ValpoScholar Valparaiso University Law Review

Volume 21
Number 2 *Winter 1987*

*pp.*467-495

Winter 1987

Collecting the Attorney's Fee in Indiana: A Proposal for Change

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COLLECTING THE ATTORNEY'S FEE IN INDIANA: A PROPOSAL FOR CHANGE

I. INTRODUCTION

An attorney practicing in Indiana is not always compensated by his client after rendering services. Yet the attorney's right to fair compensation is well established under the law.[1] The proposition that an attorney should be paid for his services may be supported on the theories of contract,[2] public policy,[3] and arguably under Indiana's constitution.[4] Assuming the attorney is in fact entitled to a fee,[5] it is essential he recognize and understand

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1. *See generally* United States Mortgage Co. v. Henderson, 111 Ind. 24, 12 N.E. 88, 93 (1887) ("If the attorney exercises reasonable and ordinary skill and diligence, and proceeds in good faith, with an honest purpose to subserve the best interests of his client, the latter may not accept the fruits of his labor without objection, and then deny or refuse to make compensation."); Scobey v. Ross, 5 Ind. 445, 446 (1854) (if a valid contract exists, an attorney is entitled to compensation); Kizer v. Davis, 174 Ind. App. 559, 369 N.E.2d 439, 443 (1977) ("In this and other jurisdictions, the right of an attorney to recover compensation for his services . . . is well established."); Roll v. Mason, 9 Ind. App. 651, 37 N.E. 298, 299 (1893) (when one accepts the benefits of an attorney's services, he should pay for them).

2. Fitzgerald v. Wasson Coal Mining Corp., 138 Ind. App. 176, 212 N.E.2d 398, 403 (1965) (recovery based on contract between attorney and client). *See also* 3 I.L.E. *Attorney and Client* § 91 (1978). The contract between the attorney and the client may be either express or implied. *Kizer*, 174 Ind. App. at 559, 369 N.E.2d at 443 (express contract); *Roll*, 9 Ind. App. at 651, 37 N.E. at 299 (voluntary receipt of valuable services will imply an obligation to pay).

3. *Kizer*, 174 Ind. App. at 559, 369 N.E.2d at 445 ("[I]t is in the public interest that attorneys receive fair compensation for their services . . . in order to assure effective representation and to maintain the integrity and independence of the bar."). *See also* Manatee County v. Harbor Ventures, Inc., 305 So. 2d 299, 301 (Fla. App. 1974); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-17 (1984). The Indiana Supreme Court has adopted the Model Rules of Professional Responsibility, effective January 1, 1987. IND. CODE ANN. tit. 34 app. RULES OF PROF. CONDUCT (West Noncumulative Interim Ann. Service No. 2 (Feb. 1987)). This change will not affect the substance of the ethical considerations as referenced throughout this note. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 302 (1961) (inadequate compensation for legal services lowers the quality of the service, injures the welfare of the profession, and makes the administration of justice less efficient).

4. Ind. Const. art. 1, § 21 ("Compensation for services or property - No man's particular services shall be demanded, without just compensation. . . ."). Therefore, an attorney's services may not be demanded without payment being made for them.

5. An attorney is entitled to compensation for legal services he has rendered unless they were rendered in a situation where he did not intend to charge for them. The attorney must exercise good faith in his actions. If he violates the instructions of his client, he will lose his right to the fee. 3 I.L.E. *Attorney and Client* § 91 (1978).

his legal and equitable remedies for its collection.[6]

There are two distinct methods available to the attorney with which to collect his fee. He may either assert a lien or sue his client.[7] Apparently, the most common way for the attorney to collect his fee is to sue the client on a contract theory.[8] Such action creates an adversary relationship between the attorney and client with the attorney as a creditor against the client as debtor. While probably distasteful to most attorneys, suing a client for fees is legal,[9] and even proper under certain circumstances.[10] The second method of fee collection is to assert an attorney's charging lien against a fund obtained for the client.[11]

The charging lien allows the attorney to impose an equitably based lien on a fund created by his services.[12] The charging lien is, however, limited in amount to the fee incurred in obtaining the particular fund.[13] In this sense,

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6. The attorney owes an unquestioned duty of loyalty to his client. Yet, one of the areas in which the Code of Professional Responsibility recognizes a lawyer may assert his self-interest against that of a client is in the collection of fees. Legal-Medical Studies, Inc., PRACTICAL ISSUES OF PROFESSIONAL RESPONSIBILITY IN THE PRACTICE OF LAW, 180 (1984) [hereinafter *Issues of Professional Responsibility*].

7. *See* Note, *Attorney v. Client: Rights and Remedies in Tennessee*, 7 MEM. ST. U.L. REV. 435 (1976) (author divides attorney's remedies into five or six separate methods; however, all are directly related to either asserting a lien or suing the client).

8. The last reported case to award the attorney his fee based on a lien theory was decided in 1947. State *ex rel.* McNabb v. Allen Superior Court, 225 Ind. 402, 75 N.E.2d 788 (1947). Since the *McNabb* case, attorneys have relied on suing the client. The reasons this has occurred are discussed in this note.

9. French v. Cunningham, 149 Ind. 632, 49 N.E. 797, 798 (1898) (it is a general rule that the attorney may recover his fee from the client by bringing suit); Kizer v. Davis, 174 Ind. App. 559, 369 N.E.2d 439, 443 (1977) (right of attorney to recover compensation is well established). *See also* Bauer v. Biel, 132 Ind. App. 224, 177 N.E.2d 269 (1961); Felt v. Mitchell, 44 Ind. App. 96, 88 N.E. 723 (1909).

10. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-23 (1984) directs the attorney to sue only to prevent "fraud or gross imposition" by the client. However, in many cases where the contract between the attorney and client is contingent, a discharged attorney will not be able to recover his fee unless he takes action against his client. *Issues of Professional Responsibility*, *supra* note 6, at 264.

11. The charging lien entitles an attorney to make a claim upon a fund created by his efforts. *See infra* note 12. The lien may be provided for by statute or be based on the courts' equitable powers. *See infra* notes 68-115 and accompanying text. *See also infra* note 54 (text of relevant Indiana statute).

12. This is the common description of the attorney's charging lien. *See generally* L. JONES, A TREATISE ON THE LAW OF LIENS § 140 (1914) [hereinafter *Lien Law*]; 3 I.L.E. *Attorney and Client* §§ 131-36 (1978).

13. The lien will only be imposed for the value of the services specifically expended to create the specific fund which is the subject of the lien. Harshman v. Armstrong, 119 Ind. 224, 21 N.E. 662 (1889) (attorney may only hold lien for the value of his services in obtaining it, and fees due from other litigation may not be included). It should also be noted that it must be the claiming attorney's services which produced the fund. Alden v. White, 32 Ind. App. 393, 68 N.E. 913, 915 (1903) (where the attorney's services were not in the procurement of the

the charging lien is characteristically different from the attorney's retaining lien.[14] The charging lien will not serve to secure a general debt owing to the attorney from the client. Rather, only the part of the debt attributable to the creation of the fund may be secured by the lien.[15] The charging lien is simply a device which prohibits the client from appropriating all of the money paid to him without paying his attorney for the services rendered to obtain the money.[16] Although the charging lien can serve as a helpful tool to collect the fee,[17] present Indiana law does not make its use effective.

The Indiana attorney is severely limited in his attempt to enforce the charging lien in two ways. First, the applicable Indiana statute providing for the attorney's lien is very narrow in its scope. The statute applies only where the court has rendered a final judgment in the client's cause of action.[18] If a client settles his case before judgment, even with the assistance of his attorney, the lawyer has no statutory remedy with which to protect his fee.[19] The second reason the lawyer is so limited in asserting a lien may be attributed to the confusion surrounding the equitable charging lien.[20] The equitable charging lien developed in early decisions as the Indiana courts' response to the limitations imposed by the statute.[21]

Given the limiting language of the lien statute, and the confusion surrounding the application of the equitable charging lien, the Indiana attorney is effectively forced to sue his client to recover his fee.[22] Suing the cli-

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fund, he may not hold a lien).

14. The retaining lien may be used to collect a general debt owed to the attorney. *See infra* note 25.

15. *See supra* note 13 and accompanying text.

16. *See* Booram v. Day, 216 Ind. 503, 25 N.E.2d 329, 330 (1940) (charging lien is supported by same policy entitling a mechanic to be reimbursed out of that which he creates); Justice v. Justice, 115 Ind. 201, 16 N.E. 615, 618 (1888) (reason for the charging lien is that the services of the solicitor have created the fund, and he ought to be protected).

17. *See infra* notes 177-218 and accompanying text.

18. The applicable language of the statute states that the "[Attorney is entitled to hold a lien] . . . on any judgment. . . ." *See infra* note 54 (full text of statute).

The courts have applied this statute only when a final judgment has been rendered. Koons v. Beach, 147 Ind. 137, 46 N.E. 587 (1897) (statutory lien only applies if there has been a judgment rendered); Blair v. Lanning, 61 Ind. 499, 502 (1878) (entry of intent to hold lien must be made after the judgment has been entered of record by the clerk); Miedreich v. Rank, 40 Ind. App. 393, 82 N.E. 117, 118 (1907) (Indiana statute allows attorney to acquire a lien upon the judgment which he obtains for his client); Peterson v. Struby, 25 Ind. App. 19, 56 N.E. 733, 734, *reh'g denied*, 57 N.E. 599 (1900) (the statutory lien attaches to the judgment).

19. IND. CODE ANN. § 33-1-3-1 (West 1983) is the only statutory remedy for fee collection. Since it applies only in the case of a judgment, the attorney is without statutory recourse absent a judgment. *See infra* note 54 (full text of statute).

20. *See infra* notes 68-115 and accompanying text.

21. The equitable lien was the Indiana courts' response to the limiting language of the applicable statute. *See infra* notes 68-115 and accompanying text.

22. When faced with a settlement, and not having been paid, the attorney may elect to

ent is presently a practical alternative to the lien, and has been the method of recovery for forty years.[23] Yet the independent action against the client has limitations making it not nearly as advantageous a method for collecting the fee as the charging lien.[24]

This note will begin with an examination of the history and development of the charging lien, the theories that support its application, and its actual application by the Indiana courts. This note will also compare the charging lien with suing the client as a means to collect the fee. The comparison will include considerations of cost, claim priority, potential recovery, and the ethical ramifications of each method. This note will conclude by presenting a statute to rectify the perceived deficiencies in existing law, and discussing the statute's promises of providing the Indiana practitioner a reliable and efficient method of fee collection.

