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LIENS: WHAT YOU NEED TO KNOW TODAY

Chapter 7
3:15 – 4:00pm
Ethics: Attorney Liens – What You Can and Cannot Do To Collect Your Fees
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1. Attorney Liens in Washington: Attachments, Notice, Foreclosure and Ethical Considerations.

ATTORNEY LIENS IN WASHINGTON:

ATTACHMENT, NOTICE, FORECLOSURE

AND ETHICAL CONSIDERATIONS

A Presentation to the King County State Bar Association

Creditor Debtor Section

Liens: What You Need to Know Today

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I. INTRODUCTION

This presentation is an annual one I usually give at the KCBA or WSBA Creditor/Debtor Sections' Seminar on Liens each November or December. These materials have been substantially updated from those used in 2012. Also included with these materials is a compendium of important attorney's lien cases, some very old and some very new. More recent cases have provided some answers to the many unanswered questions relating to the workings of Washington's attorney's lien statute.

Washington's attorney's lien derives from a statute passed by the Territorial Legislature in 1863 and codified into the Territory's first legal code in 1881. It is very poorly-worded, very incomplete and utterly fails to address most important aspects of any attorney's lien as a security device to assure lawyers are paid for their work. In short, the statute's scant three sections are about what you would expect for 1863. The statute has apparently been amended only one time in its 150 year history, that in 2004, and then only for the reason that the Legislature was troubled by Federal tax code interpretations that permitted double taxation of attorney's fees in employment cases.[1] The amendments in 2004 intended to give the Washington statute a gloss like that of Oregon, where it now provides the lawyer with a property interest in the client's litigation in order to secure the lawyer fees.[2] It is long past time for a brand new, understandable and complete attorney's lien statute.

The first section of the statute (RCW 60.40.010) spells out, albeit imperfectly, what the lien attaches to (with a lot of help from the 2004 amendments), but prescribes no way to perfect the lien, how notice is to be given, and nothing as to priorities with other liens. The second section of the statute (RCW 60.40.020) deals only with procedures for the client compelling production of money or papers held by the lawyer claiming a possessory lien under RCW 60.40.010 (1)(a & b). The last section (RCW 60.40.030) provides a rather sketchy manner in which *possessory* attorney's liens on money or papers in the lawyer's hands are resolved. The statute offers no procedure whatsoever on how realization on the charging (non-possessory) lien is accomplished.

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[1] "The purpose of this act is to end double taxation of attorneys' fees obtained through judgments and settlements, whether paid by the client from the recovery or by the defendant pursuant to a statute or a contract. Through this legislation, Washington law clearly recognizes that attorneys have a property interest in their clients' cases so that the attorney's fee portion of an double taxation on attorneys' fees received in litigation and owed to their attorneys. Thus, except for *RCW 60.40.* award or settlement may be taxed only once and against the attorney who actually receives the fee. This statute should be liberally construed to effectuate its purpose. This act is curative and remedial, and intended to ensure that Washington residents do not incur *010(4),* the statute is intended to apply retroactively." [2004 c 73, § 1.]

[2] In my presentation in the 2011 KCBA Seminar on Liens, I presented a paper, "Time for a Change – A New Attorney's Lien Statute for Washington. In it, I made the case for a new attorney's lien statute for Washington. The Creditor-Debtor's section and I hoped we would come up with a new draft statute to present to the legislative people at WSBA, but my law practice has gotten in the way. I have again picked up the mantle and have begun working on this. I have an article scheduled to be published in the WSBA Northwest Lawyer this month entitled, "Our Attorney's Lien Statute: Isn't it Time for an Update?" The point of this new article is to organize support among members of the bar for a total re-drafting of this statute.

There is very little scholarly writing on this statute.[3] Only a couple dozen published appellate annotations exist for a law dating back 150 years. The cases afford only slight guidance in terms of the foreclosure process. Almost nothing addresses the issue of notice and how it is given. Compared with other modern lien statutes enacted in the past twenty years or so, the attorney's lien statute is wholly deficient. It is very inefficient for clients, lawyers and the courts to address legal issues on a case by case basis, but that has been the rule for a century and a half.

This paper will serve to get the reader started with Washington's attorney's lien statute and the use of attorney's liens. We will cover what should go into a lien claim, how to give the requisite notice, and some suggestions on how to go about the process of foreclosing the lien. Further, the paper will highlight the numerous problem areas in the existing statute.

While the 2004 amendments to the lien statute were not intended in any way to clean up the weaknesses in this ancient statute, the 2004 amendments are important in several ways. They give the lawyer's lien priority over all other liens; they make clear the lawyer has a property interest in the client's cause of action or judgment; and they give the lawyer the right to enforce the lien against covered assets to the same extent as the client.

The lack of clear legal guidance is both a boon and a bane when it comes to litigating in this area. There is a lot of room for creativity and there is a good chance you will encounter a judge who knows less about attorney's liens than you. Any lawyer considering asserting a lien or seeking to avoid a lien must read the statute carefully and appreciate the traps that exist in this area of grossly underdeveloped jurisprudence.

II. LIEN TERMINOLOGY

The literature, treatises and case law on lawyer's liens uses various terminology not actually contained in Washington's lien statute. Terms that commonly relate to liens in general like vested, perfected, attaches, priority, foreclosure and the like are frequently used in lien literature, but are not found in Washington's attorney's lien statute. These terms often refer to specific aspects of whether a lien exists, to what the lien attaches, how it is legally brought to fruition and the like. The use of these terms can be misleading and confusing in the context of Washington's existing attorney's lien statute. I frequently use the term "foreclosure" of a lien. Most people know what that means generally, including judges. One disgruntled party recently seized on this label as being evidence that an effort to realize on an attorney's lien in state court after a lifting the stay in some way violated the Bankruptcy court's order lifting the stay – that party claimed the state court judge in her resolution of the lien used should have been "determined," not "foreclosed." With a statute as poorly written as this one, language can be a problem.

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[3] Stevens, "Our Inadequate Attorney's Lien Statutes – A Suggestion," 31 Washington L. Rev. 1 (Spring 1956); Elsner, "Rethinking Attorney's Liens: Why Washington Attorneys are Forced into Involuntary Pro Bono," 27 Seattle Univ. Law Review, 827 (2004); Brookings, "Strange Bedfellows: The New Washington Attorney's Lien Statute and the Blaney Cases," 58 WSBA Bar News 19 (2004),

III. TO WHAT DOES THE ATTORNEY'S LIEN ATTACH?

A. Creation of the Attorney's Lien – the Lien Statute as Amended.

RCW 60.40.010 provides the subject matter for attorney's liens. There are two kinds of attorney's liens, possessory and charging. This portion of the statute creating the basis for attorney's liens reads as follows:

Lien created -- Enforcement -- Definition -- Exception

(1) An attorney has a lien for his or her compensation, whether specially agreed upon or implied, as hereinafter provided:

(a) Upon the papers of the client, which have come into the attorney's possession in the course of his or her professional employment;

(b) Upon money in the attorney's hands belonging to the client;

(c) Upon money in the hands of the adverse party in an action or proceeding, in which the attorney was employed, from the time of giving notice of the lien to that party;

(d) *Upon an action, including one pursued by arbitration or mediation, and its proceeds after the commencement thereof to the extent of the value of any services performed by the attorney in the action, or if the services were rendered under a special agreement, for the sum due under such agreement;* [4]and

(e) Upon a judgment to the extent of the value of any services performed by the attorney in the action, or if the services were rendered under a special agreement, for the sum due under such agreement, from the time of filing notice of such lien or claim with the clerk of the court in which such judgment is entered, which notice must be filed with the papers in the action in which such judgment was rendered, and an entry made in the execution docket, showing name of claimant, amount claimed and date of filing notice.

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B. The Charging Lien.

1. Statutory language

The charging lien is created in RCW 60.40.010 sub§§ (1) (c) through (e). This is the lien with the potentially greatest impact for lawyers, and of significant interest to those with Bankruptcy or creditor-debtor issues. The lawyer terminated by his or her client can obtain a prejudgment lien on "money in the hands of an adverse party" by giving the required notice under subsection RCW 60.40.010(1)(c), but still the client must obtain a judgment or at least a

[4] This new section was added by the Legislature in the 2004 amendments.

settlement for the lien to be subject to foreclosure. Nowhere in the lien statute is this made explicit, but clearly this must be the case. There are also charging liens under sub§§ (1)(d) and against "actions" and (e) against a "judgment."

2. To what does the Charging Lien Attach?

The original charging lien before the 2004 amendments provided a lien against "money in the hands of an adverse party." Although the statute does not clearly so state, most lawyers have considered this language to include the value of a ***claim*** against an adverse party which would eventually result in a fund against which the lien would attach. Prof. Marjorie Rombauer, one of the few commentators who have ever addressed the lien statute, addresses this idea as follows:

> This subsection does not require that the client's money, in order to be subject to the lien, be literally in the hands of the adverse party. Essentially the lien attaches to the subject of the action, that is, the claim for money.

27 Washington Practice - Creditors' Rights and Debtors' Remedies, §4.27 at p. 331.

But does the attorney's lien under sub§(1)(c) attach to the mere claim of a lawyer's client, (those rights of action before any action is brought), the "chose-in-action?" Probably hundreds of lawyers have asserted these liens, including this author, and we have gotten paid on them. But still, does the sub§ (1)(c) lien actually "attach" to the mere right of action? The Elsner student note from 2004, "Rethinking Attorney's Liens," concludes the answer is "no" to this question. Elsner cites the language of the statute, "Upon money in the hands of the adverse party *in an action or proceeding*, in which the attorney was employed," and the case of *Plummer v. Great Northern R.R.* for the proposition that there can be no lien if there is no action pending. Clearly, the 103 year old *Plummer* case so held.[5]

Most civil cases settle, and many of those settle with no lawsuit of any kind. Is there any legal policy that favors giving lien rights to secure payment of reasonable fees to lawyers who file lawsuits, while denying the same lien rights where lawyers obtain settlements for their clients without burdening the courts? I suggest not.[6]

Under sub§(1)(d) added in 2004, it attaches to the "action, including one pursued by arbitration or mediation and its proceeds after the commencement thereof," as a matter of law, per the obvious language of the 2004 amendment. But a mediation or an arbitration is by definition, not "an action." Does this 2004 addition confer attachment of the sub§(1)(c) lien upon mere choses in action, before any suit is filed? Who knows. Another trap!

