COMMENTS

Rethinking Attorney Liens: Why Washington Attorneys are Forced into “Involuntary” Pro Bono

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I. INTRODUCTION

Nearly everyone in the business of providing services knows that clients do not always pay their bills. As service providers, attorneys should consider their options carefully, as each option is likely to have different benefits and raise potential issues: the least favorable option being involuntary pro bono. An attorney suing a client for fees may avoid ethical issues because the Washington Rules of Professional Conduct (“RPCs”) do not prohibit suing clients;¹ but, the attorney should be prepared for a bar complaint nonetheless. Even if the bar complaint is dismissed, the process will likely be costly and stressful.²

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1. See 51 AM. BAR ASS’N & BUREAU OF NAT’L AFFAIRS, LAWYERS’ MANUAL ON PROF’L CONDUCT 110–11 (2004) (indicating a strong disapproval for the practice of suing a client because, as a conflict of interest, it may violate the American Bar Association’s (ABA) MODEL RULES OF PROF’L CONDUCT R. 1.7 (2003)); see also AM. BAR ASS’N CANONS OF PROF’L ETHICS 14 (1969) (stating that “lawsuits with clients should be resorted to only to prevent injustice, imposition, or fraud”). Canon 14 was adopted on August 27, 1908. AM. BAR ASS’N COMPRENDIUM OF PROF’L RESPONSIBILITY: RULES AND STANDARDS 331 (2003). However, the 1908 Canons were withdrawn in 1969 and are no longer official ABA policy. See id. at 7. In 1969, the Canons of Professional Ethics were replaced by the ABA Model Code of Professional Responsibility. Id. This Code was then replaced by the current ABA Model Rules of Professional Conduct in 1983. Id. at 8. The canons were not rules that lawyers were required to follow. Rather, they were simply guidelines reflecting the policy interests of the ABA. While these policy interests are still relevant today, the canons were never officially adopted by the Model Rules of Professional Conduct or the Model Code of Professional Responsibility.

2. When a bar complaint is filed against an attorney, that attorney will, at a minimum, have to research the claim and prepare a response to the allegations. See WASH. RULES FOR
In addition, the client may file a malpractice counterclaim that, even if dismissed, may require disclosure of the matter to the lawyer’s insurance carrier, increasing the lawyer’s premium.

Another problem attorneys face when suing a client is that it may be difficult to collect a judgment unless the attorney can successfully interplead or intervene another lawsuit involving the former client. Collecting a judgment from a former client may be difficult, especially when that client refused to pay the first time. In addition, filing suit against a client may damage the attorney’s reputation. Who wants to be known as the attorney who sues their clients?

Instead of suing a client for fees, an attorney may assert a “lien for attorney’s fees.” While it is unlikely that asserting a lien will avoid a malpractice suit or bar complaint, an attorney’s lien is likely to provide accelerated access to earned and owed fees. However, several issues are likely to arise when an attorney asserts a lien. For example, there are different types of liens, one or more of which may or may not be appropriate. In Washington, attorney liens can be classified into

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**ENFORCEMENT OF LAWYER CONDUCT R. 10.5 (2004)** (setting forth the procedural rules for responding to bar complaints).

3. **WASH. SUPER. CT. R. 22 (2004).** Washington Superior Court Rule 22 states:

   Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not ground for objection to the joinder that the claims of the several claimants or the titles on which their claims depend do not have a common origin or are not identical but are adverse to and independent of one another, or that the plaintiff avers that he is not liable in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of cross claim or counterclaim. The provisions of this rule supplement and do not in any way limit the joinder of parties permitted under other rules and statutes.

Id.

4. **WASH. SUPER. CT. R. 24 (2004).** Washington Superior Court Rule 24 states:

   Upon timely application anyone shall be permitted to intervene in an action:

   (1) when a statute confers an unconditional right to intervene; or

   (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant’s interest is adequately represented by existing parties.

Id.

5. **See WASH. REV. CODE § 60.40.010 (2002).**

6. Revised Code of Washington (RCW) sections 60.40.020 and 60.40.030 provide a method for resolving a dispute over a retaining lien by moving for relief in the pending suit without filing an additional lawsuit. Similarly, a charging lien may be enforced by the court that enters the judgment. **See MARJORIE DICK ROMBAUER, 27 WASH. PRAC. § 4.29 (2003) [hereinafter 27 WASH. PRAC.].**

7. RCW section 60.40.010 outlines four different types of liens. **WASH. REV. CODE § 60.40.010.** This Comment groups these liens into two subcategories: Retaining liens, **WASH. REV. CODE § 60.40.010(1);** and charging liens, **id. § 60.40.010(2)–(4).**
two categories: the retaining lien on the client's files and the charging liens. The charging liens include liens on the client's money in the attorney's hands, liens on money in the hands of an adverse party, and liens on judgments. While this Comment argues that the lien on the client's money in the attorney's hands should be recognized as a retaining lien, the current Washington law classifies it as a charging lien. Thus, this Comment refers to it as a charging lien.

In addition, the lien must be asserted properly. An improper assertion of a lien will likely result in both discipline under the RPCs and failure to recover fees. Of course, the claim to fees must be valid. If the client actually does not owe the attorney any fees, a lien for those fees will not be enforceable. Unfortunately for attorneys, only a few Washington cases have addressed attorney liens. Nonetheless, the rulings have placed strong limitations on the use of attorney liens. Additionally, ethical rules and opinions have drastically limited the use of attorney liens.

These ethical and judicial interpretations have transformed Washington's attorney lien statute into a confused and illogical body of law that frustrates the statute's purpose—protecting the rights of both attorneys and clients. As a result, the statute is often misused or avoided. Five reasons contribute to the statute's misuse or avoidance: (1) the ethical rules make asserting an attorney lien too risky; (2) the retaining lien has been limited to the point that it is useless; (3) Washington courts have failed to clarify whether a lien on money in the hands of the attorney is a retaining lien or a charging lien; (4) courts have limited the charging lien on policy grounds when the

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8. Attorney liens are only permitted as an exception under the Washington Code of Professional Responsibility. See WASH. RULES OF PROF'L CONDUCT R. 1.8(j)(1) (2004). They are also treated as an exception to the rule in the Model Rules of Professional Conduct. See MODEL RULES OF PROF'L CONDUCT R. 1.8(j)(1) (2003). Thus, it is reasonable to conclude that improperly asserted attorney liens will constitute ethical violations.


12. See, e.g., Wash. State Bar Ass'n, Formal Op. 181 (1987) (stating that "[a] lawyer cannot exercise the right to assert a lien against files and papers when holding these documents would materially interfere with the client's subsequent legal representation," and "[n]or can the lien be asserted against monies held in trust by the lawyer for a specific purpose or subject to a valid claim by a third party"); WASH. RULES OF PROF'L CONDUCT R. 1.8(j)(1) (acquiring a lien to secure the lawyer's fees or expenses); id. R. 1.15(d) (stating that the lawyer shall take reasonable steps to protect the client's interests); id. R. 1.14(a)(2) (preventing a lawyer from withdrawing from a disputed portion of a trust until the dispute is finally resolved).

attorney gains too much leverage; and (5) attorney liens are useless when the client settles.

The Washington legislature should amend the attorney lien statute because it is largely unworkable and vulnerable to misuse. First, for a retaining lien on the client’s files, the Washington legislature should amend the statute to place the burden of proving that the files are necessary on the client, and the statute should not permit a lien when the files are needed for criminal defense or defending a fundamental right. Second, the statute should classify the lien on money in the attorney’s hands as a retaining lien. Third, the legislature should determine which types of property should be excluded on policy grounds and amend the statute to specifically exclude those types of property. Finally, the legislature should amend the statute to provide for a lien on settlement proceeds.

After a brief discussion of the history of the attorney lien in Part II, Part III discusses the basic rules governing the attorney lien in Washington. Part IV of this Comment discusses the various limitations on attorney liens and how those limitations have discouraged use or encouraged misuse of the statute. Part IV begins with a discussion of general professional responsibility concerns and continues with withdrawal and termination as they relate to attorney liens. Part IV concludes the Comment with a discussion of the inconsistencies of the retaining lien and a discussion of the various limitations on the charging liens.

II. HISTORY OF ATTORNEY LIENS

In general, a lien is a claim, encumbrance, or charge on property for payment of some debt, obligation, or duty.\textsuperscript{14} English courts have recognized attorney liens since the 1700s.\textsuperscript{15} Because suits for fees were generally not available, English courts recognized attorney liens so that lawyers could be compensated for their services when clients refused to pay.\textsuperscript{16}

At American common law, courts recognized a general, or retaining lien, while the special, or charging lien, was originally recognized by statute.\textsuperscript{17} The retaining lien was a passive lien,\textsuperscript{18} which

\textsuperscript{14} See \textit{BLACK’S LAW DICTIONARY} 933–36 (7th ed. 1999).
\textsuperscript{15} William J. Ohle, \textit{Oregon Attorneys’ Liens: Their Function and Ethics}, 27 WILLAMETTE L. REV. 891, 892 (1991). Ohle explains that English courts recognized attorney’s retaining liens as early as 1734. \textit{Id.} at 892. While the charging lien developed in the early 1700s, “it developed as an equitable right of the attorney to be paid out of the proceeds of a judgment.” \textit{Id.}
\textsuperscript{17} Gottstein v. Harrington, 25 Wash. 508, 510–11, 65 P. 753, 753 (1901).
was not enforceable. A lawyer could refuse to turn over any property that came into his possession until the client paid his fees. The retaining lien was also possessory: when the attorney surrenders possession of the property, the lien terminated. The charging lien, however, was a nonpossessory lien established as an equitable right. It granted the attorney a priority on property recovered by the suit. At American common law, the retaining lien was the only lien available to attorneys, but now many states, including Washington, provide a statutory charging lien.

