

2-1940

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James E. Lesh

Member, Indianapolis Bar

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Recommended Citation

Lesh, James E. (1940) "Attorney's Charging Liens," *Indiana Law Journal*: Vol. 15 : Iss. 3 , Article 2.

Available at: <https://www.repository.law.indiana.edu/ilj/vol15/iss3/2>

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ATTORNEY'S CHARGING LIENS

By JAMES E. LESH*

In litigation affecting their charging liens for fees, Indiana attorneys have not fared so well. A computation based upon appealed cases shows they have an all-time winning average of only 44 per cent. This is not high enough. Based entirely on Indiana decisions, the primary purpose of this article, therefore, is to point out the mistakes that have been made to date by attorneys in such proceedings, so that all of us will be less likely to blunder in the future.

The subject of attorney's charging liens is not one without difficulties in law. The courts, moreover, certainly have not been guilty of favoritism toward the profession. But an observation of equal moment is this: Lawyers are entirely too careless in dealing with their own rights. That human factor is responsible for more losses of liens than is ignorance of the law. We should be more careful.

Attorney's charging liens, sometimes referred to as special or particular liens,¹ may be divided into two groups: statutory liens and equitable liens. As will be seen, while each has many principles in common, nevertheless there are essential differences which must be kept in mind.

By early legislative enactment there was created the right of attorneys to hold a lien on judgments procured by their services. The statute is set out in the margin.² Its judicial interpretations are important.

* Of the Indianapolis Bar.

¹ The other class of attorney's liens is the retaining, or general or possessory lien, governed by different rules.

² "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 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." Acts 1865 (Spec. Sess.), Ch. 59, sec. 1, p. 164; Burns' 1933, sec. 4-3619.

1. *Time for Entering Notice of Statutory Liens.* The statute provides that the notice of intention must be entered on the judgment docket "at the time" of rendition of judgment. If the notice is given one day after judgment is recorded, it is not too late, for the courts are willing to give attorneys a "reasonable" time so to do.³ But three years is too long;⁴ so likewise is twenty-two months.⁵ The time for entering the notice, moreover, is not extended during the time pending an appeal.⁶ Obviously, of course, it would be impossible to forecast just how long after judgment is recorded an attorney safely may wait before entering his notice of lien. So the thing to do is to play safe and enter the notice as promptly as possible. In this connection, it must be remembered that a complaint or other proceeding to establish an attorney's statutory lien is defective if there is a failure to allege that notice of the lien was timely entered.⁷

2. *Value of Claim Must be Shown.* In the past, attorneys only too frequently have made the mistake of failing to appreciate that a mere notice of a claim for attorney's lien in a given amount is not tantamount to proof that such amount, or any amount at all for that matter, is due them for their services. A complaint on an attorney's lien which fails to allege that the amount of the claim, or lien, has either been fixed by contract or is of the value asked is demurable.⁸ As stated in *Adams et al. v. Lee et al.*,⁹ "The question is, therefore, not one of good faith or bad faith. It is simply whether the naked, unsupported, *ex parte* statement in a lien proves value." The court answered the question by declaring that without some evidence of value of the lien, "it is but an empty thing."¹⁰ Since, moreover, as presently will be seen, pro-

³ Blair v. Lanning, 61 Ind. 499.

⁴ Day v. Bowman, et al., 109 Ind. 383.

⁵ Alderman v. Nelson, et al., 111 Ind. 255.

⁶ Ibid.

⁷ Wood v. Hughes, et al., 138 Ind. 179.

⁸ Dunning, et al. v. Galloway, et al., 47 Ind. 182.

⁹ 82 Ind. 587.

¹⁰ See, also: Day v. Bowman, et al., supra, note 4; Wood v. Hughes, et al., supra, note 7.

ceedings to enforce an attorney's lien may be by informal action as part of the main suit, as well of course as by independent complaint, it must be borne in mind, as ruled in the same case, that generally "allegations of value are not admitted by a failure to controvert them."