Lastly, RCW 60.40.010(1)(e) provides a lien upon a judgment, to the extent of the value of any services performed by the attorney in the action. However, if the notice filed with the clerk is deficient in failing to include the specified required information, the lien is not

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[5] 60 Wash 214, 217 (1910).

[6] Note also that the 2004 amendments to the lien statute grants the right to lien "an action, including one pursued by arbitration or mediation, and its proceeds, . . ." Query – did the Legislature in enacting the 2004 amendments legislatively overrule *Plummer* by accident?

perfected, and cannot be foreclosed.

3. To What does the Charging Lien not Attach?

It does not attach to child support obligating or maintenance in family law cases. *See Fuqua v. Fuqua*.[7]

As interpreted by the Supreme Court, the attorney's lien statute does not grant any rights against real property of the client or other assets of the client. *Ross v. Scannell.*[8] The 2004 amendments do not change this rule. The Supreme Court has held that violation of the established rule that attorneys may not file liens on real property under RCW 60.40.010 constitutes "a violation of practice norms 'prejudicial to the administration of justice' under RPC 8.4(d)." *In re Disciplinary Proceeding Against Vanderbeek.*[9] Recording an attorney's lien against a particular piece of real property belonging to the client constitutes a slander of title. The Supreme Court has stated, "The dangers of allowing attorneys to file liens for unadjudicated, unliquidated claims thus clouding title are especially clear in the instant case." *Ross v. Scannell, supra* at 607. There is no rule relating to attorney's liens more basic than this – under the Supreme Court's interpretation of the existing attorney lien statute, attorney's liens asserted directly against real property are unlawful and unethical.

Does a charging lien attach to settlement proceeds – or a better question is whether a charging lien ever attach to settlement proceeds before the 2004 amendments. A troublesome old case, *Cline Piano co. v. Sherwood,*[10] addressed this situation. Attorney Sherwood represented Plaintiff Burton against *Cline Piano* successfully in litigation, and the trial court announced at the end of the trial that he would enter judgment in favor of Burton for $171.00. No formal judgment was then entered. Attorney Sherwood asserted with the clerk a written notice of claim of lien against the oral judgment. Enterprising client that he was, Plaintiff Burton then settled with the defendant Cline Piano for a lesser payment and agreed to dismiss the case without formal entry of judgment. Burton was paid and he formally filed a satisfaction of his claim with the court. Burton did **not** pay his lawyer Sherwood. Thereafter, the trial judge then entered a formal judgment and Sherwood filed a new claim of lien against the judgment and obtained a writ of execution upon Burton. Sherwood's lien and execution were reversed by the Supreme Court which ruled as follows:

> The law of this case depends upon the solution of the question, when does the order of the court become a judgment; upon the announcement of the court at the conclusion of the trial that his ruling is in favor of the one party or of another, or when that announcement is written out and formally entered by the court? It is our opinion that a lien cannot attach until the written judgment is formally entered.

Cline Piano, supra, at 242. The client was able to defeat the lien by his surreptitious

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[7] 88 Wn.2d 100, 107, 588 P.2d 801(1977).
[8] 97 Wn.2d 598, 647 P.2d 1004 (1982).
[9] 153 Wn.2d 64, 88, 101 P.3d 88 (2004).
[10] 57 Wash 239, 242, 106 P. 742 (1910)

settlement behind his lawyer's back.

> In my view, this is a ridiculous result, but blind adherence to century-old precedents means that at least until the 2004 amendments to the lien statute, this would be the probable result. But as we already know, the Legislature adopted sub§(1)(d) in 2004, where the attorney's lien now attaches to the "action, including one pursued by arbitration or mediation *and its proceeds after the commencement thereof, . . .*" Does this amendment effectively overrule *Cline Piano?* Again, who knows? This too is yet another trap which should be eliminated in the re-drafting of the attorney's lien statute.

C. Possessory Liens.

The possessory liens are created by RCW 60.40.010 (1)(a) & (b).

1. Papers of the Client.

Sub§(1)(a) addresses "papers of the client, which have come into the attorney's possession in the course of his or her professional employment," this clearly covers papers given by the client to the lawyer. Rombauer, 27 Washington Practice – Creditors' Rights and Debtors Remedies, §4.22. Sub§(1)(a) covers the file created by the lawyer, as well as papers which "have come into the attorney's possession," [11] certificates of stock and other corporate papers,[12] books, papers and documents,[13] and negotiable instruments. [14]

2. Client's Money in the Attorney's Hands.

Sub§ (1)(b) of the first section addresses "money in the attorney's hands belonging to the client." The lien on "money in the attorney's hands belonging to the client" is discussed extensively by Prof. Rombauer at §4.26, 27 Washington Practice – Creditors' Rights and Debtors Remedies.[15] The money need not come into the hands of the lawyer in his or her professional capacity, as is the case with the possessory lien on "papers of the client." The money of the client need not even result from any legal work done by the lawyer in that matter.[16] The money extends to money in the lawyer's trust account,[17] so long as it was not deposited there for a particular purpose or which is subject to another valid claim.[18] The Court of Appeals has determined that where an attorney had obtained the proceeds of a personal injury settlement and

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[11] *Hudson v. Brown*, 179 Wash. 32, 35 P.2d 756 (1934).
[12] *State ex. rel Park v. Superior Court*, 141 Wash., 584, 251 P. 863 (1927).
[13] *State ex. rel Robinson Co. v. Gilliam*, 94 Wash. 243, 161 P. 1194, (1917)
[14] *Gottstein v. Harrington*, 25 Wash. 508, 65 P. 753 (1901).
[15] Prof. Rombauer conducts an erudite academic discussion about whether the lien under RCW 60.40.010 (2) is a charging or possessory lien at §4.26 of her treatise. She traces earlier case law that seemed to treat this as a charging lien and the impact of the Supreme Court's decision in *Ross v. Scannell*, 82 Wn. 2d 598, 647 P.2d 1004 (1982), where the court in *dicta* seemed to limit charging liens to liens on judgments only, under the then RCW 60.40.010(4). The Elsner "Rethinking Attorney's Lien article discusses whether a retaining lien may be foreclosed. *See* 27 Seattle U. L.R. at 842-45. The author treats subsection (1)(a) and (b) liens as possessory liens.
[16] *Price v. Chambers*, 148 Wash. 170, 268 P. 143 (1928)
[17] *Crane Co. v. Paul*, 15 Wn. App. 212, 548 P.2d 337 (1976)
[18] Rombauer, *supra*, 27 Washington Practice at §4.26, p. 327.

placed them in a blocked account where his signature was required to access those funds, he had a retaining lien on the funds in the blocked account.[19] This is discussed below in the context of apparently conflicting published appellate opinions.

Since the lien under either RCW 60.40.010(1)(a) & (b) is a possessory one, in fact a codification of the common law possessory lien, the lawyer must continue to retain possession for the lien to remain in existence. Surrender of the papers or money to the client or a third party constitutes a relinquishment of the lien.[20] *Mere agreement* to surrender the papers or instruments is a relinquishment of the possessory lien.[21] However, where a lawyer surrendered a promissory note belonging to his client to secure payment of fees, for the purpose of cancelling the note after acquiring payment, the court determined in the Bankruptcy context that the lawyer's lien shifted to the proceeds. Because the receipt by the lawyer took place outside the preference period, the lien was determined to be valid and was upheld.[22]

IV. ASSERTING ATTORNEY'S LIENS; NOTICE AND FORMAT OF NOTICE

A. Is Notice Actually Required?

Most other liens require some kind of notice, to the person whose property is affected by the lien and to third parties who might deal with the property owner. In the charging lien context it would seem that the hallmark of an attorney's lien would be the giving of notice of the claiming of the lien, both to the client against whom it is asserted and to the stakeholder or opponent who holds the assets to be liened.[23] Without notice, how would the client against whom the lien is asserted even know of the existence of the lien? How would the stakeholder – i.e. the adverse party in whose hands the money is held, or against whom the claim or action lies, or against whom the judgment is taken, even know of the obligation to hold funds subject to the lien? In addressing the language of the original subsection (1)(c) ("money in the hands of an adverse party") citing *Kern v. Chicago M & P.S. Ry.*, 201 Fed 404 (W.D. Wa 1912), Prof. Rombauer states:

> The subsection requires the attorney to give notice, to the adverse party, and expressly provides that the lien does not attach until that notice is given. Failure to give the required notice defeats a lien on money in the hands of the adverse party even if the plaintiff has contracted for such a lien.

Id, §4.27 at p.331. Clearly, RCW 60.40.010(1)(e)(liens on judgments) requires the filing with the clerk a very specific form of notice (whose contents are prescribed by the statute).[24]

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[19] *Krein v. Nordstrom*, 80 Wn. App. 306, 908 P.2d 889 (1995).
[20] *Gottstein v. Harrington, supra.*
[21] *Jensen v. Kohler*, 93 Wash. 8, 159 P. 978 (1916).
[22] *In re Dungeness Timber Co.*, 50 F. Supp. 370,372 (W.D. WA, 1942).
[23] In the possessory lien context, the client already knows that the lawyer holds her money or her papers, and the lawyer's file, so notice is not all that critical.
[24] While lawyers routinely file claims of lien with the clerk and there is no harm in doing so, only a lien on a judgment must be so filed.

B. Subsection (1)(d) Liens – No Notice Seems Required.

Notice however that the new section added in the 2004 amendments, sub§ (1)(d)(liens upon an action . . ., etc) does not contain the word "notice" anywhere. For years, wise practitioners would always give notice to the client *and* to the adverse party where there was an action pending, even before the statute made reference to liens against a client's "action." Division I recently decided a case, *Smith v. Moran and Windes*, 145 Wn. App. 459, 471, 187 P.3d 275 (2008) where the court stated:

> We note further that the lien that Moran claims does not require any affirmative acts other than commencing the lawsuit. Unlike *subsection (1)(e)* that requires filing of a notice with the clerk of the court where a lien against a judgment is sought, **no such notice is required by *subsection (1)(d)***, establishing a lien against an action and its proceeds.

