REPORT OF THE ETHICS INSTITUTE OF
THE NEW YORK COUNTY LAWYERS' ASSOCIATION

This Report was approved by the Board of Directors of the New York County Lawyers' Association at its regular meeting on June 14, 2010.

This report of the Ethics Institute of the New York County Lawyers' Association ("NYCLA") is to advise NYCLA on the position it should adopt regarding a new bill no. A8697 (the "Bill") introduced in the New York State Assembly on June 3, 2009 to amend Judiciary Law Sections 475 and 475-a (collectively, the "Lien Law"). The Lien Law governs an attorney's ability to attach a charging lien to a client's monetary recovery to secure payment for legal services. As currently written, it allows an attorney to enforce a charging lien for services rendered to a client upon commencement of a court action or proceeding but not arbitration or other forms of alternative dispute resolution. To address this deficiency in the Lien Law, in November 2008, the Professional Responsibility Committee ("PRC") of the Association of the Bar of the City of New York ("ABCNY") issued a report ("PRC Report") proposing new legislation. The PRC Report was turned into the Bill. To garner support for moving the Bill forward, ABCNY has asked whether NYCLA will join it in supporting the Bill. The Ethics Institute recommends that NYCLA join ABCNY in supporting the Bill, subject to certain limitations, as discussed below.

I. New York Lien Law

Text of Current Law

§ 475. Attorney's lien in action, special or other proceeding. 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.

§ 475-a. 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.

Legislative History

Section 475 was originally enacted in 1909 and amended thereafter in 1936, 1938 and
1946. Each amendment broadened the scope of legal services for which attorneys were entitled
to obtain a charging lien to secure payment for their work. Section 475-a was created in 1955 to
allow an attorney, before commencing an action, to secure a lien on a claim or cause of action,
by serving a notice of lien upon the persons against whom his or her client may have a claim.
Roy Simon, Simon's New York Code of Professional Responsibility Annotated, Commentary on
§ 475-a (2007). The rationale for the amendments was to respond to the rapidly changing
practice of law where lawyers were representing clients in an increasing number of proceedings
before different tribunals.

NY Court Interpretation

New York courts have uniformly ruled that to be entitled to a charging lien, a cause of
action, claim or counterclaim must be asserted upon which an affirmative judgment may be
rendered in an action or proceeding which must have actually been commenced, and the attorney
seeking to enforce the charging lien must have appeared in the action or proceeding as attorney
(App. Div. 1st Dept. 1994); In the Matter of Weldon v. De Martini, 35 Misc.2d 710, 231
N.Y.S.2d 530 (Sup. Ct. Queens County, 1962). The majority of New York courts have held that
arbitration and other forms of alternative dispute resolution do not fall within the requirements of
the Lien Law because they cannot be classified as actions, special or other proceedings in any
court or before any state, municipal or federal department. In the Matter of Peerless Sales Corp.,
federal court in the arbitration qualified the proceeding as a "special proceeding" under the Lien Law; see also Spinello v. Spinello, 70 Misc.2d 521, 334 N.Y.S.2d 70 (Sup. Ct. Nassau County, 1972) (where filing of a charging lien was permitted for legal services performed pursuant to the arbitration because the lawyer commenced a proceeding to confirm the arbitration award which constituted an affirmative claim that conferred the statutory attorney's lien).

Therefore, New York case law narrowly interprets the Lien Law by holding that charging liens do not attach to legal services rendered pursuant to alternative dispute resolution. Consequently, attorneys are unable to enforce a charging lien for work done against amounts obtained through settlement in or prior to alternative dispute resolution, such as arbitration, or through an arbitration award, if they never appeared in court. Likewise, attorneys cannot secure payment for their legal fees by serving a notice of lien prior to the commencement of an alternative dispute resolution proceeding. N.Y. CLS Jud. § 475-a (West 2008).

