



# THE ENFORCER

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## Getting Paid: I'm feeling a bit insecure

**Y**ou are opening your office mail, and receive the entered Judgment of Divorce for a tough case that consumed a year. This reminds you that your newly single, financially strapped client still owes a considerable balance. You try to work out a reasonable payment plan, but the client ignores your monthly statements and recent phone calls. What now? How do you collect the fees that you worked hard to earn?

A significant concern for practitioners is getting paid for services rendered. Hard work and hours billed does not automatically equal money in the bank. There's no doubt that effective collections can increase your bottom line. You can protect your collection rate through the appropriate use of *attorney's liens*. They are good collection tools, but must be employed at the right time and against the appropriate property to be effective.

Attorneys' liens in Michigan are rooted in common-law, and are divided into two primary categories: (1) retaining liens; and (2) charging liens. Of course, attorneys may also obtain statutory and equitable judicial liens, which are classified separately from attorneys' liens. Familiarity with the different types of attorney's liens is important, as what can be the subject matter of the lien, as well as enforcement methods, are affected by how it is obtained.

A retaining lien, also called a general lien, attaches to documents, funds, or other property of the client coming into the hands of the attorney during his professional employment. It gives the attorney the right to retain possession until the fee for services is paid. *Kysor Industrial Corp. v D.M. Liquidating Co.*, 11 MichApp 438, 444; 161 NW2d 452 (1968). This arrangement requires the attorney's control (a pledge) of some kind of *res*, and depending on the circumstances, voluntary assent by the client at the outset of the case. You will probably lose your lien if you return the retained item(s), unless compelled to do so by court order.

The second category of attorney's lien, a charging lien,

creates a lien on a fund or judgment recovered as a result of an attorney's professional services. It is an attorney's equitable right to secure payment of fees from the recovery that his work created. *Id.* See also *Mahesh v Mills, et al.*, 237 Mich App 359, 361; 602 NW2d 618 (1999). An attorney's charging lien automatically attaches *only* to funds or a judgment recovered through the attorney's services. "No Michigan authority, however, permits an attorney's charging lien to attach to real property." *George v Gelman*, 201 Mich App 474, 478; 506 NW2d 583 (1993).

It is notable that an attorney cannot record a lien for unpaid fees against the real property of his client simply because the client has not satisfied their bill, unless special circumstances exist. In *Gelman*, a client brought an action to remove the attorney's lien recorded against her real property by her former attorney. In examining this issue, the Michigan Court of Appeals concluded that one of three requirements must be met before an attorney's charging lien may be recorded against a client's real property:

...[A]n attorneys' charging lien for fees may not be imposed upon the real estate of a client, even if the attorney has successfully prosecuted a suit to establish a client's title or recover title or possession for the client, unless

- (1) the parties have an express agreement providing for a lien,
- (2) the attorney obtains a judgment for the fees and follows the proper procedure for enforcing a judgment,<sup>1</sup> or
- (3) special equitable circumstances exist to warrant imposition of a lien. *George v Gelman*, 201 Mich App 474, 478; 506 NW2d 583 (1993).

In *Gelman*, the Court of Appeals determined that the defendant/attorney failed to follow the legal procedure for collecting debts owed by first obtaining a judgment for the amount owed. The Court made clear that a judgment, by itself, does not create a lien against a debtor's property. MCL 600.6001 et seq. After obtaining a judgment, the proper statutory procedure for collection and obtaining a lien must be followed.

*Gelman* teaches the limits of attorneys' charging liens and that our ability to collect at the end of a case may be due to choices made at the outset. There is a more attractive choice to suing your client and obtaining a judgment for unpaid fees. It is the inclusion of a provision in your fee agreement which authorizes the imposition of a lien as security for payment of fees upon your client's realty. Admittedly this may be difficult in a divorce scenario when most married couples hold title to their real property as tenants by the entireties.

A logistical problem arises as to when you may perfect your attorney's lien. Most practitioners will record their lien at the time they are retained. However, the Michigan Supreme Court has repeatedly held that one spouse acting alone cannot encumber to a third person an interest in entireties property. In other words, if you record a lien on entireties property granted by one spouse, your lien is not perfected and is void.

If the divorce judgment does not otherwise dispose of entireties property, MCL 552.102 provides that upon divorce tenants by the entireties become tenants in common. Therefore, to protect your lien which is granted by only one spouse, perfect the lien to which your client consented after the entry of the Judgment of Divorce.

### Endnote

We do not include a court order as one of the methods for procuring an attorneys' charging lien on real property because such an order constitutes a statutory judicial lien on the real property, not an attorneys' lien. See MCL 552.13(1); MSA 25.93(1). See also *Wolter v Wolter*, 332 Mich 229, 236; 50 NW2d 771 (1952), and *Tyrrell v Tyrrell*, 107 MichApp 435, 438-439; 309 NW2d 632 (1981).

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