This may be *dicta* since the opponent did not challenge the lien on that basis. Nonetheless, it is hard to believe that the Legislature has wiped out the element of notice for this portion of the statute, but that is the way the 2004 amendment to the lien statute appears to read. I advise giving the notie anyway.

C. How is Notice Given; What Should it Consist of?

Again, the lien statute, even as recently amended, offers practitioners not a clue on how notice must be given [other than in sub§(1)(e) on a judgment] or what information the notice must contain.[25] Although the statute is silent regarding the manner and content of the notice, common sense dictates that the notice should be in writing (although the statute does not so mandate) and at the very least, the notice should be given to the client whose fees owing are to be secured by the lien.

What should the notice contain? Again, the statute provides no guidance, but in my view, it **should** contain:

- the liening lawyer's name,
- the name and address of the client,
- a statement that the lawyer performed legal services for the client, the basis for the fee (e.g., written fee agreement, oral agreement, or implied-in-fact agreement),
- the subject matter that is to be liened,
- the name and address of the stakeholder (the person holding the *res* or subject to which it attaches),
- the amount of the lien in dollars or descriptively, if possible (e.g., one-third of the

[25] This is one of the major flaws that a new attorney's lien statute re-drafting must address.

last offer of settlement that the client has authorized the lawyer to accept), or *quantum meruit*, i.e. the reasonable value of the legal services), including costs advanced.

- The lawyer claiming the lien **should** have his or her signature on the claim of lien notarized.

D. How Should the Notice be Served?

The statute is also silent on how notice is given or served. Nonetheless, in my experience, it is imperative that the client and the stakeholder at least receive actual notice. Personal service is not required but is certainly sufficient. Mailing of the notice is adequate so long as the fact of mailing can be proved. Registered or certified mail is appropriate. The notice should be given to all interested parties and, of course, the adverse party or stakeholder. Proof of service is essential if the goal is to make the lien enforceable, although it seems that any means of service that creates actual notice is acceptable.

E. Filing the Notice?

Except in liens on a judgment, the existing statute does not require the filing of the notice with the clerk. Indeed, in the case of sub§(1)(c) liens (money in the hands of an adverse party), if there is no action pending, so there is no clerk with whom the notice can be filed.[26] In the case of a sub§(1)(d) lien, filing of the notice of claim of lien is not required but is in my opinion advisable. Presumably, under RCW 60.40.010(1)(d), the stakeholder is constructively aware of the lien by the existence of the action having been brought, but who among us wants another lawsuit against the stakeholder for later dishonoring the lien. There is no harm at all in filing with the clerk and filing proof of service.

Even so, in the case of a sub§(1)(e) lien on a judgment, filing is absolutely mandatory. Also – take note – if your RCW 60.40.010(1)(d) action matures to a judgment, under existing dusty old law, you have no lien unless you file a new lien claim with the clerk under sub§(1)(e) of the lien statute, containing all of the required information, you have no lien on the judgment. In *Jones v. International Land* [27], a lawyer claimed a lien under what is now sub§(1)(c) and (1)(e) of the statute. However, he did not give notice of the sub§(1)(c) lien, and he did not file his lien on the judgment until after the time for appeal had run. Another creditor in the interim obtained an attachment upon the judgment he subsequently liened. The lawyer lost to the intervening creditor. This situation represents yet another trap contained in the existing lien statute language and non-existent jurisprudence.

As discussed above, the attorney's lien statute does not grant any lien rights against real property of the client or other assets of the client. Do not record attorney's liens against any real property under any circumstances. Presumably under the *Ross* and *Vanderbeek* cases, merely claiming a lien against real property awarded to a client in litigation is probably also unlawful

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[26] As is discussed above, if *v Great Northern R.R.* is still good law, there is no such lien right, and the 2004 amendments created attorney's liens as a matter of law where there is "an action, including one involving mediation or arbitration."

[27] 51 Wn.App. 737, 755 P.2d 184 (1988)

and unethical. The new attorney's lien statute should remedy this situation.

V. FORECLOSURE OR REALIZING ON THE LIEN

A. The Statute Barely Addresses "Foreclosure" or Realizing on an Attorney's Lien.

If one carefully reads the entire existing statute, very little of it addresses how one realizes on the attorney's lien. RCW 60.40.030 in very ambiguous form provides several ways to resolve a possessory lien. Nowhere does the statute address how a charging lien is realized upon, and the word foreclosure is not even mentioned in the statute. The case law does provide some guidance and has formulated processes for determining the validity and the value of an attorney's lien.

B. How does One Recover on a Possessory Lien?

Where would most lawyers look first for how to recover their unpaid fees secured by a statutory possessory attorney's lien? One would think the answer would be found in the lien statute. But in Washington, one will not find the answer to that question in the lien statute, or for that matter, many other answers to questions about the operation of attorney's liens.

There are only two other sections in the lien statute. RCW 60.40.020 provides:

> **Proceedings to compel delivery of money or papers.** When an attorney refuses to deliver over money or papers, to a person from or for whom he has received them in the course of professional employment, whether in an action or not, he may be required by an order of the court in which an action, if any, was prosecuted, or if no action was prosecuted, then by order of any judge of a court of record, to do so within a specified time, or show cause why he should not be punished for a contempt.

One can see the 1863 handwriting in the statute – very few details for procedure. The statute makes clear that the **client** has a remedy for return of his money or papers in the hands of the lawyer. The procedure is the archaic "show cause" process. How curious it is that our frontier legislature granted an attorney a possessory lien on papers of the client in the lawyer's hands in subsection 1(a) and yet in sub§ .020 authorizes a judge of any court of record to order the money or papers of the client to be released, upon pain of contempt.

The only remaining section of the lien statute is RCW 60.40.030 which provides:

> **Procedure when lien is claimed.** If, however, the attorney claim a lien, upon the money or papers, under the provisions of this chapter, the court or judge may: (1) Impose as a condition of making the order, that the client give security in a form and amount to be directed, to satisfy the lien, when determined in an action; (2) summarily to inquire into the facts on which the claim of a lien is founded, and determine the same; or (3) to refer it, and upon the report, determine the same as in other cases.

This section seems to provide the court with the authority to inquire into the validity of the

attorney's lien against either money or papers of the client and presumably into the amount of the lien claim. The "If however" language of this section presumably refers back to RCW 60.40.020, in the case where the attorney has refused to deliver the papers or money of the client and the client was required to commence legal action for delivery of such papers.[28]

So what are the lawyer's rights to recover fees owed by a client through the use of a possessory lien? Clearly, the lawyer may have his possessory lien determined if the client initiates the process for return of the money or the client's papers. But may the lawyer force the issue of his or her possessory lien in the absence of a client effort to force delivery? The statute is silent. But the Supreme Court addressed this in *dicta* about 30 years ago.

In *Ross v. Scannell*, [29]the Washington Supreme Court was faced with a lawyer's assertion of a charging attorney's lien against real property of his client (the lien was actually provided to a title insurance company) to secure his claimed entitlement to fees earned in litigation for his client. The court in *Ross* clearly recognized attorney Ross' lien as a charging lien, and ultimately determined as a matter of public policy that an attorney's charging lien may not attach to the client's real property, even if the real property was the subject of the lawyer's legal services for the client. The court returned the case to the trial court to determine if the lawyer should be sanctioned for breach of fiduciary duties involving the attorney's lien.

For reasons that are wholly unclear from the opinion, the *Ross* court then engaged in a lengthy discussion of the original possessory attorney's lien provided for in the 1863 attorney's lien statute, and recited the following *dicta* that would seemingly limit the usefulness of possessory attorney's liens:

> This statute, in existence since 1881, provides a delineated and limited statutory attorney's lien designed to be a tool in the collection of fees. The statute in part is merely declaratory of the general or retaining lien recognized at common law. This possessory and passive lien gives an attorney the right to retain papers and documents which come into the attorney's possession during the course of his professional employment. It is a possessory and passive lien and is not enforceable by foreclosure and sale. See Gottstein v. Harrington, 25 Wash. 508, 65 P. 753 (1901); Stevens, Our Inadequate Attorney's Lien Statutes--a Suggestion, 31 Wash. L. Rev. 1 (1956).[30]

This *dicta* has caused problems ever since. May an attorney lawfully foreclose a possessory lien on money of the client in the lawyer's hands? In a recent case, an attorney asserted an attorney's lien for work done in a dissolution of marriage case. *In re Marriage of Glick.*[31] Glick's lawyer

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[28] To my knowledge, legal ethics rules did not even exist in 1863 or any time until the last 50 years, and the fiduciary duties of lawyers to clients had not really begun to be developed. It is clear today, however, that a lawyer may not ethically withhold from the client a case file for a case in pending litigation as leverage to get paid. *See* WSBA Advisory Opinion 181.

[29] 97 Wn.2d 598, 647 P.2d 1004 (1982),

[30] *Ross*, 97 Wn.2d at 604.

[31] 154 Wn. App. 729, 230 P.3d 167 (2009).

McIlwain sought to foreclose her lien *purportedly* against money of the client in the lawyer's hands, and "against a judgment, under RCW 60.40.010(1)(e)." The trial court foreclosed the lien, even though no client money or papers were in the lawyer's hands, nor did she recover any judgment, and incredibly gave McIlwain an *in personam* money judgment for attorney's fees against her own client. Division II reversed the judgment in favor of McIlwain. In doing so, the court could merely have said that RCW 60.40.010(1)(a) and (b) did not apply because there was neither money nor any papers of the client in the lawyer's possession, nor any judgment. Nonetheless, Division I said this:

> McIlwain's attorney lien notice alleged that it was based in part on Glick's papers and money in her possession. As already indicated, these liens are passive and generally not enforceable unless the client seeks the return of property in the attorney's possession. In any event, McIlwain never identified any of Glick's money remaining in her possession. Similarly, although McIlwain also claimed a lien " '[u]pon a judgment,' " she never identified any judgment to which an attorney lien could lawfully attach.