III. LIENS UNDER CURRENT WASHINGTON LAW

The Washington attorney lien statute provides for a retaining lien and a charging lien. Section A discusses the retaining lien and its general characteristics. Section B discusses the three types of charging liens in Washington: on money in the attorney’s hands, on money in the hands of an adverse party, and on a judgment. Even though this Comment argues that a lien on money in the attorney’s hands should

18. Id.
19. Ross v. Scannell, 97 Wash. 2d 598, 604, 647 P.2d 1004, 1011 (1982); Gottstein, 25 Wash. at 511–12, 65 P. at 754 (reasoning that the lien cannot be active because the statute does not provide any enforcement process).
21. Id. at 512, 65 P. at 754.
22. Ohle, supra note 15, at 895. Ohle explains that charging liens are equitable rights and that they differ from ordinary liens because "possession is not essential." Id. at (citing Crawford v. Crane, 204 Or. 60, 62, 282 P.2d 348, 349 (1955)). Further, Ohle distinguishes these liens from retaining liens, in that the "amount to which the charging lien attaches is only for the costs and fees of the particular litigation which brings about the judgment or recovery." Id.
be characterized as a retaining lien, it is referred to as a charging lien, which accords with the current Washington law.

A. Retaining Lien

The retaining lien allows an attorney to hold a client's files hostage until the client pays the attorney fees incurred in pursuing the client's case. Washington's retaining lien statute states that an attorney has a lien for compensation "whether specially agreed upon or implied . . . [u]pon the papers of his client, which have come into his possession in the course of his professional employment."26 The Revised Code of Washington (RCW) subsection 60.40.010(1) ("subsection 1"), the statute governing retaining liens on a client's papers, has not been significantly amended since its codification in 1881.27 As at common law, the retaining lien is possessory: If the attorney relinquishes possession of the client's property for any reason, the lien is void.28 Moreover, the lien is a passive mechanism, which is not enforceable by foreclosure or by sale.29 The retaining lien's primary use is to compel a client to pay through embarrassment or worry.30 Lastly, it is irrelevant whether the papers were retained in connection with the fees in dispute.31

B. Charging Lien

In contrast to the retaining lien, the charging lien is active and can be enforced through adjudication.32 Washington codified the charging lien as follows:

An attorney has a lien for his compensation, whether specially agreed upon or implied, as hereinafter provided: (2) upon money in his hands belonging to his client; (3) upon money in the hands of the adverse party in an action or proceeding, in which the attorney was employed, from the time of giving notice of the lien to that party; [and] (4) upon a judgment to the extent of the value of any services performed by him in the action, or if the services were rendered under a special agreement, for the sum due under such agreement, from the time of filing notice of such lien or claim with the clerk of the court in which such

27. Ross, 97 Wash. 2d at 604, 647 P.2d at 1007.
29. Ross, 97 Wash. 2d at 604, 647 P.2d at 1008. See generally Gottstein, 25 Wash. at 511-12, 65 P. at 754. As a result, the attorney cannot sell the files to a third party.
32. Ross, 97 Wash. 2d at 604, 647 P.2d at 1008.
judgment is entered, which notice must be filed with the papers in the action in which such judgment was rendered, and an entry made in the execution docket, showing name of claimant, amount claimed and date of filing notice.33

Under RCW subsection 60.40.010(2) ("subsection 2"), the attorney can assert a lien on money held in trust.34 Similar to a retaining lien, asserting a lien on money held in trust requires possession and is waived or forfeited if the attorney does not retain possession.35 Additionally, like the subsection 1 lien, it can be enforced pursuant to the summary procedure statutes,36 RCW sections 60.40.02037 and 60.40.030.38 Summary procedure, which gives courts discretion to resolve any dispute regarding the lien, is not available for money or any property that has come into the attorney's hands outside the course of professional employment.39 However, the lien does not have to secure money that was obtained in relation to that action,40 and the lien is invalid when the funds are held for a specific purpose, or if the funds are subject to a valid claim by a third

35. Id. at 215, 548 P.2d at 340.
36. Id. at 215–16, 548 P.2d at 340. RPC 1.14(a)(2) provides:
   Funds belonging in part to the client and in part presently or potentially to the lawyer or law firm must be deposited therein, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer of law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

37. Wash. Rev. Code § 60.40.020 (2002). RCW section 60.40.020 states:
   When an attorney refuses to deliver over money or papers, to a person from or for whom he had received them in the course of professional employment, whether in an action or not, he may be required by an order of the court in which an action, if any, was prosecuted, or if no action was prosecuted, then by order of any judge of a court of record, to do so within a specified time, or show cause why he should not be punished for contempt.

Id.
38. Id. § 60.40.030. RCW section 60.40.030 states:
   If, however, the attorney claim a lien, upon the money or papers, under the provisions of this chapter, the court or judge may: (1) Impose as a condition of making the order, that the client give security in a form or amount to be directed, to satisfy the lien, when determined in an action; (2) summarily to inquire into the facts on which the claim of a lien is founded, and determine the same; or (3) to refer it, and upon the report, determine the same as in other cases.
39. See id. § 60.40.020 (requiring that the retained property be received in the course of employment). But see id. § 60.40.010(2) (suggesting that there is no requirement that the money be obtained in the attorney's professional capacity).
40. See also 27 Wash. Prac. § 4.26. See generally Price v. Chambers, 148 Wash. 170, 172, 268 P. 143, 144 (1928) (noting that funds secured were originally held in relation to another case).
party.\textsuperscript{41} Funds held in trust must remain in trust if there are any disputes regarding rights to such funds between the lawyer and any third party.\textsuperscript{42} Although current Washington law states that the subsection 2 liens are charging liens, Washington Supreme Court dicta and a Washington State Bar Association ethical opinion have indicated otherwise.\textsuperscript{43} However, the dicta and the ethical opinion are not binding on the courts.\textsuperscript{44} Neither the legislature, nor the courts, has resolved this issue.

Under RCW subsection 60.40.010(3) ("subsection 3"), an attorney can assert a prejudgment lien on money in the hands of an adverse party that is the subject matter of the action,\textsuperscript{45} whereas RCW subsection 60.40.010(4) ("subsection 4") provides a lien on the judgment,\textsuperscript{46} which is not effective until a judgment is formally entered in favor of the non-paying client.\textsuperscript{47} To assert a prejudgment lien under subsection 3, the attorney must assert the lien before judgment, but after the commencement of the suit.\textsuperscript{48} Also, the general first-in-time, first-in-right rule applies to both subsection 3 and 4 liens,\textsuperscript{49} meaning that whoever asserts the first valid lien has the first rights of possession. Consequently, time is of the essence.

\begin{footnotesize}
\begin{enumerate}
\item See Model Rules of Prof'L Conduct R. 1.15(e) (2003). Model Rule 1.15(e) states: When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.
\item CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 65 (1986) ("Ethics opinions continue to be rarely cited and relied upon in judicial decisions. . . . [The ABA] issued an opinion in 1978 declaring that its opinions were not binding on lawyers." (citing Am. Bar Ass'n, Informal Op. 1420 (1978))).
\item Id. at 743, 755 P.2d at 188.
\item Humptulips Driving Co. v. Cross, 65 Wash. 636, 636–38, 118 P. 827, 827–28 (1911) (explaining that an assignment of judgment is not subject to attorney's lien; judgment must be filed to be subject to such lien); Cline Piano Co. v. Sherwood, 57 Wash. 239, 243, 106 P. 742, 744 (1910) (asserting "until judgment was actually filed, it did not become a part of the records in the case, and consequently was not a judgment"); Suleiman v. Cantino, 33 Wash. App. 602, 606–07, 656 P.2d 1122, 1124 (1983) (stating that a judgment against the attorney's non-paying client is not subject to that attorney's lien); see also Wilson v. Henkle, 45 Wash. App. 162, 170, 724 P.2d 1069, 1074 (1986).
\item Plummer v. Great Northern Railroad, Co., 60 Wash. 214, 217, 110 P. 989, 990–91 (1910) (stating that "there must be an action or proceeding pending against the adverse party").
\item E.g., Jones, 51 Wash. App. at 743–45, 755 P.2d at 188–89.
\end{enumerate}
\end{footnotesize}
Both subsection 3 and 4 liens require notice before they are effective.50 For a lien on money in the hands of an adverse party, the notice must be served on the adverse party51 and the lien becomes effective upon delivery of notice.52 On the other hand, liens on judgments have a different notice requirement. These liens must be filed with the clerk of the court in which the judgment will be entered,53 but are not effective until that time.54 For example, in Jones v. International Land Corp., Jones owed attorney fees to Hunsinger from a previous representation.55 On May 5th, Hunsinger asserted a lien under subsection 356 on money in the hands of International Land Corporation and asserted a lien under subsection 4 on the judgment of that suit.57 The court ruled that the subsection 3 lien became effective when Hunsinger served notice on International Land Corporation on May 6th, but the subsection 4 lien did not become effective until May 12th, when the judgment was entered.58 Because the first-in-time rule applies, the lien must have priority before it is effective,59 if there are competing liens, the first to become effective or perfect takes priority. Both subsections 3 and 4 liens require a judgment in favor of the non-paying client.60

Since relatively few Washington cases have decided issues regarding attorney liens, there are still many unanswered questions that create confusion when considered in light of the limitations imposed by ethical rules, ethical opinions, and judicial decisions. This confusion makes attorney liens difficult to use effectively. Primarily, attorneys either avoid their use, depriving themselves of their benefits, or misuse them, depriving their clients of their protections.