II. THE ATTORNEY'S LIEN IN INDIANA

A. *The Background and History of the Charging Lien*

There are two types of attorney's liens in Indiana. They are the possessory lien[25] and the charging lien.[26] The charging lien may be divided into

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assert a lien. He may not avail himself of the statutory lien for reasons previously discussed. He is also unlikely to be successful in asserting an equitable lien. *See infra* notes 68-115 and accompanying text. The attorney is therefore effectively *forced* to sue. *See also supra* note 8.

23. *See supra* note 8.

24. These limitations will be discussed *infra* notes 117-76 and accompanying text.

25. The possessory lien, often referred to as the general or retaining lien, is the attorney's right to retain possession of all documents, money, or other property of his client coming into his hands in his professional capacity. He has a right to retain this property until a general balance due him is paid. State *ex rel.* Shannon v. Hendricks Circuit Court, 243 Ind. 134, 183 N.E.2d 331, 333 (1962).

This note will focus primarily on the charging lien as it exists in Indiana, and will not attempt to discuss the merits or inadequacies of the retaining lien as a tool for the attorney in collecting his fees. The retaining lien presents unique questions of its own, and therefore merits complete treatment elsewhere. For a comprehensive work on the retaining lien see Note, *Attorney's Retaining Lien Over Former Client's Papers*, 65 COLUM. L. REV. 296 (1965) (an overall review of the retaining lien).

26. *See supra* notes 11, 12 and accompanying text (definition of charging lien). Both the charging lien and possessory lien are recognized under the law. *Lien Law*, *supra* note 12, at §§ 113, 153; 7A C.J.S. *Attorney & Client* § 357 (1980) (attorney's lien is of two kinds: the general, retaining or possessory lien, and the special, particular, or charging lien); 7 AM. JUR. 2D *Attorneys at Law* §§ 315, 324 (1980) (general information offered on both liens).

Indiana recognizes both types of liens. Lesh, *Attorney's Charging Liens*, 15 IND. L.J. 202 (1939) (discussing the charging lien and retaining lien in Indiana); Case Comment, *Attorney and Client - Charging Lien - Retaining Lien*, 6 NOTRE DAME LAW. 261 (1930) ("At law, an attorney has two liens: that is the retaining lien and the charging lien."); 1 B. WATSON, THE LAW OF INDIANA RELATING TO STATUTORY LIENS § 55 (1896) (besides the charging lien, an attorney has a common law lien upon his client's papers) [hereinafter *Indiana Statutory Liens*]; 3 I.L.E. *Attorney and Client* § 131 (1978) (referring to liens as "general or posses-

two subclassifications: the statutory lien and the equitable lien.[27] While both types of charging liens entitle the attorney to essentially the same rights,[28] their application is vastly different.[29]

In either form, the charging lien is based on the theory that a client should not be allowed to appropriate all the money he receives without paying his attorney for services rendered in obtaining that money.[30] The services of the attorney have in a certain sense created the fund, and his fee ought to be protected.[31] The charging lien is therefore founded upon the same equity which gives to everyone who applies his labor and skill to the property of another, at the owner's request, the right to retain that property until he is paid.[32] But the equity of the charging lien is not the only justification for the lien's application.

A second important reason for the existence of the charging lien is the attorney's status as an officer of the court. This status has played a key role in the courts' intervention, in the form of the equitable charging lien, to protect the attorney's fee.[33] The court in *Miedreich v. Rank*,[34] an early

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sory" and "charging," the later as either "statutory or equitable").

27. Lesh, *supra* note 26, at 202 (attorney's charging lien may be divided into two groups: statutory liens and equitable liens).

28. *See infra* note 30.

29. A full comparison of the application of each type of lien will be discussed *infra* notes 47-115 and accompanying text.

30. The charging lien, in either form, is founded on the equity that an attorney ought to be paid his fees out of the fund he has obtained. The statute merely codifies a limited aspect of the theory behind the charging lien. *See* Booram v. Day, 216 Ind. 503, 25 N.E.2d 329, 330 (1940) (charging lien statute is prompted by the same policy that entitles a mechanic to be reimbursed out of that which he creates); Justice v. Justice, 115 Ind. 201, 16 N.E. 615, 618 (1888) (the reason for the charging lien is that the services of the solicitor have created the fund, and he ought to be protected); Puett v. Beard, 86 Ind. 172, 175 (1882) (right to charging lien is an equitable one); Hammond, W. & E. C. Ry. Co. v. Kaput, 61 Ind. App. 543, 110 N.E. 109, 111 (1915) (equity will aid attorney in enforcing his claim, ordinarily called a lien); Hanna v. Island Coal Co., 5 Ind. App. 163, 31 N.E. 846, 847 (1892) (attorneys ought in good conscience be protected).

31. *Booram*, 216 Ind. at 503, 25 N.E. 2d at 330 (his lien is upon that which he recovered for his client); *Justice*, 115 Ind. at 201, 16 N.E. at 618 (an attorney has a lien for his costs upon a fund recovered by his aid because his services have, in a certain sense, created the fund, and he ought in equity and good conscience be protected); Peterson v. Struby, 25 Ind. App. 19, 56 N.E. 733, 735, *reh'g denied*, 57 N.E. 599 (1900) (the law granting an attorney's lien rests upon the equitable rule that one who reaps the benefits of another's services should not be allowed to run away with the fruits of those services); *Hanna*, 5 Ind. App. at 163, 31 N.E. at 847 (the reason for this rule is that the services of the attorney have in a sense created the fund, and he ought, in good conscience, to be protected).

32. *Indiana Statutory Liens*, *supra* note 26, at 22. *See also Booram*, 216 Ind. at 503, 25 N.E.2d at 330 (lien is prompted by the same policy that entitles a mechanic to be reimbursed out of that which he creates or improves); Adams v. Lee, 82 Ind. 587, 590 (1882) (the analogy between the mechanic's lien and the attorney's charging lien is a close one).

33. Miedreich v. Rank, 40 Ind. App. 393, 82 N.E. 117 (1907) (discussed *infra* notes 34-

Indiana case, made this perfectly clear. In its holding, the court noted that the usefulness of the American judiciary depends upon the members of its bar; and in the absence of an independent bar containing "right-minded, fearless lawyers," the court system would be of no use.[35] The *Miedreich* court held it had the inherent power and obligation to protect the attorney as an officer of the court.[36] While the theories behind the existence of the charging lien are apparent,[37] the lien's origin is not clear.

The actual origins of the charging lien are not explicitly expressed in any particular case or legislative action.[38] In fact, the history of the charging lien is quite obscure[39] and confusing.[40] The charging lien probably evolved from the practice of early judges assisting the attorney in securing his costs out of judgments obtained by his client.[41]

The attorney's charging lien did not exist under common law, but only by statute or in equity.[42] The common law only recognized liens upon tangible property in the possession of the one providing the services.[43] The attor-

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36 and accompanying text).

34. *Id.*

35. The *Miedreich* court developed the following theory:

> It is well known, although seldom stated, that the usefulness of the American judiciary depends upon the members of its bar. The judge can only decide questions presented to him for decision, and, in the absence of an independent bar, containing right-minded, fearless lawyers, the judge and the court would be of little use. The duty of courts to protect officers who are so essential to them and from whom the highest fidelity is exacted from fraud and imposition practiced or attempted by the litigants is perfectly clear. It is an inherent obligation, and inherent power in the court to discharge it has always been recognized.

Id. at 399, 82 N.E. at 119.

36. *Id.*

37. There are essentially two theories supporting the attorney's charging lien. The first is based on equitable principles. *See supra* notes 30-32 and accompanying text. The second is the attorney's status as an officer of the court. *See supra* notes 33-36 and accompanying text. Both theories have been utilized by the courts in applying the charging lien.

38. *Lien Law*, *supra* note 12, at 143 (origins of charging lien are not shown by any reported case).

39. Professor Jones remarks that the origins of the attorney's charging lien are obscure and uncertain. *Lien Law*, *supra* note 12, at 144.

40. *Indiana Statutory Liens*, *supra* note 26, at 23 ("[O]n few questions are our American cases in such confusion as they are on that which relates to the extent to which an attorney's charging lien is to be sustained.").

41. *Lien Law*, *supra* note 12, at 143 (courts recognized that the attorney had contributed by his labor and skill to the recovery of the judgment, and wishing to protect its own officers, exercised its powers to that extent). The early case of Welsh v. Hole, 1 Doug. 238 (1779) is usually cited as the first application of the lien as an identifiable theory. *See Lien Law*, *supra* note 12, at 144-45.

42. *Lien Law*, *supra* note 12, at 141 ("An attorney's lien for his costs is not recognized at common law, but only in equity, unless declared by statute.")(citing Hill v. Brinkley, 10 Ind. 102 (1858) for that proposition).

43. *Lien Law*, *supra* note 12, at 141-42 ("The common law recognizes only liens ac-

ney's charging lien, however, does not rest upon possession.[44] Instead, the term "lien" in this context means the right of the attorney to make a claim to the equitable interference of the court.[45] The charging lien is therefore a peculiar lien, and not a "lien" as that term is generally understood.[46]

B. The Statutory Lien in Indiana

The early Indiana legislature adopted the English view[47] that the attorney ought in good conscience be protected from an absconding client and, in 1865, codified the attorney's charging lien.[48] The statute provided the Indiana practitioner with a lien for his fees on a final judgment.[49] Prior to this enactment, Indiana courts were unwilling to impose a lien for the attorney's fee.[50] Therefore, the statute provided a benefit for the attorney.

While the codification of the lien was a step forward for the Indiana attorney, the early statute suffered from the same malady as the present statute: it applied only to a final judgment.[51] Indiana's "judgment only" statute was also very vague and incomplete, leaving out important procedural guidelines and limitations.[52] Extreme judicial interpretation was therefore required to apply the statute.[53]

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quired by possession."). *See also Indiana Statutory Liens*, *supra* note 26, at 29.

44. The attorney's charging lien is merely a claim to the court's equitable intervention on his behalf. *See supra* note 30. Therefore, unless the attorney is claiming a retaining lien, possession is impossible. *See supra* note 25 (definition of retaining lien).

45. The term "lien" has been criticized as inaccurate. The right of the attorney is merely a claim to the equitable interference of the court. *See* 7A C.J.S. *Attorney & Client* § 359 (1980).

46. The charging lien is not a lien in the true sense of the word. It is a peculiar lien since possession, which is necessary to the existence of ordinary liens, is not required. *Id.*

47. As expressed in Welsh v. Hole, 1 Doug. 238 (1779). *See also supra* note 41.

48. The original Indiana statute granting lien rights to the attorney was adopted in December, 1865. The statute reads as follows:

> That any attorney practicing his profession in any state court of record in this state, shall be entitled to hold a lien for his fees on any judgment rendered in favor of any person or persons employing [him] as such attorney to obtain the same: *Provided*, that such attorney shall, at the time such judgment shall have been rendered, enter in writing, upon the docket or record wherein the same is recorded, his intention to hold a lien thereon, together with the amount of his claim.

