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REPORT BY THE COMMITTEE ON PROFESSIONAL RESPONSIBILITY OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK RECOMMENDING AMENDMENTS TO JUDICIARY LAW SECTIONS 475 AND 475-a

This report is respectfully submitted by the Professional Responsibility Committee of the Association of the Bar of the City of New York. The Association is an organization of over 23,000 lawyers and judges dedicated to improving the administration of justice. The members of the Professional Responsibility Committee address a broad range of issues relating to the practice of law and the responsibilities of lawyers, and make recommendations regarding proposed changes in ethical codes.

The Committee submits this report and proposes certain legislation in order to address a deficiency in Judiciary Law Sections 475 and 475-a (collectively, the "Lien Law"), which govern an attorney's ability to attach a charging lien to a client's monetary recovery. As currently written, the Lien Law only permits an attorney to attach a charging lien to a client's recovery in an "action, special or other proceeding in any court or before any state, municipal or federal department, except a department of labor." An attorney may not attach a lien to the proceeds of any recovery obtained as the result of arbitration, mediation, or any pre-litigation negotiated settlement. This is a deficiency that needs to be addressed. As the Lien Law was enacted, and amended several times, to protect an attorney's right to compensation for services rendered, thereby increasing the accessibility of legal services to the general public, it is simply contrary to the legislative history and purpose of this statute to condition an attorney's recovery on the commencement of an actual proceeding. Rather, a client recovery that fairly represents the fruits of productive attorney labor should be a viable object for an attorney lien -- even absent the commencement of a court proceeding.

Section I of this paper will set forth the text of the current law, and discuss its legislative history. Section II examines how the courts have normally interpreted the Lien Law -- *i.e.,* by precluding the ability of attorneys to obtain liens for arbitration (let alone other alternative dispute resolution work). Section III argues that the Lien Law should be expanded to permit an attorney to file a charging lien for services performed pre-litigation, and examines the fact that other states allow attorneys to obtain such liens. Section IV proposes new language for amendments to Sections 475 and 475-a. A copy of the proposed bill is attached.

I. Text and Legislative History of the Lien Law

Section 475 presently reads as follows:

> From the commencement of an action, special or other proceeding in any court or before any state, municipal or federal department, except a department of labor, or the service of an answer

> containing a counterclaim, the attorney who appears for a party has a lien upon his client's cause of action, claim or counterclaim, which attaches to a verdict, report, determination, decision, judgment or final order in his client's favor, and the proceeds thereof in whatever hands they may come; and the lien cannot be affected by any settlement between the parties before or after judgment, final order or determination. The court upon the petition of the client or attorney may determine and enforce the lien.

Section 475-a presently reads as follows:

> If prior to the commencement of an action, special or other proceeding, an attorney serves a notice of lien upon the person or persons against whom his client has or may have a claim or cause of action, the attorney has a lien upon the claim or cause of action from the time such notice is given, which attaches to a verdict, report, determination, decision or final order in his client's favor of any court or of any state, municipal or federal department, except a department of labor, and to any money or property which may be recovered on account of such claim or cause of action in whatever hands they may come; and the lien cannot be affected by any settlement between the parties after such notice of lien is given. The notice shall, (1) be served by either personal service or registered mail; (2) be in writing; (3) state that the relationship of attorney and client has been established, the nature of the claim or cause of action, and that the attorney claims a lien on such claim or cause of action; (4) be signed by the client, or by a person on his behalf whose relationship is shown, and which signature shall also be witnessed by a disinterested person whose address shall also be given; and (5) be signed by the attorney. A lien obtained under this section shall otherwise have the same effect and be enforced in the same manner as a lien obtained under section four hundred seventy-five of this chapter.

Section 475 was created in 1909 and then amended in 1936, 1938, and 1946. Each amendment expanded the scope of services for which attorneys were permitted to obtain a charging lien to secure payment for their work. Specifically, the 1936 revision expanded the Lien Law to apply "in any court or before any state department, except a department of labor" in response to a lawsuit in which a court held that a lawyer who represented his client before the Commissioner of Internal Revenue was not entitled to a charging lien on any refund awarded on income tax returns. *See In the Matter of Albrecht*, 225 A.D. 423, 426 (4th Dep't 1929). The 1938 amendment added "or other" proceeding, and "federal" departments to proceedings for which attorneys can attach a charging lien. In response to these changes, the Judicial Counsel stated that "[w]ith the ever increasing number of proceedings brought before such bodies, an attorney is entitled to whatever security may be reasonably afforded him in collecting his compensation." In further support, Irving J. Joseph, then Chairman of the Committee on State Legislation of the New York County Lawyers' Association, stated that "[t]he only purpose of the lien is to provide security for payment for services rendered …." Section 475 was last amended in 1946 by expanding its scope to include "municipal" departments.

Section 475-a was created in 1955 to allow an attorney, prior to the commencement of an action, to secure a lien on the proceeds of his client's claim by serving a notice of lien upon the

persons against whom his client may have such claim. In support of this legislation, the Commerce and Industry Association of New York stated that the effect of the legislation would be to "encourag[e] attorneys to negotiate claim settlements before rather than after initiating suit . . . which would relieve calendar congestion."

