



# Ohio Board of Professional Conduct

## OPINION 2023-12

Issued December 8, 2023

### **Charging Lien in a Contingent Fee Agreement Based on Highest Settlement Offer**

**SYLLABUS:** A lawyer may not offer a contingent fee agreement that requires the client to give the lawyer a charging lien for a percentage of the highest settlement offer made prior to termination of the client-lawyer relationship.

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# Ohio Board of Professional Conduct

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**APPLICABLE RULES:** Prof.Cond.R. 1.2, 1.5, 1.8, 1.16

#### QUESTION PRESENTED:

Whether a lawyer may enter into a contingency fee agreement that provides that the client will give the lawyer a charging lien for the agreed upon contingency percentage of the highest settlement offer made prior to the termination of the client-lawyer relationship.

#### OPINION:

*Attorney Liens Expressly Permitted by Prof.Cond.R. 1.8(i)*

Lawyers are permitted by Prof.Cond.R. 1.8(i) to acquire a lien by agreement with the client to secure their fee in a matter. By asserting a charging lien, a lawyer may be able to recover the value of legal services the lawyer provided prior to termination of the client-lawyer relationship. However, the lien must be authorized by law. Prof.Cond.R. 1.8(i)(1).

Ohio courts have permitted a party's former attorney to assert a charging lien by intervening in an action, by filing a motion, or through a separate cause of action. *See, e.g.,*

*Cuyahoga Cty. Bd. of Commrs. v. Maloof Properties, Ltd.*, 197 Ohio App.3d 712, 2012-Ohio-470, ¶20 (8th Dist.); *Kisling, Nestico & Redick, L.L.C. v. Progressive Max Ins. Co.*, 158 Ohio St.3d 376, 2020-Ohio-82. Charging liens in Ohio are recognized and enforced under common law and not by statute. *Kisling, Nestico & Redick, L.L.C.* at ¶9. "A special or charging lien may be created by an express agreement on the part of the client that the attorney shall have a lien for his compensation on the amount recovered. While, before judgment, an attorney has no lien upon or interest in the cause of action, in the absence of statute, yet where the parties have contracted that the attorney shall receive a specified amount of the recovery, such agreement will operate as an equitable lien in favor of the attorney." *Mancino v. Lakewood*, 36 Ohio App.3d 219, 224, 523 N.E.2d 332 (8th Dist. 1987) citing 6 Ohio Jurisprudence 3d, Attorneys at Law, Sections 178-179, at 721-722; Section 183, at 725 (1978). "[T]he decision [by a court] to impose an attorney charging lien is based on the facts and circumstances of the particular case and is left to the sound discretion of the court." *Ohio Willow Wood Co. v. Alps S., LLC*, No. 2:04-CV-1223, 2017 WL 4217153 at \*2 (S.D. Ohio, Sept. 19, 2017) (citation omitted).

#### *Issues With Proposed Fee Agreement*

The Board recognizes that lawyers entering into contingent fee agreements often risk termination during litigation before or after a settlement offer is made. Termination of the client-lawyer relationship may be caused by client dissatisfaction with the legal services provided by the lawyer or because of the lawyer's insistence that the client accept a settlement offer that is not satisfactory to the client. At other times a lawyer may seek to terminate the client-lawyer relationship for one or more of the reasons addressed in Prof.Cond.R. 1.16 after having provided legal services under the contingency fee agreement. However, the Board believes that the placement of a charging lien in a contingent fee agreement based on the highest settlement amount offered before termination of the client-lawyer relationship may unreasonably burden or penalize the client and, in rare circumstances, constitute an excessive fee under Prof.Cond.R 1.5(a).

While the proposed fee agreement may give a lawyer a means of recovering fees earned before the client-lawyer relationship has ended, the amount of that recovery will be determined in court on a quantum meruit basis. *Reid v. Lansberry*, 68 Ohio St.3d 570, 1994-Ohio-512. Thus, the question presented to the Board concerns only the client-lawyer relationship at the outset of the engagement, not the outcome of the matter for which the

lawyer was engaged. The underlying issue is whether the insertion of the charging lien in the proposed fee agreement provides the lawyer with undue leverage or control over decisions that belong to the client.

#### *Potential Burden on Client*

The inclusion of a charging lien in a fee agreement based on the highest settlement offer may unduly interfere with the client's decision whether to settle the matter and right to terminate the lawyer's services.<sup>1</sup> Prof.Cond.R. 1.16, cmt.[4]; Prof.Cond.R. 1.2(a). The proposed fee agreement may be used as leverage that causes the client to feel he or she has little choice but to accept the highest offer made at the time out of fear that the lawyer will terminate the relationship if the offer is not accepted. Consequently, the client is compelled to stay with the lawyer despite the client's desire to obtain new counsel. Because of the potential problems created by the proposed fee agreement, the client's right to terminate the lawyer may be rendered illusory and impose an improper restraint upon the client's right to reject what may very well be the highest offer made in the matter. It also could affect the lawyer's exercise of professional judgment on behalf of the client.

#### *Potential for Unreasonable and Excessive Fee*

Another difficulty with a charging lien in a fee agreement based on the highest settlement offer is the prospect of the lawyer charging or obtaining an unreasonable or excessive fee in violation of Prof.Cond.R. 1.5. The proposed fee agreement assumes that the settlement or judgment ultimately obtained by the client after termination of the relationship will be the same as or higher than the previous offer. In circumstances where the settlement or judgment is less than the highest offer made while the lawyer was still engaged, there is the potential for a windfall to the former lawyer that may be viewed as an unreasonable contingency fee under Rule 1.5. Ultimately, it does not matter if the settlement or judgment received is lesser or greater than the highest settlement offer proposed prior to the termination of the relationship. The fee agreement would be

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<sup>1</sup> "A client has an absolute right to discharge an attorney or law firm at any time, with or without cause, subject to the obligation to compensate the attorney or firm for services rendered prior to the discharge." *Reid v. Lansberry*, syllabus; Prof.Cond.R. 1.16, cmt.[1].

improper if the charging lien suggested exceeds the value of the services rendered on a quantum meruit basis. Consequently, in the Board's view, the establishment of the charging lien under the proposed fee agreement would create opportunities for the former lawyer to charge and collect a fee that would likely be considered excessive or unreasonable under certain, albeit rare, circumstances. Prof.Cond.R. 1.5(a).

For the foregoing reasons, the Board concludes that a lawyer may not include in a contingent fee agreement a charging lien based on the highest settlement offer made prior to termination of the client-lawyer relationship. In order to remain in compliance with the Rules of Professional Conduct, a lawyer's recourse is to assert a charging lien based on the settlement award or judgment the former client ultimately receives.