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Attorney's Liens

Arthur F. Lustig*

IN FORMER YEARS, AN ATTORNEY WAS PAID a fee "not as a salary or hire but as a mere gratuity which a counselor cannot demand without doing wrong to his reputation."¹ These customs are long since past. The English rule that a counselor or barrister has no right to charge for his services and that he cannot enforce compensation no longer prevails in Ohio,² for example, and in other states. Today, in most jurisdictions, an attorney's right to payment for services rendered is protected by statute.³ As of the end of 1955, thirty-one states had some form of an attorney's lien statute.⁴ In the rest, including Ohio, there is an absence of a *general* attorney's lien statute, though some liens are provided for in some particular situations.

Dean George Neff Stevens of the University of Washington Law School made the pointed statement that the average attorney appears to have little interest in, nor does he realize the inadequacy of, the attorney's lien laws of his state; this is usually the case, until he finds himself personally involved.⁵

There are two types of attorney's liens. First is the general or retaining lien, also referred to as a possessory lien. This general or retaining lien had its beginning in the early English Common Law, being recognized as early as 1779.⁶ The general lien attaches to papers, documents, money, securities, and other property of the client which comes into the lawful possession of the attorney in his professional capacity; the property may then be retained as security for the payment for compensation for the professional services rendered.⁷ This lien comes into existence by operation of law, and obviates the necessity of any contract or agreement between the parties to the creation of

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¹ Blackstone's Commentaries, Book 3, Ch. 4, p. 419 (Edited by W. H. Browne, 1892).

² Roberson v. Dalton, 55 Ohio Wkly. Law Bull. 3 (1910).

³ R. Berger, The Attorney's Lien in Federal Courts: A Protection That Is Long Overdue, 39 A. B. A. J. 131 (1953).

⁴ G. F. Stevens, Our Inadequate Attorney's Lien Statutes—a Suggestion, 31 Wash. L. R. 2 (1956).

⁵ Ibid. This article contains a comprehensive survey of all existing attorneys' lien statutes in the United States as of Spring 1956.

⁶ Welsh v. Hole, 99 Eng. Rep. 155 (K. B., 1779).

⁷ George v. Walton, 36 Ohio Law Abstract 306, 43 N. E. 2d 515 (1942).

the lien. Possibly the most peculiar feature of this lien is that it is entirely passive in character. The attorney, while having the right to retain as security for his fee the property of his client, may not actively enforce his lien either at law or in equity.⁸ For this type of lien, a client-state is treated the same as an individual client.⁹ Moreover, this lien secures not only just compensation due the attorney for any specific professional services he has rendered, but also all sums due from the client; that is, for the general balance due from the client for any services rendered by the attorney.¹⁰

In the absence of a specific statute permitting it, the retaining lien cannot be enforced by a sale of the property which it covers.¹¹ Even though the statute of limitations may have run against the debt, the lien endures until the debt is paid, hence the statute can in no way defeat it.¹²

The second type of lien is known as the special or charging lien. This type of lien is merely the right of an attorney to obtain a charge upon a judgment, award or decree obtained by him for his client. A second distinguishing characteristic of this lien is that it is limited to costs, disbursements, and services in connection with the litigation from which the judgment, decree or award has been produced.¹³ It is in effect, therefore, simply the attorney's right to enforce in equity a common law lien upon a judgment or upon property which is the subject of a judgment, to the extent of his claim.¹⁴

The case of *Cohen v. Goldberger* sets forth the basis for the attorney's lien.¹⁵ An action was brought by Cohen against Goldberger and Morgenthaler for an accounting of certain assets of a partnership consisting of Cohen and Goldberger. It was found that Goldberger had transferred to Morgenthaler a claim of the firm against the United States Steel Products Company for commissions earned under a contract with the company. Judg-

⁸ Wood v. Biddle, 7 Ohio Nisi Prius 225 (1896).

⁹ State v. Ampt., 6 Ohio Decision Reprints 699 (1879).

¹⁰ 6 Ohio Jur. 2d 95, Atty. at Law, Sec. 80.

¹¹ In re Wilson, 12 Fed. Rep. 235 (D. C. N. Y., 1852).

