Revisiting Attorney Liens: A Paper Tiger in Need of Teeth and Enforceability

By Lee Rosenberg

While attorney liens – charging and retaining – have a long history of viability and effectiveness, those protections can be valueless in the context of a divorce case. Just as the system has singled out family law practitioners by being subject to additional ethical boundaries that other attorneys do not have, we are also singled out in the stripping away of security for our fees that other practice areas benefit from. Given the undermining of the retaining lien resulting from the provisions of the Matrimonial Rules[1] that mandate that the client be provided with case-related documents, the easy availability to access filed court documents through the court's electronic portal, and the availability of the client to assert a "compelling need" for the file, the security of holding on to the file as security for the fees due, often has no teeth. Similarly, the charging lien – security in the assets retained or distributed by settlement or disposition at trial – has been pared back by case law and thus also readily rendered ineffective. The charging lien is often additionally subject to initial establishment of the entitlement of the fee whether or not challenged by the client by fee arbitration requirements and limitations on security interests also governed by the Matrimonial Rules.[2] In some instances, the court may also reject the retaining lien and relegate the attorney to the charging lien alone. It would appear then that the protection of our outstanding fees by the court is by and large often non-existent. As a result, legislative or rule change is required.

A Look Back

Attorney liens were initially established under English law in 1779 as a continuation of Roman tradition and then accepted in New York after prior common law rejection in 1840 although the retaining lien – as a general lien – had been recognized. The charging lien later became statutory in 1879.[3]

As later developed, in New York, a retaining lien is a possessory lien recognized under common law over all property documents, moneys or securities that come into a lawyer's possession in the course of employment as a lawyer.[4] This right excludes the attorney acting as a trustee or escrowee.[5]

The charging lien, as stated, was later codified and is set forth in Judiciary Law § 475, and is intended to protect against the "knavery" of the client by permitting the attorney to acquire an interest in the client's claim.[6] It becomes effective only upon the commencement of an action or proceeding or initiation of ADR.[7] It attaches to the fund created by the attorney as a result of a favorable result of the litigation.[8] It may be asserted within the existing proceeding or by plenary action.[9] Such lien, however, may be forfeited if the attorney withdraws from representation without good cause.[10] So, presuming all is well ethically and the attorney fulfills their obligations to the client, what could go wrong?

The Retaining Lien

As indicated, this long existing general lien presumes to provide the attorney with security in their earned fee by way (primarily) of his or her file. In other words, the lawyer holds the client file from the client and usually from incoming counsel until payment is made for the outstanding fee. This is a substantial piece of leverage when the case is ongoing, much has transpired and incoming counsel needs all of the papers, motions, records, financial documents, transcripts, and communications which have gone before. The client's (and new counsel's) recourse would (in year's past) be to go to the county clerk's office and stand in front of an available copy machine with dollars or quarters in hand and copy only what was filed with the clerk – and not remove any staples in the process.

In the digital age with documents being scanned, certain documents can be printed by the clerk for the related fee. The non-filed documents – particularly financials – were often still in the outgoing attorney's file. In cases where many motions have been filed – it was a daunting and time-consuming task indeed to spent hours or days at the clerk's office getting access to a working copy machine and retrieving the file on a page-by-page basis. All of the forgoing being a great incentive for the client to satisfy or settle the outstanding fee and retaining lien.

The mandatory terms of the Statement of Client's Rights and Responsibilities[11] and Retainer Agreement provisions[12]

that are contained in the Matrimonial Rules undercuts much of the security which existed in the retaining lien.

From the Statement of Client's Rights and Responsibilities:

> You are entitled to be kept informed of the status of your case and to be provided with copies of correspondence and documents prepared on your behalf or received from the court or your adversary.

From the Retainer Agreement:

> The agreement shall contain the following information . . . . :10. Client's right to be provided with copies of correspondence and documents related to the case, and to be kept informed of the status of the case.

With essentially all of the contents of the file having to be provided to the client and all filed information accessible on the court's electronic portal,[13] other than attorney work product/notes, there is little in the retaining lien left to secure the fee.

The Charging Lien

The creation of a fund by the attorney which may be liened in the context of a matrimonial matter is obviously different from that in other fields. As an example, in a personal injury matter there is recovery for pain and suffering; in a commercial matter there is recovery of compensatory damages or breach of contract; in tort claims there is recovery for compensatory losses and possible punitive damages. In a matrimonial matter, establishment of support is off limits, so from whence does the fund come? Certainly, those funds may arise from trial or settlement where a distributive award is determined to be appropriate – say the "out-spouse's" entitlement to the value of a business interest or where a similar pool of funds is claimed from the lawyer's efforts.