50. WASH. REV. CODE §§ 60.40.010(3)-(4) (2002); see 27 WASH. PRAC. § 4.27 (remarking that although written notice is only required under subsection 4, it is highly recommended that notice under subsection 3 be in writing because the date of notice marks when the lien is effective); McRea v. Warehime, 49 Wash. 194, 197, 94 P. 924, 925–26 (1908) (stating that a lien on a judgment must be in writing, since it must be filed with the court).
51. WASH. REV. CODE § 60.40.010(3) (2002).
53. WASH. REV. CODE § 60.40.010(4) (2002).
55. Id. at 738, 755 P.2d at 185.
56. Id., 755 P.2d at 185; see also WASH. REV. CODE § 60.40.010(3) (2002).
57. Jones, 51 Wash. App. at 738, 755 P.2d at 185; see also WASH. REV. CODE § 60.40.010(4) (2002).
59. See id. at 743, 755 P.2d at 188.
IV. LIMITATIONS ON ATTORNEY LIENS

This part explores various limitations on Washington’s attorney lien statute within the framework discussed in Part III. Section A discusses how ethical rules place a great risk on an attorney who chooses to assert an attorney lien, particularly because an improper lien is an ethical violation, and the rules are vague and general. Another limitation, discussed in section B, is that if an attorney wants to withdraw from a case, the lien is only valid if the withdrawal is for good cause. However, good cause is irrelevant if an attorney is terminated by her client, as discussed in section C. Section D explains how the retaining lien has been effectively limited to the extent that the attorney is deprived of leverage, which is the only way the lien can be effective. Section E concludes Part IV, discussing the limitations on charging liens. Specifically, the limitations on the charging lien on money in the attorney’s hands make the lien practical only as a retaining lien. Additionally, the charging lien has been limited in other ways: (1) the lien does not apply to child support payments or real property; and (2) the lien is not enforceable against a settlement.

A. General Professional Responsibility Concerns

If an attorney is found to have violated the ethical rules, a court may find that any claim to fees from the matter is invalid. Asserting an attorney lien is the exception to the rule prohibiting an attorney

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65. See generally WASH. RULES OF PROF’L CONDUCT R. 1.14(a)(2) (2004). Since disputed funds must be held in trust until the dispute is resolved, the lien cannot be enforced as a charging lien, but rather serves as a retaining lien. See id.
67. See Cline Piano Co. v. Sherwood, 57 Wash. 239, 244, 106 P. 742, 744 (1910).
from attaining a proprietary interest in the cause of action.\textsuperscript{69} Thus, an improperly asserted attorney lien constitutes an ethical violation.

There are several rules affecting a lawyer's use of the attorney lien statute. When attorneys withdraw or are terminated from representation of a certain client, they must take reasonable steps to protect their client's interests.\textsuperscript{70} One way attorneys can protect their clients' interests is by surrendering property when the client is entitled to it by law.\textsuperscript{71} Another way attorneys can protect their clients' interests is by charging reasonable fees.\textsuperscript{72} Additionally, as a policy concern, attorneys have been warned to avoid controversies over compensation and to resort to a lawsuit only to prevent injustice, imposition, and fraud.\textsuperscript{73} Although the American Bar Association (ABA) provided guidance in the RPCs, it did not define the limits of those rules as they apply to asserting attorney liens.\textsuperscript{74} The ABA indicated that courts will decide whether the assertion of the attorney lien was ethical, rather than the disciplinary committee.\textsuperscript{75} As a result, the boundaries of the ethical rules as they apply to attorney liens are undefined.

Attorney liens are dangerous for two primary reasons: first, there is great uncertainty in the boundaries of the ethical rules; and second,

\textsuperscript{69} \textit{Wash. Rules of Prof'L Conduct} R. 1.8(j)(1) (2004). RPC 1.8(j)(1) states:

\begin{quote}
A lawyer who is representing a client in a matter ... (j) shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may: (1) acquire a lien granted by law to secure the lawyer's fee or expense.
\end{quote}

\textit{Id. See also Model Rules of Prof'L Conduct} R. 1.8(j)(1)(2003).

\textsuperscript{70} \textit{Wash. Rules of Prof'L Conduct} R. 1.15(d). RPC 1.15(d) states:

\begin{quote}
A lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law.
\end{quote}

\textit{Id. See also Model Rules of Prof'L Conduct} R. 1.16 (d).

\textsuperscript{71} \textit{See Wash. Rules of Prof'L Conduct} R. 1.15(d); \textit{Model Rules of Prof'L Conduct} R. 1.16(d).

\textsuperscript{72} \textit{Wash. Rules of Prof'L Conduct} R. 1.5(a) ("A lawyer's fee shall be reasonable."); \textit{see also Model Rules of Prof'L Conduct} R. 1.5(a) (stating that a "lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses").

\textsuperscript{73} \textit{Canons of Prof'L Ethics} 14 (1969); \textit{see also discussion supra} note 1.

\textsuperscript{74} ABA Comm. on Ethics and Prof'L Responsibility, Informal Op. 86-1520 (1986) (citing Informal Opinion 1461, which states: "When a client fails to pay a lawyer's fees, the lawyer, in determining his course of action, should exercise sound discretion in light of the Model Code provisions discussed above. These provisions do not set forth specific rules applicable to every situation but only general guidance.").

\textsuperscript{75} ABA Comm. on Ethics and Prof'L Responsibility, Informal Op. 86-1520 (1986) (explaining that whether the attorney's lien is proper is an issue determined by law, not by ethics).
an attorney asserting an improper lien is violating an ethical rule.\textsuperscript{76} Therefore, attorneys who assert these liens must be careful to assert a valid attorney lien without violating the RPCs. Because these rules are vague and inconsistent with the statute, and because the ABA has refused to set specific standards,\textsuperscript{77} the only clear message to attorneys is that they should only resort to attorney liens when they are necessary and absolutely proper. As a result, attorneys have heeded this advice and rarely assert liens; the legal community is generally content to abandon pursuit of such fees for fear of harsh consequences.\textsuperscript{78} These limitations confuse the statute and have gone too far, such that the risks outweigh the potential benefits.

\textbf{B. Withdrawal Without Good Cause as Fee Waiver}

When an attorney withdraws from representation, the validity of an attorney's lien depends largely on the circumstances that ended the relationship.\textsuperscript{79} Whether an attorney may withdraw from a case is a different question from whether the attorney is entitled to fees.\textsuperscript{80} The attorney who withdraws with good cause is entitled to fees, but the attorney who withdraws without good cause is not entitled to fees.\textsuperscript{81} Accordingly, an attorney contemplating withdrawal must consider whether it would be with or without cause to determine if the client is required to pay fees because an attorney's lien will always be invalid when the client is not required to pay fees.

In \textit{Ausler v. Ramsey}, for example, the court held that the attorney waived his right to the lien because he withdrew without good cause.\textsuperscript{82} In that case, attorney Blumenthal was retained as plaintiff Ausler's attorney under a contingent fee arrangement in a personal injury suit

\textsuperscript{76} See Ross v. Scannell, 97 Wash. 2d 598, 609–10, 647 P.2d 1004 (1982).
\textsuperscript{77} ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 86-1520 (1986).
\textsuperscript{78} See Barrie Althoff, Ethical Consideration as to Liens, WASH. STATE BAR NEWS, Apr. 2000, at 47 (suggesting that attorneys are better off to classify such hours as involuntary pro bono work).
\textsuperscript{79} See Ausler v. Ramsey, 73 Wash. App. 231, 236, 868 P.2d 877, 880 (1994) (stating that if withdrawal is for good cause or justified, then the attorney may recover based on quantum meruit).
\textsuperscript{80} Compare Kingdom v. Jackson, 78 Wash. App. 154, 159–61, 896 P.2d 101, 104–05 (1995) (stating that a motion to withdraw should generally be granted provided that the client has sufficient notice and ability to continue claim and when withdrawal would not interfere with the efficient and proper functioning of the court), with Ausler, 73 Wash. App. at 235–36, 868 P.2d at 879–80 (stating that an attorney who withdraws is only entitled to fees if the withdrawal was for "good cause").
\textsuperscript{81} Ausler, 73 Wash. App. at 236–37, 868 P.2d at 880.
\textsuperscript{82} Id. at 239, 868 P.2d at 882.
resulting from an automobile accident. Blumenthal asked Ausler by letter whether she was interested in resolving the case in arbitration. Ausler did not respond. Blumenthal discussed arbitration with Ausler three months later, and a dispute arose regarding the value of the suit and the best course of action for Ausler. Blumenthal then withdrew, claiming that Ausler did not heed his best legal advice, was not acting in her own best interests, and did not respond to his letter, inquiring whether she was interested in arbitration. Shortly after withdrawing from the case, Blumenthal asserted an attorney's lien on any judgment received by Ausler pursuant to RCW section 60.40.010 on the basis of quantum meruit. Ausler then sought new counsel and continued to seek damages. The trial court rendered judgment for Ausler and ordered the full lien amount to be paid directly to Blumenthal. Ausler appealed this ruling on the grounds that Blumenthal's withdrawal was without good cause.

