

## PRACTICE TIPS FROM BAR COUNSEL

# WHEN CAN A COURT ADJUDICATE AN ATTORNEY- CLIENT FEE DISPUTE?

BY GLENN MACHADO, ASSISTANT BAR COUNSEL, STATE BAR OF NEVADA

When attorneys call our office regarding their options in dealing with nonpaying clients, we usually refer them to *Figliuzzi v. Eighth Judicial District Court*,<sup>1</sup> which notes that an attorney can assert a charging lien or a retaining lien (described further, below). This past September, the Supreme Court issued a decision concerning when a court may adjudicate a charging or retaining lien against a nonpaying client. The case was entitled *Argentina Consolidated Mining Company v. Jolley Urga Wirth Woodbury & Standish*.<sup>2</sup>

Argentina was one of several defendants in a personal injury action that occurred in an abandoned mine the company owned. Jolley Urga represented Argentina for three years, and towards the end of the three-week trial in the matter, the firm entered into a settlement agreement with the plaintiff, wherein the plaintiff dismissed the company in its entirety in exchange for Argentina waiving any and all costs that it may have been entitled to receive from plaintiff, including attorney's fees.<sup>3</sup>

After this settlement was reached, the firm orally moved for a determination of good faith settlement, which was granted. Shortly thereafter, Argentina fired Jolley Urga and retained new counsel. Argentina claimed that it had not authorized Jolley Urga to waive the right to recover attorney fees and, as a result, refused to pay the firm's bill, which was approximately \$213,000.<sup>4</sup>

Jolley Urga maintained that it acted appropriately and asserted a retaining lien on the file. The firm also moved the court that presided over the underlying personal injury case to adjudicate its "attorney lien." Argentina argued that the court did not have jurisdiction to render a summary determination, especially in light of the malpractice issues. The court granted the firm's motion and the company appealed.<sup>5</sup>

The Supreme Court reversed in a detailed opinion, wherein it discussed and clarified charging liens, retaining liens and a district court's ability to adjudicate attorney-client fee disputes. The "CliffsNotes" version of the Supreme Court's decision is as follows:

In order for a court that presided over a client's underlying litigation to have jurisdiction to adjudicate an attorney-client fee dispute, either: (1) an enforceable charging lien must exist; (2) if a retaining lien has been asserted by the attorney,

the client requests the court to determine the value of the attorney's services in order to post adequate or substitute security in order to recover the file; or (3) the client otherwise consents to the court adjudicating the retaining lien.<sup>6</sup>

In making its decision, the Supreme Court rejected the argument that a district court has incidental powers to adjudicate fee disputes irrespective of an attorney's lien.<sup>7</sup> The Supreme Court found that two Nevada cases, relied upon for that argument, incorrectly extended a holding from a 1957 case, *Earl v. Las Vegas Auto Parts*,<sup>8</sup> which concerned a charging lien, although the case was later cited for the proposition that a court's power to resolve an attorney-client fee dispute was "unrelated to the nature of the lien sought to be enforced."<sup>9</sup> The Supreme Court also noted that these previous cases involved a client either consenting to the court's adjudication or asking the court to resolve a retaining lien, neither scenario of which was present in *Argentina*.

In regard to charging liens, the Supreme Court noted they are a creature of statute, namely NRS 18.015, which allows an attorney to assert a lien "on the judgment or settlement [that] the attorney has obtained for the client."<sup>10</sup> The Supreme Court agreed

with Argentina's argument that a charging lien only exists when a client has filed suit and asserted an affirmative claim for damages, and a charging lien cannot be sought when the party did not seek or obtain any affirmative recovery in the underlying action. As such, there was no enforceable charging lien against Argentina.<sup>11</sup>

As for retaining liens, they are asserted by an attorney "withholding the client's file and other property until the court, at the request or consent of the client, adjudicates the client's rights and obligations with respect to the lien."<sup>12</sup> Retaining liens were established by common law, and the Supreme Court noted they are passive liens. As such, an attorney cannot actively enforce retaining liens in judicial proceedings. The client, however, may ask a court to compel the former attorney to deliver the client's files contingent upon the client providing adequate or substitute security in exchange for having the files returned.<sup>13</sup> In *Argentina*, the mining company did not ask the court to establish an amount in order to determine the appropriate security.