Division I also offered this *dicta:*

> Under chapter 60.40 RCW, Washington's attorney lien statute, an attorney has a lien for compensation upon the client's papers and money that have come into the attorney's possession. [2] Our Supreme Court has noted that these provisions are based on the common law retaining lien. Because such liens are possessory and passive, they are generally not enforceable by foreclosure and sale. (Citing *Ross v. Scannell, supra*)

The *McIlwain* court then cited the dicta in *Ross* quoted above.

It is curious that Division I in *McIlwain* did not discuss its own holding in the case of *Krein v. Nordstrom*, 80 Wn. App. 306, 908 P.2d 889 (1995). In *Krein,* a personal injury case where the first lawyer was terminated and a second lawyer obtained a recovery, the first lawyer asserted a charging attorney's lien against the client's recovery. The insurer put the names of both lawyers and the clients on the settlement check and the funds ended up in a blocked account that required both lawyer's consent for release of funds. The lawyers sought a determination of the first lawyer's attorney's lien. This is not a case where the client sought the return of his money under RCW 60.40.010(1)(b). It appears from the opinion that the trial court treated the lien foreclosure as one for *a charging lien* and awarded the first lawyer some but not all of the fees he claimed.

On appeal in *Krein*, the first lawyer challenged the summary proceeding the trial court used (which involved live testimony and expert witnesses). Division I upheld the summary proceeding provided for in RCW 60.40.030, even though it expressly only applied to possessory liens.[32] In order to do so, the appellate court had to shoe-horn the obvious charging lien against the recovery in *Krein* into a possessory lien, by holding that

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[32] Division I has subsequently so held in 2007 in *King County v. Seawest Investors*, 141 Wn. App. 304, 170 P.3d 53(2007).

Lawyer I had "constructive possession," by virtue of the blocked account. The court seemed to ignore the fact that both lawyers had "constructive possession" by virtue of the fact that the blocked account required both lawyers' signatures for release.

This fig leaf in the *Krein* appellate opinion and the *dicta* in *Ross* and *McIlwain* are both problematic. Even if the Supreme Court's interpretation in *Ross* was correct in 1982, under existing interpretations of possessory liens elsewhere, it is bad policy today. If a client who has entrusted money to the lawyer, then fails or refuses to pay attorney's fees due, the lien against the client's money in the lawyer's hands should be capable of being foreclosed or determined. The *Ross* court relied upon the argument that since the possessory lien at common law (which had to be elsewhere since there was virtually none in Washington in 1863) was merely passive, the lawyer had no remedy. What business does a state supreme court setting legal policy have in relying on 200 year old common law for legal policy today in a modern setting, and doing so in *dicta?* I note that Division I affirmed the summary foreclosure of an alleged "possessory lien" in *Krein,* while ignoring the Supreme Court's *dicta* in *Ross* that the lawyer could do nothing to recover his fees. The *Krein* court cited yet another dusty old case, *State ex. rel. Robinson v. Gilliam* [33]in support of its result. In *Krein,* Division I mentioned that the client in the *Gilliam* case had asked the superior court to adjudicate the lien and stated of the *Krein* case, "The same is true here." But in fact it wasn't – there is nothing in the *Krein* opinion to suggest that the client ever asked for the summary adjudication.

In yet another Division I case, *Jones v. International Land Corp,*[34] a different panel of the court was forced to confront the Supreme Court's *dicta* in *Ross* that charging liens only applied to judgments, and nothing else. Division I in *Jones* rejected the Supreme Court's *dicta* in *Ross:*

> The court compared the attorney's lien laws of various states, noting that some allow liens on a client's cause of action and the judgment, but stating that Washington recognizes a charging lien on the judgment only. *97 Wn.2d at 604-05*. This language is dicta and appears to have limited application. Prefacing this statement in the opinion is a description of the charging lien recognized by the Washington statute. The court observed: "This lien is upon the judgment obtained for the client as a result of the attorney's professional services to secure his compensation. *RCW 60.40.010*(*4*)." (Italics ours.) *Ross, at 604*. . The court ignored subsection 3 and the above noted authorities in its discussion of the attorney's liens authorized by the statute. In light of the authorities noted above and the language of subsection 3, we do not read the *Ross* dicta as applying to subsection 3.

Jones, supra at 742, fn 1.

The Supreme Court's decisions in *Ross* and *Vanderbeek* that make for a very unjust result is discussed not only in the Elsner article but by Division II in *Voshell v. Baum,* 2006

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[33] 94 Wash 243, 161 P. 1194(1917)

[34] 51 Wn. App. 737, 755 P.2d 184 (1988)

Wash App Lexis 1146. Lawyer Baum represented client Voshell in a dissolution of marriage, and the case was tried to the court, which fashioned a property division in which husband Voshell was granted real property. Baum and his client had a falling out as the final papers were being prepared, and Baum was allowed to withdraw with leave of court. Baum asserted an attorney's lien under RCW 60.40.010(1)(c), money in the hands of an adverse party, and under sub§(1)(e) "on a judgment." The decree awarded cash to the wife and the real property to Voshell. The wife owed Voshell no money. Baum claimed he was entitled to a lien on the proceeds of the sale of real property awarded to the husband Voshell. Division II rejected this contention, based specifically on the Supreme Court's opinions in *Ross* and *Vanderbeek*, leaving Baum with no fees. Division II recognized the injustice of this result in the following statement:

> Baum is correct that *Ross* and *VanDerbeek* produce unsettling results from a policy perspective. If, instead of a building, Voshell had been awarded the couple's bank account, *Ross* and *VanDerbeek* do not prevent Baum from obtaining a lien on those funds (assuming, without deciding, that dissolution-related judgments are fair game for attorney liens). The only thing preventing Baum's lien in this case is Washington's common law rule that an attorney has no lien if the recovery his client obtains is real property. However problematic *Ross's* rule is, the Washington Supreme Court created it and recently reasserted it in *VanDerbeek*.

Baum, supra, slip op at 4.[35]

I find it unseemly for appellate courts of this state to be forced to engage in such rhetorical gymnastics in order to support a result deemed just, simply because the statute is so bad. This situation exemplified in *Baum*, that there is no lien right if the fruit of the lawyer's efforts is real property, but there is a lien right if the fruits are cash, urgently calls out for a fix, which as the *Baum* opinion makes clear, can only occur legislatively.

In attorney's lien foreclosures, the term "summary proceeding" is thrown around loosely by lawyers and the courts. Nonetheless, RCW 60.40.030 is the only place in the statute where any authority exists for a "summary proceeding." *This statutory section is limited by its express language to possessory liens only.* This section is rather ambiguous in its wording. The statute's first alternative merely provides for other security to be substituted, and the determination of the lien postponed to a later time. The second alternative allows the court to **summarily inquire**, presumably into the validity of the lien, and "determine the same." The third alternative makes reference to a "report," after "referring it" which may involve appointing a master or referee to make a factual determination back to the court. Unfortunately, no reported case addresses this latter alternative.

Only a few cases interpret this subsection of the statute. The court may order the attorney

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[35] To add insult to injury, there was a fee shifting clause in Baum's fee agreement with Voshell. The Court of Appeals awarded Voshell his attorney's fees against Baum.

to deliver property to client or be held in contempt. *Buck v. Bailey* [36] This section only applies to money or papers of the client entrusted by the client to the lawyer. The Supreme Court determined that this section does not apply to personal property (there a diamond stick pin) delivered to an attorney as security for fees. *Golden v. Hyde.* [37] The court may make summary investigation and determination when attorney refuses to deliver papers because of lien. *State ex rel. Trumbull v. Sachs*.[38] In my attorney's lien practice, I have never had occasion to use this part of the lien statute.

Remember – this part of the statute relates only to possessory liens on money or papers in the lawyer's hands – **it does not apply to charging liens**.

C. The Remainder of the Lien Statute as Amended in 2004.

Important provisions relating to the charging lien were added in the 2004 amendments:

> (2) Attorneys have the same right and power over actions to enforce their liens under subsection (1)(d) of this section and over judgments to enforce their liens under subsection (1)(e) of this section as their clients have for the amount due thereon to them.
>
> (3) The lien created by subsection (1)(d) of this section upon an action and proceeds and the lien created by subsection (1)(e) of this section upon a judgment for money is superior to all other liens.
>
> (4) The lien created by subsection (1)(d) of this section 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.
>
> (5) For the purposes of this section, "proceeds" means any monetary sum received in the action. Once proceeds come into the possession of a client, such as through payment by an opposing party or another person or by distribution from the attorney's trust account or registry of the court, the term "proceeds" is limited to identifiable cash proceeds determined in accordance with *RCW 62A.9A-315(b)(2)*. The attorney's lien continues in such identifiable cash proceeds, subject to the rights of a secured party under *RCW 62A.9A-327* or a transferee under *RCW 62A.9A-332*.

Sub§(2) grants to lawyers property rights in the client's recovery to secure their fees. While the legislative motivation for this addition dealt with double taxation of attorney's fees, nonetheless, this addition is important because it gives lawyer's the same rights as clients to collect against an opposing party.

The ultimate meaning of sub§ (3) is still not clear, but it certainly bodes well for lawyers. Sub§ (4) would seem to legislatively overrule Cline piano and prevent the client form getting

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[36] 82 Wash. 398, 144 P. 533 (1914).
[37] 117 Wash. 677, 202 P. 272 (1921).
[38], 3 Wash. 371, 28 P. 540 (1891).

away with destroying the value of the claim of lien. Sub§ (5) gives a broad definition of "proceeds" which presumably can be used by lawyers to "follow the money" where clients seek to avoid payment of fees.