II. PRC Report

To cure the deficiency in the Lien Law, the PRC proposed legislation (see Sec. III. below) to expand the scope of the Lien Law to provide attorneys the ability to obtain charging liens for legal services performed outside of formal court proceedings, such as arbitrations, mediations or other forms of alternative dispute resolution. This would also allow attorneys to file charging liens against settlement proceeds obtained prior to or during the course of any such proceedings. Outlined below are the PRC's reasons for amending the Lien Law:

- **Respond to dynamic change in law practice:** the Lien Law was enacted, and amended several times, to protect an attorney's right to compensation for services rendered and to increase the accessibility of legal services to the general public. The proposed amendment, like its predecessors, has become necessary as lawyers are practicing before a growing number of different tribunals, making it contrary to the legislative history and purpose of the Lien Law to condition attorney recovery on the commencement of a court proceeding.

- **Alternative dispute resolution is beneficial to clients and courts:** the emergence of alternative dispute resolution, including arbitration and mediation, as a universally-accepted means of dispute resolution, affords clients a more economical approach to resolving disputes than litigation, and benefits the court system by removing disputes that are ripe for resolution from the often overtaxed courts.

- **Protect attorneys' right to compensation for services rendered:** attorneys take on a substantial risk by performing legal services for clients absent the filing of litigation because the Lien Law, as currently written, provides attorneys no means to secure payment for their services. If a dispute never reaches a court, the attorney is unable to attach a charging lien and even if it does reach the court, it is unclear if fees incurred prior to the filing of the court proceeding can be recovered. Since New York law is well settled that an attorney may attach a charging lien to settlement proceeds resulting from a court or other proceeding, expanding the Lien Law to include alternative dispute resolution would 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 services.

• Public interest would be best served: lawyers should not be confronted with choosing
between pursuing the best course of action for the client (which may be a form of alternative
dispute resolution) and ensuring that they will be compensated for their services.

• Other states permit charging liens for work done out of court: the State of Washington
authorizes attorney liens for compensation for services performed after the commencement
of arbitration or mediation proceedings. See WASH REV. CODE ANN. § 60.40.010(1)(d)
(West 2008). Maryland allows a lien to attach for legal services rendered in a settlement or
award that is received by the client as a result of the lawyer's work. MD. CODE ANN. BUS.
OCC. & PROF. § 10-501 (West 2008). Utah permits an attorney's lien to commence at the
time of employment of the attorney by the client. UTAH CODE ANN. § 38-2-7(2) and (3)
(2008). In addition, at least one state has directly dealt with the issue through case law.
law recognizes a common-law attorney’s lien on a judgment or fund resulting from the
attorney's services).

III. The Bill

The PRC Report is the basis for the Bill amending the Lien Law, as follows:

§ 475. Attorney's lien in action, special or other proceeding. 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 or
her client's cause of action, claim or counterclaim, which attaches to a verdict,
report, determination, decision, award, settlement, judgment or final order in his
or her 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.

§ 475-a. Notice of lien. 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 or her 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 or her 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,
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 or her 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] article.

IV. NYCLA Position

The PRC Report proposed legislation to amend the Lien Law which currently restricts an attorney's ability to pursue a charging lien for services rendered through alternative dispute resolution. The Bill will allow an attorney to attach a charging lien to awards and settlement proceeds received by his or her client through alternative dispute resolution or settlement negotiations. The Ethics Institute agrees that the scope of the Lien Law should be expanded to include arbitrations and mediations because such proceedings are akin to litigations. This will protect an attorney's right to compensation for services rendered upon commencement of arbitration or mediation proceedings. However, the Ethics Institute is concerned that "settlement" is too broad and vague a term to include in the amended Lien Law, and believes that such term should be excluded from the Bill, as follows:

§ 475. Attorney's lien in action, special or other proceeding. 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 or her client's cause of action, claim or counterclaim, which attaches to a verdict, report, determination, decision, award, settlement, judgment or final order in his or her 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.

§ 475-a. Notice of lien. 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 or her 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 or her 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.
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 or her 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 article.

Accordingly, the Ethics Institute recommends that NYCLA join ABCNY in supporting the Bill, subject to the above qualifications.