In 2015's *Charnow v. Charnow*,[14] the Appellate Division, in a painfully short decision, addressed the most common of circumstances by way of both trial and settlement – the value of a spouse's interest by way of distribution from the marital residence. How often is the fee secured by a provision in an agreement which states that the attorney will be paid from the proceeds of sale? What if a spouse – or both – refuse that provision. What if there is a challenge to the fee by way of arbitration to be determined? What if a conflict arises mid-trial and the court will not permit a withdrawal and unpaid fees escalate? What if the fee, upon application by counsel for a lien, is sent back by the court for such arbitration or if the right to the lien itself is challenged? The latter is *Charnow.*

Charnow, which arises from the attorney's assertion of a charging lien against the proceeds of the marital residence,[15] denies that lien in two short paragraphs:

> A charging lien is a security interest in the favorable result of litigation, giving the attorney equitable ownership interest in the client's cause of action and ensuring that the attorney can collect his fee from the fund he has created for that purpose on behalf of the client" (*Chadbourne & Parke, LLP v. AB Recur Finans*, 18 A.D.3d 222, 223 [2005] [citation omitted]; *see* Judiciary Law § 475). In a matrimonial action, a charging lien will be available "to the extent that an equitable distribution award reflects the creation of a new fund by an attorney greater than the value of the interests already held by the client" (*Moody v. Sorokina*, 50 A.D.3d 1522, 1523 [2008] [internal quotation marks omitted]). However, "[w]here the attorney's services do not create any proceeds, but consist solely of defending a title or interest already held by the client, there is no lien on that title or interest" (*Theroux v. Theroux*, 145 A.D.2d 625, 627-628 [1988]).
>
> *In this case, the plaintiff and the defendant already owned the marital residence jointly as tenants by the entirety. Thus, the parties' settlement agreement merely permitted the plaintiff to retain her existing interest in the marital residence.* "Although the nature of the property was converted from realty into dollars, her interest remained the same. Thus, *no equitable distribution fund to which a charging lien can attach was created by the efforts of the [plaintiff's] attorney*" (*Id.* at 628; *see Matter of Golden v. Whittemore*, 125 A.D.2d 942 [1986]). (emphasis added)

What is missing from the court's analysis (or lack thereof) is that since the enactment of the Equitable Distribution Law in 1980, New York is an equitable distribution state and *not* a title state. The fact that the parties are equally in title does not, by way of the Domestic Relations Law, mean that they have an entitlement of equality of equitable distribution, and certainly *not* without the efforts of the attorney.

As the Third Department held in *Solomon v. Solomon*,

> While the distribution of the parties' marital assets must be equitable, there is no fixed rule that distribution be equal even in marriages of long duration (*see O'Connell v. O'Connell*, 290 A.D.2d 774, 776, 736 N.Y.S.2d 728 [2002], *lv. granted sub nom. O'Connell v. Corcoran*, 99 N.Y.2d 503, 753 N.Y.S.2d 806, 783 N.E.2d 896 [2002]; *Goudreau v. Gou-*

dreau, 283 A.D.2d 684, 686, 724 N.Y.S.2d 123 [2002][16].

The Second Department in 2024's *D'Ambra v. D'Ambra*,[17] citing *Solomon, id.* makes a similar finding,

> "A marriage has been characterized, among other things, as an economic partnership[,] which upon its dissolution necessitates a winding up of the parties' economic affairs and a severance of their economic ties by an equitable distribution of the marital assets" (*Schanback v. Schanback*, 130 A.D.2d 332, 341, 519 N.Y.S.2d 819 [citation and internal quotation marks omitted]). "Equitable distribution law does not mandate an equal division of marital property" (*Jones v. Jones*, 182 A.D.3d 586, 587, 120 N.Y.S.3d 831 [internal quotation marks omitted]). Indeed, "there is no fixed rule that distribution be equal even in marriages of long duration" (*Solomon v. Solomon*, 307 A.D.2d 558, 560, 763 N.Y.S.2d 141). Instead, "[t]he equitable distribution of marital assets must be based on the circumstances of the particular case and the consideration of a number of statutory factors. Those factors include: the income and property of each party at the time of marriage and at the time of commencement of the divorce action; the duration of the marriage; the age and health of the parties; the loss of inheritance and pension rights; any award of maintenance; any equitable claim to, interest in, or direct or indirect contribution made to the acquisition of marital property by the party not having title; and any other factor which the court shall expressly find to be just and proper" (*Jones v. Jones*, 182 A.D.3d at 587–588, 120 N.Y.S.3d 831 [citations and internal quotation marks omitted]). "The trial court is vested with broad discretion in making an equitable distribution of marital property . . . and[,] unless it can be shown that the court improvidently exercised that discretion, its determination should not be disturbed" (*Morille–Hinds v. Hinds*, 169 A.D.3d 896, 898, 94 N.Y.S.3d 336 [internal quotation marks omitted]). However, "this Court has discretion to determine issues of equitable distribution that is as broad as that of the trial court (*DeVries v. DeVries*, 35 A.D.3d 794, 796, 828 N.Y.S.2d 142).