¹² Mechem, Agency, 1889, 4th Impression Book 5, Ch. 1, Sec. 867, p. 728, citing In re Murry, 3 W. N. 190 (1867).

¹³ F. D. Hall, Attorney's Charging Lien, 4 U. of Fla. L. R. 58 (1951).

¹⁴ Walcutt v. Huling, 5 Ohio App. 326 (1913). This case has been followed in the more recent one of Hyers v. W. & S. Life Insurance Company, 33 Ohio App. 333 (1913).

¹⁵ 109 Ohio State 22 (1923).

ment was rendered in favor of the plaintiff and was affirmed in the Court of Appeals.¹⁶ Thereafter, and before the judgment was paid, two law firms filed their motion in the Court of Appeals in which they stated that they were the attorneys of the plaintiff who had agreed to pay them for their services one-half of the amount which might be recovered, and asked that the same be allowed as a lien upon the judgment. Cohen by answer admitted the rendition of the services as claimed. The court ordered the amount of the judgment plus interest paid to the Clerk of Court. Then one Cramer filed an intervening petition, wherein he claimed to be a partnership creditor and claimed the entire amount of the judgment as partnership assets, arguing that the attorney fee was an individual obligation of Cohen's. The court decided the question as follows:

The contention of Cramer is based wholly on the proposition that the attorneys are the individual creditors of Cohen, and that the priority, if any, can arise only after all the firm creditors of Goldberger & Cohen are paid in full, and the balance, if any remaining, is ordered paid to Cohen as his interest in the partnership. That position would be tenable if it be conceded that the fund represented by the judgment belongs to the firm, and not to Cohen individually, and if the attorneys were general creditors of Cohen; but that would put aside entirely the question of their interest in, or lien upon, the fund produced by their skill and labor, and would result in taking from them that which had thus been procured, and distributing it among general creditors of the firm, probably leaving without remuneration of any sort the attorneys but for whose efforts, presumably, the fund would not have been procured or made available for the payment of the creditors either of the firm or the individuals composing it. The mere statement of that proposition discloses its inequity.¹⁷

Quoting 2 Ruling Case Law, page 1069, the court continued:

This right, though called a lien, rests * * * on the equity of an attorney to be paid his fees and disbursements out of the judgment which he has obtained, and is upheld on the theory that his service and skill produced the judgment, and in accordance with the principle which gives a mechanic a lien upon a valuable thing which, by his skill and labor, he has produced.

The court concluded by saying:

¹⁶ *Morganthaler v. Cohen*, 103 Ohio State 328 (1921).

¹⁷ *Cohen v. Goldberger*, 109 Ohio State 26, 27, 28. This case has been followed in the later decision of *Newcomb v. Krueger*, 36 Ohio App. 469 (1930).

We find no basis for the contention . . . that a lien cannot be asserted by attorneys, in the absence of an agreement with their client that they should have such lien.

From this case one may derive the proposition that the right of the attorney to payment of fees earned in the prosecution of litigation to judgment rests on the equity of the attorney to be paid out of the judgment recovered by him, on the theory that his services and skill instrumentally created the fund.

The right of an attorney to enforce the charging lien has no statutory basis in the Ohio code. Only from a long line of decisions by the various Ohio courts has it been determined that such an equitable right does exist and that in proper cases the courts of the state will enforce this lien.¹⁸ This lien has been held not to extend beyond the charges and fees in the suit in which the judgment was recovered, and therefore not to cover any general balance which may be due.¹⁹ Likewise, attorneys' fees for professional services rendered in one case may not be ordered paid out of funds recovered in a second case. Nor for that matter, for any services rendered other than those in the instant case in which the money was produced.²⁰

An Illinois court has held that an attorney, in response to a subpoena to produce records as to the services rendered, cannot refuse to obey the subpoena on the ground that his lien would obviously be destroyed because the property would pass from his possession.²¹ On the brighter side however, there is at least some authority for the supposition that the charging lien may be enforced in a like manner as the retaining lien, although the attorneys' claim is barred by the statute of limitations.²²

To appreciate the tenuous ground upon which both the general and special liens rest in Ohio, one must carefully note that the former is a completely passive lien and the latter is in the nature of an equitable right which has no basis in Ohio statutory law but is completely and utterly contingent upon the will of the court for its enforcement.