The court in Ausler adopted the general rule that when an attorney withdraws from a case, the attorney may only recover on quantum meruit when the withdrawal was for good cause. However, an attorney's lien is invalid when the attorney withdraws without good cause. Consequently, to assert a valid lien and stay within the bounds of the RPCs, an attorney must establish good cause for terminating representation.

The court in Ausler found that Blumenthal did not have good cause to withdraw because there was only evidence of one time where

83. Id. at 233, 868 P.2d at 878. In Ausler, the agreement was a standard contingent fee agreement providing for one third of the recovery as attorney fees and no fee was to be charged unless the plaintiff recovered damages. Id.
84. Id., 868 P.2d at 879.
85. Id.
86. Id.
87. Id. at 234, 868 P.2d at 879.
88. See id. at 234, 868 P.2d at 879; BLACK'S LAW DICTIONARY 1255 (7th ed. 1999). "Quantum meruit" literally means "as much as he deserves." Id. It is based on the theory of contract implied by law, and that no one who benefits from the labor and materials of another shall be unjustly enriched. Id. The law implies a promise to pay for that which is deserved. Id. See also Thomas D. Sawaya, Attorney's Right to Compensation when Prematurely Discharged Without Cause, FLA. BAR J., Feb. 1989, at 24 (1989) (explaining that courts apply quantum meruit to provide greater freedom to the client is selecting and substituting counsel and protecting the attorney's right to compensation for services provided).
89. Ausler, 73 Wash. App. at 234, 868 P.2d at 879.
90. Id.
91. See id.
92. See id. at 236–37, 868 P.2d at 880.
93. See id. at 236, 868 P.2d at 880.
94. See id. at 238–39, 868 P.2d at 881–82 (placing the burden on attorney to prove good cause); cf. WASH. RULES OF PROF'L CONDUCT R. 1.8(j)(1) (2004); see also MODEL RULES OF PROF'L CONDUCT R. 1.8(i)(1) (2003).
the client did not respond to correspondence and because an attorney is generally bound to abide by the client's decision to accept or reject a settlement offer.95 The court further noted that there is not necessarily good cause to withdraw when the client has retained other counsel, the attorney does not believe that the fee agreement is fair, the attorney feels that the case does not have any potential, or when the client refuses a settlement offer.96

While few Washington cases have decided the issue of whether an attorney had good cause for terminating representation, courts from other jurisdictions that have examined the issue have found that an attorney's withdrawal from a case was for good cause in the following situations: (1) when the attorney knows the client's claim is fraudulent;97 (2) when the client is uncooperative;98 (3) when the attorney and client suffer a breakdown in communication;99 (4) when the client degrades the attorney;100 (5) when the client refuses to pay justified attorney fees and costs;101 (6) when the client refuses to accept

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95. *Ausler*, 73 Wash. App. at 239, 868 P.2d at 882 (citing WASH. RULES OF PROF'L CONDUCT R. 1.2(a)).
96. *Id.* at 236 n.4, 868 P.2d at 880 n.4.
97. *Id.*; see *Matheny v. Farley*, 66 S.E. 1060, 1061 (1910) (holding that when a client demands that the attorney perform an illegal or unprofessional act, or carry out a malicious or unlawful design, withdrawal may be for good cause); see, e.g., *Tucker v. Rio Optical Corp.*, 20 Kan. App. 2d 233, 236, 885 P.2d 1270, 1272 (1994) (in which client demanded that the appellants bribe the judge); *Clark v. Nichols*, 111 N.Y.S. 66, 66 (1908) (in which attorney learned six months after initiation of suit that client claimed more damages than actually suffered).
98. *Ausler*, 73 Wash. App. at 236 n.4, 868 P.2d at 880 n.4; see also *General Brewing Co. v. Gordon*, 694 F.2d 190, 191–92 (9th Cir. 1982) (noting that client stipulated to withdrawal based on failure to communicate and cooperate); *Kannewurf v. Johns*, 632 N.E. 2d 711, 714 (1994) (noting that, among other acts, client refused to cooperate in attempts to negotiate claim with insurance carrier); *Ashford v. Interstate Trucking Corp. of America*, 524 N.W. 2d 300, 502 (1994) (client's continued failure to sign authorization pursuant to order to compel production of documents); *Dempsey v. Dorrance*, 132 S.W. 33, 34 (1910) (client broke off all communication). But see *In re Estate of Falco*, 233 Cal. Rptr. 807, 808 (1987) (stating that mutual animosity and disagreements regarding settlements was insufficient); *Ausler*, 73 Wash. App. at 238, 868 P.2d at 881; *Falco*, 233 Cal. Rptr. at 816–17.
99. *Ausler*, 73 Wash. App. at 236 n.4, 868 P.2d at 880 n.4; *e.g.*, *Dempsey*, 132 S.W. 33, 34 (1910); *General Brewing Co.*, 694 F.2d 190, 191–92 (9th Cir. 1982). But see *Ausler*, 73 Wash. App. at 238, 868 P.2d at 881; *Falco*, 233 Cal. Rptr. at 816–17.
100. *Ausler*, 73 Wash. App. at 236 n.4, 868 P.2d at 880 n.4; *see*, *Matheny*, 66 S.E. 1060, 1061 (noting that client attempted to sustain case by the subordination of witnesses); *Reed Yates Farm, Inc. v. Yates*, 526 N.E.2d 1115, 1122 (1988) (noting that client filed disciplinary grievance); *Genrow v. Flynn*, 131 N.W. 1115, 1115 (1911) (noting that client wrote to attorney "you have deceived, lied, and neglected me in every possible way you could... [and] I don't intend to stand your abuse any longer"); *Matarrese v. Wilson*, 118 N.Y.S. 2d 5, 9 (1952) (noting that client told attorney that the only reason the settlement offer was recommended was because the attorney needed money).
101. *Ausler*, 73 Wash. App. at 236 n.4, 868 P.2d at 880 n.4; *see*, *e.g.*, *Upgrade Corp. v. Mich. Carton Co.*, 410 N.E.2d 159, 161 (1980) (fee dispute over unpaid fees); *Reed Yates Farm,*
a settlement offer,\textsuperscript{102} or (7) when the ethical rules require the attorney to withdraw.\textsuperscript{103} Attorneys should withdraw and assert an attorney lien only when they are certain that they have good cause to do so. The \textit{Ausler} standard delineates when an attorney has good cause to withdraw from representation in Washington. When the attorney does not have good cause to withdraw, the court will likely hold the attorney lien void.\textsuperscript{104} Recall that an improperly asserted attorney lien is likely to constitute an ethical violation.\textsuperscript{105}

\textbf{C. Termination of Contingency Fee Relationships}

In Washington, when a client agrees to pay an attorney under a contingency fee agreement and terminates the attorney before occurrence of the contingency, the attorney may recover based on quantum meruit.\textsuperscript{106} In contrast to withdrawal, this rule applies whether the client terminates the relationship with or without cause.\textsuperscript{107} However, there are two exceptions to this rule. First, if an attorney violates the RPCs, then compensation is not available.\textsuperscript{108} Second, if the attorney substantially performs the duties owed to the client, then the attorney may recover the full contingency, not just quantum meruit.\textsuperscript{109} The substantial performance exception only applies in the

\begin{itemize}
  \item 526 N.E.2d at 111 (client failed to pay fees after a reasonable time). \textit{But see} Charles Weiner Corp. v. D. Jack Davis Corp., 448 N.Y.S.2d 998, 999 (1982) (stating that when litigation has begun, the attorney's right to withdraw is not absolute).
  \item 102. \textit{See, e.g.,} Kannewurf, 632 N.E.2d at 714; Ambrose v. Detroit Edison Co., 237 N.W.2d 520, 522 (1975) (in which the client refused to accept fair, reasonable, and equitable settlement that was in the best interests of the client and did not cooperate). \textit{But see Ausler, 73 Wash. App. at 237, 868 P.2d at 880 (accepting a settlement offer was explicitly excluded from its ruling); Falco, 233 Cal. Rptr. at 808.}
  \item 103. Ausler, 73 Wash. App. at 236 n.4, 868 P.2d at 880 n.4; \textit{see also} WASH. RULES OF PROF'L CONDUCT R. 1.15 (2004). \textit{For other examples of these factors, see George L. Blum, Annotation, Circumstances Under Which Attorney Retains Right to Compensation Notwithstanding Voluntary Withdrawal from Case, 53 A.L.R.5th 287–374 (1997).}
  \item 104. Ausler, 73 Wash. App. at 236 n.4, 868 P.2d at 880 n.4.
  \item 109. \textit{Barr, 124 Wash. 2d at 329, 879 P.2d at 918; Ross, 97 Wash. 2d at 608–09, 647 P.2d at 1010.}
rare case where full performance is delinquent by "minor and relatively unimportant deviations."\textsuperscript{110}

Washington attorneys must consider the extent of services provided to determine the appropriate fee calculation when asserting a lien. Whether the attorney substantially completed the duties owed to the client depends on how much time elapsed between termination and satisfaction of the contingency.\textsuperscript{111} To illustrate, in Barr v. Day, the client, Barr fired attorney Day eleven months before a settlement was reached and before commencing negotiations.\textsuperscript{112} The court held that Day had not substantially performed his duties and that his fees were limited to quantum meruit.\textsuperscript{113} In contrast, in Taylor v. Shigaki, the client, Taylor, fired his attorney, Zeder, only nine days before the trial date and six hours before a settlement was reached.\textsuperscript{114} Additionally, before Zeder was terminated, he obtained a substantial settlement offer for Taylor.\textsuperscript{115} In that case, the court held that Zeder had substantially performed his duties and was entitled to full recovery according to the contingency fee agreement of the settlement Zeder obtained.\textsuperscript{116} If the client owes the attorney fees, the attorney may use the lien statute as an enforcement mechanism. Whether the attorney substantially performed will determine whether the lien will be enforceable for the full contingency or quantum meruit.