E. How Does the Lien Statute Address Foreclosure (or Not)

1. What does the Lien Statute Provide regarding Foreclosure?

The entirety of the procedure for foreclosing **any** attorney's liens is contained in the few lines of RCW 60.40.030. However, the section of the statute, often cited for the so-called "summary foreclosure" process to be used for charging liens, by its own express language, *applies only to the possessory liens created by sub§§ (1)(a) and (b), upon papers and money in the hands of the lawyer.*[39] A recent case in the Court of Appeals so held. In *King County v. Seawest Investors,* [40] the court stated:

> Seawest further argues that *RCW 60.40.020* and *60.40.030* must be read together because prior to codification they were not separated into sections. Read together, the plain meaning of *section .030*--"If, however, the attorney claim[s] a lien, ***upon the money or papers*** ... the court or judge ..."--suggests that the procedures of *RCW 60.40.030* are limited to when an attorney claims a lien upon the "money or papers" of the client under *RCW 60.40.020*. Thus, the words of these two sections indicate that the procedures of *RCW 60.40.030* are not available where the attorney claims a lien on something other than the money or papers of the client. In this case, that something is the judgment in the underlying condemnation proceeding. As *RCW 60.40.010(e)* indicates, a lien on a judgment is distinct from that on money or papers.[41]

2. The Lien Statute is Wholly Silent as to Foreclosing or Realizing upon a Charging Lien.

As for foreclosing charging liens, the statute is entirely silent. However, the law cannot allow the vacuum caused by the absence of a remedy in the statute to stand where there is a clear statutory right created. The appellate courts have stepped forward where the legislature has slept. In *Krein v. Nordstrom*, *supra,* which involved the assertion of an attorney's lien against settlement funds in a personal injury lawsuit, the Court of Appeals affirmed a trial judge's decision to permit a half-day trial on the short calendar where the court entertained affidavits and some live testimony to resolve the lien claim. Expert testimony by declaration was also permitted. This "summary process" was upheld as meeting the requirements of procedural due process and was affirmed. In all probability, the trial court will be upheld in whatever manner it allows the litigants to determine the validity of the lien, as long as each party has the opportunity to offer evidence and to be heard on the issue. Prof. Rombauer sees *Krein* as a case involving a sub§ (1)(b) possessory lien, "money in the hands of the attorney," where the signature of the

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[39] "If, however, the attorney claim a lien, upon the money or papers, under the provisions of this chapter, the court or judge may . . ."

[40] 141 Wn. App. 304, 170 P.3d 53(2007).

[41] Nonetheless, the court did allow a "summary" form of foreclosure process in the case of charging liens. See the discussion of *Seawest Investors* below.

lawyer here seeking fees was required to access the funds. See 27 Washington Practice at §4.22, p.323. This is debatable, as I pointed out above.

F. Suggestions on Foreclosing Charging Attorney's Liens

Obviously, a charging lien that cannot be foreclosed is essentially worthless. The law abhors a vacuum. Courts fashion remedies. Charging liens do have real value, and are used frequently for security, although court foreclosures of charging liens are relatively uncommon. Where proper notice is given, the adverse party or stakeholder may ignore the lien at his or her peril. In a recent case, I sued three insurers who disregarded attorney's liens, based upon the oral assurance of the opposing party that he would satisfy the liens out of the settlement funds and failed to do so. Sub§(2) of RCW 60.40.010 (from the 2004 amendments) provides that "Attorneys have the same right and power over actions to enforce their liens under subsection 1(d) of this section and over judgments to enforce their liens under subsection 1(e) of this subsection as their clients have for the amount due thereon." Presumably, the lawyer can pursue the stakeholder or the adverse party for their fees where the lien has been disregarded. A stakeholder aware of the lien claim ignores it at his peril, yet no case law supports these obvious conclusions. The new attorney's lien statute should squarely address this.

So how should the charging lien foreclosure be accomplished? Many judges have never been through this process, and very few practitioners have ever prosecuted a foreclosure against a cause of action, settlement or judgment. How formal and extensive a process you as the foreclosing counsel should want depends ultimately on the amount at stake. In cases where there are significant sums of money at stake, the liening lawyer does not want the process to be handled "quick and dirty." Where fees are in the six and seven figures, or greater, something like a real trial with discovery, expert testimony, motions, live testimony and cross-examination may be desired. If the amount of fees is $100,000 or less, something less than a full trial makes a lot of sense. I have tried six or more attorney lien cases to judgment, three of which were treated like an actual trial. Others involved an evidentiary hearing with some limited discovery. One judge allowed only oral argument and the submission of affidavits, while another judge allowed only oral argument and the presentation of evidence by declaration, but included expert testimony and the right to take a few depositions. Some King County judges would entertain lien foreclosures on a six day motion calendar, solely on paperwork with no oral argument. My view is that such would fall short of the requisite due process in cases where there is a sufficiently large sum at stake. At the very least, a client should have a real opportunity to examine and challenge the lawyer's claim for fees.

This issue of "how much process is due" actually came up in the *Seawest Investors*[42] case mentioned above, in the context of a lien on a judgment. A large Seattle law firm represented a client in a condemnation proceeding and a judgment was entered for some $7.6 million. The client balked at paying the law firm its claimed fees and the law firm asserted a claim of lien in the amount of almost $325,000. The client conceded only that $85,000 was owed and the balance was placed in the registry of the court. The law firm sought to foreclose its lien by motion in the underlying cause. The client objected and insisted that the lien dispute could only be determined in an action separate and apart from the condemnation proceeding. The appellate

[42] *King County v. Seawest Investors*, 141 Wn. App. 304, 170 P.3d 53(2007).

court correctly noted that none of the prior cases interpreting the lien statute addressed whether the foreclosure of a lien on a judgment could be done "summarily" under RCW 60.40.030. After ruling that the summary process of RCW 60.40.030 only applied where the claimed lien is asserted against money or property of the client in the hands of the lawyer (the statutory possessory liens), the court tackled the issue of what the foreclosure hearing must consist of in the case of a charging lien. I quote at length from the opinion because at present, other than *Krein* discussed above, *Seawest Investors* contains the only real court guidance on how such a foreclosure of a charging lien should be conducted. The *Seawest* court opened with the following:

> Notwithstanding our conclusion in the prior portion of this opinion, there is still an unresolved question: whether the attorney lien statute requires the adjudication of an attorney lien against a judgment in a separate action. For the reasons that follow, we conclude that the statute does not require a separate action.
>
> Where an attorney lien is claimed against a judgment, the court has a right to determine all questions affecting the judgment in some form of proceeding. A proceeding to enforce a lien is an equitable proceeding. Courts have broad discretion when fashioning equitable remedies, and we review those remedies for an abuse of discretion. A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds. (Footnotes omitted)[43]

The court concluded that the process utilized by the trial court, described in the opinion, was sufficient:

> The trial court's decision to adjudicate the attorney's lien by the evidentiary hearing in this case was a tenable choice. Here, the only persons asserting interests in the judgment were before the court. The parties had three months, which was ample time, to conduct discovery and otherwise prepare for the evidentiary hearing. Finally, the hearing gave them ample opportunity to present evidence, bring counterclaims, and argue their theories of the dispute. In short, Seawest was given an opportunity to contest the lien asserted by Graham & Dunn by raising whatever issues it chose to raise. While it now complains on appeal that it did not assert Consumer Protection Act, *chapter 19.86 RCW*, and other claims that it would have, there is nothing in the record to support the conclusion that it was denied the opportunity to assert such claims at the hearing.
>
> At the same hearing, the trial court also determined that the written fee agreement was enforceable and that the fees were reasonable. In *Krein*, this court considered whether the lack of a full adversarial hearing in adjudicating an attorney's lien was error. We held that considering the fee involved, the statutory requirements, and the hearing actually held, that the procedure comported with due process. The

[43] *Seawest Investors, supra*, 141 Wn. App. at 314.

procedure followed here also fully complies with due process. [44]

There clearly must be an adversarial process. The *Seawest* court spoke approvingly of its earlier decision in *Krein* and seemed to judge the amount of due process to be afforded as necessarily proportional to the amount at stake. The fee in *Krein* was small while the fee in *Seawest* was substantial. The *Seawest* court identified some discovery as appropriate, and even seemed to countenance counterclaims, even ones involving the Consumer Protection Act. While I question the legal basis for this latter comment by the court about "counterclaims,"[45] the appellate court came down on the side of the trial court's sound discretion in allowing a meaningful adversarial evidentiary hearing with live testimony, discovery, cross-examination and the right to expert testimony.

VI. WHERE DOES THE ATTORNEY'S LIEN FIT INTO BANKRUPTCY COURT?

Bankruptcy can often be the 800 pound gorilla in the room, particularly for non-bankruptcy lawyers like me. Presumably, many attendees to this seminar either deal in bankruptcy as regular part of their practice or will do soon, so there should be some curiosity as to how attorney's liens operate in Bankruptcy Court and what the jurisdiction of the court is. With the filing of a petition for Bankruptcy, a debtor can stay activities to collect debt in state court and vest the Bankruptcy Court with jurisdiction to deal with the debtor's assets and liabilities. Before any Bankruptcy filing, a creditor lawyer could certainly have asserted a claim of attorney's lien against an asset of the bankrupt-to-be. I am unaware of any law that would prevent the Court in Bankruptcy from adjudicating the rights of the liening lawyer in Bankruptcy court, any more than there would be obstacles to enforcing rights in a mortgage, deed of trust or a lien by judgment in Bankruptcy Court. In fact, the filing of attorney's liens in Federal court by a former lawyer seeking to get paid is not uncommon, although recently, a local Federal trial judge recently declined to foreclose an attorney's lien in Federal court, which forced the law firm to file suit in state court. It is certainly possible that the debtor's lawyer who filed the petition might file and serve a claim of lien in the Bankruptcy court for services rendered in the Bankruptcy. Presumably, the Court in Bankruptcy would treat the lien as any other lien and litigate the validity and value of the lien as would any state court judge, if necessary.

Nonetheless, there is authority in the Bankruptcy Code for lifting the stay in bankruptcy for the realization upon pre-petition security and this certainly would apply to the attorney's lien. Indeed, several years ago I was successful in lifting the stay to pursue the foreclosure of an attorneys' lien in superior court. Even so, the Bankruptcy court would seem to have jurisdiction to decide the validity of the lien and to foreclose the lien and award funds based on it.

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[44] *Seawest Investors, supra*, 141 Wn. App. at 315-316.