¹⁸ 6 Ohio Jur. 2d 98, Atty. at Law, Sec. 85. The U. S. Supreme Court in the case of *Winton v. Amos*, 255 U. S. 373, 393 (1921), recognized the claim against a lien upon a fund so produced as having a "curious analogy to the salvage services of the maritime law."

¹⁹ 5 Am. Jur. 395, Atty. at Law, Sec. 223.

²⁰ *Phillips v. Travelers Ins. Co.*, 18 Ohio Circ. Ct. (New Series) 356 (1911).

²¹ *Ross v. Wells*, 127 N. E. 2d 519 (Ill., 1955). See also *Reynolds v. Warner*, 258 N. W. 462 (Nebr., 1935).

²² *Mechem*, op. cit. supra, note 12, at p. 735, Sec. 874, citing *Higgins v. Scott*, 2 B&Ad 413 (1831).

A third and curious type of "lien" is the right of offset as recognized in the common law.²³ In Ohio, it is synonymous with counterclaim. Essentially, this is the right of the attorney to apply all the client's funds received by the attorney against the general balance of compensation due from the client for professional services. Some Ohio cases follow this view. An early Ohio case, *Diehl v. Friester*,²⁴ held that a motion to set off one judgment against another is an appeal to the equitable power of the court, to be granted or refused upon consideration of all the facts. In granting such motion, the claim of the attorney for fees will be respected. The right of an attorney in such a case is not a specific lien upon judgments, but is a right which under certain circumstances a court may protect.

A similar line of reasoning was used in the case of *Montalto v. Yeckley*.²⁵ Plaintiff brought an action against defendant and recovered a judgment which was appealed. While the case was pending in the trial court, the defendant filed an amended answer in the Court of Appeals setting up in effect that he had, during the pendency of the action, purchased and received by assignment from a third person a judgment against the plaintiffs, and prayed that it be set off against the plaintiff's judgment. The Appellate Court allowed the judgment assigned to the defendant as a set-off in full satisfaction of the plaintiff's judgment without making any allowance for attorneys' fees. Counsel for the plaintiffs insisted that the defendant's judgment should not be set off so as to deprive them of their attorneys' fees for services rendered. Their fee was contingent and was to be based upon an agreed percentage of the amount that might be collected. They had no lien on the judgment and no assignment of any part thereof to protect their contingent fee. The court then discussed the previous case of *Diehl v. Friester* and ended with the following:

The court's power to exercise discretion in the allowance of a set-off finds its counterpart in the court's power to exercise discretion with regard to attorneys' fees. If the claim for fees is allowed, then the amount allowed to a defendant as a set-off must be reduced accordingly. The trial court herein refused to take into consideration attorney fees in allowing the set-off to defendant. This action of the court

²³ Stevens, *supra*, note 4, at 2.

²⁴ *Diehl v. Friester*, 37 Ohio State 473 (1882).

²⁵ 143 Ohio State 181 (1944).

was within its discretion and did not constitute reversible error under the particular facts of this case.²⁶

The question naturally arises as to the situations which might be presented to a court that could be valid foundations for the granting of such relief.

The problems inherent in set-offs have not been dealt with by many states. Several statutes²⁷ provide for the subordination to the rights existing between the parties of the attorneys' lien. One state²⁸ requires that the executions not be set-off against each other in such a way as to do injury to whatever lien the attorney may have.

Other aspects of the attorney's lien are worthy of consideration. A special or charging lien may be created by an express contract between the attorney and his client.²⁹ Therefore, a contract of attorneys with their client, whereby they are to have three-tenths of the proceeds of any judgment that they may recover in an action to be instituted by them for such client, creates an equitable lien in their favor on the proceeds of the judgment recovered.³⁰ In a later case,³¹ it was held that an attorney who successfully prosecutes a claim for a client on a contingent fee contract of one-third of the amount recovered, has a retaining lien upon a check issued by the Clerk of the Court for the amount of the recovery. If, without the attorney's consent, the client forcibly snatches the check from the hand of the attorney and converts the proceeds to his own use, the attorney has a cause of action for damages against the client for such tortious act. It is interesting to note that the court awarded to the plaintiff a judgment exactly equal to the amount of his claimed lien.³²

Apparently, in Ohio notice to the judgment debtor of the attorney's lien is necessary in order to protect it against a bona fide settlement and payment of the debt by the debtor

²⁶ *Ibid.*, 185.