1 R.S. 1876, p.149 (as cited in Blair v. Lanning, 61 Ind. 499, 501 (1878)).

49. *Id.*

50. Hill v. Brinkley, 10 Ind. 102 (1858) (no lien available for attorney's fees).

51. Compare the original statute with its modern counterpart. *See supra* notes 48, 54. Note that each is applicable only in cases where a judgment has been rendered.

52. The statute, as it existed in 1865, contained no provisions as to the length of time the attorney had to assert his lien. It also lacked procedural guidelines in case of appeal. *See supra* note 48. These defects are remedied in the modern statute. *See infra* note 54.

53. *See, e.g.*, Wood v. Hughes, 138 Ind. 179, 37 N.E. 588, 589 (1894) (court interpreted the statute as requiring notice to be filed within a reasonable time after judgment); Blair v.

The modern version of the attorney's lien provision closely resembles the 1865 statute.[54] With clarifications as to timing and procedure, the new statute remains essentially the same as the old.[55] The statute allows an attorney practicing in any court of record in Indiana to hold a lien for his fees on any judgment rendered in favor of his client.[56]

The statutory lien will be enforced so long as the attorney fulfills the requirements of the statute.[57] All the attorney must do is enter in writing on the docket or record where the judgment is rendered his intention to hold a lien.[58] An attorney satisfies the requirements of the statute by a timely recording and by indicating the amount of his fee.[59] While this procedure appears easy, many attorneys have run afoul of some of the statutory requirements and have thereby failed to establish their lien.[60] It is vital that

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Lanning, 61 Ind. 499, 502 (1878) ("This act was, in some respects, loosely drawn, and must be liberally, rather than literally, construed, [sic] to make it effective for the purposes it was evidently intended to accomplish."). While statutes often may require judicial interpretation to effect legislative intent, the early statute left important procedural questions for the individual courts to interpret (e.g. when to file). Therefore, the attorney seeking to impose a statutory lien could not be assured of his success.

54. IND. CODE ANN. § 33-1-3-1 (West 1983), as amended in 1949, is the current statute providing for the charging lien. It reads as follows:

> *Lien of attorney.* Any attorney practicing his profession in any court of record in this state, shall be entitled to hold a lien, for his fees, on any judgment rendered in favor of any person or persons employing such attorney to obtain the same: Provided, That such attorney, within sixty (60) days from the time such judgment shall have been rendered, enter in writing upon the docket or record wherein the judgment is recorded, his intention to hold a lien thereon, together with the amount of his claim, and if an appeal is taken on such judgement, such lien may be entered within sixty (60) days from the date the opinion of the higher court is recorded in the office of the clerk of the trial court or from the date of final judgment where the cause is reversed and retried.

55. Compare the statute as it exists today with the statute as it existed until 1949. *See supra* notes 54, 48. They are identical in that they both apply only to a judgment. The clarification in the modern statute is procedural: defining the period in which notice must be entered (30 days), and making allowances for appeals.

56. The statute specifically allows an attorney a lien only on a judgment. *See supra* note 54. This construction has been strictly enforced by the courts. *See infra* note 57. The decision to limit the applicability of the statute was based on policy justifications. *See infra* notes 99-116 and accompanying text.

57. Clarke v. Harris, 76 Ind. App. 185, 132 N.E. 6, 8 (1921) (statutory lien is enforceable so long as all the steps are followed). *See also* 7 AM. JUR. 2D, *Attorneys at Law* § 325 (1980) (statutory liens will not attach except where the conditions therein exist); Blair v. Lanning, 61 Ind. 499, 502 (1878) (case interpreting 1865 statute found it "loosely drawn" and, therefore, subject to a liberal interpretation). Yet, in so deciding, the *Blair* court was interested in the issue of the timing of the notice. This problem has been specifically corrected by the 1949 amendment. Therefore, it is likely the statute, as it exists today, will be strictly construed.

58. *See supra* note 54.

59. *See supra* note 54.

60. For a guide to the common pitfalls attorneys have encountered in their attempts to assert a statutory lien, see Lesh, *Attorney's Charging Liens*, 15 IND. L.J. 202 (1939).

the attorney closely follow the letter of the law to establish his lien.

As with the original statute, the modern statutory charging lien contains a severe limitation: it applies only to final judgments.[61] This limitation has been strictly enforced by the courts when an attorney attempts to rely on the statute without the court of record having rendered its judgement.[62] Consequently, an attorney has no statutory remedy to pursue when complete performance of his contract becomes impossible due to the actions of his client.[63] For example, if after several months of research, investigation, and preparation a client settles his claim out of court, the attorney has no statutory remedy to secure his fee out of the settlement. Indiana is in the minority in this regard.

The majority of jurisdictions have codified the charging lien in a much more liberal fashion than Indiana.[64] The more progressive statutes give the

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Apparently, the most common failure of the attorney is in stating the amount due. *See, e.g.*, Wood v. Hughes, 138 Ind. 179, 37 N.E. 588, 589 (1894) (statutory lien fails because it was not alleged that the services of the attorney were of any value); Adams v. Lee, 82 Ind. 587, 592 (1882) (statutory lien fails because there is nothing within the notice by which to fix value).

If the attorney fails to perfect the statutory lien after a judgment is rendered, he has no statutory remedy. However, this will not preclude him from attempting to assert an equitable charging lien. *See, e.g.*, Blankenbarker v. Bank of Commerce, 85 Ind. 459 (1882) (attorneys successful at asserting equitable lien where they failed to perfect applicable statutory lien); Justice v. Justice, 115 Ind. 201, 16 N.E. 615 (1888) (equitable lien found under similar circumstances as in *Blankenbarker*).

61. *See supra* note 51.

62. *See supra* note 18. *See also* Olczak v. Marchelewicz, 98 Ind. App. 244, 188 N.E. 790, 792 (1934) (where there is no judgment, any lien an attorney has must of necessity be one other than that created by the statute and which is equitable in nature).

63. The only statutory aid the attorney has available to him is IND. CODE ANN. § 33-1-3-1 (West 1983) (*see supra* note 54).

64. The majority of state legislatures have adopted a greatly expanded concept of the charging lien. In these states, the statute allows for a lien on the client's cause of action. These liens are therefore not limited to a judgment. The following states have adopted such a statute: ALA. CODE § 34-3-61 (1985); ALASKA STAT. § 34-35-430 (1975); ARK. STAT. ANN. § 25-301 (1948); COLO. REV. STAT. § 12-5-119 (1985); GA. CODE ANN. § 15-19-14 (Michie 1985); IDAHO CODE § 3-205 (1979); ILL. REV. STAT. ch. 13, ¶ 14 (1983); IOWA CODE § 610.18 (1975); KAN. STAT. ANN. § 7-108 (1982); KY. REV. STAT. ANN. § 376.460 (Baldwin 1985); MD. ANN. CODE art. 10 § 46 (1981); MASS. GEN. LAWS ANN. ch. 221, § 50 (1958); MINN. STAT. ANN. § 481-13 (West 1971); MO. ANN. STAT. § 484-130 (Vernon 1952); MONT. CODE ANN. § 37-61-420 (1984); NEB. REV. STAT. § 7-108 (1983); NEV. REV. STAT. § 18.015 (1986); N.H. REV. STAT. ANN. § 311:13 (1984); N.J. REV. STAT. § 2A:13-5 (1952); N.Y. JUD. LAW § 475 (McKinney 1983); N.D. CENT. CODE § 35-20-08 (1980); OHIO REV. CODE ANN. § DR5-103 (Baldwin 1984); OKLA. STAT. tit. 5, § 6 (1981); OR. REV. STAT. § 87.445 (1953); R.I. GEN. LAWS § 9-3-1 (1985); S.D. CODIFIED LAWS ANN. § 16-18-21 (1979); TENN. CODE ANN. § 23-3-102 (1979); UTAH CODE ANN. § 78-51-41 (1977); VA. CODE ANN. § 54-70 (1982); WASH. REV. CODE ANN. § 60.40.010 (1961); WIS. STAT. ANN. § 757.36 (1981); WY. STAT. § 29-1-102 (1981) [hereinafter "cause of action" statutes].

attorney a lien on his client's cause of-action.[65] From the moment the client's action is begun, the attorney is assured a lien on any money received by his client.[66] Such a statute, if applied to the above example, would provide the attorney the statutory security he requires.[67] The benefits to the attorney of such a statute are substantial and should prompt a revision by the legislature of Indiana's relevant code section. But, as the law exists today, an Indiana attorney faced with a settlement must either sue the client, or appeal to the court's equitable powers to enforce an equitable charging lien.

C. *The Equitable Charging Lien in Indiana*

The Indiana attorney, faced with the severe limitation of the statutory lien, turned to the court's equitable jurisdiction for assistance.[68] The constraint which the statute imposed on the attorney was quickly recognized by the Indiana courts.[69] The courts therefore began to assist the attorney in imposing a lien upon a fund obtained by the client, even where no judgment had been rendered.[70] But the courts would only assist the attorney under circumstances where equity demanded it.[71] The application of the equitable

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65. *See supra* note 64. Such lien avoids the prerequisite of a final judgment, as required under Indiana law, because attachment to the cause of action necessarily precedes a final judgment.

66. The Illinois statute provides a clear example of such a statute. ILL. ANN. STAT. ch. 13, ¶ 14 (Smith-Hurd 1983) ("Attorneys at law shall have a lien upon all . . . causes of action . . . which may be placed in their hands by their clients. . . .").

67. *See supra* note 66. *See also* Process Color Plate Co. v. Chicago Urban Transp. Dist., 125 Ill. App. 3d 885, 466 N.E.2d 1033 (1984) (client may release claim or settle, but must stand ready to pay lawyer that portion of the proceeds which the client agreed to pay the lawyer). The Illinois statute requires the attorney to notify the adverse party of his intent to hold a lien in order to collect from him in case of settlement. Rhoades v. Norfolk & W. Ry. Co., 78 Ill. 2d 217, 399 N.E.2d 969 (1979) (lien not enforceable against adverse party until after notice is served).

68. *See supra* notes 47-65 and accompanying text.

69. The first reported Indiana decision adopting the equitable lien was Blankenbarker v. Bank of Commerce, 85 Ind. 459 (1882). This case and its progeny are discussed in this note. *See infra* notes 74-95 and accompanying text.