D. Limitations on Retaining Liens: Enforcing the Retaining Lien on a Former Client’s Files

This section discusses how limitations on the retaining lien in Washington have made the subsection 1 lien worthless. Then it explains a different approach adopted by the Illinois courts, arguing that Washington should adopt the Illinois standard.

1. The Washington Retaining Lien

Summary procedure, which gives courts discretion to resolve any dispute regarding the lien, is available for a quick resolution of the retaining lien.\textsuperscript{117} The summary procedure permits a judge to require


\textsuperscript{111} See Barr, 214 Wash. 2d at 329–30, 879 P.2d at 918.

\textsuperscript{112} Id. at 329, 879 P.2d at 918.

\textsuperscript{113} Id. at 330, 879 P.2d at 918.

\textsuperscript{114} Taylor, 84 Wash. App. at 729, 930 P.2d at 343–44.

\textsuperscript{115} Id. at 730, 930 P.2d at 343–44.

\textsuperscript{116} Id., 930 P.2d at 344. Zeder did not claim that Taylor owed him a percentage of the final settlement, only the percentage of the settlement figure procured by Zeder. Id.

\textsuperscript{117} See WASH. REV. CODE § 60.40.030(2) (2002).
the client to provide adequate security or to resolve the dispute.\textsuperscript{118} In other words, a court may require relinquishment of the lien in replacement for a lien on some other property owned by the client. Summary procedure, however, does not apply to any other property besides papers or money secured for payment of fees.\textsuperscript{119} Even though the summary procedure statute seems straightforward, the ethics opinions have limited the retaining lien to the point that it is useless.

The WSBA attempted to abrogate the retaining lien on the papers of the client.\textsuperscript{120} Recall that the retaining lien on the papers of the client gives the attorney the right to hold the client's files hostage when fees are due,\textsuperscript{121} and its primary use is to force a client into paying through embarrassment or worry.\textsuperscript{122} The WSBA Formal Opinion 181 establishes the following standard: if assertion of the lien prejudices the client, the duty to protect the former client's interests supersedes the right to assert the lien.\textsuperscript{123} Additionally, a client's need of his or her files will almost always be presumed if the client requests them.\textsuperscript{124} However, the lien is only effective as leverage when the client wants or needs the property retained.\textsuperscript{125} As a result, the retaining lien is useless because an attorney cannot worry a client into paying by holding the client's files hostage if the attorney is required to turn them over when the client requests them.

WSBA Formal Opinion 181 further limited the retaining lien when the files relate to current legal representation.\textsuperscript{126} Lien rights do not exist when there is any possibility that the lien will interfere with the client's self-representation or representation by a new lawyer.\textsuperscript{127} Conversely, if the client has the ability to pay, and when there is no

\textsuperscript{118} See id. § 60.40.030(1).
\textsuperscript{119} Golden v. Hyde, 117 Wash. 677, 680, 202 P. 272, 273 (1921); see WASH. REV. CODE § 60.40.020.
\textsuperscript{121} See WASH. REV. CODE § 60.40.010(1).
\textsuperscript{122} Gottstein v. Harrington, 25 Wash. 508, 511, 65 P. 753 (1901) (stating that the retaining lien may "be used to embarrass the client, or, in some cases express it, to worry him into the payment of the charges").
\textsuperscript{124} Id.
\textsuperscript{125} Id.
\textsuperscript{126} See Frenkel v. Frenkel 599 A.2d 595, 597–98 (1991) (quoting Brauer v. Hotel Ass'n, Inc. 40 N.J. 415, 422–23, 192 A.2d 831 (1963)). In Frenkel, the court reasoned that if the retained property is of no subjective value to the former client, then the lien is worthless, but when the subjective value surpasses the owed fees, then the client will likely pay the fees and receive the property. Id.
\textsuperscript{127} Id.
dispute over the amount of fees, it is proper for an attorney to assert the lien.\textsuperscript{128}

The WSBA opinion is confusing and illogical because the lien is only effective when the client wants or needs the files for some use other than legal representation, and the attorney asserting the lien can rebut the presumption that the client \textit{actually} needs the files. Moreover, if the client seeks protection through the summary procedure statute, the client will enjoy a presumption that the files are needed.\textsuperscript{129} In this situation, a court may require the client to provide adequate security, but most likely the security will provide less leverage than the client's files.\textsuperscript{130} In short, the WSBA opinion has removed much of the leverage from the retaining lien, making it significantly less effective.

In addition to being confusing and illogical, WSBA Formal Opinion 181 is not binding authority on Washington courts.\textsuperscript{131} The Washington Supreme Court adopted RPC 1.15(d),\textsuperscript{132} which provides that "the lawyer may retain papers relating to the client to the extent permitted by other law."\textsuperscript{133} As explained above, the WSBA Formal Opinion 181 attempts to abrogate the retaining lien, reasoning that it is only valid as leverage when the client does not need the property.\textsuperscript{134} The WSBA opinion fails to cite to any case or statutory authority for this position;\textsuperscript{135} instead, it borrows language from ABA Informal Opinion 86-1520,\textsuperscript{136} which also was not adopted by the Washington Supreme Court.\textsuperscript{137} Such abrogation is without precedent and only binding in a disciplinary review, not a judicial hearing on the validity of a retaining lien. As a result, WSBA Opinion 181 is only relevant as persuasion, and courts will have to approach the issue as one of first impression.

\textsuperscript{128} \textit{Id.} For practical reasons, a reasonable attorney would not likely assert a lien against a former client who is unable to pay.

\textsuperscript{129} \textit{Id.}

\textsuperscript{130} Otherwise, the client would simply permit the attorney to keep the files.

\textsuperscript{131} The WSBA Formal Opinions are approved and adopted by the Association's Board of Governors, not the Washington Supreme Court. \textit{See WASHINGTON STATE BAR ASS'N, RESOURCES 406} (Allison L. Parker ed., 2001-2002).

\textsuperscript{132} Barrie Althoff, \textit{Preface}, WASH. STATE BAR ASS'N, WASHINGTON LAWYER DISCIPLINE MANUAL, at i (Feb. 28, 2002).

\textsuperscript{133} WASH. RULES OF PROF'L CONDUCT R. 1.15(d) (2004). The "other law" permitting the retaining lien is RCW subsection 60.40.010(1). WASH. REV. CODE § 60.40.010(1) (2002).

\textsuperscript{134} Wash. State Bar Ass'n, Formal Op. 181 (1987). In effect, the opinion amounts to an abrogation because if a client does not need the property, then there is no leverage and the lien is impotent.


\textsuperscript{137} \textit{See Althoff, supra note 132, at i.}
Moreover, this ambiguity is troubling when a former client files a bar complaint and moves for resolution of the dispute through the summary procedure statute. If the court refuses to follow WSBA Formal Opinion 181, the lien may be valid according to the statute and yet be the cause of ethical discipline for an attorney. Such inconsistency can only further dissuade attorneys from asserting liens properly or asserting them altogether.

2. A Different Approach

At least one court has applied a different standard for determining when a retaining lien is proper.\textsuperscript{138} For example, in Lucky-Goldstar International, Inc. v. International Manufacturing Sales Co., the defendant, International Manufacturing Sales Company ("IMS"), hired Conklin & Adler, Ltd. ("C&A") for representation in a breach of contract action brought by Lucky-Goldstar International, Inc. ("Lucky").\textsuperscript{139} Approximately six months after commencing representation, C&A withdrew with leave of the court and consent of IMS.\textsuperscript{140} IMS then retained other counsel and continued its defense.\textsuperscript{141} When IMS subpoenaed C&A for delivery of its files pursuant to a discovery request by Lucky, C&A asserted an attorney's lien on the files of IMS, demanding payment of substantial fees.\textsuperscript{142}

The court, faced with the same dilemma that the Washington standard presents, held that the lien was valid.\textsuperscript{143} However, the court held that in the interest of judicial efficiency, the files must be produced if the former client posts adequate security.\textsuperscript{144} The court also reasoned that the rules on ethics are not helpful because they do not resolve the issue; rather, the rules merely state that a properly asserted lien is ethical while an improperly asserted lien is unethical.\textsuperscript{145}

In addition, the court in Lucky based its analysis on the idea that the aim of the lien on client files is to provide access to needed documents without prejudicing the rights of either party.\textsuperscript{146} The court sought to balance the interests of the attorney, the client, and others who might be substantially affected.\textsuperscript{147} The court indicated that the

\textsuperscript{139} Id. at 1060.
\textsuperscript{140} Id. at 1060–61.
\textsuperscript{141} Id. at 1061.
\textsuperscript{142} Id.
\textsuperscript{143} Id. at 1064.
\textsuperscript{144} Id. at 1062.
\textsuperscript{145} Id. at 1062–63
\textsuperscript{146} Id.
\textsuperscript{147} Id. at 1063.
attorney should consider the following factors before asserting a retaining lien on the former client’s files:

(1) the financial situation of the client, (2) the sophistication of the client in dealing with lawyers, (3) whether the fee is reasonable, (4) whether the client clearly understood and agreed to pay the amount now owing, (5) whether imposition of the retaining lien would prejudice the important rights or interests of the client or of other parties, (6) whether failure to impose the lien would result in fraud or gross imposition by the client, and (7) whether there are less stringent means by which the matter can be resolved or by which the amount owing can be secured.148

The court also noted that if the files are requested for defense in a criminal action or in defending a similarly important personal liberty, the lawyer should not ordinarily assert the lien.149 Unlike Washington’s rebuttable presumption standard, the Lucky court placed the burden on the former client to show need of the files.150 The court ultimately denied C&A’s motion to quash the subpoena on the condition that IMS tender adequate security.151 The following facts were particularly relevant to the court’s decision: the record did not indicate an improper assertion of the lien, the files were not necessary for defense of a criminal charge or personal liberty, and IMS was able to pay the fee.152 Balancing the interests of the attorney as well as the client, the court found that the lien was valid and should not be dismissed. However, to avoid delay in the present proceeding, the court held that IMS could provide security to the attorneys in exchange for the retained property.153

3. Washington Should Adopt the Lucky Approach

Washington courts should adopt the standard set forth in Lucky, which shifts the burden to the former client to show need for the files and distinguishes between needing the files for defense of “important” rights and for other uses.154 First, the Lucky court places the burden

148. Id.
149. Id.; see also In re Garcia, 76 B.R. 68, 69 (1987) (stating that the retaining lien is valid subject only to a situation where a former client’s fundamental rights would be impaired); cf. Fed. Land Bank of Jackson v. Fed. Intermediate Credit Bank of Jackson, 128 F.R.D. 182, 186 (1989) (interpreting Lucky to indicate that a retaining lien should not be set aside absent a showing of fraud or gross imposition by the client).
150. Lucky, 636 F. Supp. at 1063 (citing Pomerantz v. Schandler, 704 F.2d 681, 683 (2d Cir. 1983)).
151. Id. at 1060.
152. Id. at 1064.
153. Id. at 1064–65.
154. Id. at 1063.
on the client to show a need for the files.\textsuperscript{155} For example, if the former client needs the files for defense of a criminal charge, it would be very easy for the former client to provide a copy of the charging information to the court. In contrast, if the reverse were required, it would be nearly impossible for the attorney to prove a negative proposition—that the client does not need the files.

Second, the standard set forth in \textit{Lucky} distinguishes between criminal defense and other cases, presumably because the consequences resulting from the lien are typically more severe when needed for a criminal defense. This standard widens the scope of the retaining lien. Further, it offers attorneys a list of factors to consider when deciding whether to assert a lien. Implementing a logical and comprehensible approach increases the likelihood that an attorney will only assert a lien when appropriate, and it lessens the practice of improperly asserted liens. Without a list of factors to rely on, attorneys will either refrain from asserting a retaining lien because the amount of money available is not worth the risk of an improperly asserted lien and an ethical violation,\textsuperscript{156} or they will improperly rely on the seemingly plain language of the statute and misapply the law altogether.

\textbf{E. Limitations on Charging Liens}

In addition to the retaining lien, the charging lien has been limited such that it is undefined, unpredictable, and illogical. First, the RPCs limit the lien on money in the attorney’s hands such that it is only possible to assert the lien as a retaining lien.\textsuperscript{157} Second, liens are not permitted on certain types of property: namely, child support funds and real property.\textsuperscript{158} Third, attorney liens are not enforceable against settlement proceeds.\textsuperscript{159}

1. Liens on the Client’s Money in the Attorney’s Possession.

In Washington, the current enforcement status of a lien on a client’s money in the attorney’s possession is unclear. The subsection 2 lien, which provides a lien on a client’s money in the attorney’s

\textsuperscript{155} See id.
\textsuperscript{156} See generally Althoff, supra note 78, at 47 (concluding that attorneys should almost never assert attorney liens, but should instead consider the representation as involuntary pro bono service because the risks and burdens are simply too high for the potential benefits).
\textsuperscript{158} Fuqua v. Fuqua, 88 Wash. 2d 100, 558 P.2d 801 (1977); Ross v. Scannell, 97 Wash. 2d 598, 647 P.2d 1004 (1982).
\textsuperscript{159} Cline Piano Co. v. Sherwood, 57 Wash. 239, 242, 106 P. 742, 743 (1910).
possession, was originally a charging lien.\textsuperscript{160} However, in Ross \textit{v. Scannell}, the Washington Supreme Court summarily indicated otherwise.\textsuperscript{161} The ethical rules do not permit a subsection 2 lien if there is a fee dispute.\textsuperscript{162} Thus, an attorney can only use a subsection 2 lien when the client does not dispute the fee. However, Washington courts have not yet encountered this situation, and it does not seem likely that one will arise. Moreover, under the summary procedure statute, a client's rights can be protected if the subsection 2 lien is asserted as a retaining lien.\textsuperscript{163} The lien on money in the attorney's hands, as a charging lien, is impracticable; the statute should be amended to classify it as a retaining lien.

In 1901, the Washington Supreme Court explained that the special or charging lien applies to "judgments, money in hand, or in the hands of adverse party after notice."\textsuperscript{164} The Washington Court of Appeals held similarly in \textit{Crane Co. v. Paul}.\textsuperscript{165} The attorney in \textit{Crane}, James Henry, performed legal services for plaintiff Crane Company from 1964 to 1967.\textsuperscript{166} In 1970, Crane retained Henry a second time, but Crane was dissatisfied with the service provided by Henry.\textsuperscript{167} Crane discharged Henry and directed him to return the files and funds.\textsuperscript{168} At that time, Henry held almost four thousand dollars in trust, belonging to Crane.\textsuperscript{169} Henry sent the files and a check for the amount held in trust; however, Henry claimed that Crane owed him almost $6000 for fees and costs advanced.\textsuperscript{170} When Crane's new attorneys notified Henry that his fees would have to be itemized,\textsuperscript{171} Henry cancelled the check and gave notice of his intent to assert a lien on the money in his possession.\textsuperscript{172} Crane and Henry both filed suit.\textsuperscript{173}

\begin{footnotes}
\footnote{161. See Ross, 97 Wash. 2d at 605, 647 P.2d at 1008.}
\footnote{162. WASH. RULES OF PROF'L CONDUCT R. 1.14(a)(2); see also MODEL RULES OF PROF'L CONDUCT R. 1.15(e) (2003).}
\footnote{163. See generally 27 WASH. PRAC. § 4.26. A subsection 2 lien, as a retaining lien (limited by RPC 1.14(a)(2), WASH. RULES OF PROF'L CONDUCT R. 1.14(a)(2)), requires attorneys to hold any disputed funds in trust; however, as a charging lien, the subsection 2 lien permits attorneys to convert the funds to their own. \textit{Id.}}
\footnote{164. Gottstein, 25 Wash. at 510–11, 65 P. at 753–54 (1901).}
\footnote{165. 15 Wash. App. 212, 214, 548 P.2d 337, 339 (1976).}
\footnote{166. \textit{Id.} at 213, 548 P.2d at 338.}
\footnote{167. \textit{Id.} at 214, 548 P.2d at 339.}
\footnote{168. \textit{Id.}}
\footnote{169. \textit{Id.}}
\footnote{170. \textit{Id.}}
\footnote{171. Under the current RPCs, Crane would have been required to state in writing the basis or rate of his fees or the factors involved in determining the charges. See WASH. RULES OF PROF'L CONDUCT R. 1.5(b) (2004).}
\footnote{172. Crane, 15 Wash. App. at 213–14, 548 P.2d at 338.}
\footnote{173. \textit{Id.} at 212, 548 P.2d at 338.}
\end{footnotes}
The Court of Appeals held that Henry properly asserted the lien and offset his fees by converting the client's trust funds to his own personal use. The court also awarded judgment in favor of Henry for the balance of his fees. The court reasoned that Henry had abided by the ethical rule DR 9-102(B)(4), which required an attorney to promptly pay or deliver to his client funds "which the client is entitled to receive." However, the court did not address the then current ethical rule DR 9-102(A)(2), which required Henry to hold the funds in trust without converting them because there was a dispute over the amount of fees owed. Crane failed to argue that Henry violated the ethical rules, and the court concluded that Crane was not entitled to the funds once the lien was asserted.