²⁷ Alaska, Compiled Laws Annotated, Vol. 4 (1949), Sec. 26-8-1 (fourth) (but see 1957 renumbering of Alaska statutes); Minn. Code, Vol. 2 (1953), Sec. 481.13 (5).

²⁸ Rev. Stat. Maine, c. 118, Sec. 28, Vol. 3 (1954).

²⁹ 5 Am. Jur. 394, Atty. at Law, Sec. 221.

³⁰ *Chapman v. Lee*, 45 Ohio State 356 (1887); *Larwill v. Smith*, 65 Ohio State 566 (1901). Dicta in the *Chapman* case has been criticized in *Powers v. Ruelbach*, 66 Ohio Law Abstract 31 (1952).

³¹ *Wheaton v. Chandler*, 68 Ohio App. 474 (1942).

³² *Ibid.*, 479.

made in ignorance of the existence of the lien.³³ An attorney who has, by agreement with his client, an interest in the award produced by his services, may enforce his lien against the judgment debtor if the latter has been duly notified of the attorney's rights.³⁴ However, although the attorney possesses a share of the proceeds of the cause of action, he cannot, merely by giving notice, impose on the tortfeasor an obligation to account to him for his share; by such effect the attorney would virtually be able to place himself in the position of the injured person and he would be able to negotiate for settlement in that light.³⁵ Such notice may merely apprise the judgment debtor that the attorney claims to have an assignment of a portion of whatever may be paid. It may contain no assertion that whatever might be paid should be paid to the attorney, or that it might not be paid to his client. Again, the notice may not truly state the nature of the interest which was assigned.³⁶

An interesting problem arises as to whether or not the attorney who does work for a minor may possess a lien for his fees out of the legal services which he has performed. It is generally thought that since a minor is liable for services which are necessities, an attorney's fee for prosecuting the minor's claim could be so classified, thus rendering the minor's estate liable. How could the minor prosecute some claims without the aid of counsel?³⁷

In a startling Missouri decision—*Fenn v. Hart Dairy Company*³⁸—this theory was completely rejected. The court adopted the reasoning found in an old Vermont case,³⁹ stating that necessities are only those things which are of "necessity" to the minor. The Missouri court then gave this term its narrowest possible meaning, stating that since the minor is not brought into court under any compulsion, the suit is not a necessity.⁴⁰ It even brought in the argument that the statute of limitations does not

³³ 6 Ohio Jur. 2d 97, Atty. at Law, Sec. 83.

³⁴ *Bailey v. Toledo & O. C. R. Co.*, 30 Ohio Nisi Prius (New Series) 366 (1905).

³⁵ *Pennsylvania Co. v. Thatcher*, 78 Ohio State 175 (1908).

³⁶ *Ibid.*, 189-190.

³⁷ *Troiani, Problems of Attorney's Fees. . . . Arising from a Minor's Tort Claim*, 1957, Wash. U. L. Q. 264.

³⁸ 231 Mo. App. 1005 (1935).

³⁹ *Thrall v. Wright*, 38 Vt. 494 (1865).

⁴⁰ *Supra*, note 38.

begin to run on his cause of action until he reaches majority.⁴¹ The *Fenn* case was labeled an unfortunate decision,⁴² for the court created a situation in which attorneys representing minors can only hope that the minor will not disaffirm his agreement.