70. Koons v. Beach, 147 Ind. 137, 46 N.E. 587 (1897), provides a good analysis of when a court will be likely to enforce an equitable lien. *See infra* note 71 (discussion of *Koons*). It is also important to remember that the equitable lien may be applicable where the attorney has failed to avail himself of the statutory lien. For example, if a client obtains a judgment in his favor and then releases it for payment from the adverse party, the attorney may use the equitable charging lien. *See, e.g., Blankenbarker*, 85 Ind. at 459, and Justice v. Justice, 115 Ind. 201, 16 N.E. 615 (1888), discussed *supra* note 60.

71. *See, e.g., Koons*, 147 Ind. at 137, 46 N.E. at 587. In determining whether to impose an equitable lien, the *Koons* court proposed a two prong test. First, the court asked the question, "Was the fund secured by the client through the efforts of the attorney?" The second question: "Was the [attorney's] compensation . . . such a charge against the fund as to amount to an assignment of some part thereof?" If the answers were yes, the court would

charging lien was therefore determined on a case by case basis.[72] This *ad hoc* application of the charging lien resulted in a body of confusing and sometimes explicitly contradictory case law.[73]

The first Indiana case to recognize that an equitable lien existed apart from the statutory lien was *Blankenbarker v. Bank of Commerce*.[74] In that case, petitioners, who were attorneys, failed to enter notice of their intent to hold a lien for their fee on the record after a judgment had been rendered in favor of their client.[75] Consequently, they did not meet the requirements necessary for application of the statutory lien.[76] The defendant subsequently paid the attorneys' client to release him from the judgment.[77] However, the attorneys and their client had previously agreed that any money recovered would serve as a fund from which the attorneys could draw their fee.[78] Based on the evidence of the contract, and the court's finding that the attorneys' services were useful and beneficial to the client, the Indiana Supreme Court found that the client had fraudulently deprived the attorneys of their fee.[79] The court then imposed an equitable charging lien in the attorneys' favor on the money received by their client.[80]

While the Indiana Supreme Court in *Blankenbarker* had little difficulty imposing an equitable charging lien,[81] the same court, five years later, held that an equitable charging lien could never exist in Indiana.[82] In *Al-*

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grant the equitable lien. *Id.* at 143, 46 N.E. at 587. *See also Justice*, 115 Ind. at 201, 16 N.E. at 618 (lien will be enforced where "in equity and good conscience" it is required).

72. The determination of equitable circumstances is necessarily delegated to a case by case analysis. In this application, attorneys generally had a forty-four per cent success ratio in asserting the equitable lien. Lesh, *supra* note 26, at 202. Attorney's have been most successful in cases involving fraud on the part of the client. *See, e.g.*, Hammond, W. & E. C. Ry. Co. v. Kaput, 61 Ind. App. 543, 110 N.E. 109, 111 (1915) (settlement of action between plaintiff/client and defendant made after a judgment has been rendered for the plaintiff, without the knowledge or consent of the plaintiff's attorney, is a constructive fraud entitling the attorney to assert his interest); Miedreich v. Rank, 40 Ind. App. 393, 82 N.E. 117, 119 (1907) (while settlements are favored, favored treatment will not extend to those tainted with fraud).

73. This case law is developed and analyzed in this note. *See infra* notes 74-95 and accompanying text.

74. 85 Ind. 459 (1882).

75. *Id.* at 460.

76. *Id.* at 463.

77. *Id.* at 462.

78. *Id.* at 461.

79. *Id.* at 462.

80. *Id.* (affirming lower court's decision).

81. The *Blankenbarker* test for imposing an equitable lien was relatively easy for the attorney to meet. It required only 1) the services were beneficial to the client, and 2) an agreement existing between the attorney and client that the recovery would provide a fund for the fees. *Id.* at 461. *Cf.* McNagney v. Frazier, 1 Ind. App. 98, 27 N.E. 431, 432 (1891) (an attorney may not pursue an equitable lien if he fails to pursue an applicable statutory remedy).

82. *See infra* notes 83-85 and accompanying text.

derman v. Nelson,[83] petitioners failed to enter a timely notice of their intent to hold a lien.[84] The court held that the attorneys were therefore unable to take advantage of the statutory lien.[85] Moreover, the court held:

> It is not necessary to inquire whether an attorney had a lien on his client's judgment at Common Law; *for the statute covers the entire subject, and creates the lien; and that is the only one that can be enforced.* . . . [T]he statute is now the source from which the lien is derived, and it can only exist as the statute creates it.[86]

In *Alderman*, the court makes no mention of its earlier decision in *Blankenbarker*. The contradiction is blatant; within five years, the Indiana Supreme Court had completely reversed its position from recognizing the equitable charging lien to completely ignoring it.

The next year, the Indiana Supreme Court deepened the confusion surrounding the equitable charging lien. In *Justice v. Justice*,[87] the attorneys/petitioners were seeking imposition of an equitable charging lien in their favor on a fund received by their client.[88] The *Justice* court granted the attorneys' request and imposed an equitable charging lien on their behalf.[89] In very general language, the court noted that in both the United States and England attorneys have a lien for their fees upon a fund recovered through their services.[90] The reason for the rule, the court continued, was that the services of the attorneys had in a sense created the fund, and they were therefore entitled to a lien "in equity and good conscience."[91] The *Justice* opinion failed to cite either *Alderman* or *Blankenbarker*, even though both cases were directly relevant.

These three decisions are indicative of the contradiction and confusion which has plagued the application of the equitable charging lien since its inception. The *Justice* decision is in accord with the *Blankenbarker* decision, both finding and applying an equitable charging lien.[92] Yet the *Alderman* case, which was decided before *Justice* and after *Blankenbarker*, held that an equitable charging lien could never exist.[93] Compounding the con-

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83. 111 Ind. 255, 12 N.E. 394 (1887).
84. *Id.* at 257, 12 N.E. at 395.
85. *Id.* at 258, 12 N.E. at 395.
86. *Id.* at 258, 12 N.E. at 396 (emphasis added).
87. 115 Ind. 201, 16 N.E. 615 (1888).
88. *Id.* at 206, 16 N.E. at 615-17.
89. *Id.* at 210, 16 N.E. at 618.
90. *Id.*
91. *Id.*
92. *Blankenbarker*, 85 Ind. at 462 (finding an equitable lien); *Justice*, 115 Ind. at 210, 16 N.E. at 618 (imposing an equitable lien).
93. *Alderman*, 111 Ind. at 258, 12 N.E. at 396.

tradiction was the fact that these decisions were all handed down by the Indiana Supreme Court within a period of seven years.[94]

The confusion surrounding the application of the equitable charging lien continued, resulting in a body of case law offering little precedential value.[95] If a general rule could be gleaned from the decisions it would be that no lien attaches in the absence of a final judgment, unless, under the circumstances, equity compels it.[96] The client is free to settle or compromise his claim without the attorney's knowledge or consent.[97] The courts which refuse to find an equitable charging lien acknowledge that the client has this freedom, and base the denial of the equitable charging lien on a public policy argument requiring the retention of that freedom.[98]

The policy argument used to defend the courts' decisions denying the attorney a prejudgment lien concerns the desire to foster settlements between plaintiffs and defendants.[99] The courts reason that if the attorney

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94. *Blankenbarker* was decided in 1882, *Alderman* in 1887, and *Justice* in 1888; all were decided by the Indiana Supreme Court.

95. After these three cases were decided by the Indiana Supreme Court (*Blankenbarker*, *Alderman*, and *Justice*), the confusion surrounding the equitable lien continued. McNagney v. Frazer, 1 Ind. App. 98, 27 N.E. 431, 432 (1891) (refused to decide the question as to the existence of an equitable lien apart from the statutory); Hanna v. Island Coal Co., 5 Ind. App. 163, 31 N.E. 846, 847 (1892) (recognizing the equitable lien); Hammond, W. & E. C. Ry. Co. v. Kaput, 61 Ind. App. 543, 110 N.E. 109, 112 (1915) (equitable lien recognized, but not applied); Alden v. White, 32 Ind. App. 393, 68 N.E. 913, 915 (1903) (equitable lien recognized, but not applied); Kitch v. Moslander, 114 Ind. App. 74, 50 N.E.2d 933, 937 (1943) (equitable lien recognized and attorney was successful in asserting it).

96. As one source states the rule, "[A]n attorney's right to a fee may be protected . . . where a fund has been created by the attorney's efforts out of which he is equitably entitled to compensation. . . ." 3 I.L.E. *Attorney and Client* § 131 (1978).

97. It is a basic rule of law that the client has the general right to settle his case without permission from or notice to the attorney. State *ex rel.* McNabb v. Allen Superior Court, 225 Ind. 402, 75 N.E.2d 788, 791 (1947) (an attorney is not a party to the litigation and a client may settle his case without consulting his attorney); Davis v. Chase, 159 Ind. 242, 64 N.E. 88 (1902) (a contract prohibiting the client from settling his case unless the attorney is present and directs the settlement is void as against public policy). This right is not absolute and must be exercised openly and in good faith. *Kitch*, 114 Ind. App. at 74, 50 N.E.2d at 936 (the general rule favors such transactions only when carried out openly and in good faith, and untainted with fraud, duress, undue influence and collusion); Olczak v. Marchelewicz, 98 Ind. App. 244, 188 N.E. 790, 792 (1934) (lien may arise apart from statute under equitable circumstances). *See also* Miedreich v. Rank, 40 Ind. App. 393, 82 N.E. 117, 120 (1907) (a settlement reached by the parties out of the presence and without knowledge of the plaintiff's attorney will be viewed with suspicion).

98. The public policy limitation on the charging lien will be addressed. *See infra* notes 99-115 and accompanying text. *See also supra* note 97.

99. Indiana has refused to adopt the "cause of action" approach of many other states. An attorney's lien on the client's cause of action is feared to be an impediment to the policy of encouraging settlements. This view has been continuously reflected in court decisions. *See, e.g.*, *McNabb*, 225 Ind. at 402, 75 N.E.2d at 788 (client may dismiss or settle his claim at anytime without the attorney's knowledge as this fosters the public policy of encouraging settlements);

acquires a lien before judgment, fewer settlements will be reached. This fear is based on the belief that the attorney's approval of the settlement figure will be required before a negotiated resolution of the matter is reached. Consequently, the courts believe a settlement will not be reached until the attorney is satisfied with the amount of his fee.[100] Yet the policy of encouraging settlements is not hampered when the law allows the attorney a lien on his client's cause of action.[101]

The majority of states have adopted statutes giving the attorney a lien on his client's cause of action.[102] In these jurisdictions, the legislators have determined that an attorney's lien on the cause of action is not a deterrent to settlement.[103] The "cause of action" statutes really do not have the effect of inhibiting parties from reaching an amicable settlement.[104] Attorney consent to a settlement is not required under any of the statutes, indeed, such a requirement has been held to be unconstitutional.[105] Since the attorney has no control over the client's right to settle, good faith settlements will not be deterred.[106] Rather, such statutes require only that the client satisfy his debt out of the fund obtained.[107] Indiana courts have yet to recognize that fact, and the prohibition continues, even to the point where a contract pro-

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Kaput, 61 Ind. App. at 543, 110 N.E. at 109 (settlements are encouraged by law).