Six years later, the Washington Supreme Court indirectly attacked the charging status of the subsection 2 lien. In Ross v. Scannell, the issue before the court was the validity of an attorney's lien on real property as the judgment. Nonetheless, the court stated that "five states, including Washington, recognize a charging lien upon the judgment only," but it is unclear whether the court intended to exclude liens on the client's money in the attorney's possession or in the hands of an adverse party. This statement, however, is dicta and not binding on lower courts because the lien on a client's money in the attorney's possession was not a question before the court. Two paragraphs before announcing that charging liens only apply to judgments, the court also failed to include liens on the client's

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174. Id. at 213–14, 548 P.2d at 338–39.
175. Id. at 214–16, 548 P.2d at 339–40.
180. Id. at 215, 548 P.2d at 340.
181. Ross v. Scannell, 97 Wash. 2d 598, 605, 647 P.2d 1004, 1008 (1982). This was an indirect attack because the issue of a subsection 2 lien was not before the court.
182. Id. at 599–600, 647 P.2d at 1005–06 (the underlying case was for specific performance of a plot of land).
183. Id. at 605, 647 P.2d at 1008.
money when describing the retaining lien.\textsuperscript{184} Moreover, the court did not address subsection 2 liens anywhere in the opinion.\textsuperscript{185}

Despite the court’s dicta in Ross, the WSBA cited Ross for the proposition that “attorneys have a ‘retaining’ or ‘possessory’ lien under RCW section 60.40.010 against papers or \textit{money} in the lawyer’s possession [which] cannot be foreclosed.”\textsuperscript{186} This language was not taken directly from the Ross decision, and it is unclear that the court actually intended to overrule the Crane decision. In fact, the evidence points to the contrary.\textsuperscript{187}

Recall that in Jones, where the attorney asserted a lien under subsections 3 and 4 for fees owed from a previous defense representation,\textsuperscript{188} the Washington Court of Appeals did not adopt the Washington Supreme Court’s dicta in Ross because doing so would effectively render a lien on money in the hands of an adverse party superfluous\textsuperscript{189} if it could only be filed on a judgment.\textsuperscript{190} The court stated that the Ross court “ignored subsection 3 in its discussion of the attorney’s liens authorized by the statute. . . . [W]e do not read the Ross dicta as applying to subsection 3.”\textsuperscript{191} Similarly, the court’s dicta in Ross did not address liens on money in the attorney’s hands. Consistent with Jones, Washington courts may recognize the limited scope of the dicta in Ross and continue to permit the lien on the client’s money in the attorney’s possession to be enforceable as a charging lien—thereby rejecting the language of WSBA Formal Opinion 181.

The subsection 2 lien should be classified as a retaining lien. If a court held that a subsection 2 lien was a charging lien, the client’s right to dispute the fee would be violated.\textsuperscript{192} RPC 1.14(a)(2) restricts attorneys from asserting a subsection 2 lien when there is a fee dispute.\textsuperscript{193} An attorney may anticipate that a client who refuses to pay

\textsuperscript{184} Id., 647 P.2d at 1007 (1982) (implying that the subsection 2 lien is not a retaining lien, but is a charging lien).

\textsuperscript{185} See generally Ross, 97 Wash. 2d 598, 647 P.2d 1004.


\textsuperscript{187} See Jones v. International Land Corp. Ltd., 51 Wash. App. 737, 755 P.2d 184 (1988); 27 WASH. PRAC. § 4.26 (noting that “[t]he lien does have a basic characteristic of a retaining lien in that it requires possession, but it should not be limited to that status so far as enforcement is concerned”).

\textsuperscript{188} Jones, 51 Wash. App. at 738, 755 P.2d at 185.

\textsuperscript{189} Id. Subsection 3 liens were also excluded when the Ross court stated that “Five states, including Washington, recognize a charging lien upon the judgment only.” Ross, 97 Wash. 2d 598, 605, 647 P.2d 1004, 1008 (1982).

\textsuperscript{190} Jones, 51 Wash. App. at 741–42, 755 P.2d at 187.

\textsuperscript{191} Id. at 742, 755 P.2d at 187.


\textsuperscript{193} Id.
will also dispute the fee, and RPC 1.14(a)(2) prohibits the attorney from asserting the charging lien in such a situation. If, on the other hand, the attorney asserts a retaining lien, the matter is likely to be resolved under the summary procedure statute.\(^{194}\) Significantly, under that statute, the client’s rights are protected because a court would resolve the fee dispute. Moreover, asserting the lien as a retaining lien is consistent with RPC 1.14(a)(2), because the funds would not be withdrawn until the dispute is resolved.\(^{195}\) In short, a lien on money in the attorney’s hands should be classified as a retaining lien to protect attorneys from ethical violations and to preserve the client’s right to dispute the fees.

2. What Types of Property are Subject to a Charging Lien on a Judgment?

While courts have been unclear when interpreting subsection 2 liens, courts have been unpredictable when interpreting liens on a judgment under subsection 4.

\textit{a. Child Support Funds}

Washington courts, without much controversy, do not allow a lien against child support or alimony judgments.\(^{196}\) In \textit{Fuqua v. Fuqua}, the Washington Supreme Court adjudicated two companion cases.\(^{197}\) In the first case, attorney Meier represented Mrs. Brudijean Fuqua in a divorce proceeding in which Mrs. Fuqua received custody of her four children and child support from the father.\(^{198}\) Meier later asserted an attorney lien against the judgment comprised of those payments.\(^{199}\) In the second case, attorney Chawla represented Karen Kaur in a private action, in which Ms. Kaur received custody of her child and $2000 past support plus $75 per month.\(^{200}\) Chawla filed notice of an attorney lien for $1000 and $37.50 per month to be paid out of the child support payments.\(^{201}\) While Washington’s attorney lien statute is silent on the matter of liens attached to judgments

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\(^{194}\) See 27 WASH. PRAC. § 4.26 (stating that "[i]t is likely that the summary procedure will most often be invoked when an attorney has a lien on a client’s moneys . . . [but also noting] enforcement of the lien should not be limited to summary adjudication).  
\(^{195}\) WASH. RULES OF PROF’L CONDUCT R. 1.14(a)(2).  
\(^{196}\) Fuqua v. Fuqua, 88 Wash. 2d 100, 107, 558 P.2d 801, 805 (1977).  
\(^{197}\) Id. at 101, 558 P.2d at 802.  
\(^{198}\) Id.  
\(^{199}\) Id.  
\(^{200}\) Id.  
\(^{201}\) Id. It is unclear if these payments to the attorney were limited to a certain amount of time or a certain amount of money.
composed of child support payment, the court ruled that as a matter of public policy, such liens would not be permitted. The court relied on the premise that such payments are not for the benefit of the client and compromise the basic needs of the children. Additionally, the court extended this ruling to apply to all charging liens including liens on money in the hands of an adverse party and on money in the attorney’s hands belonging to the client. This issue has not since been debated, and the court is, for good reason, unlikely to change its position.

b. Real Property as the Judgment

Additionally and more controversially, Washington courts have ruled that attorney liens cannot attach to real property. In Ross v. Scannell, attorney Lawrence Ross sought fees through assertion of an attorney lien from his business partner and client, William Scannell. Mr. Scannell, a real estate broker, negotiated for the purchase of a plot of land of 1410 acres. Pursuant to Scannell’s inquiry, Ross summoned a small group of investors, including himself, to become partners in a joint venture to purchase the land. Scannell was unable to acquire the land because the owners refused or were unable to clear title to the property, ending the joint venture. Scannell, who was counseled by Ross under a contingent fee agreement, brought suit against the sellers seeking specific performance of the 1410 acres. The contingent fee agreement indicated that if specific performance were awarded, then Ross’ fee would depend in part on the value of the land. After the action was filed, McKinney, one of the partners of the joint venture, sued Scannell for breach of fiduciary duty.

203. Fuqua, 88 Wash. 2d 100, 106–07, 558 P.2d 801, 804–05.
204. Id. (citing decisions from several other jurisdictions in support of this policy-based ruling).
205. Id. at 107, 558 P.2d at 805 (holding that “as a matter of public policy, statutory attorney’s liens may not be asserted against monies which represent payments for child support,” and reasoning that any effort to assert such a lien is void, whether it be against funds in the hands of (1) the clerk, (2) the lawful custodian of the children, or (3) an attorney. The relevant statutes are RCW subsections 60.40.010(2) and (3).
207. Id. at 600–03, 647 P.2d at 1005–07.
208. Id. at 600, 647 P.2d at 1005.
209. Id.
210. Id.
211. Id.
212. Id. at 600–01, 647 P.2d at 1006.
213. Id. at 600, 647 P.2d at 1006.
agreed to represent Scannell in that case and the prior action.214 Near the trial, Ross hired Mr. Warren Peterson on an hourly basis to try the case because Ross realized that he would likely be called as a witness.215 The trial court entered judgment for Scannell in the first action for 960 acres: $32,499 in damages, and $2500 previously paid by Scannell as a down payment.216 Scannell offered Ross a one-third equity participation in the 960 acres plus one third of $32,499.217 Ross claimed he was entitled to one-third of the profits derived from the subsequent sale of the property plus one third of $32,499.218 Ross then filed an attorney lien on the property at issue.219

The court in Ross reasoned that because other states' statutes specifically provide for liens on a judgment of real property and because Washington's statute does not, the Legislature did not intend to include real property under subsection 4 of the statute.220 The court indicated that there are other remedies available to the attorney, such as suing the client for fees and attaching the client's real property to a judgment lien.221 Primarily, the court reasoned that allowing attorneys to burden property before any adjudication on the claim could give attorneys improper bargaining power over their clients.222 Thus, it is likely that the court would have been more comfortable with a lien on the former client's real property if it accompanied a proceeding to settle the dispute.

While the court's holding in Ross is defensible on policy grounds, the court's other reasons are problematic. First, the court stated that the statute at issue, RCW section 60.40.010, should be strictly construed because it is in derogation of the common law.223 However, the court's analysis did not rely on strict construction of the statute. Rather, the court relied on the fact that the statute did not expressly provide for liens on real property.224 Strictly interpreting the words "upon a judgment,"225 implies an understanding that the statute provides that a lien will attach to any judgment, not all judgments

214. Id.
215. Id. at 601, 647 P.2d at 1006. In fact, Ross was the principal witness. Id.
216. Id.
217. Id.
218. Id. at 601–02, 647 P.2d at 1006.
219. Id. at 602–03, 647 P.2d at 1006.
220. Id. at 605, 647 P.2d at 1008.
221. Id. at 605–06, 647 P.2d at 1008.
222. See id. at 606, 647 P.2d 1008–09.
223. Id.
224. Id. The court in Ross reasoned that because the statute does not specifically include real property, the Legislature must have intended it to be excluded. Id.
225. See WASH. REV. CODE § 60.40.010(4) (2002).
except those comprised of real property. This is especially true because subsections 2 and 3 expressly exclude all property except money, and subsection 4 liens do not expressly exclude any type of property.  