[45] *See* the case of *Monk v. Dreissen*, 2012 Wash App Lexis 2430(2012), an unpublished opinion, that I excerpted in the attached compendium of attorney's lien cases. In Monk the appellate court determined that the client need not have brought legal malpractice claims against the lawyer in a charging attorney's lien foreclosure, *because the counterclaims were not compulsory but permissive.* The court did not address a more fundamental question as to whether the court has subject matter jurisdiction over legal malpractice counterclaims in a statutory attorney's lien proceeding.

Attorney's liens are of the "first in time, first in right" variety.[46] As a rule, lien rights are determined according to state law. Accordingly, a Bankruptcy court should accord lien priorities according to state law. Consult your favorite Bankruptcy pro for further details.

VII. ETHICAL LIMITATIONS ON THE USE OF ATTORNEY'S LIENS

The attorney's lien was originally intended to provide lawyers with means of security for unpaid fees. The lien statute provides attorneys with protections and security not existing at common law. The common law possessory lien probably did not afford much protection to the lawyer, since if the client was unable or unwilling to pay counsel's fees, he/she was unlikely to place valuable papers or money in the hands of the lawyer. The charging lien created not only those protections and security, but also the opportunity for lawyer mischief.

As lawyers, we are governed by the Rules of Professional Conduct. The RPCs are disciplinary as well as establishing the minimum standard of conduct for lawyers in their civil relationships with clients. First and foremost, lawyers who breach ethical duties may lose all or part of their fees by the process of disgorgement or fee forfeiture. *See Ross v. Scanell, supra.*. This is very uncommon and forfeiture/disgorgement of fees for breach of fiduciary duty requires extremely serious ethical wrongs, usually (but not always) accompanied by pecuniary loss by the client. If it is determined that the fee is not earned, in whole or in part, the security of the lien will provide little solace. If an attorney withdraws on a contingency fee case, as a rule, he or she forfeits the fee, unless the withdrawal is "for good cause."[47] Nonetheless, in my practice, I actually see lawyers asserting attorney's liens where no fee may be owing at all. This certainly raises serious ethical questions and the prospect of discipline. In *Wilson v. Henkle*,[48] a Seattle lawyer was sanctioned for claiming an attorney's lien improperly and obtainin possession of court registry funds by misleading a court commissioner in the *ex parte* department.

Even more frequent is the situation where an attorney is asserting a fee that is **grossly excessive or is unearned**. By the terms of the statute, the lien is limited "to the extent of the value of any services performed by the attorney in the action, . . ." The Supreme Court has observed, "As noted above, RCW 60.40.010(4) (the pre-2004 statute) is in derogation of the common law and therefore must be strictly construed. See *A.A.C. Corp. v. Reed*, 73 Wn.2d 612, 440 P.2d 465 (1968)."[49] The assertion of an attorney's lien for an excessive amount, or contrary to law (*e.g.* claiming a lien for one third of the last offer of settlement made, before a lawyer is terminated), may be determined to be a violation of RPC 8.4(c) and (d). The Bar has recently disbarred a lawyer for many ethical wrongs, one of which was the assertion of attorney's liens in several cases for fees that were excessive and unreasonable.[50] Where attorney Marshall demanded additional attorney's fees in a flat fee case, asserted an attorney's lien for those unlawful additional fees, and where the client refused to accept a settlement insisted on by the

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[46] *Spokane Security v. Bevan*, 172 Wash. 418, 20 P.2d 31 (1933); *Barney v. Kreider*, 32 Wn. App. 904, 650 P.2d 1130 (1982).

[47] See *Ausler v. Ramsey*, 73 Wn. App. 231, 868 P.2d 877 (1994).

[48] 45 WnApp 162, 724 P.2d 1069 (1986) See case summary of *Wilson v. Henkle* at p. 6 of the Compendium of Attorney's Line cases.

[49] *Ross v. Scannell, supra*, 97 Wn.2d at 605.

[50] *See In re Marshall*, 167 Wn.2d 51, 217 P.3d 291 (2009).

lawyer, the court found this conduct violated RPC 1.5(a), 8.4(a) and 8.4(c). In another disciplinary case, *In re Stansfield*, 164 Wn.2d 108, 187 P.3d 254 (2008), a lawyer was disciplined in part for claiming attorney's fees in a case where he had not been retained and compounded his wrong by asserting an attorney's lien for those fees, which lien delayed payment of a settlement to the client. In a recent case of mine, a terminated law firm asserted an attorney's lien claim for over $2.1 million in fees. At the trial of the attorney's lien/reasonableness determination, the trial court determined that the lien was more than double what was a reasonable fee. The Court held that the assertion of the excessive lien was a violation of RPC 8.4(c) and (d), a breach of fiduciary duty and with other fiduciary duty breaches found, the trial court forfeited some $400,000 in otherwise earned fees.[51]

Lawyers may not hang on to the client file when they withdraw or are terminated, as security for the payment of fees, when to do so would harm the client's ongoing case. WSBA Formal Opinion #181 states, "A lawyer cannot exercise the right to assert a lien against files and papers when withholding those documents would materially interfere with the client's subsequent legal representation." Upon termination of the attorney-client relationship, a lawyer is obligated to "take such steps to the extent reasonably practicable to protect a client's interest. . ." RPC 1.16(d). The rule gives a number of examples. Seeking to harm the client's ongoing case under the guise of asserting a possessory lien against the file is both unlawful and unwise.

And remember – do not assert an attorney's lien directly against real property of the client, whether or not your efforts brought about the client's recovery of the property in the very case you were litigating for the client. That is the fastest route to bar discipline and fee forfeiture/disgorgement I know of.

VIII. CONCLUSIONS

Attorney's liens will continue to play an important part in the process of insuring just compensation for lawyers. They will also afford opportunities for lawyers to engage in mischief at their clients' expense, and will undoubtedly serve as a fertile ground for lawyer discipline, both by the Bar and by courts in fee disputes. With the increasing assertiveness and litigiousness of clients and the inexorable process of more regulation of the profession by the Bar, lawyer-client litigation over fees is likely to increase and the attorney's lien will probably play an important part in that expanding litigation. It is important for lawyers to use the lien process wisely and according to the law (to the extent it is clear), in order to realize all fees to which the lawyer is entitled and to avoid ethical accusations by clients over the claimed misuse of attorney's liens.

Some things are clear, nonetheless. The statute contains clear limitations in its application which must be studied. The requirements of notice (in most situations) must be given if the liens are to be perfected. As a creature of statute, the attorney's lien will be strictly construed. Procedural failings may derail the lawyer's efforts to get paid. And the discretion of trial judges to fashion procedures for the determination of the lien disputes will be like be upheld, so long as there is a minimal level of due process. Nonetheless, for the average

[51] *Meadow Valley Owner's Ass'n v. Levin and Stein*, 2010 Wash App Lexis 1537 (2010), discussed in the compendium of attorney's lien cases contained in these materials.

practitioner, the process will undoubtedly be overshadowed with uncertainty for a long time into the future.

The Washington attorney's lien statute, in largely the same form now as it was when it was enacted 150 years ago, is an anachronism whose need for re-writing is long past due. In the lien statute, there are more unanswered questions about attorney's liens, their application, assertion and determination, than clear answers. There are many traps for the unwary, and lots of opportunities for inconsistent judicial decisions on liens, given the statute's severe deficiencies. If the statute is not repealed and entirely re–worked, it will probably take another 50 years before the process of using and foreclosing these liens will be modestly clear and straightforward as a result of the development of common law. I encourage all readers of these materials to get on the bandwagon supporting a whole new attorney's lien statute. Those who are seriously interested should contact me to discuss potential involvement in the re-drafting process.

COMPENDIUM OF KEY ATTORNEY'S LIEN CASES

The following is a summary of the key Washington state published (and a few unpublished) decisions that address the attorney's lien statute. For reasons of space, only critical points are discussed.

1. *Taylor v. Shigaki*, 84 Wn. App. 723, 930 P.2d 340 (1997). This is my own case, and in fact my first attorney fee dispute case. In *Taylor*, a client fired his lawyer just before the case settled in order to try to defeat the contingency fee on the probable settlement. This is an important "substantial performance" case. It is important regarding attorney's liens as there was a lien filed here, the fee was tied up in an escrow via the lien, and when the lawyer was awarded the contingency fee based on substantial performance, the lawyer was also awarded fee shifting fees and prejudgment interest as well, based on the clause in the written fee agreement. The Court's decision constituted a foreclosure of the attorney's lien. The fee shifting fees and interest came out of the funds secured by the lien.

2. *U.S.* v. *MM RR RM Corp,* 880 F.Supp 1109 (2012). This very recent case addresses the issue of the validity of a claim of attorney's lien upon property belonging to a client that was subsequently forfeited. The attorneys here clearly did legal work for the owners of a topless establishment on Aurora Avenue North in Seattle, which resulted in a payment by the City of Shoreline of $98,000 to the corporation as a result of the lawyers' efforts, in exchange for a right of way over the client's property. During the course of this legal work, the US Government indicted the corporation on RICO charges and obtained a preliminary injunction encumbering the topless club owners' property. The corporation pleaded guilty and settled with the Government, agreeing to forfeit the property to the Government, but this was apparently after the lawyers asserted their attorney's lien against the $98,000. *The lawyers cited RCW 60.40.010 (3) that attorney's liens are superior to all other liens.* Applying Federal law, the Federal Court ruled for the Government, on the ground that where the lawyer's lien interest in the property arose after the criminal conduct which gave rise to the forfeiture, the lawyer's lien came in second. *The Feds usually come in first.*

3. *Hawley* v. *Business Computer Training Institute,* 2010 U.S. Dist. Lexis 43154, (W.D. Wa 2010). This case involved a lawsuit for misrepresentations by the owner of a computer training business about the likelihood of available jobs after the training was completed. One law firm associated another lawyer to assist with the case and a signed agreement was executed by the lawyers to work together. Apparently the second lawyer was never asked to perform any actual services, and he performed no services, but nonetheless asserted an attorney's lien for unstated compensation. In interpreting the lien statute's language, Judge Settle quashed the second lawyer's lien on the grounds that he failed to prove that he was an attorney of record for the plaintiffs, that the plaintiffs had consented to his representation in the case or that he had performed any services. Another cogent argument would have been that where lawyer #2 had no contractual privity with the plaintiffs in the form of an executed written contingency fee agreement as required by RPC 1.5(c), he had no right to claim an attorney's lien. *See e.g.* Hirsh v. *Dezao* & Dibrigida. LLC, No. 57320-9-1 (Linked with No. 57821-9-I), COURT OF APPEALS OF WASHINGTON, DIVISION ONE, 2007 Wash. App. LEXIS 3345, where the absence of contractual privity was held to be fatal to the right to assert a claim of attorney's lien. A third argument not raised here was that the lawyer asserting the lien

had no agreement with his co-counsel for a sharing of the contingency fee that was approved by the client in writing, an absolute requirement of RPC l.5(e).