A valuable case to keep in mind is that of *State of Indiana, ex rel. Mock et al., v. Bleeke et al.*¹¹ That decision illustrates another of the many pitfalls lawyers may encounter in trying to establish their liens on judgments procured by their efforts. Relators, attorneys, there brought suit against the clerk of court and his bondsmen to recover a sum equal to the amount of an attorney's lien, which relators timely had entered on the judgment docket. Ignoring the notice of lien and the rights of the relators, the clerk had paid to other counsel, for their use and that of their clients, the entire sum of the judgment. A demurrer to the complaint was sustained below and the ruling thereon afforded the sole question on appeal. Relators had averred in the complaint that the amount of their claim was the reasonable value of their services. Bearing that in mind, but bearing in mind also that it was necessary for relators, in order to recover on the clerk's bond, affirmatively to show a breach of official duty on the part of the clerk, the reviewing court sustained the judgment below. Its reasoning, entirely sound, for so doing follows:

"* * * The mere filing of Mock and Sons of their declaration of intention to hold a lien on the judgment did not determine the existence or the amount of the same, but left it open for adjudication or adjustment between the contracting parties." (Citing cases.) "The act of filing such declaration of intention, in pursuance of the statute, is an unilateral proceeding, and does not assume to fix the amount due. Its only purpose is to protect the attorney rendering the service for whatever amount is actually due, as may thereafter be determined. The statute itself designates the amount to be stated in such declaration as a mere claim, and does not purport to state a determined amount. * * * Until the validity and extent of any such lien is established, no official duty rested upon the clerk to pay any part of such money to Mock & Sons, as mere lienholders, whatever his duty may have been to pay the

¹¹ 71 Ind. App. 23.

same to the judgment creditor himself, or the attorneys of record on behalf of their principal."

The court added that the same rule would apply whether the lien was statutory or equitable. The opinion does point out, however, that if relators would take the proper steps to have the amount of their lien determined, a duty would then rest upon the clerk to pay them that sum and if he refused to do so that would constitute a breach of official duty, with accompanying liability on his bond.

While the lien in controversy in *Kennedy et al. v. Eder et al.*¹² was said to be one equitable in nature, the principle held controlling is equally applicable to statutory liens. Under circumstances, here unnecessary to recite, amounting to a fraud on his attorneys, the plaintiff noted a satisfaction on the judgment docket. Failing to receive compensation for their services, the attorneys sought to have execution issue for the amount they claimed was due them. It was held this could not be done, for that would amount to permitting them to be the judges of their own case.

Last of the series of cases deserving comment in connection with this phase of the article is *McCabe v. Britton et al.*¹³ It holds that, in the absence of a binding contract fixing the amount, attorneys in divorce cases may not take a valid lien for fees in an amount in excess of that fixed by the court. The theory upon which the result was reached was that, since by statute the husband was required to pay all the reasonable expenses of the wife in the divorce proceeding, the "sum so allowed having been determined to be the fair and reasonable fee, there is no ground left for claiming a further sum as a lien upon the decree for alimony." Assuming that decision will stand, it then appears clear it is advisable in that type case to have a contract with the wife as to the amount of fees to be paid. Whether the same rule would apply in other similar cases wherein the defendant by law is required to pay, for the use of the plaintiff, attorney's fees is questionable.

¹² 79 Ind. App. 644.

¹³ 79 Ind. 224.

From a practical standpoint, however, it would seem to be a wise course, under most circumstances, to have a contract with the plaintiff in regard to fees.

3. *Procedure to Enforce Statutory Liens.* The case of *Clarke v. Harris*¹⁴ sets out a number of principles dealing with the enforcement of attorney's liens. (1) Two forms of procedure are open to attorneys in order to obtain an adjudication of their liens: (a) They may bring an original action in their own name against the judgment plaintiff,¹⁵ or (b) they may file an intervening petition in the cause in which the judgment was rendered. (2) If the former, notice and summons as in ordinary cases must issue; but if the latter, the proceeding is said to be summary in character and requires only reasonable notice to be given. (3) If by way of intervening petition in the original case, the proceeding may not be attacked on the ground it was commenced after the term during which the judgment was rendered. (4) Like the enforcement of all other liens, the matter comes within the sole jurisdiction of a court of equity and hence is not triable by jury. (5) On proper application, either side is entitled to a change of venue from the judge.

Procedure to enforce an attorney's lien is not, unfortunately, always so simple a matter as merely selecting which of the two forms of proceedings to take. It is when fraud, on the part of either the judgment plaintiff or the judgment defendant, toward the attorney becomes a factor that the more vexed questions arise. Before taking up a discussion of those problems, however, some consideration first should be given to the so-called attorney's equitable lien.

4. *Equitable Liens.* The first Indiana case giving consideration to that type lien is that of *Blankenbaker et al. v. Bank of Commerce et al.*¹⁶ In that case it appears petitioners, attorneys, had procured a divorce and judgment for substantial alimony for their client. They had failed to enter notice of a

¹⁴ 76 Ind. App. 185.