100. It has been held by at least one court that a statute giving a lien on the subject matter of a suit changes a previously existing public policy in so far as it deprives a party of complete control over his law suit. Bell v. Bell, 214 Ala. 573, 103 So. 624 (1926) (attorney has partial control of the client's suit).

Relying on that theory, there have been many, albeit unsuccessful, constitutional challenges to such statutes. Annotation, *Constitutionality of Statute Which by Express Terms or Construction Declares that Attorneys' Liens Shall Not be Affected by Settlement or Compromise Between the Parties*, 122 A.L.R. 974 (1939). The statutes are generally upheld on the theory that the right to settle is unaffected, but the client must stand ready to pay the lawyer that portion of the proceeds which he agreed to pay. *See, e.g.*, Process Color Plate Co., Inc. v. Chicago Trans. Dist., 125 Ill. App. 3d 885, 466 N.E.2d 1033 (1984). However, a statute declaring any settlement to be invalid unless consented to by the attorney has been held unconstitutional. Strahlendorf v. Long Island R.R. Co., 162 A.D. 358, 147 N.Y.S. 806 (1914).

101. *See infra* notes 102-07 and accompanying text.

102. *Supra* note 64.

103. The additional benefit to the attorney under these statutes does not impede the client's right to settle his case, as the Indiana courts believe. *See supra* notes 99-100. *See, e.g., Process Color Plate*, 125 Ill. App. 3d at 585, 466 N.E.2d at 1033 (client has the basic right to settle his case, but must stand ready to pay the lawyer that portion of the proceeds he agreed to). In fact, the client's right to settle his case is strictly enforced. *See* Marcus v. Wilson, 16 Ill. App. 3d 724, 306 N.E.2d 554, 555 (1973) (attorney has no standing to complain about the manner in which his client has dismissed or otherwise settled his claim). This is the more reasoned view. These statutes do not make settlements subject to the attorney's approval, but merely subject to the attorney's fee. *See, e.g., Process Color Plate*, 125 Ill. App. 3d at 585, 466 N.E.2d at 1033.

104. *See supra* note 103.

105. *See supra* note 100.

106. *See supra* note 103.

107. *See supra* note 103.

viding for a prejudgment lien may not be enforced.[108]

The Indiana Court of Appeals has held that even where the attorney and client agree that fees should be paid from a settlement, and that the attorney will have a lien on any settlement to cover his fee, the settlement will not be taken subject to the lien.[109] In *Olczak v. Marchelewicz*,[110] the attorney had procured an offer from the adverse party of two hundred dollars to settle his client's claim.[111] The client refused this offer.[112] Soon after the refusal, the client contacted the defendant and settled his claim for two hundred dollars.[113] The attorney sought to enforce the lien as stipulated by their agreement.[114] The court held that no attorney's lien attaches prior to a judgment, even if provided for by agreement, which could inhibit the client from settling his case.[115] The court failed to recognize that the contract between the attorney and client did not require the attorney's approval of a settlement figure. The court also ignored the fact that the client did indeed settle his case; he was not deterred from settling by the agreement. However, the decision does evidence the policy argument used to deny a prejudgment charging lien.[116]

In summary, Indiana courts have been quite reluctant to impose a charging lien where the statutory lien does not apply. These decisions are based on the strict interpretation of Indiana's "judgment only" statute, and a policy of not providing a broader application of the equitable charging lien for fear of adversely affecting settlements. The end result has been that the attorney collects his fee using a less efficient and advantageous means than asserting a charging lien: suing his client.

III. ATTORNEY V. CLIENT: THE LIMITATIONS OF SUING THE CLIENT FOR FEES

The second avenue available to the attorney to collect his fee is an independent action against the client.[117] Where the complete performance of the attorney's services is made impossible or prevented by the client, he may sue.[118] The Indiana courts have been receptive to this type of action,[119]

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108. *See generally infra* notes 109-15 and accompanying text.

109. Olczak v. Marchelewicz, 98 Ind. App. 244, 188 N.E. 790 (1934).

110. 98 Ind. App. 244, 188 N.E. 790 (1934).

111. *Id.* at 245, 188 N.E. at 791.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* at 247, 188 N.E. at 792 (no lien may be acquired before judgment, even by agreement, unless equity demands it).

116. *Id.*

117. *See supra* note 7 and accompanying text.

118. *See, e.g.*, Finney v. Estate of Carter, 130 Ind. App. 381, 164 N.E.2d 656, 660

and suing the client for the fee has become a well established right of the attorney.[120]

Choosing between suing the client for the fee on the one hand, and asserting a lien on the other, should be a decision which is within the attorney's discretion. This is especially true since suing the client is generally distasteful to most practitioners.[121] However, when the attorney faces a settlement without compensation, the limitations in the Indiana law effectively force him to sue.[122]

When the attorney undertakes to sue his client for payment, he is in the ranks of a general creditor.[123] Unless asserting a retaining lien,[124] the attorney holds no security for his debt. As a general creditor, the attorney has available to him a protective device which may help secure his payment: the prejudgment attachment statute.[125] Under the conditions deline-

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(1960) (where complete performance of an attorney's services has been rendered impossible by acts of the client, the attorney, as a general rule, may recover).

119. Kizer v. Davis, 174 Ind. App. 559, 369 N.E.2d 439, 445 (1977) (noting that the Ethical Considerations and Disciplinary Rules will not bar a proper suit).

120. French v. Cunningham, 149 Ind. 632, 49 N.E. 797, 798 (1898) (if the contract is broken by the client, the attorney may recover on quantum meruit for the reasonable value of his services); United States Mortgage Co. v. Henderson, 111 Ind. 24, 12 N.E. 88 (1887) (where attorney acts in good faith and in best interests of client, and the latter afterwards ratifies and accepts the benefits of such action, such attorney is entitled to reasonable compensation for his services); Scobey v. Ross, 5 Ind. 458, 459 (1854) (where a valid contract is rescinded by the client, the attorney may recover the reasonable value of services performed); *Finney*, 130 Ind. App. at 381, 164 N.E.2d at 660 (where client makes complete performance impossible for attorney, latter may recover the reasonable value of his services).

121. The Ethical Considerations limit suits against the client to cases involving client impropriety, indicating the general distastefulness the bar sees in attorney-client litigation. *See infra* note 160 and accompanying text.

122. *See supra* note 22.

123. *See* Note, *supra* note 7, at 435 (author describes attorney/plaintiff as creditor holding no security for his debt).

124. *See supra* note 25.

125. IND. CODE ANN. § 34-1-11-1 (West 1983) provides Indiana creditors with a prejudgment attachment right. The statute provides:

> *Cases for attachment*—The plaintiff, at the time of filing his complaint, or at any time afterwards, may have an attachment against the property of the defendant, in the cases and in the manner hereinafter stated, where the action is for the recovery of money:
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> First. Where the defendant, or one of several defendants, is a foreign corporation or a nonresident of this state;
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> Second. Where the defendant, or one of several defendants, is secretly leaving or has left the state, with intent to defraud his creditors; or,
>
> Third. So conceals himself that a summons cannot be served upon him; or,
>
> Fourth. Is removing or about to remove his property subject to execution, or a material part thereof, out of this state, not leaving enough therein to satisfy the plaintiff's claim; or,
>
> Fifth. Has sold, conveyed or otherwise disposed of his property subject to execution, or suffered or permitted it to be sold with the fraudulent intent to cheat, hinder or delay

ated within this statute, the court will attach the client's property in order to apply it to satisfy a subsequent judgment.[126] The attachment remedy, however, does not avoid the requirement of obtaining a judgment in order to recover his fee.[127] Therefore, while possibly of some use to the attorney/creditor, the prejudgment attachment statute hardly solves all the attorney's problems.

A lawyer suing his client for fees faces considerations he would not otherwise have if he were freely allowed to assert a lien.[128] Not only is an independent action a more burdensome and inefficient process than asserting a lien, other concerns also weigh heavy in selecting this alternative. Some of these concerns the attorney shares with a general creditor.[129] Yet, as an attorney, the attorney/creditor is faced with certain considerations unique to his position.[130]

A. An Independent Action

When a lawyer sues his client to collect a fee, a new cause of action arises, one which is separate from the action the attorney initiated for the client.[131] The attorney is now the plaintiff and must bear the costs, both in time and in money, to pursue his action.[132] Moreover, even if victorious, these costs will not be recoverable from the client since each party is generally responsible for their own legal fees incurred in trying a law suit.[133] Consequently, the attorney contemplating suing his client must carefully weigh all the costs associated with the new and independent action against the possible recovery.[134] In many cases, the outstanding balance on the cli-

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his creditors; or,

Sixth. Is about to sell, convey or otherwise dispose of his property subject to execution, with such intent. Provided, That the plaintiff shall be entitled to an attachment for the causes mentioned in the second, fourth, fifth and sixth specifications of this section, whether his cause of action be due or not.

126. *Id.*

127. *Id.*

128. *See infra* notes 131-76 and accompanying text.

129. *See infra* notes 131-45 and accompanying text.

130. *See infra* notes 148-76 and accompanying text.

131. *See supra* note 123.

132. Since the action against the client is a new and independent one, it will entail the same costs associated with a regular suit. *See* Fitzgerald v. Wasson Coal Mining Corp., 138 Ind. App. 176, 212 N.E.2d 398, 399 (1965) (suit by attorney for fees).

133. Garvin v. Rappaport, 216 Ind. 471, 25 N.E.2d 249 (1940) (generally, each party to law suit must pay his own fees). *See generally* Gibson v. Gibson, 122 Ind. App. 559, 106 N.E.2d 102, 103 (1952) (an attorney normally cannot look for his fees to one who has not engaged him). It might therefore be wise for the attorney to include in his employment contract a provision whereby any additional costs incurred in pursuit of the original fee will be borne by the client.

