 238 AD 534 [4 Dept. 1933].
- Under certain circumstances, a court may order the attorney to turn over the file to the client without payment or security, such as criminal capital punishment or matrimonial case, indigence (attorney may contest this claim of poverty and get an expedited hearing), or other exigent circumstances. *Matter of Hauptman*, 243 AD 613 [2 Dept. 1935].
- Lien can be waived where attorney voluntarily releases property. *Kaplan v. Reuss*, 113 AD2d 184 [2 Dept. 1985].

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2. Charging lien or 'statutory' lien:

The charging lien is an equitable one, originating from common law and later codified under Judiciary Law Section 475. It grants to the attorney a property right in the client's case from inception through judgment.

§ 475. Attorney's lien in action, special or other proceeding. From the commencement of an action, special or other proceeding in any court or before any state, municipal or federal department, except a department of labor, or the service of an answer containing a counterclaim, or the initiation of any means of alternative dispute resolution including, but not limited to, mediation or arbitration, or the provision of services in a settlement negotiation at any stage of the dispute, the attorney who appears for a party has a lien upon his or her client's cause of action, claim or counterclaim, which attaches to a verdict, report, determination, decision, award, settlement, judgment or final order in his or her client's favor, and the proceeds thereof in whatever hands they may come; and the lien cannot be affected by any settlement between the parties before or after judgment, final order or determination. The court upon the petition of the client or attorney may determine and enforce the lien.

- It creates a vested property interest in the attorney. *LMWT Realty Corp. v Davis Agency Inc.*, 85 NY2d 462 [1995].
- Lien attaches to the client's cause of action, verdict, judgment or award for his client. *People v. O'Keefe*, 50 NY2d 149 [1980].
- Lien is given only to counsel who appears for a party – granted to the "attorney of record." *Itar-Tass Russian News Agency v Russian Kurier, Inc.*, 140 F3d 442 [2 Cir. 1998].
- Law firm associates or "of counsel" attorneys have no statutory lien. *Jaghab & Jaghab v Marshall*, 256 AD2d 342 [2 Dept. 1998].
- There must be proceeds from the litigation upon which the lien can affix. *Banque Indosuez v Sopwith Holdings Corp.*, 98 NY2d 34 [2002].
- Attorney for a defendant who asserts a counterclaim can have a lien.
- Charging lien is granted in actions, special proceedings, or other proceedings in a court or governmental department (except Dept. of Labor). Lien may apply to a wide range of courts, including federal, bankruptcy, Surrogate's (in decedents' estates), and state courts.
- There must be proceeds from the litigation upon which the lien can affix. *Banque Indosuez v Sopwith Holdings Corp.*, 98 NY2d 34 [2002].
- Lien may apply to services performed by attorneys in proceedings in and out of New York.
- Charging lien is to be measured by the reasonable value of attorney's services.
- In contingency cases where termination by the client without cause during the pendency of the case occurs, the court can set the lien at either a fixed dollar amount based upon quantum meruit or as a contingent percentage to be determined at the conclusion of the case (attorney has the option for either one). *Wiggins v. Kopko*, 105 AD3d 1132 [3 Dept. 2013].
- Judiciary Law §475-a permits a pre-action 'notice of lien' to be served upon other parties (written notice signed by client and attorney, served by personal service or registered mail).
- Unlike a retaining lien, a charging lien applies only to services rendered in the particular case and not to general balances due the attorney. *Banque Indosuez v Sopwith Holdings Corp.*, 98 NY2d 34 [2002].
- Lien attaches to the client's cause of action, which continues even if that attorney is longer counsel of record upon the action's conclusion. *Klein v. Eubank*, 87 NY2d 459 [1996].
- Lien cannot be affected by any settlement between the parties; so, a defendant who pays settlement proceeds directly to the plaintiff with notice of the lien, pays at his own peril. *Fischer-Hansen v Brooklyn Hgts. R. Co.*, 173 NY 492 [1903].
- Charging lien is superior to a creditor's execution, judgment or other liens subsequent in time. In order to supersede an attorney's charging lien, a party's claim must be a prior one against the specific fund upon which the attorney's lien has attached.

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- Lien takes priority over federal tax lien (except for claim against USA); hospital lien; right of setoff of adverse party.
- Lien may be lost if attorney abandons the case, withdraws from representation without cause, or by reason of misconduct (such as disbarment, suspension, or infidelity). More is required than a client's general dissatisfaction with an attorney's performance. *DeLuccia v. Village of Monroe*, 180 AD2d 897 [3 Dept. 1992].

B. The procedure to determine and enforce an attorney's lien is either through summary proceeding or a motion in the underlying action.

- The remedies available to an attorney, including the retaining lien, charging lien and action for fees, are cumulative and not exclusive. An attorney may bring a summary proceeding to determine and enforce the lien, and bring a plenary action. *Wankel v Spodek*, 1 AD3d 260 [1 Dept. 2003].
- If parties colluded to settle case without paying attorney's lien or otherwise disregard the lien, attorney may bring a proceeding against the plaintiff and defendant to enforce the lien.
- A hearing will be held to determine the amount of the outgoing attorneys' lien, to be determined upon the basis of the value of the services rendered up to the time of his discharge. *Goldenstein v Goldenstein*, 28 AD2d 962 [1 Dept. 1967].
- When an attorney was hired on a contingency basis, the proper practice is to compel the discharged attorney to elect, at the time the substitution is made, either to have his compensation then fixed at a specified amount or to have his fee fixed at a percentage basis at the conclusion of the case. *Podbielski v Conrad*, 286 AD 1040 [2 Dept. 1955].
- An attorney who is discharged for cause is not entitled to a lien. *Callan & Byrnes, LLP v Ruth E. Bernstein Law Firm*, 48 AD3d 459 [2 Dept 2008].