The foregoing amendments, like the ones proposed herein, became necessary in response to the changing practice of law, as lawyers found themselves practicing before an increasing number of different tribunals.

II. Current State of the Law Concerning the Lien Law and Arbitration Claims

New York courts have consistently interpreted the Lien Law to exclude alternative dispute resolution from the definition of "other proceedings" and, accordingly, have prohibited attorneys from pursuing a charging lien against amounts obtained through settlement in or prior to an arbitration proceeding or through an arbitration award. In short, a lawyer cannot enforce a lien for work done in or prior to an arbitration proceeding if the attorney never appeared in court. *In re Taylor, Jacoby & Campo*, 208 A.D.2d 400, 401 (App. Div. 1994); *In the Matter of Weldon v. De Martini*, 231 N.Y.S.2d 530, 533 (Sup. Ct. 1962) ("The action or proceeding must have actually been commenced and the attorney seeking to enforce the lien must have appeared in the action or proceeding as attorney of record."). Likewise, attorneys cannot secure payment for their legal fees by serving a notice of lien prior to commencement of an alternative dispute proceeding. *See* N.Y. CLS Jud. § 475-a (West 2008).

Indeed, even bringing a confirmatory action to enforce an arbitration award may not result in the attorney being able to file a charging lien for services performed in the arbitration itself; rather, the attorney's ability to recover on such a lien may be limited to the services performed solely in the confirmatory proceeding. We are aware of only one New York court, *Spinello v. Spinello*, 334 N.Y.S.2d 70 (Sup. Ct. 1972), which allowed an attorney who was seeking confirmation of an arbitration award to file a charging lien for legal services performed pursuant to the arbitration itself. The majority of New York courts have found that a charging lien does not attach to services performed pursuant to an arbitration. *See, e.g., In re Peerless Sales Corp.*, 68 A.D.2d 476, 478 (App. Div. 1979) (affirming that "there is no attorney's charging lien for services rendered prior to the first application to the Court seeking affirmative relief."); *see also Maris Equip. Co., Inc. v. Genetech Bldg. Syst. Inc.*, No. 97-CV-709 (FB), 1998 WL 355181, at *2 (E.D.N.Y. July 1, 1998) (holding that a charging lien is available *only* for the judicial intervention by the federal courts in an arbitration, because this qualifies as a "special proceeding" under Section 475; however, the lien is limited to the services rendered in federal court and is not available for the services rendered in the arbitration proceeding). Although Section 475-a "allows a lawyer to create a lien upon the claim or cause of action before commencing an action," *Roy Simon, Simon's New York Code of Professional Responsibility Annotated, Commentary on § 475-a (2007),* we are not aware of any court which has allowed a lawyer to create a lien upon a claim or cause of action before commencing an arbitration pursuant to Section 475-a.

III. Why the Lien Law Should be Revised

The practice of law has changed tremendously since Section 475 was last revised in 1946 and Section 475-a was adopted in 1955. Since then, alternative dispute resolution, including both arbitration and mediation, has become a common, universally-accepted, means of dispute resolution. Such proceedings generally provide clients with a more economical approach to

dispute resolution than an action through the courts, due to abbreviated discovery and limited motion practice. Alternative dispute resolution also benefits the court system by taking disputes that are ripe for resolution out of the often overtaxed courts. However, while clients and the court system benefit from the increased use of alternative dispute resolution, attorneys are assuming a substantial risk in agreeing to perform legal services for clients, absent the filing of litigation, because, as the Lien Law is currently written, attorneys have no means to secure payment for their services. If the dispute never reaches a court, the attorney cannot obtain a charging lien to secure payment for her fees, and even if the dispute does reach a court, the Law is unclear as to whether the attorney can recover her legal fees incurred prior to the filing of the court proceeding. The public interest would be best served were lawyers not confronted with having to decide between following the best course of action for the client, which may be a form of alternative dispute resolution, and ensuring that the lawyers will be compensated for their services.

New York law is well settled that an attorney may attach a charging lien to settlement proceeds resulting from a court or other proceeding. Accordingly, expansion of the Lien Law to include arbitration, mediation and other forms of alternative dispute resolution would also allow attorneys to file a charging lien against settlement proceeds obtained prior to or during the course of any proceeding, thereby, affording attorneys this added protection for the value of their legal services.

Other states provide attorneys with the opportunity to obtain liens for work done outside of formal court proceedings. For example, the State of Washington cured this problem by drafting its lien law expressly to authorize liens for compensation for legal services performed "after the commencement" of an "arbitration or mediation."[1] Other states allow the lien to attach for legal services performed for the client "from the time the cause of action arises"[2] or from the "time of employment of the attorney by the client."[3] At least one state has directly addressed this issue through case law.[4]

IV. Proposed Amendments to the Lien Law

The following are proposed amendments to Section 475 and 475-a. The amended statutes will allow an attorney to attach a charging lien to awards and settlement proceeds that clients receive in arbitration or through other forms of alternative dispute resolution. The proposed amended text is in ***italics*** below. We have also attached a proposed bill showing these amendments.