¹⁵ If there are other necessary or interested parties they should of course be joined as parties defendant.

¹⁶ 85 Ind. 459.

statutory lien. It had been mutually agreed between client and them that the recovery for alimony should constitute a fund to which petitioners were to look for their compensation. Their suit was in attachment and pending trial the client died and her administrator was substituted as a party defendant. The Supreme Court fully approved the theory of the trial court, which was that since, upon the facts stated, the services of petitioners were useful and beneficial to the client, the funds in the hands of the administrator therefore were consequently impressed with an equitable lien in their favor. In *Justice v. Justice*¹⁷ it was held an attorney who procured a will to be set aside for his client and established the latter's right to share in the estate acquired an equitable lien upon the fund for his fees, and that such lien was senior to a general judgment lien acquired by another, against the client, after the contract for legal services was entered into. The Supreme Court there observed that a court of equity will limit a legal lien to the actual interest of the judgment debtor in the property, and will fully protect the rights of attorneys who have prior equitable interests in such property, or in the proceeds thereof. There again, no statutory lien had been taken.

*Koons, Admr., et al. v. Beach*¹⁸ is an enlightening and well-considered case on this subject. The facts must briefly be noted in order adequately to understand the scope of the ruling. An heir individually employed the attorney to assist the administrator in the collection of a life insurance policy made payable to the estate. The company had denied the claim. By reason of the sagacity of the attorney a favorable compromise was reached and the money was turned over to the administrator, although no suit yet had been filed. On the original hearing the court declared it was settled that a statutory lien is not the only lien afforded for the security of the attorney, in the performance of services beneficial to his client, and that the fund acquired by the aid of the employed attorney is burdened by the fee and cannot be relieved by any act of the client. In its opinion on rehearing, in answer to criticism

¹⁷ 115 Ind. 201.

¹⁸ 147 Ind. 137.

of counsel, the court admitted its expression "equitable liens"¹⁹ was not strictly correct, but went on to explain:

"The lien which an attorney is said to have is merely a claim to the equitable interference of the court for his debt, when he finds that his client is about to deprive him of it. * * *

"When, therefore, equity is appealed to, the inquiry is not necessary, did the attorney procure a judgment? but it is, does he present a claim where the law supplies no remedy as efficient, and where in good conscience the client should not be permitted to defeat the attorney of his just compensation. One test of this claim, as originally shown, is this: Was the fund secured by the client through the efforts of the attorney. And another is: Was the compensation of the attorney expressly or by implication such a charge against the fund as to amount to an assignment of some part thereof. In either event equity will aid the attorney in the enforcement of his claim, ordinarily called a lien.

"* * * Therefore, it could not be said that a judgment in favor of the client is indispensable."

It goes without saying that the foregoing principle often may be of vital importance in protecting an attorney who, before the controversy reaches the stage of actual litigation, procures for his client a fund against which it would be impossible to impress a statutory lien.

While we shall leave until later any extended discussion of *Olczak v. Marchelewicz*,²⁰ it here should be observed that one reason why the attorney there failed in his effort to obtain an equitable lien was because there remained, at time of suit, no fund upon which to impress a lien. This is an indispensable element.

5. *Enforcement of Equitable Liens.* Proper procedure to enforce statutory liens have been set out under point 3, *supra*. All that is said there is applicable to the enforcement of equitable liens. There is no need for repetition.

6. *Protection Against Fraudulent Settlements.* As already has been stated, the greatest difficulties to be encountered in the subject-matter of attorney's charging liens are those arising in connection with protection against fraudulent settlement

¹⁹ It is still constantly used.

²⁰ 98 Ind. App. 244

between parties which are done in order to beat attorneys out of their fees.