134. In some cases the attorney may be in for a battle. A client is allowed to raise an

ent's account may not be worth the additional time and money necessary to prosecute and collect the account.[135] If the attorney could assert a lien on his client's cause of action, the additional costs of prosecuting the claim would be largely avoided.[136]

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array of defenses. *See, e.g.*, Manley v. Felty, 146 Ind. 194, 45 N.E. 74 (1896) (fraud on the part of the attorney, inducing the client to contract, will prevent recovery). *See generally* 7A C.J.S. *Attorney & Client* § 196 (1980). The potential of a defense being raised will, of course, increase the attorney's cost of recovery.

Another aspect of this being an independent action is the possibility the defendant/client will be judgment proof. Some protection may be had through application of the prejudgment attachment statute. *See supra* note 125. However, the danger of never recovering may not be insured against as well as it may by pursuing a lien.

In Indiana, the statutory lien will attach to the judgment. The lien is therefore present as the fund is paid from the adverse party. *See* Union Mut. Life Ins. Co. v. Buchanan, 100 Ind. 63, 68 (1884) (fees earned by attorney are his and not the client's; therefore, when adverse party pays the judgment, the attorney has an action for them). *See also* Lesh, *supra* note 26, at 202. If the money is paid over to the court clerk, it will not reach the client before the attorney's lien is satisfied; assuming the validity and extent of the lien have been established. State *ex rel.* Mock v. Bleeke, 71 Ind. App. 23, 116 N.E. 2, 4 (1917) (until validity and extent of lien are established, no official duty rests with the clerk to pay the attorney). The validity and extent of the lien may be established in summary fashion. Clarke v. Harris, 76 Ind. App. 185, 132 N.E. 6 (1921) (such notion is clear). On the other hand, if the money is paid directly to the client, and the attorney has entered notice on the record of his intent to hold a lien, the attorney may collect from the adverse party.

The adverse party who is on notice as to the attorney's intent to hold a lien has an affirmative duty to protect the fee. If after receiving notice, the adverse party settles with the client, the former will be liable for the amount of the lien. *See generally* Annotation, *Affirmative Duty of Defendant to Protect Lien of Plaintiff's Attorney*, 94 A.L.R. 696 (1935). If the adverse party was not on notice, the attorney may request the court's intervention to set the post-judgment release aside, allowing him to proceed against the adverse party to a judgment. The court in Miedreich v. Rank, 40 Ind. App. 393, 82 N.E. 117, 119 (1907) gave the following explanation of this process:

> Though a party may, without the consent of his attorney, make a bona fide adjustment with the adverse party, and dismiss an action or a suit before a judgment or a decree has been entered therein, if it appears, however, that such settlement was collusive and consummated pursuant to the intent of both parties to defraud the attorney, the court in which the action as a suit was pending may interfere to protect him, as one of its officers, by setting aside the order of dismissal, and permitting him to proceed in the cause, in the name of his client as plaintiff, to final determination to ascertain what sum of money . . . is due him for his services when fully performed.

The fact that the lien attaches to the fund as it is created, and the ability of the attorney to collect the fee from the adverse party, make the lien a more assured method of recovery. *See also* Note, *supra* note 7, at 435 (author reaches same conclusion).

135. Suppose, for example, your client settles his complaint with the defendant for $3000.00, and releases his claim. If the contingent fee contract provided for a thirty percent fee, the attorney has a bona fide claim to $900.00. It is not hard to imagine the costs of an independent action, especially where defenses are raised and the fee disputed, being much larger than $900.00.

136. The only costs would be those associated with filing the requisite notice. *See supra* note 54. The execution of the lien may be had in a summary manner. *Clarke*, 76 Ind. App. at 185, 132 N.E. at 8 (court held it was clear that execution could be had in summary manner

When the attorney asserts a charging lien, his actions are deemed to be collateral to the existing action between the client and the client's adversary.[137] The attorney therefore does not need to bring a separate action to assert a lien; he must only give notice of his intent to hold a lien.[138] Consequently, the only cost to assert a charging lien is the expense of preparing and filing the notice.[139] Any additional costs of executing the lien will be minimal since that may be done in a summary manner.[140] Therefore, asserting a charging lien for the fee largely avoids the costs associated with the independent action against the client.

B. The Priority of the Attorney's Claim

In an action against his former client, the attorney is in the ranks of the general creditor holding an unsecured debt.[141] If more than one unsecured creditor is suing the client for payment, none of the claims will be given special priority. An attorney is given no special preference as an unsecured creditor, even though the attorney may have created the fund upon which he, and possibly other creditors, are basing their claims.[142]

When an attorney asserts a lien against a fund obtained by his efforts, courts give that lien preference over the claims of other creditors: both secured and unsecured.[143] The reason for the courts giving priority to the attorney's lien is that it was the attorney's efforts which produced the fund, and his lien against it should take precedence over other creditors.[144] Indi-

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after notice had been filed). *See also supra* note 134 (discussion of recovery from third party).

137. Day v. Bowman, 109 Ind. 383, 10 N.E. 126, 128 (1887) (attorney's lien is incidental to the judgment to which it is attached).

138. The notice requirement is pursuant to the statute. *See supra* note 54.

139. Even this cost would be avoided if the proposed statute is adopted. The initiation of the client's cause of action would serve as notice of the attorney's lien. *See infra* notes 194-99 and accompanying text.

140. *Clarke*, 76 Ind. App. at 185, 132 N.E. at 8 (execution may be had in summary fashion).

141. This statement assumes the attorney is not asserting a retaining lien. If he is, the attorney *does* have security for his debt. Note however that the value of the security (papers, files, etc.) may be relatively worthless vis-a-vis the debt; especially after the client has his money, and the case is settled. *See generally* Note, *supra* note 25, at 296.

142. *See generally* Note, *supra* note 25, at 296.

143. Booram v. Day, 216 Ind. 503, 25 N.E.2d 329, 330 (1940) (attorney who recovers land for his client comes before other creditors, in this case, the mortgagor); Justice v. Justice, 115 Ind. 201, 16 N.E. 615 (1888) (attorney's lien is paramount to that of persons interested in the fund, or those claiming as creditors).

144. *Booram*, 216 Ind. at 506, 25 N.E.2d at 330 (reasoning is sound since the attorney assisted in creating the assets out of which other creditors seek to recover, and the services have therefore benefitted not only the client, but the other creditors as well); *Justice*, 115 Ind. at 201, 16 N.E. at 618 (reason for rule is that services of the attorney have, in a sense, created the fund, and he ought in good conscience to be protected); Adams v. Lee, 82 Ind. 587, 592 (1882) (there is no doubt that the lien of an attorney properly taken is superior to the claim of

ana authority even gives priority to the attorney's lien over the right of the adverse party to assert a set-off against the client.[145]

Just as a general creditor has concerns about the cost of a law suit, so too does the attorney/creditor.[146] Similarly, both the general creditor and attorney/creditor are concerned about the priority of their respective claims relative to the other claims against the debtor.[147] Yet these are not the only concerns of the attorney/creditor. The lawyer also has considerations unique to his position as an attorney.

C. *Limitation to Quantum Meruit*

When a general creditor pursues an action against a debtor, recovery is measured by the full value of the contracted debt.[148] The creditor is not limited in his recovery by what may be considered the "reasonable value" of his services, but may recover the full value of the contract.[149] Such is the case also where the attorney and client enter into a contract for a specific amount.[150] But if the attorney-client contract is contingent, the attorney is limited in the amount he may recover in a suit against the client.[151]

If the contract between the attorney and client is for a contingent fee, the attorney suing on that contract will only be entitled to recover "quantum meruit" for his services.[152] Recovery quantum meruit is limited to the

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others).

145. *Set-off* is a counter-claim demand which defendant holds against plaintiff, arising out of a transaction extrinsic of plaintiff's cause. It is a remedy employed by defendant to discharge or reduce plaintiff's demand by an opposite one arising from transaction extrinsic to plaintiff's cause of action. BLACK'S LAW DICTIONARY 1230 (5th ed. 1979). The attorney's lien is given priority over set-off rights. Puett v. Beard, 86 Ind. 172, 175 (1882) (even when attorney has notice of a set-off, the attorney's lien is superior); *Adams*, 82 Ind. at 592 (no doubt that attorney's lien is superior to the claim of one owning a judgment against the client); Shirts v. Irons, 54 Ind. 13, 15 (1876) (exercise of set-off will not be set aside if there is still enough left in fund to cover attorney's lien); Johnson v. Ballard, 44 Ind. 270, 271 (1873) (affirming trial court's decision to give priority to attorney's lien over adverse party's claim to a set-off).

146. *See supra* notes 131-40 and accompanying text.

147. *See supra* notes 141-45 and accompanying text.

148. *See generally* D. CAMPBELL & D. LYNN, CREDITOR'S RIGHTS HANDBOOK: A GUIDE TO THE DEBTOR-CREDITOR RELATIONSHIP (1985).

149. *Id.*

150. *See* Scobey v. Ross, 5 Ind. 445 (1854) (where contract is for a stipulated compensation, attorney is entitled to the full amount upon rendering the services).

151. *See infra* notes 152-59 and accompanying text.

152. Most jurisdictions have taken the position that an attorney employed on a contingent fee contract who is discharged without fault on his part is *not* entitled to recover the full compensation on the contract. Instead, the attorney is limited to quantum meruit. Apparently, the rationale behind this rule is that the contracted-for contingency has not occurred, therefore a suit on the contract *per se* would be premature. Annotation, *Limitation to Quantum Meruit*

reasonable value of the services which the attorney provided to the client.[153] Under this type of recovery, neither the terms of the contract nor the actual hours or days spent on a certain case are determinative of the award.[154] The determination of a reasonable fee is left to the court's discretion. The court will examine the reputation, ability, prestige, and past record of accomplishment of the aggrieved attorney.[155] Asserting a charging lien, however, will not have the effect of limiting the attorney's recovery.[156]

An attorney seeking to impose a lien for his services is entitled to the full amount of the contract under most circumstances.[157] He is therefore not limited to quantum meruit recovery as he is when suing the client.[158] The difference in the amount of recovery between asserting a lien and suing the client may be quite significant[159] and, therefore, should provide a great incentive to pursue the lien as opposed to suing the client.

Recovery, Where Attorney Employed Under Contingent Fee Contract is Discharged Without Cause, 92 A.L.R. 3d 692 (1979). Indiana has adopted this rule. French v. Cunningham, 149 Ind. 632, 49 N.E. 797, 799 (1898) (the rule as to contracts employing attorneys is, if they are broken by the client, the attorney may recover on quantum meruit for the reasonable value of his services); Kizer v. Davis, 174 Ind. App. 559, 369 N.E.2d 439, 444 (1977) (attorney can recover in quantum meruit for services rendered); Fitzgerald v. Wasson Coal Mining Corp., 138 Ind. App. 176, 212 N.E.2d 398, 402 (1965) (suit by attorney for fees is limited to recovery quantum meruit); Finney v. Estate of Carter, 130 Ind. App. 381, 164 N.E.2d 656, 660 (1960) (where complete performance by attorney becomes impossible due to client's actions, attorney may recover the reasonable value of his services rendered).

