

Collecting Your Fees After Discharge

BY SHARON STERN GERTZMAN

Larry Jones, your neighbor and good friend, a loyal client over many years, has retained you in three pending matters. In the last two weeks, you've detected an increasing tension in his voice when he calls you to discuss the matters. Finally, this morning, the phone call you dreaded but had come to expect: he wants you to send the files on all three matters to another law firm.

After your initial dismay and annoyance, you begin to think about all the work you've done on the files and the fees that are owed to you. You realize that each matter requires a different approach.

The first matter is a personal injury action for which Larry signed a standard 334/3% contingent fee retainer agreement. To date, you've incurred \$1500 in disbursements. The second is a matrimonial action covered by an hourly rate agreement upon which he has already advanced \$2500. The last is a lease negotiation upon which you've spent considerable time but which is not covered by any formal agreement. You've been too busy on other matters to bill Larry for any of your time in these lease negotiations.

Things to Consider

An attorney may bring a plenary action in contract or in quantum meruit to recover fees owed by her client, or she may enforce a common law retaining lien on the file and a statutory charging lien on any proceeds. Judiciary Law §475.

But if the attorney has been discharged for cause, she has no right to compensation or to a lien. So, before you decide to enforce your fees, do a little introspection to test whether Larry had good cause to take his matters elsewhere. Also, consider whether you will be exposing yourself to a counter-claim for legal malpractice. When your relationship with a client has deteriorated to the point which prompts him to seek other counsel, you may be virtually certain he will consider striking back if you impede his access to his files.

The Personal Injury Action

If you decide to protect your fees, there are two liens which can be asserted under the retainer agreement in the personal injury action. The first is the retaining lien, which is asserted against the contents of the file. The second is the charging lien, which is asserted against whatever proceeds the personal injury action may ultimately bring. The charging lien applies whether the recovery is by verdict or by settlement.

If you've already incurred \$1500 in disbursements, your files will probably be of value to Larry's new lawyer, and he'll want the files as soon as possible. Your retaining lien entitles you to hold on to the file

until your disbursements are repaid. *Security Credit Systems, Inc. v. Perfetto*, 242 App.Div.2d 871, 662 N.Y.S.2d 674 (4th Dept. 1997).

As for your services in the personal injury matter — because the retainer agreement was based upon a contingent fee, you may not fix a fee yourself. You do, however, have the right to proceed against Larry immediately in quantum meruit. If you proceed in quantum meruit, you will need to prove the number of hours you have worked and an appropriate hourly rate at an evidentiary hearing before the court. At the close of the hearing, the court will set the amount of your fee. The amount fixed by the court will constitute your charging lien. The court will also fix the amount of your disbursements; this amount will constitute your retaining lien. Your retaining lien must be satisfied before you are required to turn over the file. It's up to the court to decide whether your charging lien must also be paid before you have to relinquish the file. If the disbursements and fees are paid, you're out of it. If only the disbursements are ordered paid, you'll have to wait until the end to get the amount of your charging lien.

In lieu of quantum meruit, you may proceed to establish your lien upon the ultimate contingent fee and fix the amount of your disbursements. Upon your motion or the motion of new counsel who seeks to get your files, the court will conduct an initial hearing. On this motion, the court will acknowledge your charging lien and fix your retaining lien for disbursements. The court may also set forth the procedure to be followed during and at the end of the litigation to determine the rights of both lawyers in the distribution of fees.

At the end of the litigation, the court will conduct a hearing to determine the relative value of the work performed by you and the work performed by the new attorney and will allocate the fee between you.

Both the initial hearing and the hearing to set your fee will be conducted before the judge to whom the personal injury action was assigned. Assuming the new lawyer's arrangement with the client is for a contingent fee, the decision whether to proceed on a quantum meruit basis or to seek your contingent share of the total fee is yours alone to make. *Lai Ling Cheng v. Modansky*, 73 N.Y.2d 454, 541 N.Y.S. 2d 742 (1989).

The Matrimonial Action

The matrimonial action is similar to the personal injury action in providing you with a retaining lien and a charging lien. The retaining lien attaches to Larry's file and also to his \$2500 retainer. The statutory charging lien attaches to any property awarded to Larry in the matrimonial judgment. However, because this is a matrimonial action, the Rules of the Supreme Court Appellate Divisions, Part 1400 govern the retainer agreement. If you are not in compliance with these rules you will not be permitted to enforce your right to fees. *K.E.C. v. C.A.C.*, 173 Misc.2d 592, 661 N.Y.S.2d 715 (Sup.Ct. Kings Co. 1997~. The rules require, for example, that you give Larry notice of his right to arbitrate any fee dispute.

If you are in compliance with Part 1400, you will be able to assert a lien on Larry's file, on the \$2500 paid, and upon any property eventually awarded to Larry in the divorce.

If your disbursements and the fee that you have earned under the retainer agreement total less than \$2500, you must return the excess to him. DR 2-106(C)(2)(B).

If your charges exceeded \$2500, you would be able to move before the judge assigned to the matrimonial action to set your fee and to provide some security for its payment. The court might require you to turn over the file upon payment of disbursements and fees, or it might allow Larry to file a bond for the fees outstanding. *Manes v. Manes*, 248 App. Div.2d 515, 669 N.Y.S.2d 899 (2nd Dept. 1998). Keep in mind that your lien will not attach to any property to which Larry already has title, but will reach only the property awarded to him in the matrimonial judgment. *Golden v. Whittemore*, 125 App. Div.2d 942, 510 N.Y.S.2d 340 (4th Dept. 1986).

The Lease Negotiations

If you have not taken care to reduce your fees to writing or to send regular invoices and statements which fix your fees and disbursements, you will be forced to establish the reasonable value of your services at the point of discharge. You may enforce this either by starting a plenary action or by asserting a retaining lien on the file. Because your services did not arise in connection with litigation, you will not be able to assert a statutory charging lien. You should immediately send Larry a bill for unpaid services and disbursements to date and hope that he pays it. If he doesn't pay it and he doesn't need his file to maintain the lease negotiations, your only remedy is to commence an action against him. Only you can decide if the suit will be cost effective or if other circumstances dictate against it.

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