It may not be doubted that the early ruling in *Hanna v. The Island Coal Co.*²¹ certainly has its limitations today. There it was held that a client may, as a matter of right, dismiss his suit at any time before judgment, without the consent of his attorney, and thereby deprive the attorney of opportunity of taking a lien on the judgment. We look to, as stating the true doctrine, the well-considered case of *Miedreich v. Rank et al.*²² It is valuable to us in at least two respects: It correctly lays down the substantive rights involved, and points to the method of procedure attorneys may employ when the fraudulent conduct of the parties adversely affects their chances of collecting just compensation for their services. In that case there was no fraud on the part of client. The fraud was practiced by the defendant, which, by fraudulent misrepresentations, induced the client, for an utterly inadequate consideration, to sign a motion of dismissal of the suit. The attorney was ignorant of the matter until the motion to dismiss was filed. He thereupon objected to the dismissal and, by verified motion, asked leave for permission to prosecute the suit to final judgment in the name of his client. The motion to dismiss was granted; the motion to proceed was denied. The Appellate Court reversed. The first point to be noted in the decision is that necessarily limiting the ruling in the *Hanna* case.²³ While recognizing the general rule laid down in that case, the court in the opinion now being considered adopted the following from a New York decision: "The right of the parties thus to settle is absolute and the settlement determines the cause of action and liquidates the claim. * * * Of course we do not refer to dishonest settlements made to cheat attorneys, which the courts will brush aside with strong hands." Their power so to do, it is declared, rests upon the inherent powers of courts to protect their own officers against collusion and fraud practiced by the parties to the cause. Laying down the

²¹ 5 Ind. App. 163.

²² 40 Ind. App. 393.

²³ *Supra*, note 21.

proper course of procedure for attorneys to take in such circumstances, the court goes on to hold that if it appears that such settlement was collusive and consummated pursuant to the intent of the parties to defraud the attorney, the court in which the action or suit was pending may interfere to protect him by setting aside the order of dismissal and permitting him to proceed in the name of his client as plaintiff to final determination to ascertain what sum of money or interest in the subject-matter, if any, is due him for his services when fully performed.

Discussion of the *Miedreich* case necessarily requires some notice of one or two later decisions having a bearing upon similar questions. First of these is *Hammond, Whiting, etc., R. Co. v. Kaput*.²⁴ There it was held that where there was a judgment below in favor of the plaintiff, and his attorneys took a lien to secure fees and thereafter, without actual fraud, the judgment defendant settled with the plaintiff without consent of the attorneys, the judgment defendant had no ground for appeal, because the only thing at stake was the attorney's lien. In opposition to a motion to dismiss, appellant urged it had the right to appeal in order to try to obtain a reversal and thus become relieved from the enforcement of the attorney's lien. Referring to such contention, the court said that was in effect a concession by appellant that it had been guilty of a constructive fraud on appellee's attorneys. Partly responsible, moreover, for the result reached apparently was some misgivings in the minds of the court as to whether, in event of reversal, the attorneys would then have the right to litigate the case on their own behalf in order to secure their compensation.

Rested both upon public policy and upon the fact that such a cause of action is non-assignable, it has been held that attorneys may not be permitted to prosecute on their own behalf a suit for enticement of a wife, where, before judgment, the plaintiff, without the consent of his counsel, voluntarily dismissed the case.²⁵

²⁴ 61 Ind. App. 543.

²⁵ *Gerdink, et al. v. Meginnis, et al.*, 73 Ind. App. 39.

It is rather difficult to reconcile all of that which is said in the recent decision of *Olczak v. Marchelewicz*²⁶ with the ruling in the *Miedreich* case.²⁷ In the *Olczak* case, appellant was employed by appellee to prosecute a tort action and it was agreed appellant should receive for his compensation fifty per cent of anything collected, whether by suit or compromise. After complaint was filed, appellee surreptitiously settled the case and paid the appellant attorney nothing. Subsequently, appellee received a discharge in bankruptcy. Thereafter, appellant brought suit against him, claiming an equitable lien on the fund received through the settlement. The judgment below for appellee was affirmed. Clearly, the correct result was reached, for the discharge in bankruptcy barred appellant's claim; and, as has been stated heretofore,²⁸ there was in existence no fund to which a lien might attach and, therefore, no basis for an equitable lien.²⁹ Another factor, which was not noticed by the reviewing tribunal, was that instead of asking the court to avoid the settlement made by appellee, as he should have done, appellant, by instituting suit to enforce the lien, recognized the finality of the settlement and order of dismissal. But the point in the decision which is vulnerable to criticism is the statement, based on and citing the *Hanna* case,³⁰ that "no lien can be acquired before judgment, even by agreement, that will prevent the client from compromising and releasing his claim without the attorney's consent." Since the act of the client amounted to a fraud on the attorney, the general doctrine laid down in the *Hanna* case was without application. Instead, if at all opportune, the circumstances called for a consideration of the principles laid down in the *Miedreich* case, which, as stated before, limit the *Hanna* decision to cases where fraud is not present.

There is illustrated in the case of *Peterson et al. v. Struby*³¹ a situation which attorneys should be careful to avoid. The

²⁶ *Supra*, note 20.