C. There may be other circumstances in which an attorney may have a lien.

Aside from the rights to a retaining lien and a charging lien, the attorney may have an independent right to a lien for attorney's fees against another party. In general, New York follows the "American" rule that legal fees are not awarded when a party succeeds in the litigation. However, legal fees may be awarded to the prevailing party under a statute, court rule or contract. Various statutes have prevailing attorney's fees and fee-shifting rules, such as Domestic Relations Law §237, Debtor and Creditor Law §276-a, Worker's Compensation Law §225; and Fair Debt Collection Practices Act (15 USC 1692k). Enforcement of the attorney's lien against other parties may be had in such circumstance.

D. Collection actions: Once the attorney has come to the decision to further pursue collection of the debt through means of a plenary action, it is important to follow pre- and post-commencement steps in order to ensure a successful recovery.

1. Pre-litigation activities:

- Deciding whether to pursue the debt against former client – rule of thumb is to sue only on cases in which the attorney achieved a favorable result for the client.
- Referral to a collection agency – dunning campaign, including letters and telephone calls.
- Implications of the Fair Debt Collection Practices Act (FDCPA) on collection activities – also, compliance with state collection restrictions.
- Assessing the collectability of the debt from the client – is the client 'judgment proof' and not worth pursuing?
- Review of attorney's file to determine whether all documents are in the file; contemporaneous time records were made and are preserved; retainer agreement on file; ripe for collection.
- Ensuring conditions precedent, including service of the appropriate notice of right to fee arbitration under Part 137 (as applicable) or any notices to cure defaults have been served.

2. Court action:

- There are considerations concerning the venue of the action, including whether the debt is a 'consumer debt' in which the action must be brought in either the county where the transaction took place or where the debtor resides.
- Confirm detailed bills were issued at regular intervals, preferably every 30-60 days. *Edelstein v. Greisman*, 67 AD3d 796 [2 Dept. 2009].
- Anticipating defenses/counterclaims of the debtor/former client.
- A charging lien entered in the underlying action against the client may bar him from thereafter asserting a claim for legal malpractice. *Lusk v Weinstein*, 85 AD3d 445 [1 Dept. 2011].
- Consideration of the three-year statute of limitations for legal malpractice cases. *CPLR 214(6)* ("an action to recover damages for malpractice, other than medical, dental or podiatric malpractice, regardless of whether the underlying theory is based in contract or tort" must be commenced within 3 years).
- Allegation of license to practice law.

3. Causes of action:

- Breach of contract - based upon retainer agreement/engagement letter.
- Retainer agreement/engagement letter required under Rules of Court §1215. Exceptions to the Rule include where the fee to be charged is expected to be less than \$3,000 domestic relations matter (where Part 1400 applies); and where the attorney's services of the same general kind as previously rendered to and paid for by the client.
- Quantum meruit/unjust enrichment claims. Attorney must prove that the terms of the retainer agreement were fair, fully understood and agreed to by client. *Gary Friedman PC v. O'Neill*, 115 AD3d 792 [2 Dept. 2014].
- Account stated. Retaining bills without objection or even with partial payment by the client ratifies them. *Mintz & Gold LLP v. Hart*, 48 AD3d 526 [2 Dept. 2008].

E: Ethical/professional concerns: Separate from the normal considerations of any person when deciding whether to pursue legal remedies to collect an unpaid bill, attorneys have other, special considerations, including:

1. Billing concerns
2. Grievance arising out of liens/actions
3. Legal malpractice actions or counterclaims
4. Disclosure of client's confidential information
5. Withdrawal from the case or terminating representation of the client at the right (or wrong) time.
6. Breakdown of the attorney/client relationship.
7. Careful with the escrow account! Setting aside only the disputed portion and not withholding from the client the undisputed portion.
8. Reporting on insurance applications – could affect premium amount
9. Reasonableness of legal fee
10. Rule of Professional Conduct 1.5(a) states that the cardinal principle that governs all lawyer fee agreements is: "A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses."
11. The factors to be considered in determining the reasonableness of a fee include: (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and the ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent. Rule 1.5.
12. Diversion of the attorney's resources from future, productive work (putting good money after bad).
13. Some attorneys do not want to have the image that they sue their clients.

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F: Risk management: There are measures that attorneys can take and systems to be put in place to reduce exposure to potential legal malpractice claims and to ensure payment of legal fees, including:

1. Client selection – do you get the sense of trouble when the client walks in the door?!
2. Written engagement letters/retainer agreements should be provided to client, as may be required under Part 1215 (and, if relevant, filing retainer statements with the Office of Court Administration, Supreme Court, or other office, including Fiduciary Clerk for court appointments).
3. Checking for conflicts of interest.
4. Calendar management – preferably two methods of managing the calendar, including one for statute of limitations and deadlines.
5. Billing systems – appropriate time entries and review of time expended for quality control; detailed entries to eliminate “block billing.”
6. Review of fee actions for potential counterclaims
7. File closing and disengagement letters
8. Withdraw from a case when appropriate. There are three primary reasons allowing an attorney to withdraw from a case: (a) failure to remain in contact with counsel; (b) deterioration of the attorney-client relationship; and (c) nonpayment of legal fees. *Tartaglione v. Tiffany*, 280 AD2d 543 [2 Dept. 2001].
9. Document retention policies
10. Rules of Professional Conduct annual review.
11. Maintaining Professional Liability Insurance
12. Returning calls and emails and keeping the client updated on the matter!

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Litigation for the Legal Profession:

Legal Malpractice defense of attorneys

Legal Malpractice actions against attorneys

Attorney fee collection

Consultation on and litigation of attorney's retaining and charging liens

Expert Witness analysis and testimony on reasonable attorney's fees and awards

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