

By Margaret Christensen



PRESERVATION AND RECOGNITION OF ATTORNEY'S LIENS

You have successfully obtained a settlement in your client's favor, much to his or her satisfaction. The only remaining issue is the client's former attorney asserts a lien on the proceeds, and you are unsure of what, if anything, you must do to ensure the lien is satisfied. This article will hopefully provide best-practice guidance and tips for predecessor and successor attorneys to ensure attorney-fee liens are paid and both attorneys abide by their ethical responsibilities.

STATUTORY AND EQUITABLE ATTORNEY FEE LIENS

Indiana recognizes attorney-fee liens by statute and as a matter of equity. Statutory-fee liens are governed by Indiana Code § 33-43-4-1, which provides “[a]n attorney practicing law in a court of record in Indiana may hold a lien for the attorney’s fees on a judgment rendered in favor of a person employing the attorney to obtain *judgment*.” (emphasis added). Because statutory liens only apply to “judgments,” Indiana courts also have recognized equitable liens to protect attorney fees. An equitable lien can be in the form of a retaining lien or a charging lien. A retaining lien “is the right of the attorney to retain possession of a client’s documents, money, or other property which comes into the hands of the attorney professionally, until a general balance due him

for professional services is paid and exists as long as the attorney retains possession of the subject matter.” *State Farm Mut. Auto. Ins. Co. v. Kenn Nunn Law Office*, 977 N.E.2d 971, 976 (Ind. Ct. App. 2012). Commonly, equitable liens are in the form of a

cases where your fee agreement contemplates a contingency fee. As our Indiana Supreme Court has explained, “The conventional rule is that [a]n attorney who is employed under a contingent fee contract and discharged prior to the occurrence of the contingency is limited to

contained a clause stating, “if the Client discharges the Attorney, the Client agrees to compensate the Attorney for the reasonable value of the Attorney’s services rendered to the Client up to the time of the discharge based on the Attorney’s prevailing hourly charge in effect at the time of termination.” *Id.* The court held the termination clause in the fee agreement constituted a

“Following termination, the attorney sought to recover fees earned from representing Four Winds even though the case had not yet resolved.”

charging lien, which “is the equitable right of attorneys to have the fees and costs due them for services in a suit secured out of the judgment or recovery in that particular suit.” *State Farm*, 977 N.E.2d at 976.

TIPS FOR THE PREDECESSOR ATTORNEY

First, you should ensure your fee agreement with the client explicitly states the manner in which you will be paid if the client relationship is terminated prior to dissolution of the case, and you may place a charging lien on the eventual proceeds obtain in the disposition of the matter. This is supported by case law even if the matter settles before judgment. Indiana courts assume “that an agreement calling for a reasonable method of compensating a discharged lawyer may be enforceable according to its terms.” *Galanis v. Lyons & Truitt*, 715 N.E.2d 858, 861 (Ind. 1999). If the desired fee in the event of discharge is based on the attorney’s hourly rate, then be sure the fee agreement explicitly states such, especially in

quantum meruit recovery for the reasonable value of the services rendered to the client, and may not recover the full amount of the agreed contingent fee.” *Id.* (internal quotations omitted). In determining the reasonable value of services, the court has noted “[i]f a fee agreement provides for an hourly rate in the event of a pre-contingency termination, it is presumptively enforceable, subject to the ordinary requirement of reasonableness.” *Id.* at 862.

Second, if you wish to avoid dealing with a fee lien altogether and receive payment for your work immediately upon discharge, include such a clause in the fee agreement. In *Four Winds, LLC v. Smith & DeBonis, LLC*, 854 N.E.2d 70, 71 (Ind. Ct. App. 2006), an attorney was hired on a contingency fee basis to represent Four Winds but was discharged before the resolution of the case. *Id.* Following termination, the attorney sought to recover fees earned from representing Four Winds even though the case had not yet resolved. *Id.* The fee agreement

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contrary agreement, converting the contingency fee to an hourly fee, which the attorney was entitled to receive upon discharge. *Id.* at 75. Finally, once the former client has hired another attorney, you should put the successor attorney on notice of your lien, the amount of fees owed, and a prospective reminder of the successor's ethical obligation pursuant to Rule 1.15(d) to ensure the lien is satisfied from the proceeds upon the case's resolution.