153. To recover quantum meruit, it must be shown that the legal services were rendered with the client's approval. *See* Potter v. Dailey, 220 Ind. 43, 40 N.E.2d 339 (1942); Estate of Anderson v. Smith, 161 Ind. App. 480, 316 N.E.2d 592 (1974). Upon that preliminary showing, the attorney is entitled to the reasonable value of his services. *See also supra* note 152.

154. *See, e.g., Fitzgerald*, 138 Ind. App. at 176, 212 N.E.2d at 402 (in determining the reasonable value of the services, the time expended is not controlling; the contract is wholly irrelevant in fixing the fee).

155. *In re* Meyer's Estate, 138 Ind. App. 649, 215 N.E.2d 556 (1966) (trial court has power to fix attorney fees in its discretion). A trial judge, relying upon his own knowledge and experience, may take judicial notice of what a reasonable attorney's fee would be under the circumstances. *In re* Lockyear, 261 Ind. 448, 305 N.E.2d 440 (1974); *In re* Davis, 204 Ind. 227, 183 N.E. 547 (1932); Gerberin v. Gerberin, 172 Ind. App. 255, 360 N.E.2d 41 (1977). *See also* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106(B), EC 2-18 (1984).

156. *See infra* notes 157-59 and accompanying text.

157. Where the terms of the contract between the attorney and client fix the value of the attorney's services, his lien will be measured by the contract. United States v. Hudson, 39 F. Supp. 797, 802 (D. Mont. 1941). Therefore, in a case of settlement or judgment, the lien should be measured by the contract; in each case the value is fixed. *See infra* note 190. *But see supra* note 152. On the other hand, where the attorney is dismissed, and the client proceeds to a judgment with a second attorney, the former will be limited to a reasonable fee. *See In re* Grabow's Estate, 78 Ill. App. 3d 837, 397 N.E.2d 563, 565 (1979).

158. *See supra* notes 148-55 and accompanying text.

159. A simple comparison will show the difference clearly. Assume a personal injury where the plaintiff contracts with his attorney for 30 percent of the total recovery. The attorney does all the necessary filing, discovery, investigation, and trial approaches. The plaintiff then settles his claim, out of court, for $100,000.00. The client refuses to pay his attorney.

D. The Attorney's Ethical Considerations[160]

By virtue of his status as an attorney, owing respect to both his client and the bar, the attorney has an additional factor to consider before suing his client.[161] Indeed, due to the respect owed by the attorney, before suing a client for fees, the attorney should resort to less drastic measures in an attempt to reconcile differences between himself and the debtor/client.[162] Such measures may include private communication,[163] a fee arbitration process,[164] or some other similarly non-adversarial procedure.[165] However, the collection of fees does present one of the few areas where the Ethical Considerations of the Code of Professional Responsibility recognize that a lawyer may assert his own self-interest against that of his client.[166]

The Ethical Considerations, as promulgated by the Committee on Professional Ethics, are not given the weight of rules of law in Indiana.[167] They are therefore neither a bar to a proper suit nor an affirmative defense

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Attorney v. Client: Suing the Client for the Fee

The attorney is limited to quantum meruit recovery. Assume it can be determined the attorney spent 100 hours on the plaintiff's case before the plaintiff settled it. Also assume that the plaintiff's attorney can establish his hourly rate is $100.00. Therefore, 100 hrs. * $100.00 = $10,000.00 recovery for the attorney, if the judge determines this to be reasonable.

Attorney's Lien

The attorney requests the court to enforce an equitable lien in his favor. The attorney is entitled to recover 30 percent * $100,000.00 = $30,000.00.

By suing his client, the attorney not only incurs the additional costs of an independent action, discussed *supra* notes 131-40 and accompanying text, but also stands to lose $20,000.00 in fees.

160. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-23 (1983) states:

A lawyer should be zealous in his efforts to avoid controversies over fees with clients and should attempt to resolve amicably any differences on the subject. He should not sue a client for a fee unless necessary to prevent fraud or gross imposition by the client.

161. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 250 (1943) advises the attorney to avoid suits against a client. The opinion nevertheless recognizes that such suits may occur, stating, "Ours is a learned profession, not a mere money getting trade. . . . Suits to collect fees should be avoided. Only where the circumstances imperatively require, should resort be had to a suit to compel payment."

162. *Issues of Professional Responsibility*, *supra* note 6, at 101 (discussing the propriety of suing a client for fees).

163. *Issues of Professional Responsibility*, *supra* note 6, at 101.

164. *Issues of Professional Responsibility*, *supra* note 6, at 101.

165. The charging lien may be a similarly mild procedure. *See infra* notes 171-76 and accompanying text.

166. *Issues of Professional Responsibility*, *supra* note 6, at 180.

167. The Indiana Supreme Court has repeatedly held that the Code of Professional Responsibility lacks the force and effect of Indiana statutes or case law. *In re* Kuzman, Ind. , 335 N.E.2d 210, 212 (1975) (unpublished in official reporter); Bell v. Conner, 251 Ind. 409, 241 N.E.2d 360, 361 (1968); Tokash v. State, 232 Ind. 668, 115 N.E.2d 745, 746 (1953).

thereto.[168] Rather, the Ethical Considerations form a desired model for the attorney to emulate in his practice.[169] However, conduct outside the parameters of these guidelines may ultimately result in an action against the attorney in a later disciplinary proceeding.[170] Nevertheless, the attorney's lien may be more ethically acceptable.

The attorney's charging lien is not an action against the client *per se*. Rather, the assertion of the lien is collateral to the central action.[171] It is a lien against a fund created by the attorney's services.[172] One author has suggested that, therefore, the Ethical Considerations need play no part in the decision to assert a lien.[173] This conclusion, however, may be too general.

In a recent informal opinion, the American Bar Association's Committee on Ethics and Professional Responsibility examined the propriety of asserting an attorney's lien.[174] In that opinion, the Committee concluded that the burden is on the lawyer to determine whether the circumstances justify asserting a lien to which he may be entitled under the law.[175] The inference is that the Ethical Considerations should be a relevant factor in the decision to assert a lien. But given that the lien is collateral to the action between the client and the adverse party and, therefore, not an action against the client,[176] asserting a charging lien is a less drastic remedy to collect the fee than suing the client. From an ethical standpoint, the attorney's lien should therefore be preferred.

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168. Kizer v. Davis, 174 Ind. App. 559, 369 N.E.2d 439, 445 (1977) (Ethical Consideration 2-23 was never intended as a rule of law, nor can it be used as a bar to an otherwise successful action on quantum meruit).

169. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY Preamble and Preliminary Statement (1983) ("The Ethical Considerations are aspirational in character and represent the objectives toward which every member of the profession should strive.").

170. *Kizer*, 174 Ind. App. at 559, 369 N.E.2d at 443 (the Code operates as the rule of law in disciplinary proceedings; it delineates the conduct which will expose the attorney to censure). *See also* INDIANA RULES FOR ADMISSION TO THE BAR AND THE DISCIPLINE OF ATTORNEYS Rule 23 § 2(a) (1983) ("Any conduct that violates the . . . [code] . . . shall constitute grounds for discipline.").

171. Day v. Bowman, 109 Ind. 383, 10 N.E. 126, 128 (1887) (attorney's lien is incidental to client's action).

172. *See supra* note 12.

173. *See* Note, *supra* note 7, at 435 (author suggests consideration of ethical ramifications is unnecessary when asserting lien).

174. ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1461 (1980) (opinion entitled *Assertion of Attorney Lien Until Payment of Fee*). This opinion dealt with the propriety of holding client's papers until fee was paid; i.e. retaining lien. Nevertheless, application to the charging lien may be implied.

175. *Id.*

176. *See supra* note 171.

IV. A Proposal of a "Cause of Action" Attorney's Lien Statute to the Indiana Legislature

The current state of the law in Indiana as it relates to the attorney's charging lien works against the attorney/creditor. When presented with the situation where the client has settled or dismissed his case and subsequently refuses to pay the attorney's fee, the attorney is effectively forced to sue for compensation.[177] In such a situation, the attorney has no statutory recourse available to him since the applicable statute applies only in cases where a final judgment has been rendered.[178] Furthermore, the case law interpreting and applying the equitable charging lien is so confusing and contradictory that its application is, in a practical sense, unavailable to the attorney.[179]

The majority of jurisdictions have made substantial advances into this area of the law by allowing the attorney a charging lien on his client's cause of action.[180] The Indiana courts have recognized the benefits of these "cause of action" statutes,[181] but have attacked them as infringing upon the right of the individual client to settle his case.[182] Yet, those states which have the "cause of action" statutes do not question the client's unconditional right to settle his case.[183] These statutes merely have the effect of making the benefit received by the client subject to the attorney's lien for his fee.[184]

For the reasons that will follow, the Indiana legislature should adopt a different statute. This note therefore offers the following statute to the Indiana legislature:

> Any attorney practicing his profession in any court of record in this state shall be entitled to hold a lien for his fees upon any cause of action, claim, or demand placed within his authority. Commencement of the action by the filing of documents in a proper court shall serve as notice to the adverse party of the attorney's rights under this act. The amount of the lien shall be only for services and costs associated with the particular cause of action as measured either by the agreement between the at-

177. *See supra* note 22.

178. *See supra* note 56 and accompanying text.

179. *See supra* note 8.

180. *See supra* note 64.

181. *See, e.g.*, Miedreich v. Rank, 40 Ind. App. 393, 82 N.E. 117, 119 (1907) (recognizing that other states have expanded notion of attorney liens, and have codified the law to include a lien on the client's cause of action; comparing it to Indiana law, the court notes Indiana's statute is only applicable after judgement); Hammond, W. & E. C. Ry. Co. v. Kaput, 61 Ind. App. 543, 110 N.E. 109, 112 (1915) ("We have no statute in this state providing for a lien by an attorney on his client's cause of action.").

182. *See supra* note 99.

183. *See supra* notes 99-100 and accompanying text.

184. *See supra* notes 99-100 and accompanying text.

> torney and client, whether it be for a set fee or percentage; or for the reasonable value of those services if no agreement is proven. Nothing in this act affects the client's right to freely settle or compromise his claim. Any settlement shall be subject to the attorney's rights under this act.