The First Department in *Campbell v. Campbell*[18] holds,

> However, equitable distribution does not mean equal (*see Arvantides v. Arvantides*, 64 N.Y.2d 1033, 1034, 489 N.Y.S.2d 58, 478 N.E.2d 199 [1985]), and "an unequal distribution is appropriate when a party has not contributed to the marital asset in question" (*Del Villar v. Del Villar*, 73 A.D.3d 651, 652, 902 N.Y.S.2d 43 [1st Dept.2010]).

In *Culman v. Boesky*[19] from 2022, the court found:

> Specifically, and of great relevance to this case, our precedents support a smaller percentage distribution to the nontitled spouse of the value of a business created and managed by the titled spouse. Accordingly, reducing equitable distribution to a single fraction reflecting the value of the assets distributed divided by the total amount of marital assets does not accurately represent the equity of the distribution. Rather, in a situation like this, where the complex marital estate is composed of multiple assets of varying natures, many of which cannot be distributed in kind, the court must carefully consider the equitable distribution of *each asset based on the applicable statutory equitable distribution factors, which frequently leads to an unequal distribution that is nevertheless equitable.* (Emphasis added.)

These cases are not outliers. The requirement of equitable and not equal distribution is clear and was made so by the enactment of the law and the factors the court is to consider in fashioning is rulings. While equal is often the case, it is not required. This principle is again reiterated in the October 22, 2024 decision by the Court of Appeals in *Szypula v. Szypula*, at 2024 N.Y. Slip Op 05177, which appears in this issue as the decision of interest. This point is missing from *Charnow.* Further hamstringing us is that as an appellate determination, it is binding until it is otherwise determined not to be. The court in *Dayan v. Dayan*,[20] found itself so bound.

In an extensive analysis of retaining and charging liens, the *Dayan* court considers the binding precedent of *Charnow.* Although the charging lien issue was determined not to be ripe under the circumstances presented, and referred the issue for additional proceedings to determine the viability of an "interim" lien, the court reflected,

> Plaintiff has been placed in a position by the defendant while at the same time his own counsel has been paid in excess of $200,000.00 according to plaintiff's former counsel, ostensibly by defendant's father, which has not been disputed by defendant.

> Thus, the plaintiff, who was benefitting from the parties' prior lifestyle, the less-monied spouse, is left with very few remedies based upon her husband's actions and the inability to obtain her case file and transfer it to her newly retained counsel.

The issue of title which appears key in *Charnow* again remains puzzling. Under Equitable Distribution, the court can award the entirety of the house to one; the court can direct a sale and award a greater amount of proceeds to one;[21] the court can direct a sale and find that an equal distribution is appropriate; the court may find separate property credits attach thereby skewing a distribution which would otherwise be equal. Title, as it were, is irrelevant to all of the foregoing.

By way of settlement, assuming the agreement is silent on the payment of counsel from proceeds of the house sale, that settlement is, like a trial determination, brought about through the efforts of counsel – perhaps sacrificing the payment language to get the agreement signed, but anticipating the ability to collect at the time of sale by an order of the court that might not come. So, what is equitable for the litigant remains inequitable for the matrimonial attorney.

Going Forward

As cases cite to *Charnow,* including *Dayan, supra*, and given the massive hole in the retaining lien brought about by changes in the Uniform Rules applicable only to domestic relations matters, matrimonial attorneys will continue to receive short shrift in trying to enforce their right to secure earned fees when title to an asset – such as the marital residence – is held jointly and is the only path to such security. And so all of the efforts for the client may become a pyrrhic victory for counsel – a job well done and a hard way forward to obtain the fruits of that labor – plenary action or arbitration requiring confirmation of the arbitration, and then the longer path to collection.