Further, the Supreme Court also stated that, when malpractice allegations are made by the client, as was the case in *Argentena*, a summary determination of attorney’s fees is inappropriate.<sup>14</sup> In addition, should the court have jurisdiction to adjudicate the fee dispute, the court must include a basis for finding that the attorney fee awarded was reasonable, and the absence of such a finding is considered an abuse of discretion.<sup>15</sup>

In *Argentena*, there was no charging lien. Although a retaining lien was asserted, the client never asked the court to intervene. Likewise, the company never consented to the court’s adjudicating of the fee. As such, the Supreme Court found there was no basis for the presiding district court to assert jurisdiction over the attorney-client fee dispute, resulting in the attorney-fee judgment being void.<sup>16</sup>

The Supreme Court concluded that when an attorney does not have an enforceable charging lien, or a client does not move the court to resolve a retaining lien, or the client refuses to consent to the court’s adjudication of a retaining lien, the proper way for the attorney to adjudicate the fee dispute is to bring a separate proceeding against the former client.<sup>17</sup>

Our office frequently sees motions to reduce an attorney’s lien to judgment as part of our disciplinary investigations. Accordingly, if you find yourself in such a proceeding, you may wish to check the grounds upon which you are asking the court to adjudicate the fee dispute.

Finally, although not specifically referenced in the *Argentena* opinion, the state bar’s Fee Dispute Arbitration Rules allows an attorney to initiate a fee-dispute arbitration against a client. As such, you may wish to consider that option in lieu of suing the client in court. We make the suggestion because, based upon bar complaints received by our office, suing a client in court often results in a counterclaim alleging malpractice, and the client subsequently sending a not-so-nice letter about you to the state bar. **NL**

1 111 Nev. 338, 890 P.2d 798 (1995).  
2 125 Nev. Adv. Op. 40 (September 24, 2009). The current Westlaw citation is 2009 WL 3048455 (Nev.).  
3 See *Argentena*, 125 Nev. Adv. Op 40 at 2-3.  
4 See id. at 3.  
5 See id. at 3-4  
6 See id. at 2.  
7 See id. at 10-15.

8 73 Nev. 58, 307 P.2d 781 (1957).  
9 *Sarman v. Goldwater, Taber and Hill*, 80 Nev. 536, 396 P.2d 847 (1964). The *Sarman* decision was based, in part, on *Gordon v. Stewart*, 74 Nev. 115, 324 P.2d 234 (1958), which was found to have improperly extended the *Earl* ruling. See *Argentena*, 125 Nev. Adv. Op 40 at 15.  
10 *Argentena*, 125 Nev. Adv. Op 40 at 5, quoting *Figliuzzi*, 111 Nev. at 342, 890 P.2d at 801.  
11 See *Argentena*, 125 Nev. Adv. Op 40 at 9.  
12 *Argentena*, 125 Nev. Adv. Op 40 at 6, quoting *Figliuzzi*, 111 Nev. at 342, 890 P.2d at 801.  
13 See *Argentena*, 125 Nev. Adv. Op 40 at 7, 9-10.  
14 See id. at 16.  
15 See id. at 18-19, fn. 2.  
16 See id. at 17.  
17 See id. at 18.

**GLENN MACHADO** is Assistant Bar Counsel for the State Bar of Nevada. A native of New York, where he also is licensed to practice law, he was admitted to the Nevada bar in 2001. Before joining the State Bar of Nevada in 2004, he practiced commercial litigation and transactional law.

