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REPORT ON LEGISLATION BY
THE COMMITTEE ON PROFESSIONAL RESPONSIBILITY
THE COMMITTEE ON ARBITRATION
THE COMMITTEE ON ALTERNATIVE DISPUTE RESOLUTION

A.5275 **M. of A. Titone**
S.1546 **Sen. Sampson**

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

THIS BILL IS APPROVED

The New York City Bar 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 the ethical rules governing the practice of law. The members of the Arbitration and Alternative Dispute Resolution Committees address legal and other issues pertaining to the use of alternative means to resolve disputes outside of the court system, including arbitration and mediation.

This report is respectfully submitted in support of A.5275/S.1546, which will put private settlements and alternative dispute resolution ("ADR") on the same footing for practitioners as court-initiated litigation. The bill encourages both out-of-court settlements and ADR, and thereby reduces the number of cases clogging our civil court dockets, by affording attorneys the same fee protections in settlements and ADR-resolved cases as are available to attorneys in court-filed cases. Any attorney wishing to exercise his or her rights under the bill would be subject to existing Rules of Professional Conduct.

Specifically, the bill addresses 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 report sets 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 or out-of-court settlements). 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.

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. (Emphasis added.)

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. . . .

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 in A.5275/S.1546, 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

Alternative dispute resolution is a widely practiced and respected method of resolving disputes. It is cost-effective and efficient and lightens court dockets. When attorneys represent parties in ADR, however, they assume a greater risk of not getting paid for their services because the Lien Law does not currently allow attorneys to secure payment in that context. Given the increasing importance of ADR, there is no reason to distinguish this method of resolving disputes from court-initiated litigation when it comes to allowing attorneys to secure payment for services rendered. Expanding the Lien Law to include both out-of-court settlements and ADR gives attorneys a commonsense added protection, avoids attorney fee disputes, closes an outdated loophole, encourages ADR as a means to resolve both contingency fee and hourly cases, and aids the overburdened court system. While providing a commonsense protection for the payment of attorneys' fees in ADR cases and settlements, the bill will have no impact on the Rules of Professional Conduct that currently govern an attorney's ethical obligations in all cases of attorney representation, including regarding fees.

A review of procedures in other states demonstrates the various methods used to address this issue. Washington law expressly authorizes liens to secure compensation for legal services performed after an arbitration or mediation is commenced.[1] Maryland allows the lien to attach for legal services performed for the client "from the time the cause of action arises"[2] and Utah from the "time of employment of the attorney by the client."[3] The State of Michigan has addressed this issue through case law.[4] The City Bar endorses the proposed solution of A.5275/S.1546. By expanding Judiciary Law section 475-a to permit an attorney to file a notice of lien prior to the commencement of any "arbitration, mediation or a form of alternative dispute resolution" and by permitting the lien to attach to an "award [or] settlement" before an "arbitral tribunal" the bill properly addresses a current deficiency in the law.

IV. Conclusion

Given the foregoing, the City Bar supports A.5275/S.1546 and urges its enactment.

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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").