Members of the Cuyahoga County (Cleveland) Bar in Ohio are in a more fortunate position. Pursuant to the Ohio Code⁴³ the Probate Courts are authorized to set up rules of procedure. Rule 25 concerns counsel fees in connection with settlement of claims for wrongful death, conscious pain and suffering, claims for personal injuries to persons under guardianship, and settlement of personal injuries to minors.⁴⁴ According to Rule 25, in cases wherein representation is on a contingent basis, counsel will be allowed maximum fees on the amount obtained in accordance with the following schedule:

33 $\frac{1}{3}$ % of the first \$10,000
30% of the next \$10,000
25% of the balance in excess of \$20,000,

provided, however, that additional compensation may be granted on a showing of extraordinary services.⁴⁵

The right of an attorney to either a general or special lien may be waived, as is true of most other rights. The lien may be given up upon the acceptance by the attorney of some se-

⁴¹ *Supra*, note 38.

⁴² Troiani, *supra*, note 37.

⁴³ Ohio Rev. Code, § 2101.04: "The several judges of the probate court shall make rules regulating the practice and conducting the business of the court, which they shall submit to the supreme court. In order to maintain regularity and uniformity in the proceedings of all the probate courts, the supreme court may alter and amend such rules and make other rules."

⁴⁴ Ohio Rev. Code, § 2111.18: "When personal injury, damage to tangible or intangible property, or damage or loss on account of personal injury or damage to tangible or intangible property is caused to a ward by wrongful act, neglect, or default which would entitle the ward to maintain an action or recover damages therefor, the guardian of the estate of such ward may adjust and settle said claim with the advice, approval and consent of the probate court. In such settlement, if the ward is a minor, the parent or parents may waive all claim for damages on account of loss of service of such minor, and such claim may be included in such settlement; provided, that when it is proposed that the claim involved be settled for one thousand dollars or less, the court may, upon application by any person whom the court may authorize to receive and receipt for such settlement, authorize such settlement without the appointment of a guardian and authorize the delivery of said moneys to the natural guardian of the minor, to the person by whom the minor is maintained or to the minor himself. Such court may authorize such minor or person receiving such moneys to execute a complete release on account thereof. Such payment shall be a complete and final discharge of any such claim."

⁴⁵ Rule 25 of the Probate Court of Cuyahoga County, Ohio.

curity for his claim. Should the attorney then be dismissed by his client he has no lien upon papers filed by him in court and, therefore, would not be able to withdraw them.⁴⁶ Similarly, should the attorney without proper cause divest himself of the attorney-client relationship and withdraw from the case, he consequently surrenders any lien which he might otherwise have held. Under certain circumstances,⁴⁷ the Ohio Court of Common Pleas has jurisdiction to entertain a proceeding for the cancellation of a lien for attorney's fees.⁴⁸

Should a judgment-debtor attempt to assign his judgment to defeat an attorney's lien which has once attached, the lien will not be defeated despite the fact that the assignee was without notice of the lien.⁴⁹ As has already been stated, the attorney cannot acquire such an interest in his client's cause of action as will put him in the place of the client and make the judgment-debtor answerable to him. However, where the client effects a compromise or settlement without the attorney's consent, the lien will not be defeated but will attach to the proceeds of the settlement.⁵⁰

From the foregoing, the status of the law on attorneys' liens obviously is extremely confused and inadequate. Statutory enactments, rather than judicial interpretation, are needed in order to clarify the situation.

The previous foregoing discussion was concerned primarily with the liens of a plaintiff's attorney. A word concerning the rights of the defendant's attorney is in order. Only seven states have specifically provided for a lien for the defense attorney where he has filed a counterclaim,⁵¹ but only two states have made a statutory effort to provide the defendant's attorney with a charging lien.⁵² At least one law compiler takes the view that

⁴⁶ *Dodson v. Riddle*, 1 Ohio Decision Reprints 54 (1844).

⁴⁷ Ohio Rev. Code, § 707.28. This statute represents a highly technical and narrow situation which results from the division of property and funds which must be made when a village is created from a township.

⁴⁸ *Eastlake v. Davis*, 94 Ohio App. 71 (1952).

⁴⁹ *Hinman v. Rogers*, 4 Ohio Decision Reprints 303 (1878).

⁵⁰ *Supra*, note 30.