> From the commencement of an action, special or other proceeding in any court or before any state, municipal or federal department, except a department of labor, or the service of an answer containing a counterclaim, ***or the initiation of any means of alternative dispute resolution, including but not limited to mediation or arbitration, or the provision of services in a settlement negotiation at any stage of the dispute,*** the attorney who appears for a party has a lien upon his client's cause of action, claim or counterclaim, which attaches to a verdict, report,

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1 *See, e.g.*, WASH. REV. CODE ANN. § 60.40.010(1)(d) (West 2008).
2 *See, e.g.*, MD. CODE ANN. BUS. OCC. & PROF. § 10-501 (West 2008) (attorney lien upon any "settlement, judgment, or award that a client receives as a result of legal services that the attorney at law performs").
3 *See, e.g.*, UTAH CODE ANN. § 38-2-7(2) and (3) (2008).
4 *See, e.g.*, *Doxtader v. Sivertsen*, 183 Mich. App. 812 (Mich. Ct. App. 1990) (holding that Michigan law "recognizes a common-law attorney's lien on a judgment or fund resulting from the attorney's services").

determination, decision, ***award, settlement***, judgment or final order in his client's favor, and the proceeds thereof in whatever hands they may come; and the lien cannot be affected by any settlement between the parties before or after judgment, final order or determination. The court upon the petition of the client or attorney may determine and enforce the lien.

Section 475-a should be amended as follows:

If prior to the commencement of an action, ***arbitration, mediation, or a form of alternative dispute resolution***, ***or a*** special or other proceeding, an attorney serves a notice of lien upon the person or persons against whom his client has or may have a claim or cause of action, the attorney has a lien upon the claim or cause of action from the time such notice is given, which attaches to a verdict, report, determination, decision, ***award, settlement***, or final order in his client's favor of any court, ***arbitral tribunal*** or of any state, municipal or federal department, except a department of labor, and to any money or property which may be recovered on account of such claim or cause of action in whatever hands they may come; and the lien cannot be affected by any settlement between the parties after such notice of lien is given. The notice shall, (1) be served by either personal service or registered mail; (2) be in writing; (3) state that the relationship of attorney and client has been established, the nature of the claim or cause of action, and that the attorney claims a lien on such claim or cause of action; (4) be signed by the client, or by a person on his behalf whose relationship is shown, and which signature shall also be witnessed by a disinterested person whose address shall also be given; and (5) be signed by the attorney. A lien obtained under this section shall otherwise have the same effect and be enforced in the same manner as a lien obtained under section four hundred seventy-five of this chapter.

November 2008

STATE OF NEW YORK

2009-2010 Regular Sessions

IN ASSEMBLY

_____, 2009

Introduced by M. of A. _____ -

AN ACT to amend the judiciary law, in relation to allowing an attorney to attach a charging lien to awards and settlement proceeds that clients receive through alternative dispute resolutions and settlement negotiations:

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section 475 of the judiciary law, as added by chapter 35 of the laws of 1909, as amended by chapter 876 of the laws of 1936, as amended by chapter 34 of the laws of 1938, and as amended by chapter 105 of the laws of 1946, is amended to read as follows:

> From the commencement of an action, special or other proceeding in any court or before any state, municipal or federal department, except a department of labor, or the service of an answer containing a counterclaim, or the initiation of any means of alternative dispute resolution, including but not limited to mediation or arbitration, or the provision of services in a settlement negotiation at any stage of the dispute, the attorney who appears for a party has a lien upon his client's cause of action, claim or counterclaim, which attaches to a verdict, report, determination, decision, award, settlement, judgment or final order in his client's favor, and the proceeds thereof in whatever hands they may come; and the lien cannot be affected by any settlement between the parties before or after judgment, final order or determination. The court upon the petition of the client or attorney may determine and enforce the lien.

Section 2. Section 475-a of the judiciary law, as added by chapter 551 of the laws of 1955, is amended to read as follows:

> If prior to the commencement of an action, arbitration, mediation, or a form of alternative dispute resolution, or a special or other proceeding, an attorney serves a notice of lien upon the person or persons against whom his client has or may

have a claim or cause of action, the attorney has a lien upon the claim or cause of action from the time such notice is given, which attaches to a verdict, report, determination, decision, award, settlement, or final order in his client's favor of any court, arbitral tribunal or of any state, municipal or federal department, except a department of labor, and to any money or property which may be recovered on account of such claim or cause of action in whatever hands they may come; and the lien cannot be affected by any settlement between the parties after such notice of lien is given. The notice shall, (1) be served by either personal service or registered mail; (2) be in writing; (3) state that the relationship of attorney and client has been established, the nature of the claim or cause of action, and that the attorney claims a lien on such claim or cause of action; (4) be signed by the client, or by a person on his behalf whose relationship is shown, and which signature shall also be witnessed by a disinterested person whose address shall also be given; and (5) be signed by the attorney. A lien obtained under this section shall otherwise have the same effect and be enforced in the same manner as a lien obtained under section four hundred seventy-five of this chapter.

Section 3. This act shall take effect on the ninetieth day after it shall have become law.