

# ENFORCING YOUR RIGHT TO GET PAID

*Ethics, Lien Rights and Retainers*

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**I**n certain cases and under certain conditions, Arizona law allows lawyers common law lien rights for the purpose of securing the payment of fees and expenses incurred on behalf of their clients. The most common situations that give rise to questions concerning lien rights of lawyers who have not yet been fully paid are those in which:

1. Recovery of money or property has been achieved for the client by the lawyer's efforts but has not yet been paid or distributed to the client;
2. The lawyer has either been fired by, or has terminated the relationship with, the client, and the client has requested "the file."
3. There is money that the client has paid as a retainer sitting in the lawyer's trust account, and the client does not think the lawyer has earned the amount left in the account and wants it returned.

Each one of these situations involves different ethical rules, some of which changed on Dec. 1, 2003, when Arizona's new Rules of Professional Conduct became effective.<sup>1</sup>

#### THE LAWYER'S CHARGING LIEN

Let us start with the easiest one first. This concerns what is known in Arizona and elsewhere as the attorney's "charging lien," a right recognized in the common law<sup>2</sup> that allows a lawyer to recover her fees and costs from the fund or property ultimately recovered on behalf of the client.

This is not a possessory lien, as is the case concerning retaining liens, discussed subsequently. The lien can be imposed only on the recovery, be it cash or property, gained for the client, and does not extend beyond the charges in the case in which the judgment, recovery or settlement was achieved.<sup>3</sup>

In Arizona, the authority cited for the creation and enforcement of the charging lien is *Linder v. Lewis, Roca, Scoville & Beauchamp*,<sup>4</sup> a case involving attorney Beauchamp's recovery of a contingent fee after having successfully obtained a verdict for his client in a malicious prosecution case. The client assigned the judgment to another lawyer for collection, who then collected the judgment and turned over the proceeds to a second assignee, all in derogation of Mr. Beauchamp's charging lien rights.

The Arizona Supreme Court, in ruling for Mr. Beauchamp, stated three principles that still apply concerning charging liens in Arizona. First, there must be evidence that the lawyer and the client intended the lawyer's fee to be paid from the fund or property recovered; second, the amount of the fund necessary to pay the charging lien cannot effectively be assigned by the client; and third, whoever receives the fund assigned holds it for the attorney's use and benefit.<sup>5</sup>

Of course, the classic case of a charging lien is the claim a lawyer has against the client's recovery in a contingent fee case. In such a situation, the written fee agreement required by ER 1.5(c), and signed by the client, will satisfy the showing of the intent that the fund created is to be used to pay the lawyer. The charging lien should not be confused with other agreements to secure a lawyer's right to be paid, such as accepting a lien on a client's real property as security for the payment of fees,<sup>6</sup> or tak-

ing a lien on community funds in a dissolution proceeding.<sup>7</sup>

Once the fund is created and the charging lien arises, how is it enforced?

There is not much modern authority on this in Arizona, although it would seem pretty obvious that some sort of notice to the judgment debtor would be wise once the judgment is entered,<sup>8</sup> as well as spelling out to the opposing side how the settlement check is to be made out in the event of a settlement. Insurance companies almost automatically make the claimant's lawyer a payee on settlement checks. In cases in which title to real property has been acquired for the client, recording a notice of the lien would be appropriate.<sup>9</sup> No formal notice to the client is necessary, however, once the fee agreement is signed.<sup>10</sup> And, when all else fails, there are rules of civil procedure that can be used to assist the lawyer should judicial intervention in enforcing the charging lien become necessary.<sup>11</sup>

#### THE LAWYER'S RETAINING LIEN

In contrast to the nonpossessory charging lien described above, the law has long recognized the possessory retaining lien that lawyers have on the client's file and in other property belonging to the client that comes into the lawyer's possession during the representation.<sup>12</sup>

In Arizona, the case most often cited on retaining liens is *National Sales & Service Co., Inc. v. Superior Court*.<sup>13</sup> There, over a vigorous dissent, it was recognized that an attorney has a retaining lien upon the papers and other chattels of her client.<sup>14</sup> The Court limited the lien's breadth, however, by holding that the lien could not be imposed on documents that the client has brought to the lawyer either to pass on to the other side in response to discovery requests or to serve as exhibits in litigation.

In his concurring opinion, Justice Feldman pointed out that although an attorney's work product could be withheld to secure payment, nothing in the file was subject to the lien if the client had been abandoned or if the lawyer had been justifiably discharged. Justice Feldman joined the majority in cautioning against any action in asserting the lien that caused prejudice to the client.<sup>15</sup> Thus it was, prior to Dec. 1, 2003, that issues concerning the attorney's retaining lien turned on the type of documents being held by the lawyer—for example, the lawyer's research notes versus the client's corporate books and records.<sup>16</sup>

Now, however, with new ER 1.16(d),<sup>17</sup> few of these considerations

are still relevant. What is relevant is whether and to what extent the assertion of the lawyer's retaining lien prejudices the client—that is, if not giving the documents back to the client until the lawyer is paid hurts the client's interests, the lien will not be enforced.

There is a recent Arizona formal ethics opinion on this issue and on the effect of new ER 1.16, and you should read it before you attempt to assert a retaining lien on any document of what-

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ever classification in your client's file.<sup>18</sup> In short, what was once a cautionary suggestion in Justice Feldman's concurring opinion in *National Sales & Service* is now the determining factor in whether a retaining lien will withstand scrutiny; the more valuable the item withheld is to client, the less likely it is that it will be subject to a retaining lien.

