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EXTORTION-FREE ATTORNEY'S LIENS IN FAMILY LAW CASES

By Gregory W. Herring with assistance from Bret G. Anderson; 2009

Although many have the impression that the rule was handed down from above on a stone tablet, the fact is that it was only 35 years ago that the Court of Appeal held that an attorney cannot keep client files where the subject matter of her purported lien on them is of no economic value to her. (See *Academy of California Optometrists, Inc. v. Superior Court (Damir)* (1975) 51 Cal.App.3d 999.) Extortion is thus off the table as a means of gaining disputed fees from a client.

When properly accomplished, attorney liens, however, can still be a legitimate ways of ensuring payment. California law recognizes at least two types of liens for all lawyers -- charging liens and general retaining liens. A third, Family Law Attorney Real Property Liens, is reserved for lawyers in family law cases.

Charging liens can be created by contract to satisfy a lawyer's expenses and fees out of the anticipated judgment to be recovered. (See *Academy of California Optometrists*, supra, at 1003.) They can secure either an hourly or a contingency fee, but they cannot be created without a contract. (*Fletcher v. Davis* (2004) 33 Cal.4th 61, 62.)

A 2004 California Supreme Court case, *Fletcher v. Davis* (supra.), fleshed-out the ethical requirements for charging liens. It held that, although public policy favors such liens, they are potentially adverse to the client within the meaning of Rules of Professional Conduct, Rule 3-300. As such, the attorney must:

- explain the transaction fully;
- offer fair and reasonable terms;
- provide a copy of the agreement;
- give the client an opportunity to seek independent legal advice, and
- secure the client's written consent.



(*Id.*, at 71.)

A charging lien may be created in the fee agreement or in a stand-alone agreement by including language such as:

"Attorneys Lien: A lien acts as security for payment due to Attorney by Client. This lien could delay payments to Client until any disputes over the amount to be paid to Attorney are resolved. Client hereby grants Attorney a lien for any sums due and owing to Attorney for fees and costs at the conclusion of Attorney's services.

The lien will attach to [any and all real or personal property of Client's, including] any recovery Client may obtain by judgment in this matter. Client may seek the advice of an independent lawyer of the client's choice about this lien and this matter. By initialing this provision and signing this agreement Client acknowledges that he has been so advised and given a reasonable opportunity to seek that advice.

Explained, Read and Approved: _____ [client's initials]."

A 2007 Appellate Court case clarified that, "[a]fter the client obtains a judgment, the attorney must bring a separate, independent action against the client to establish the existence of the lien, to determine the amount of the lien, and to enforce it. [Citations.]" As such, "[a]n order within the underlying action purporting to affect an attorney's lien is void." (*Cal-Western Reconveyance Corp. v. Reed et al.* (2007) 152 Cal.App.4th 1308, 1321.)

General Retaining Liens, which apply to papers and personal property of the client coming into an attorney's possession, are rare because of their limited usefulness. Although there is no specific authorization for retaining liens, the Court of Appeal has recognized them, subject to the limitation that the property retained has some monetary value to the attorney, and that the lien's value is not solely extortion. (*See Academy of California Optometrists*, supra, at 1003.) Although *Fletcher v. Davis* did not specifically address retaining liens, its restrictions would certainly seem to equally apply to them.

Especially in an "up" market (which this one finally appears to be), **Family Law Attorney Real Property Liens ("FLARPLs")** provide an important means for payment in ". . . a proceeding for dissolution of marriage, for nullity of marriage, or for legal separation of the parties." (Fam. Code §2033.) Although these liens were previously created under common law, Family Code sections 2033 & 2034 now set forth the modern guidelines.

A great thing about FLARPLs is that they provide an anti-bankruptcy shield.

Section 522 of the Bankruptcy Code allows a debtor to avoid certain liens on exempt property, such as the former marital residence. Of course, the motivations behind the statute are to protect the debtor's exemptions and facilitate his "fresh start." Notwithstanding the fundamental importance of this concept, however, it only applies to "judicial liens." While there are no published cases deciding whether a FLARPL is a statutory lien or a judicial lien, the statutory



text of the Family Code and analogous cases signal that a FLARPL is a statutory lien that cannot be avoided.

Especially in this economy, attorney's liens may prove useful to any family law attorney towards gaining full payment of hard-earned fees. But, as *Fletcher v. Davis* instructs and Family Code section 2033 specifies (as to FLARPLs), these must be carefully perfected.