⁵¹ Idaho Code, Vol. 2, Sec. 3-205 (1953); Mo. Rev. Stat., Vol. 27, Sec. 484-130 (1949); Mont. Rev. Code, Vol. 7, Sec. 93-2120 (1947); Nev. Comp. L., Vol. 4, Sec. 8923 (1929); N. Y. Judiciary L., Issue 2, 1957, Part I of Consolidated Laws Service, Vol 6, Sec. 475; Okla. Stat. (1951), Title 5, Sec. 6; Utah Judicial Code (1953), Sec. 78-51-41.

⁵² Georgia Code (1933), Vol. 4, Sec. 9-613 (5); La. Rev. Stat. (1950), Vol. 1, Sec. 9:5001.

there may be instances in which the defendant's attorney also has such a right.⁵³

Dean Stevens has suggested a model attorney's lien statute which is set out as follows:⁵⁴

A PROPOSED ATTORNEY'S LIEN STATUTE

ATTORNEY'S LIENS: Extent, notice, priority, enforcement and release.

A—EXTENT:

An attorney has a lien for the general balance of all compensation due him from his client, for professional services to such client whether especially agreed upon or implied, as provided in this section:

- 1—Upon all papers, personal property and money of his client in his possession;
- 2—Upon any claim, cause of action or defense placed in the attorney's hands, which shall attach to a verdict, report, determination, decision, judgment, decree or final order in his client's favor of any court, or, of any state, municipal, federal or other governmental agency, and to any money or property, real or personal, which may be recovered, or cleared, as a result of such claim, cause of action, or defense, no matter in whose hands (including governmental agencies) such money or property, real or personal, may be; provided however, that this section shall not apply where the money or property involved is specifically excepted from claims or liens by law.

B—NOTICE SUFFICIENT TO CREATE THE LIEN: Parties affected:

- 1—Possession of papers, personal property or money by the attorney shall be sufficient notice to create the lien as against all the world.
- 2—Notice, in writing, to the adverse party or, where the adverse party is represented by counsel, to his attorney, that the attorney has been retained with respect to a

⁵³ 6 Ohio Jur. 2d 94, Atty. at Law, Sec. 79; 5 Am. Jur. 396, Atty. at Law, Sec. 224.

⁵⁴ Stevens, *supra*, note 4, at 20-21. It might be noted that there is one Ohio statute which deals with attorney's liens: Ohio Rev. Code § 5719.20. Being under title 57 it deals with the very narrow field of liens on land for money advanced to pay taxes:

"Each attorney, agent, guardian or executor seized or having the care of lands who is subjected to any trouble or expense in paying the taxes thereon, or advances his own money for listing or paying the taxes thereon, shall be allowed a reasonable compensation for the time spent, the expenses incurred, and the money advanced, which shall be a just charge against the person for whose benefit it was advanced."

particular claim, cause of action or defense, shall be sufficient to create the lien as to the adverse party and his assignees, and no further or additional notice shall be required.

3—The commencement of an action, suit, proceeding or hearing on the claim or cause of action or the filing of a defense thereto, in a court or before any state, municipal, federal or other governmental agency, shall be deemed sufficient notice to create the lien as against all the world, and no further or additional notice shall be required.

C—PRIORITY: When the lien provided in Section A attaches by virtue of Section B, it shall be superior:

1—To all other liens, except tax liens and liens of record properly perfected prior thereto, and

2—To any settlement or assignment by or between the parties or third persons, or any of them, made thereafter.

D—ENFORCEMENT AND RELEASE OF LIEN: The Superior Court, upon petition of an attorney claiming the lien, or of the client or an interested third party contesting the amount or validity of a claim of lien, may proceed summarily, without a jury, on not less than five (5) days' notice to interested parties, to adjudicate the rights of the parties involved on the issues raised, and enforce, continue, or release such lien on such terms and conditions as justice may require.

This proposal is an excellent starting point or basis upon which to build an Ohio Attorney's Lien Statute. Obviously, certain allowances, exceptions and changes would have to be made to bring it into conformity with general matters of Ohio jurisprudence. The enactment of such legislation would undoubtedly not only serve to clarify the existing status, but would surely prove of manifest and just value to the members of the Ohio Bar. It also is desirable, as is shown above, in a number of other states.