Just then, as the Matrimonial Rules (which undercut the retaining lien) were enacted to protect the client, a rule change or legislative change is needed to protect the matrimonial attorney. It is only equitable.

Lee Rosenberg, Editor-in-Chief, is a Fellow of the American Academy of Matrimonial Attorneys, a member of the American Academy of Matrimonial Attorneys New York Chapter Board of Managers, and a past chair of the Nassau County Bar Association Matrimonial Law Committee and its Grievance Committee. He is managing principal at Rosenberg Family Law P.C. in Garden City. His email address is Lrosenberg@rfamlaw.com.

Endnotes

1. 22 N.Y.C.R.R. Part 1400, *et seq*.
2. See 22 N.Y.C.R.R. 1400.2, 1400.3; 1400.5, and 1400.7. *See also* 22 N.Y.C.R.R. 137 (Fee Arbitration Rules) and 22 N.Y.C.R.R. 1200, Rule 1.5 (d) and (e) – ethical rules regarding fees in domestic relations matters.
3. *See* Berman, Frederick S., *The Attorneys Lien in New York – A New Look*, NYLS Law Review, vol. 6, issue 3, July 1960.
4. See *Robinson v Rogers*, 237 N.Y. 467 (1924); *Matter of Heinsheimer*, 214 N.Y. 361 (1915).
5. *See, e.g., Mayeri Corp v. Shea & Gould*, 112 Misc2d 734 (1982).
6. *In Re City of New York*, 5 N.Y. 300 (1959).
7. Jud. Law § 475.
8. *LMWT Realty Corp v. Davis Agency*, 85 N.Y.2d 462 (1995); *Chadbourne & Parke, LLP v. AB Recur Finans*, 18 A.D.3d 222 (1st Dep't, 2005).
9. *Wasserman v. Wasserman*, 119 A.D,3 932 (2nd Dep't, 2014).
10. *Tucker v. Schwartzapfel*, 196 A.D.3d 527 (2nd Dep't, 2021).
11. 22 N.Y.C.R.R. § 1400.2.
12. 22 N.Y.C.R.R. § 1400.3.
13. NYSCEF.
14. 134 A.D.3d 875 (2nd Dep't, 2015).
15. The dilemma posed by *Charnow* was explored at length by Delores Gebhardt in *Charging Liens in Matrimonial Actions*, NYLJ, Aug. 23, 2017.
16. *Solomon v. Solomon*, 307 A.D.2d 558 (3rd Dep't, 2003).
17. *D'Ambra v. D'Ambra*, 225 A.D.3d 662 (2nd Dep't, 2024).
18. *Campbell v. Campbell*, 149 A.D.3d 560 (1st Dep't, 2017).
19. 207 A.D.3d 18 (1st Dep't, 2023) *leave to appeal denied*, 39 N.Y.3d 907 (2023).
20. 58 Misc 3.d 957 (Sup Court, Kings County 2017, Sunshine, J.).
21. See *G.S. v. B.S.*, 63 Misc. 3d 1202(A) (Sup Court, Richmond County 2019, DiDomenico, J.), "Pursuant to Judiciary Law § 475, an attorney in an action or proceeding has a statutory lien against his or her client's cause of action. This lien, known as a 'charging lien,' does not provide for an immediately enforceable judgment, like a money judgment, but rather provides a security interest against an asset, i.e., a judgment or settlement in their client's favor." *See Bernard v. De Rham*, 161 A.D.3d 686 (1st Dep't, 2018). In the context of a matrimonial proceeding, a charging lien is available to the extent that an equitable distribution award creates an award for the client "greater than the value of the interests already held." *See Charnow v. Charnow*, 134 A.D.3d 875 (2d Dep't, 2015). A charging lien is only payable when an attorney is discharged without cause as was the case here. *See Sprole v. Sprole*, 151 A.D.3d 1405 (3rd Dep't, 2017). As per this decision, wife succeeded in obtaining 55% of the equity in the former marital home, and as such, Mr. Baum shall be entitled to the sum of $31,253 payable to him "off the top of any proceeds distributed to wife by husband in a buyout, or at closing if the house is sold to a third party. A redacted copy of this decision shall be forwarded to Mr. Baum, as former counsel, so that he can be advised of his right to recovery herein."