Another way to view the rule is that the strongest lien claim will be against the items about which the client cares the least, making the retaining lien of questionable value to the lawyer. And it is probably not worth trying to bluff the client into blinking; the check that comes to you in the same envelope as the notice of a Bar complaint is seldom worth it. This is especially true since it is settled in Arizona that the burden of showing that the client has not been prejudiced by the assertion of a retaining lien is on the lawyer.<sup>19</sup>

#### THE RIGHT TO MONEY GIVEN TO SECURE PAYMENT OF THE FEE

Having discussed the lien rights on the client's recovery and the lien on his lawyer's file, what of the more enviable situation in which the lawyer has received a refundable retainer from the client and is holding it in his trust account to be used to pay his fee?

This is normally not a troublesome area, except when the client disagrees that he owes the lawyer more than he has already paid and wants the rest of the retainer refunded. In those cases, there is no "lien," and the lawyer should not use the retainer to pay any contested amounts, even though the client is clearly wrong or is being unreasonable. ER 1.15(e) (Safekeeping Property) states that:

When in the course of representation a lawyer possesses property in which two or more persons (one of whom may

be the lawyer) claim interests, *the property shall be kept separate by the lawyer until the dispute is resolved*. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute. (Emphasis supplied)

This provision covers disputes over property being held by a lawyer, and its provisions are clearly broad enough to cover disputes between the lawyer and a client over an unused retainer. In the event of a dispute with a client over funds still remaining in the trust account, the comment to ER 1.15(e) states very clearly that the disputed portion of the funds must remain in the lawyer's trust account and that the lawyer should take steps to promptly resolve the dispute, such as through the State Bar's fee arbitration facilities.<sup>20</sup> And, very importantly, any undisputed amounts cannot be kept by the lawyer as leverage in the dispute over the rest of the retainer. Uncontested amounts must be returned to the client promptly.

#### CONCLUSION

Fee disputes are the worst kinds of disagreements we have with clients. Regardless of the outcome, the relationship afterward is seldom ever the same and often results in the client looking for another lawyer the next time the need arises for legal services.

The use of charging liens, retaining liens and fee arbitrations is sometimes necessary, but it is seldom the best solution to the problem. Studies have shown that regular billing, with statements showing the details of the work done, and frequent communication between lawyer and client about the status of the client's case do more to assist the lawyer in getting paid than any lien rights he may wish to assert. When, as a last resort, the issue must be decided by lien or arbitration, lawyers need to be aware of and follow the applicable ethical rules. **A7**

#### endnotes

1. Rule 42, ARIZ.R.S.CT.
2. RESTATEMENT (SECOND) OF AGENCY § 464(e) (lawyer has security interest for fees in judgment obtained for client); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 43(2) (client and lawyer may agree that lawyer can have a security interest in property of client recovered through lawyer's efforts).
3. See generally McAULIFFE, ARIZONA LEGAL ETHICS HANDBOOK § 1.5.240 (2004); 7 AM. JUR. 2d *Attorneys at Law* § 342 et seq. (1997); Anno: *Attorney's charging lien as including services rendered or disbursements made in other than instant action or proceeding*, 23 A.L.R. 4th 336 (1983).
4. 333 P.2d 286 (Ariz. 1958).
5. 333 P.2d at 289. In *Holly v. State*, 18 P.3d 152 (Ariz. 2001), it was held that a lawyer's charging lien on a prisoner's personal injury recovery even took priority over the State's statutory right to setoff for incarceration costs.
6. *Skarecky & Horenstein, P.A. v. 3605 North 36th Street Co.*, 825 P.2d 949 (Ariz. 1991). Transactions of this nature are probably "business transactions" with a client. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 43(4).
7. Arizona Ethics Op. No. 86-12 (Oct. 21, 1986).
8. *Millsap v. Sparks*, 188 P.135 (Ariz. 1920) (charging lien not perfected until notice given to obligor); Anno: *Sufficiency of notice to opposing party (or of serving or filing thereof) required to establish attorney's lien upon client's claim or cause of action*, 85 A.L.R. 2d 859 (1962).
9. Rothrock, *Recording Charging Liens Against Real Property: When, Not Whether*, 31 COLO. L. 121 (October 2002).
10. 7 AM. JUR. 2d *Attorneys at Law* § 348 (1997).
11. See, e.g., Rules 70 and 71, ARIZ.R.CIV.PRO.; RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 43 (3) (court in which case is pending may adjudicate lawyer's lien claims).
12. RESTATEMENT (SECOND) OF AGENCY § 464(b) (lawyer has right to retain possession of money, goods or documents until he is paid); RESTATEMENT OF SECURITY § 62(b) (lawyer has a possessory lien upon papers and other chattels of client coming into his possession as client's lawyer); Anno: *Rights and Remedies of client as regards papers and documents on which attorney has retaining lien*, 3 A.L.R. 2d 148 (1949).
13. 667 P.2d 738 (Ariz. 1983).
14. This is not the view held in the Restatement. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 43 (lawyer does not acquire lien entitling him to retain client's property in order to secure payment of fees).
15. *National Sales*, 667 P.2d at p. 742.
16. See *The Attorney's Retaining Lien*, ARIZ. ATTORNEY (July 1999) at 19, *Termination of Lawyer/Client Relationship*, ARIZ. ATTORNEY (June 1999) at 18.
17. ER 1.16(d) provides, in pertinent part, that the lawyer "may retain documents reflecting work performed for the client to the extent permitted by other law only if retaining them would not prejudice the client's rights."
18. Arizona Ethics Op. No. 04-01 (January 2004).