4. *Rafel Law Group v. Defoor*, 2013 Wash. App. LEXIS 1919.(Published in part) This is another case of mine at the trial level. Attorney Rafel took over a very difficult case from another law firm that had not properly worked the case up. After a dispute with the client resulted in a court-approved withdrawal by the attorney for good cause, the client then re-hired the same lawyer, who thereafter tried a month+ long trial to the court which resulted in a significant 7-figure judgment for the client in a vigorously-defended trial. The lawyer asserted attorney's liens for his fees. When the client paid nothing, the lawyer ultimately sued for those fees. The defendant-client raised the typical legal malpractice and breach of fiduciary duty claims, which today are usually asserted in every lawyer's claim for fees. Shortly before the trial, the trial court granted summary judgment for attorney Rafel for all of the hourly fees claimed, virtually all of his costs, nearly a half million in prejudgment interest and a substantial award of fee shifting fees. The ensuing judgment was for over $2 million. The trial court dismissed all of the malpractice and ethical claims on summary judgment

   One of the principal issues was whether the lawyer had violated RPC 1.8(a) when he negotiated a promissory note for the past due hourly fees at the time the client re-engaged him. The trial court ruled that RPC 1.8(a) did not apply as the lawyer had withdrawn with court approval. As the result of excellent advocacy of my co-counsel at Corr Cronin, Division I fully affirmed the judgment. The primary issue raised by the client Defoor relating to attorney's liens involved the claim that Rafel had asserted liens for excessive amounts of fees and costs. Defoor's claim here was weak because she had retained no expert who offered opinions that either the fees or the costs incurred were excessive or unreasonable. The attorney's judgment was affirmed *in toto.*

   The court never got to the issue of whether there was any breach of fiduciary duty for asserting an excessive lien because there was no evidence to support the conclusion that the fees and costs were excessive. Nonetheless, the ethical basis for breach of fiduciary duty for asserting an excessive attorney's lien can only be RPC 8.4, the fraud rule. For an attorney's lien to violate the fraud rule, the amount of the line must be grossly excessive, and the lawyer must be aware that there is no factual basis to support the gross amounts sought. We still await the published decision where this issue is *squarely* decided.

5. *Meadow Owners' Ass'n (MVOA) v. Levin and Stein*, 2010 Wash App lexis 1537 (2010)(unpublished) This is another case that I tried at the trial level. Between 2004 and 2011, MVOA was engaged in litigation first in a construction defect lawsuit against the developer and contractor of a condominium project and later against the law firm that represented them in the condo defect case, Levin and Stein. This case is a poster child for how not to treat clients by a law firm. MVOA maintained that the law firm failed to work up the case for trial properly and failed to honor the client's litigation objectives. In the end, MVOA terminated the law firm which had a contingency fee agreement with its client. Levin and Stein was replaced by another law firm that completed the job.

The terminated law firm contended that it had substantially performed its contingency and asserted a grossly unreasonable attorney's lien for legal services and sued its former client. This very complex fee dispute case progressed through a 5-week trial. MVOA prevailed on virtually everything, and the law firm's lien was reduced from over $2.1 million to about $120,000. The case is important because the trial court, as affirmed by the Court of Appeals, held the law firm to have breached fiduciary duties, in part, for asserting a grossly excessive attorney's lien that damaged the client. The trial court forfeited $400,000 of earned fees as a sanction. The trial court's Findings of Fact and Conclusions of Law were particularly strong and pointed. The Findings and Conclusions were affirmed. They make for good reading and the case a great one for teaching lawyer ethics in Washington.

6. *Jones v. Int'l Land Co*, 51 Wn. App. 737, 743, 755 P.2d 184 (1988). This case clearly held that an attorney cannot have a lien against a judgment unless the lawyer has a properly perfected attorney's lien before the judgment was taken. An attorney having properly asserted his claim of attorney's lien by notice is entitled to recover his fees pursuant to his written fee agreement. Lawyer's liens are accorded "first in time, first in right," as are most liens. See also Rombauer, 27 Washington Practice – Creditor's Rights and Debtors' Remedies, §4.27.

7. *Ross v. Scannell*, 97 Wn.2d 598, 605, 647 P.2d 1004 (1982). In ruling that attorney's liens do not attach to real property, the Supreme Court observed:

> One of the states with a statute similar to ours has held that the attorney lien statute must be strictly followed and not judicially expanded to reach real property as fruits of a judgment. *Keehn* v. Keehn, 115 Iowa 467, 88 N.W. 957 (1902). We agree with this analysis. **As noted above RCW 60.40.010(4) is in derogation of the common law and therefore must be strictly construed.** See A.A.C. Corp. v. Reed, 73 Wn.2d 612, 440 P.2d 465 (1968). (Emphasis added)

The Supreme Court sent the case back to the trial court to determine if this sharp practice of the lawyer violated the lawyer's fiduciary duties to the client. This case is infamous for its erroneous *dicta* about possessory liens. *See* the main CLE materials on possessory liens.

8. *In re Disciplinary Proceeding Against Vanderbeek*, 153 Wn.2d 64, 88, 101 P.3d 88 (2004). Hard cases make for bad law. This case is a textbook example of how not to treat your clients regarding fees. Among the many bad acts by this family law lawyer was asserting liens on the proceeds of sale of properties awarded to her clients. In this case, the Supreme Court ruled that the *Ross v. Scannell* prohibition against asserting liens against client real property extends to the proceeds of the sale of those properties awarded to a client in a dissolution of marriage case.

9. *Voshell v. Baum*, 2006 Wash App Lexis 1146 (Div II) (Unpublished). I mention this case because it contains an appellate court's recognition of the unfairness of the Supreme Court's decision in *Ross v Scannell* relating to no liens on real property. Lawyer Baum represented client Voshell in a dissolution of marriage, and the case was tried to the court, which fashioned a property division in which husband Voshell was granted real property. Baum and his client had a falling out as the final papers were being prepared, and Baum was allowed to withdraw with leave of court. Baum asserted an attorney's lien under RCW 60.40.010(1)(c), money in the hands of an adverse party, and under sub§(1)(e) "on a judgment." The decree awarded cash to the wife and the real property to Voshell. The wife owed Voshell no money. Baum claimed he was entitled to a lien on the proceeds of the sale of real property awarded to the husband Voshell. Division II rejected this contention, based specifically on the Supreme Court's opinions in *Ross* and *Vanderbeek,* leaving Baum with no fees. Division II recognized the injustice of this result in the following statement:

> Baum is correct that *Ross* and *Vanderbeek* produce unsettling results from a policy perspective. If, instead of a building, Voshell had been awarded the couple's bank account, *Ross* and *Vanderbeek* do not prevent Baum from obtaining a lien on those funds (assuming, without deciding, that dissolution-related judgments are fair game for attorney liens). The only thing preventing Baum's lien in this case is Washington's common law rule that an attorney has no lien if the recovery his client obtains is real property. However problematic *Ross's* rule is, the Washington Supreme Court created it and recently reasserted it in *Vanderbeek*.

Baum, supra, slip op at 4.

10. *Humptulips Driving Co. v. Cross*, 65 Wash. 636, 639, 118 P. 827 (1911). Here in a condemnation action, the property owner was awarded judgment for $4,500. The condemnor appealed. Then the defendants assigned their judgment to a third party for valuable consideration. Thereafter their attorney filed a notice of claim of lien upon the judgment in order to get paid. The Supreme Court ruled that where the statute required the filing of notice of the claim of lien for the lien to attach to the judgment, the claim of lien was junior to the assignment. The court reasoned, "The lien does not become effective as against a settlement between the parties or a sale of the judgment made in good faith prior to the filing of the lien. In other words, there is no attorney's lien until the claim is properly filed. The right to claim the lien exists before the filing, but the lien only exists from the time of filing."

    Here, the Supreme Court rejected the concept of an equitable attorney's lien. The court stated, "If it be suggested that this interpretation works a hardship upon deserving counsel, we answer: *Ita lex scripta est* [So the law is written]." *Humptulips Driving Co., at 640*.

This case is one of the case law poster children exemplifying the need for a new attorney's lien statute.

11. *Cline Piano Co. v. Sherwood*, 57 Wash. 239, 106 P. 742 (1910). This dusty old case has been cited a number of times since its decision in 1910. The plaintiff received an oral decision in his favor in the amount of $171.00 at the end of the testimony. Before any written judgment was entered, the plaintiff's counsel asserted a claim of attorney's lien **against the judgment** (which had yet to be formally entered) for fees in the amount of $40.00. A month later, the plaintiff and the defendant settled the case for the payment of a $40 gold coin. The coin changed hands and the claim was satisfied in writing with the clerk. About three months after that, the trial judge entered judgment. The lawyer then asserted a lien against the judgment and obtained a writ of execution against the client for the unpaid fees.

    The Supreme Court, after rejecting some procedural arguments by the attorney lien claimant, ruled that there could be no lien on a judgment until the written judgment is actually entered (based on even dustier out of state case law), as the written judgment is the only judgment of the court. ("It is our opinion that a lien cannot attach until the written judgment is formally entered. ") Citing a treatise which relied on an older Maine case, the court ruled that "the lien on the cause for his fees does not attach until the judgment is entered." "The lien is thereby defeated" by the client's settlement before judgment.