The proposed statute, if adopted, would have the effect of improving the Indiana practitioner's ability to collect his fee, and solve many of the problems he currently faces.[185]

A. The Statute Provides a Lien on the Cause of Action

The most obvious and beneficial aspect of the proposed statute is that it provides the attorney with a lien on his client's cause of action.[186] This would overcome the judgment limitation which the present statute imposes upon the attorney.[187] A "cause of action" statute would benefit the attorney in several ways.

One of the biggest advantages of the proposed statute is the money it could save the attorney. Currently, when an action is settled, the attorney is forced to sue his client for compensation,[188] and his recovery in such a suit is limited to quantum meruit.[189] Asserting a lien under the proposed statute would entitle the attorney to the full amount of his contracted fee; even if the contract was for a contingent fee.[190] Limitation to quantum meruit is therefore avoided, thus potentially increasing the attorney's fee recovery.[191] The "cause of action" statute would not only save the attorney money, but would also increase the likelihood of his obtaining his fee.

The "cause of action" lien would improve the attorney's position vis-a-vis his client. The lien would attach from the time the action was filed in

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185. *See infra* notes 186-218 and accompanying text.

186. The proposed statute provides for "a lien . . . upon any cause of action. . . ."

187. The most severe limitation of the present Indiana statute is that it attaches only to a final judgment. *See also supra* notes 18-19 and accompanying text.

188. *See supra* note 22.

189. *See supra* notes 148-59 and accompanying text.

190. The proposed statute provides, "The amount of the lien shall be . . . measured . . . by the agreement between the attorney and client, whether it be for a set fee *or percentage*." (emphasis added). When the terms of the contract fix the value of the services, his lien will be measured by such contract. *See generally* 7A C.J.S. *Attorney & Client* § 364 (1980) ("[A]n attorney has a lien on his client's cause of action for the percentage of the amount recovered to which he is entitled under his contract with the client."). The proposed statute may have the effect of altering the current Indiana rule regarding termination of a contingent contract by the client. *Supra* note 152. However, this rule is based upon an attorney suing his client, and recovery quantum meruit. A lien is not an independent action, but incidental to the client's. Day v. Bowman, 109 Ind. 383, 10 N.E. 126, 128 (1887).

191. *See supra* note 159.

court.[192] Consequently, a client could not defeat the attorney's fee by settling his case because settlements would be made subject to the attorney's fee.[193] Therefore, the attorney would no longer be forced to either appeal to the court's equitable interference or sue the client.

Another benefit attributable to the proposed statute would be the attorney's ability to recover from the adverse party.[194] Currently, the attorney may only recover from the adverse party in cases of post-judgment settlements reached to release the adverse party from the judgment against him;[195] and then, only where the attorney has entered notice of his intent to hold a lien on the judgment.[196] Under the proposed cause of action lien, once the initial documents are filed with the court, the adverse party is on constructive notice as to the attorney's intent to hold a lien.[197] Such a provision would avoid the problems encountered in earlier cases where the attorney failed to enter his notice upon the record. Once the initial documents are filed, the adverse party would have an affirmative duty to protect the attorney's fee.[198] This duty would include the responsibility for payment of

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192. The proposed statute provides: "Commencement of the action by the filing of documents in a proper court shall serve as notice. . . ." Filing will serve to perfect the lien.

193. *Cf.* Process Color Plate Co., Inc. v. Chicago Urban Transp. Dist., 125 Ill. App. 3d 885, 466 N.E.2d 1033 (1984) (client may settle claim, but must stand ready to pay lawyer that portion of proceeds which was agreed to).

194. There is a duty on the part of the adverse party to give the plaintiff's attorney a reasonable opportunity to protect his fee. The attorney must first give notice to the adverse party of his intent to hold a lien. *See supra* note 134. Notice acts as an assignment, of sorts, of an interest in the fund. Cohen v. Kirchheimer, 285 Ill. App. 583, 2 N.E.2d 592 (1936) (such assignment is one the debtor must respect). *See also* Phillips v. Jones, 355 P.2d 166, 170 (Alaska 1960) (third paragraph of attorney lien statute gives attorney a lien for his compensation upon money in the hands of the adverse party in any action or proceeding where the party was on notice); Fisher v. Slayton & Co., 25 Ill. App. 2d 250, 166 N.E.2d 617 (1960) (abstract opinion); Mid-City Trust & Savings Bank v. City of Chicago, 292 Ill. App. 471, 11 N.E.2d 617, 620 (1937) (attorney's lien is created upon notice to adverse party; adverse party with notice is liable for attorney's fee).

195. *See supra* note 134.

196. *See surpa* note 134.

197. The proposed statute provides: "Commencement of the action by the filing of documents in a proper court shall serve as notice to the adverse party of the attorney's rights under this act."

198. An affirmative duty is reasonably inferred from the language of the proposed statute. Similar statutes have been interpreted accordingly. *See generally* Annotation, *Affirmative Duty of Defendant to Protect Lien of Plaintiff's Attorney*, 94 A.L.R. 695 (1935). *See also In Re* Elliott, 208 Mo. App. 348, 234 S.W. 520, 524 (1921), *rev'd on other grounds*, Wabash Ry. Co. v. Elliott, 261 U.S. 457 (1923) (notice to defendant of plaintiff's attorney is not required where defendant made settlement with plaintiff after commencement of the suit); Wildong v. Security Mortgage Co. of America, 143 Minn. 251, 173 N.W. 429, 430 (1919) (in making a settlement, parties are required to take notice of the lien rights as given by the statute; this includes duty on adverse party to protect and guard against possible second liability on his part).

the fee if he chose to settle with the client.[199]

B. The Statute Provides a Reliable and Ethically Acceptable Method for Collection

One of the major problems facing the Indiana attorney today when he tries to assert a lien prior to judgment is the uncertainty which is involved.[200] There are no concrete guidelines for the attorney to follow in asserting the equitable lien because of the confusing and contradictory case law.[201] The attorney has no assurance that the court will impose a lien in his favor, unless he meets the statutory requirements.[202] Consequently, many attorneys have simply chosen to sue their clients for the fee.

The proposed statute would codify the essential qualities of the equitable charging lien,[203] and thereby avoid the necessity of appealing to the courts' equitable powers. The attorney would be assured that he had a lien prior to a judgment.[204] The attorney could therefore plan his route to recovery, opting not to sue, but to assert a lien. The reliability of the statute could therefore lead to a reduction in the amount of litigation between attorneys and their clients.[205]

The statutory lien is also not a direct action against the client.[206] It is a collateral claim to the main action.[207] Therefore, the charging lien is probably less repugnant to the Ethical Considerations of the Code of Professional Responsibility than a lawsuit against the client.[208]

C. The Policy Aspect

Indiana courts have long recognized the benefits to the attorney of a

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199. *See supra* note 198.

200. *See supra* notes 73-95 and accompanying text.

201. *See supra* notes 73-95 and accompanying text.

202. *See supra* notes 73-95 and accompanying text.

203. The essential qualities of the equitable charging lien are those allowing the attorney to enforce a charging lien prior to a judgment. *See supra* notes 68-71 and accompanying text.

204. The proposed statute entitles the attorney to a lien on his client's cause of action. The lien takes effect from the filing of the first document. Filing of the first document of course necessarily precedes the rendering of a judgment.

205. If an attorney is allowed a lien on his client's cause of action, similar to the one proposed, it is probable he will pursue the lien for collecting his fee rather than suing. This is especially true in light of the disadvantages to the attorney inherent in a suit against his client. *See supra* notes 117-76 and accompanying text. The effect will therefore be to reduce the amount of attorney client litigation.

206. *See supra* note 171.

207. *See supra* note 171.

208. *See supra* notes 160-76 and accompanying text.

"cause of action" lien statute.[209] The problem has been that the courts typically see the "cause of action" lien as infringing upon the rights of the client to settle his claim.[210] Indiana courts have reasoned that such a statute will therefore have a deleterious effect on their efforts at reducing the amount of litigation.[211]

However, Indiana courts have also held that an attorney should be entitled to an equitable lien, basing that opinion upon another policy argument. The courts reason that, in certain circumstances, the attorney should be protected because his services created the fund.[212] The courts also recognize the attorney's status as an officer of the court, and that he therefore deserves protection from less than honest clients.[213] The proposed statute would adequately reconcile both of the courts' policy goals.[214]

The proposed statute explicitly states that the client has the complete right to settle his case.[215] This is merely a codification of the judicial interpretation given to similar statutes in other jurisdictions.[216] Therefore, the policy of encouraging settlements would be maintained. Yet, the attorney will also be protected as he will have a lien for his fee on that settlement.[217] The practical effect of such a statute will be to deter only those settlements entered into in fraud of the attorney's fee,[218] and those settlements would supposedly be subject to the court's imposition of the equitable charging lien.

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209. *See supra* note 181.

210. This is apparently the major stumbling block to the wholesale application of the charging lien prior to judgment. *See supra* note 99.

211. *See supra* note 210.

212. *See supra* note 31 and accompanying text.

213. *See supra* notes 33-36 and accompanying text.

214. The proposed statute provides, "Any settlement shall be subject to the attorney's rights under this act." This explicit guarantee is a departure from most other states. It grants the attorney a specific statutory guarantee that any settlement rendered will be subject to his fee. While not codified in most jurisdictions, this right has been inferred by the courts. *See, e.g.*, Process Color Plate Co., Inc. v. Chicago Urban Transp. Dist., 125 Ill. App. 3d 885, 466 N.E.2d 1033 (1984) (court construed the Illinois statute accordingly). Yet the proposed statute also provides, "Nothing in this act affects the client's right to freely settle or compromise his claim." This provision will protect the client.

215. The proposed statute provides, "Nothing in this act affects the client's right to freely settle or compromise his claim."

216. *See supra* note 103.

217. *See supra* note 186.

218. Hopefully, when a client settles his case after services have been performed by the attorney, the client will remit to the attorney his fee. These types of settlements will be unaffected by a statute imposing a lien for fees on that fund since the client would pay the fee anyway. The only application of the statute to the settlement will be where the client does not pay the fee; those entered into in fraud of the attorney's fee.

V. Conclusion

Practicing attorneys in Indiana need a reliable, efficient, and fair means with which to collect their fee from recalcitrant clients. The method currently utilized by Indiana attorneys is an independent action against the client. The Indiana attorney has also had some limited success asserting a charging lien. But neither of these methods provide a truly adequate means for collecting the attorney's fee.

Indiana therefore needs to adopt a statute providing for a "cause of action" lien, such as the one proposed by this note. A "cause of action" statute would provide the attorney with the most reliable and efficient means with which to collect his fee, while at the same time, maintaining a general "fairness" between the attorney and client. Such a statute would also provide the best protection for all the parties involved: the court, the adverse party, the client, and finally, the practicing attorney.

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