Second, the court’s approach is unpredictable. If “judgment” in subsection 4 does not include real property and does not expressly limit the lien to money, the types of property comprising the judgment that are subject to the lien are unclear. This construction leaves the practitioner with little guidance regarding whether the court is likely to exclude any other type of property from the statute.

Third, the majority in Ross failed to consider the powerful disincentives to asserting questionable attorney liens, which severely punish many of the attorneys who ignore such risks. Ross ignored such risks in this case. He represented parties in a dispute over a transaction in which he was involved. Ross was a key witness, yet he continued to ignore this conflict of interest. As a result, the court could have declared Ross’ lien invalid because he was in violation of the RPCs.

Nonetheless, the court’s policy rationale, imbued with a reluctance to punish attorneys, is persuasive. The idea that attorney liens on real property give too much leverage to attorneys because clients will often be forced to settle the claim for fees based on the client’s need for the property underlies the court’s analysis. The distinction between money and real property makes a difference here because land is unique. While the client can replace money, it is unlikely that the client would be able to replace land.

The message from Fuqua and Ross is that if the lien gives the attorney too much leverage, a court may rule that it no longer applies to that type of property. Unfortunately, neither the courts nor the legislature have defined what constitutes too much leverage. Attorneys should beware: this may be a trend toward applying the WSBA’s view on retaining liens to liens upon judgments.

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226. Compare WASH. REV. CODE § 60.40.010(2)-(3), with id. § 60.40.010(4).
227. Recall that attorneys who assert liens must comply with the RPCs or else the lien will be invalid and the attorney will be subject to discipline. See Althoff, supra note 78, at 47 (stating that attorneys should weigh heavily whether collecting from the client is worth the effort and risk, because most lawyers would be far better off by considering the time spent on the case as involuntary pro bono).
228. Ross, 97 Wash. 2d at 600, 647 P.2d at 1005–06.
229. Id. at 601, 647 P.2d at 1006. After Scannell questioned Ross about his dual role, Ross assured him that he could serve as both attorney and witness. Id.
230. See id. at 607, 647 P.2d at 1009; see also WASH. RULES OF PROF’L CONDUCT R. 1.5, 1.7, 3.7 (2004).
231. Ross, 97 Wash. 2d at 606, 647 P.2d at 1009.
3. Liens on Settlement Proceeds

Another potential arena of dispute is whether an attorney can assert a charging lien against a client's settlement. Washington's attorney lien statute permits charging liens on money in hand,232 money in the hands of an adverse party,233 and for the judgment,234 suggesting that the lien does not apply to settlements. In fact, Washington courts have specifically ruled that an attorney lien on the judgment does not apply to settlements.235 For example, in Cline Piano Co. v. Sherwood, the plaintiffs received a judgment in their favor against defendant Cline Piano Company.236 The plaintiffs' attorneys filed a lien on the judgment under RCW subsection 60.40.010(4).237 The court announced judgment from the bench,238 but unfortunately for the plaintiffs' attorneys, the parties settled before the court entered a final judgment.239 The court, therefore, ruled that there was no official judgment because the case settled before the judgment was formally entered.240 As a result, the lien on the judgment was invalid because there was no judgment.241 However, the court provided a safeguard that if the client's settlement was intended to defeat the attorney's lien, the attorney may then require the hearing to continue.242 Ultimately, the court reasoned that the attorney filed a lien upon the judgment, and the court had not entered a final judgment.243

The effect of Cline Piano is that if a non-paying client settles the case before judgment, the attorney cannot use a lien to secure compensation. Here, the attorney must resort to other less attractive collection methods.244 This situation is rare, and the attorney could

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233. See id. § 60.40.010(3).
234. See id. § 60.40.010(4).
236. Id. at 240-41, 106 P. at 742.
237. Id. at 241, 106 P. at 743.
238. Id. at 242, 106 P. at 743.
239. Id.
240. Id.
241. Id. at 243, 106 P. at 744; accord Wilson v. Henkle, 45 Wash. App. 162, 170, 724 P.2d 1069, 1074 (1986) (citing Suleiman v. Cantino, 33 Wash. App. 602, 606-07, 656 P.2d 1122, 1124 (1983) (stating that attorney liens are invalid under RCW subsections 60.40.010(3) or (4) where the attorney was unsuccessful in obtaining a judgment for the client)).
243. Id.
244. The most obvious alternative is to bring suit for fees. However, several other options are also available. See, e.g., Laurie Berke-Weiss, Getting Paid: Good Ideas That Work and Are Ethical, 60 Practicing Law Inst., N.Y. Prac. Skills Course Handbook Series 143, 145 (Oct. 1999); J. Lindsay Short, Jr. & Lynne Little St. Leger, You've Earned It... Now How Do You Collect?, Fam. Advoc., Fall 1988, at 27.
have avoided this problem by providing for such compensation in the fee agreement prior to representation. A more likely scenario is one in which an attorney provides representation for several months, and the client uses that representation to gain some leverage against the other party, ultimately settling the action and then refuses to pay; in this scenario, there is no recourse for the attorney under the Washington Attorney Lien Statute.\textsuperscript{245}

Refusing attorney liens to attach settlement proceeds raises two issues. First, an attorney may instruct the opposing party to pay the settlement funds to their office to be deposited in trust. Then, attorneys can assert a lien under subsection 2 on the client’s money in the hands of the attorney.\textsuperscript{246} However, it may be problematic when the former client seeks judicial inquiry into the matter under RCW section 60.40.030,\textsuperscript{247} because the court will likely be persuaded that the subsection 2 lien was actually an attempt to circumvent the settlement restriction on the subsection 4 lien. Additionally, if attorneys manipulate such situations, clients will be unwilling to trust attorneys to control their funds. Such trickery may not be an ethical violation, but manipulating statutes in which misuse can bring harsh consequences is risky business. This process finds support in an unpublished opinion from the Ninth Circuit.\textsuperscript{248} In that case, the court reasoned that there was no rule or law prohibiting a law firm from asserting a lien on settlement money in its possession.\textsuperscript{249} Unfortunately, the court did not cite any authority for its position, and there are no published Washington cases addressing the validity of such a lien. Therefore, it is unclear whether converting the interest in the settlement proceeds into a subsection 2 lien is actually a valid option.

Second, in some situations, this restriction will lead to unfair and absurd results. For example, a client may terminate an attorney without good cause and seek alternate counsel, who assists in obtaining judgment for the client. In that situation, the former attorney could receive compensation through a lien on the judgment to

\textsuperscript{245} See generally Cline Piano Co., 57 Wash. at 242, 106 P. at 743. Recall that an attorney cannot recover settlement proceeds under a lien upon money in the hands of an adverse party, because a judgment is required under subsection 3. Wilson, 45 Wash. App. at 167, 170, 724 P.2d at 1072, 1074.

\textsuperscript{246} See WASH. REV. CODE § 60.40.010(2) (2002).

\textsuperscript{247} See id. § 60.40.030.

\textsuperscript{248} Nisqually Indian Tribe v. City of Centralia, 1994 WL 58981 at *3 (9th Cir. Feb 25, 1994) (stating that “[n]othing prohibits the firm from filing liens on the settlement money in its possession to cover all of the costs and fees of all of the attorneys who associated in the course of the litigation and who were to be compensated under the same contract”).

\textsuperscript{249} Id.
be determined based on quantum meruit. But, where the client settles the action, the attorney may have to sue to recover fees. In both situations, the attorney provided the same services from which the former client benefited, but depending on how the client receives the remedy, the attorney may not be eligible for compensation through a lien. Since the statute does not provide for a lien on settlement proceeds, this rule is unlikely to change. Attorneys should be aware of this limitation and provide for compensation through their fee agreements.

V. CONCLUSION

The Washington Attorney Lien Statute is now limited in ways that prevent it from serving its purpose. The statute was designed to simultaneously protect the rights of both the client and the attorney. While some limitations on the statute are necessary, other limitations imposed by court opinions and ethical rules and opinions provide clients with substantially more protection than they do to the attorneys. Nevertheless, this is necessary to counter the unequal bargaining power between the attorney and the client. However, some of these limitations are ambiguous and likely to discourage use or encourage misuse of the statute for the following five reasons: (1) the ethical rules have made asserting an attorney lien too risky; (2) the retaining lien has been limited to the point where it is useless; (3) the courts have failed to clarify whether a lien on money in the hands of the attorney is a retaining lien or a charging lien; (4) the courts have limited the charging lien on policy grounds when the attorney gains too much leverage; and (5) attorney liens are useless when the client settles. In addition, the Washington higher courts have rarely upheld the validity of an attorney lien.

Therefore, the Washington legislature should amend the Attorney Lien Statute to correct these problems. With respect to retaining liens on the client's files, the statute should place the burden on the client to prove that the files are necessary and the statute should be invalid for criminal defense and for defending fundamental rights. The statute should also classify the lien on money in the attorney's hands as a retaining lien. Additionally, the legislature should determine which types of property should be protected, in the public interest, from attorney liens and specifically exclude those types of property from the statute. Finally, the statute should be amended to provide for a lien on settlement proceeds. Until these changes are made, attorneys should only resort to attorney liens when absolutely
necessary and proper—otherwise, they may face such consequences as involuntary pro bono.