    The dissent pointed out the obvious unfairness in the result and cited another foreign case where the result was different. At the time this *Cline Piano* case was decided, there were only 2 bases for charging liens, one against a judgment and the other against "money in the hands of an adverse party." This troublesome old case would allow a client to defeat an attorney's lien before judgment is entered by settling the case or firing the lawyer. The 2004 amendments to the lien statute extends the lien to the "proceeds of a settlement by the client. This 103 year old case cannot still be good law, but who knows?

12. *Spokane Security v. Bevan*, 172 Wash. 418, 20 P.2d 31 (1933). In this case, the Supreme Court held that a previously filed and served attorney's lien was to be accorded priority over a creditor's set-off **later granted** by the trial court.

13. *Barney v. Kreider*, 32 Wn. App. 904, 650 P.2d 1130 (1982). Here lawyer Doolittle litigated a case for client Kreider and ultimately obtained a judgment. Doolittle filed and served three claims of lien, one before the judgment and two following. A creditor of Kreider obtained an attachment on the judgment based on another judgment against Kreider. All three claims of lien (two after the judgment was rendered) were filed and served before the attachment. Division I upheld the priority of the lawyer's lien, and in doing so stated, "The trial court correctly determined that the Schweppe claim of attorneys' lien was valid and prior to Gordon's attachment of the money held by the clerk to satisfy the judgment of Kreider against Satellite." This is a "first in time, first in right" result.

14. *Wilson v. Henkle*, 45 Wn. App. 162, 724 P.2d 1069 (1986). Here, the court here affirmed the imposition of CR 11 sanctions against a lawyer who asserted an attorney's lien that had no factual or legal basis. The underlying facts are too complicated to recite here. Lawyer McCormick represented the owner of real property where the owner had defaulted. A purchaser bought at a trustee's sale. There was subsequent litigation between the original owner and the buyer at the trustee's sale. Lawyer McCormick asserted a claim of attorney's lien and with a legal chicane he used with his client, was able to obtain disbursement of funds from the court registry in an *ex parte* action where he misled a court commissioner. McCormick was sanctioned for this abusive behavior. Division I affirmed, and in so doing, ruled:§

> In 1985 our state's CR 11 was amended to incorporate essentially the same language as the amended federal rule 11. The amended CR 11 authorizes the assessment of a sanction, including reasonable attorney fees, against an attorney in certain circumstances. The imposition of such a sanction is not outside the scope of a court's authority. A Washington court has the inherent power to assess the litigation expenses, including attorney fees, against an attorney for bad faith litigation conduct. See Roadway Express, Inc. v. Piper, supra. The trial court's finding of fact 3 that McCormick's conduct was "inappropriate and improper," which is tantamount to a finding of bad faith, is supported by the record evidence. Thus the imposition of sanctions in the amount of the Henkles' attorney fees and costs was proper.
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> McCormick's reliance upon Hahn v. Boeing Co., 95 Wn.2d 28, 621 P.2d 1263, 20 A.L.R.4th 846 (1980) is misplaced. The hearing here was not a disciplinary proceeding. While the superior court lacks the authority to conduct disciplinary proceedings, it has the "authority and duty to see to the ethical conduct of attorneys in proceedings before it." Hahn, at 34.

15. *Seawest Investment Advisors v. King County*, 141 Wn. App. 304, 313, 170 P.3d 53 (2007), where the court ruled:

> We conclude that a fair reading of the attorney lien statute requires us to hold that the legislature intended the summary procedures set forth in *RCW 60.40.030* to apply only when *RCW 60.40.020* applies. Specifically, the procedures of *RCW 60.40.030* are triggered when the claimed lien is asserted against money or papers of the client, but not when the lien is asserted against a judgment.

Nonetheless, Division One approved the summary adjudication remedy fashioned by the trial court as appropriate in the case of a charging lien such as here. The court held:

> Where an attorney lien is claimed against a judgment, the court has a right to determine all questions affecting the judgment in some form of proceeding. A proceeding to enforce a lien is an equitable proceeding. Courts have broad discretion when fashioning equitable remedies, and we review those remedies for an abuse of discretion. A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds.
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> * * *
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> Like the version of Washington's statute that existed when *Angeles Brewing* was decided, the current version of the statute does not set out a procedure for adjudicating a lien against a judgment. Although the 2004 amendments mention an action to enforce a lien on a judgment in *RCW 60.40.010(2),* the statute does not set out a procedure for enforcement. Significantly, the statute does not require that such an action be separate from the underlying proceeding. Thus, it 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." [26] Cases since *Angeles Brewing* have cited this principle with approval. [27] Thus, we conclude that the trial court here was authorized to fashion an appropriate remedy, which it did.

Seawest Investment Advisors, supra, 141 Wn. App. at 314-15.

16. *Krein v. Nordstrom*, 80 Wn. App. 306, 908 P.2d 889 (1995). In this case, Division I approved of the summary foreclosure type of proceeding in a claim involving what I believe was a classic charging lien. The court went some lengths to squeeze this case into a possessory lien involving "money of the client in the hands of the lawyer." In that case, three members of a family were injured in a motor vehicle collision. There the attorney, on a contingency fee basis, settled two of the three cases, and then was terminated by the wife, who hired other lawyers. The wife's case was later settled for a substantial amount, by the new lawyers, but not before the original attorney filed and served a notice of claim of attorney's lien. The trial court summarily determined the right of the first lawyer to his fees on *quantum meruit* and awarded $20,000 plus reimbursement of costs. Division I held that the summary adjudication did not violate due process nor did the trial court abuse its discretion in only awarding $20,000 in fees to the original lawyer.

17. *Smith v. Moran and Windes*, 145 Wn. App. 459, 471, 187 P.3d 275 (2008). This recent case contains the *dicta* that an attorney's lien arises under sub§ (1)(d) of the statute, added in the 2004 amendments against the client's cause of action, merely by commencing the action. The court stated that the lien statute as amended, requires no notice of any kind "or other affirmative acts," in order for the lien to attach. The actual holding was that the lien was not discharged either by the subsequent sale of the plaintiff's interest in the action or by the substitution of the judgment creditors for the plaintiff as the real parties in interest. The case was remanded to the trial court for determination of the amount of fees owed.

18. *Marriage of Glick*, 154 Wn. App. 729, 230 P.3d 167 (2009). Dissolution lawyer McIlwain was owed fees by her client in post-dissolution proceedings. She withdrew and asserted an attorney's lien for about $5,000. The lien was asserted under RCW 60.40.010(1)(a) and (b) upon the papers of the client and client money in her hands, as well as on the "judgment." Her problem was that she had no money of the client in her hands and apparently there was no money or property belonging to her client in the decree that her attorney's lien could attach to. Nonetheless, the attorney moved the trial court to foreclose her "liens," despite the fact that her liens attached to no property of the client in her possession. Nonetheless, the trial court went ahead and granted her a money judgment on her lien and collection costs. Division I reversed, ruling 1) that the trial court had no authority to order a money judgment where there was no judgment in the dissolution for the lien to attach to, and 2) ruled that the possessory liens against papers and money are passive and may not be foreclosed, citing *Ross v. Scannell*, 97 Wn. 2d 598 (1982). The court's decision in *Glick*, relying on the *dicta* in *Ross v. Scannell*, seems to be squarely contrary to its own holding in *Krein v. Nordstrom* above, 80 Wn. App. 306, 908 P.2d 889 (1995).

19. *Monk v. Dreissen*, 2012 Wash App lexis 2430 (2012)(unpublished). This case is important only for its having addressed whether counterclaims in an attorney's lien foreclosure are mandatory or permissive. Attorney Pierson represented client Monk in an adverse condemnation lawsuit against two cities, and obtained a judgment. The cities paid the judgment. Apparently the attorney was not paid and he asserted an attorney's lien for about $65,000 against the recovery in the court's registry. Monk hired attorney Dreissen to defend the lien foreclosure. Lawyer Pierson moved to foreclose his lien, and the trial court held the lien valid and awarded him over $55,000. Then Monk sued Dreissen for malpractice, claiming that Dreissen failed to plead and prove claims against Pierson in the lien foreclosure. The trial court granted Dreissen's motion for summary judgment of dismissal. Both the trial court and the Court of Appeals held that the claims that were not brought in the lien foreclosure proceeding were not compulsory counterclaims but merely permissive and accordingly, Monk could have brought them after the lien foreclosure was completed. For its decision, the Court of Appeals relied on an interpretation of CR 13 and two published decisions from New Mexico and Kansas. This is the first Washington case I have seen that addressed whether a client opposing a lien foreclosure must raise counterclaims against the lawyer in the lien foreclosure proceeding.

20. *Reidel v. Pierson*, 2010 Wash App Lexis 542 (2010)(unpublished). Lawyer Pierson represented clients in a mediation in a condemnation dispute. At the mediation, the clients asked for the amount of Pierson's fees to date when the State sought to settle and asked for the amount of the costs Pierson incurred. Pierson obtained a figure from this office, the case settled and the State agreed to pay client Reidel the fees balance Pierson represented. Reidel had buyer's remorse and terminated Pierson. Pierson asserted an attorney's lien; the client Reidel tendered a significantly smaller amount as payment in full. When Pierson refused it, the clients in effect, moved to quash the lien, and the trial court struck the lien based on detrimental reliance, in effect an estoppel.

21. *Plummer v. Great No. R.R.*, 60 Wash 214, 217 (1910). Yet another dusty old case for millennial lawyers to deal with today. The original charging lien before the 2004 amendments provided a lien against "money in the hands of an adverse party." Although the statute does not clearly so state, most lawyers have considered this language as including the value of a ***claim*** against an adverse party which would eventually result in a fund against which the lien would attach. Does this include the client's mere claim for damages before any "action" was ever commenced? Many lawyers including the undersigned have asserted such liens and have been paid. Are such liens valid and authorized by the statute? The statute grants a lien upon money in the hands of the adverse party ***in an action or proceeding,*** in which the attorney was employed. . .," In *Plummer* there was no action or proceeding pending. The Supreme Court ruled that there can be no lien if there is no action pending.