²⁷ *Supra*, note 22.

²⁸ See note 20.

²⁹ It is likewise so held in *Alden v. White, Admr., et al.*, 32 Ind. App. 393.

³⁰ *Supra*, note 21.

³¹ 25 Ind. App. 19.

attorneys there had procured a judgment for the plaintiff and had duly entered a notice of attorney's lien. Subsequently, the plaintiff assigned the judgment to another who, without receiving any consideration therefor, released the judgment in full. Since neither the plaintiff nor the assignee would pay the attorneys their fees, they brought suit against the assignee to recover from her personally what was due them. Rested upon the principle that the lien of an attorney for his fees, if validly entered, cannot be discharged without his authority by any act of the judgment plaintiff, or his assignee, it was held the attorneys could not prevail in their action. In other words, the court took the view that, under the circumstances, the status of the lien was unchanged; as much so, in fact, as if the judgment had not been noted satisfied by the assignee. Before going on to state what procedure the attorneys should have followed, we direct attention to the declaration of the court that if appellee had in fact received the amount of the judgment, then appellants might have recovered "from her the amount of their lien,³² as for money had and received."

It is easy to see how counsel in the foregoing case made the mistake they did. But what they should have done was to take the following steps: (1) Go into the court where the judgment was obtained and move to set aside the satisfaction of the judgment.³³ (2) As between themselves and the judgment plaintiff establish the validity of their lien, including the amount thereof. (3) Proceed to cause execution to issue against the judgment debtor to the extent of the attorney's lien.

It appears, from a perusal of the authorities as a whole, that it would, by appropriate petition, be entirely permissible to take all three of the foregoing steps in one proceeding, provided such action be in the same court where the original judgment was rendered. In that event, only reasonable notice to appear, as has been stated previously,³⁴ would be necessary.

³² Of course, as stated ante, the attorneys first would have had to prove the value of their services or that there was a contract governing the amount of the fee.

³³ *Ibid.* See, also: *Kennedy v. Eder*, *supra*, note 12.

³⁴ See note 14.

Such notice, of course, should go to the judgment plaintiff, to the plaintiff's assignee, if any, and to the judgment debtor. In this same connection it should be stated that a notice of an attorney's lien upon the judgment docket is notice to all the world; no personal notice thereof to the assignee of the judgment plaintiff is necessary.³⁵

7. *Miscellaneous Principles Noted.* There remains to be mentioned but a few miscellaneous principles that occasionally may arise and which may prove convenient to bear in mind. They follow:

The right of an attorney taking a lien for services in procuring a judgment is superior to the right of the judgment debtor to set off any judgment he may have.³⁶

An attorney's lien for services, being an incident of the judgment, is as much assignable as the judgment itself. A copy of the assignment, moreover, need not be carried into the pleading.³⁷

Even where an equitable lien is being asserted, the claim has no vitality if barred by the statute of limitations.³⁸

It is proper for a party against whom notice of an attorney's lien has been taken to move, at any time while the lien still stands, to expunge the claim of lien from the record, if, for example, the lien is without merit.³⁹ This may be done in the same suit or in an independent action.⁴⁰

An attorney's charging lien, as distinguished from a holding lien, is restricted to the services of the case in which the judgment upon which the lien is taken, and may not extend to, or protect, other services rendered by the attorney.⁴¹ The case cited in support of the foregoing deals with statutory liens, but obviously the same rule would apply to equitable liens.

³⁵ Peterson, et al. v. Struby, supra, note 31.

³⁶ Adams, et al. v. Lee, et al., supra, note 9; Puett, et al. v. Beard, et al., 86 Ind. 172.

³⁷ Day v. Bowman, et al., supra, note 4.

³⁸ McNagney, et al. v. Frazier, Ex'r., et al., 1 Ind. App. 98.

³⁹ Clarke, et al. v. Harris, supra, note 14; Vivian Collieries Co. v. Cahall, 184 Ind. 473.

⁴⁰ Clarke, et al. v. Harris, supra, note 14.

⁴¹ Harshman v. Armstrong, et al., 119 Ind. 224.

If, after judgment for the plaintiff, there is an assignment of the judgment and thereafter the attorneys, with consent of the assignee, take down the money paid into court and turn it over to the assignee and mark the judgment satisfied, such attorneys, if they fail to take out their fees, lose their right even to an equitable lien on the fund turned over to the assignee.⁴²

⁴² *Berry, et al. v. State Bank of Otterbein, et al.*, 99 Ind. App. 655.