SUCCESSOR ATTORNEY'S ETHICAL RESPONSIBILITY

If the client's former attorney has a valid charging lien, the successor attorney has an ethical obligation to ensure the lien is satisfied from the proceeds of the settlement. Indiana Rule of Professional Conduct 1.15(d) requires:

Upon receiving funds or other property in which the client or third person has an interest, a lawyer

shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(emphases added). Pursuant to Rule 1.15(d), a successor attorney is ethically obligated to ensure the predecessor attorney is compensated from the proceeds of the settlement for the work the predecessor attorney performed while representing the client in the matter, thus discharging the lien. The successor attorney should review the predecessor attorney and client's fee agreement to determine whether it explicitly states how fees will be calculated upon discharge (i.e., an hourly rate) and the total amount of fees the former attorney earned. Moreover, Rule 1.15 requires that a lawyer safeguard disputed funds in trust until the dispute is resolved so



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the lawyer can effectuate accurate disbursement. Ind. R. Prof. Cond. 1.15(e); *In re Cassady*, 814 N.E.2d 247, 248 (Ind. 2004) (commenting that it is implicit in Rule 1.15 that an attorney must hold disputed funds in trust). Comment 4 to Rule 1.15 explains,

Paragraph (e) also recognizes that third parties may have lawful claims against specific funds or other property in a lawyer's custody, such as a client's creditor who has a lien on funds recovered in a personal injury action. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client. In such cases, when the third-party claim is not frivolous under applicable law, the lawyer must refuse to surrender property to the client until the claims are resolved. A lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party, but, when there are substantial grounds for dispute as to the person entitled to the funds, the lawyer may file an action to have a court resolve the dispute.

Accordingly, if the client disputes the predecessor attorney's charging lien, the successor attorney must refuse to surrender the proceeds to the client until the dispute is resolved.

TIPS FOR THE SUCCESSOR ATTORNEY

First, discuss with the client the ramifications of any lien asserted by a predecessor attorney, including the amount of fees being sought and your ethical duty under Rule 1.15 to satisfy the charging lien from any proceeds obtained in the resolution


of the case and to hold disputed funds in trust pending resolution.

Second, it is likely prudent of you to include in the fee agreement the manner in which the predecessor attorney's charging lien will be paid, especially in contingency fee agreements. Generally, in contingency-fee situations, the successor attorney will be required to satisfy the predecessor attorney's charging lien from the contingency fee he or she earns; however, the successor attorney and the client may reach an alternate arrangement

“Always keep in mind your ethical responsibilities, especially Rule 1.15.”

when negotiating the fee. Our Supreme Court has explained, “[I]t is incumbent upon the lawyer who enters a contingent fee contract with knowledge of a previous lawyer's work to explain fully any obligation of the client to pay a previous lawyer and explicitly contract away liability for those fees. If this is not done the successor assumes the obligation to pay the first lawyer's fee out of his or her contingent fee.” *Galanis*, 715 N.E.2d at 863.

Finally, regardless of the unique facts and circumstances of the situation and various fee agreements, always keep in mind your ethical responsibilities, especially Rule 1.15. Disbursing settlement or judgment

proceeds to your client without regard to third-party liens (attorney liens) might result in you paying the predecessor attorney's lien out-of-pocket and getting involved in a disciplinary action. There is no reason the pursuit of an attorney's earned fee should subject the attorney, or a successor attorney, to disciplinary problems. Following these simple rules will enable all involved the compensation they deserve while avoiding the need to contact the undersigned counsel. 

Footnotes:

1. Despite recognition of the concept of a retaining lien, attorneys should proceed with caution any time they seek to withhold case files or client materials that could prejudice the client. Attorneys have been sanctioned for refusal to surrender materials to clients pursuant to 1.16(d). *See, e.g., Matter of Corbin*, 716 N.E.2d 429 (Ind. 1999); *Matter of McCausland*, 605 N.E.2d 185 (Ind. 1993).
2. It is important, however, that you do not threaten to report the successor attorney for ethical violations for failure to satisfy the charging lien, but rather, simply remind him or her of the ethical responsibility. *In re Dimick*, 969 N.E.2d 17 (Ind. 2012)

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