Liens, Judgments, Enforcements: Adjudicating an Attorney's Lien After *Argentena*

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In addition to litigating trial and appellate cases in Nevada, Mr. Willick has participated in hundreds of divorce and pension cases in the trial and appellate courts of other States, and in the drafting of various State and federal statutes in the areas of pensions, divorce, and property division. He has chaired several Committees of the American Bar Association Family Law Section, and has repeatedly represented the entire ABA in Congressional hearings on military pension matters. He has served on many committees, boards, and commissions of the ABA, AAML, and Nevada Bar, has served as an alternate judge in various courts, and is called upon to testify from time to time as an expert witness. He serves on the Board of Directors for the Legal Aid Center of Southern Nevada.

Mr. Willick received his B.A. from the University of Nevada at Las Vegas in 1979, with honors, and his J.D. from Georgetown University Law Center in Washington, D.C., in 1982. Before entering private practice, he served on the Central Legal Staff of the Nevada Supreme Court for two years.

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While in law school, Mr. Creel practiced as a student attorney with the Thomas and Mack Legal Clinic, externed at the Eighth Judicial District Court (Family Division), and taught a weekly family law class to members of the Las Vegas community in conjunction with Clark County Legal Services.

Mr. Creel has volunteered his time to the Clark County Family Law Self-Help Center's "Ask a Lawyer" program, and has acted as a volunteer judge for the HSGI/Truancy Diversion Programs (for at-risk children) at both Cannon Middle School and Morris/Global High School.

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ADJUDICATING AN ATTORNEY'S LIEN AFTER *ARGENTENA*

I. INTRODUCTION AND HISTORY (Marshal)

A. **What is a "lien"?** "The legal claim of one person upon the property of another person to secure the payment of a debt or the satisfaction of an obligation."

B. **Lien claims are statutory** – provided by statute under NRS 18.010(1), "The compensation of an attorney and counselor for his services is governed by agreement, express or implied, which is not restrained by law."

1. **NRS 18.015(1)** – an attorney's lien "is for the amount of any fee which has been agreed upon by the attorney and client" (or, in the absence of an agreement, for the reasonable value of services rendered).

2. **NRS 18.015(4)** – on motion by an attorney who has such a lien, the court shall adjudicate the rights of the parties on five days' notice.

C. **Retaining v. Charging Lien:**

1. **Retaining or General Lien** – established at common law, which allows a discharged attorney to withhold 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. *Figliuzzi v. Dist. Court*, 11Nev. 338, 890 P.2d 798 (1995).

2. **Charging Lien** – this is a creature of statute that gives the attorney the right to attach his lien to any judgment or settlement the attorney has obtained for the client. *Figliuzzi v. Dist. Court*, 11Nev. 338, 890 P.2d 798 (1995).

D. **Pre-*Argentena*** – it was common for attorneys in family court to continue representing clients who were unable or unwilling to comply with a retainer agreement in contemplation of having an efficient and inexpensive way of fixing, adjudicating and collecting fees at the conclusion of representation. This was done by adjudicating the attorney's entire claim for compensation under the retainer agreement as to fees outstanding. Once adjudicated, attorney's liens could be recorded like any other judgments.

1. **Why Stay On?** – the attorney's right to compensation is based upon the contract between him and the client, not limited to his lien. To hold that an attorney's right to compensation is limited to his lien rights is in effect to deprive him of any right to contract for other than a contingent fee (which is not allowed in domestic relations cases pursuant to NRPC 1.5(d)(1)), since no fee contract could ever be enforced save in the event of a successful recovery to which a lien might attach, and a lien is only security for the

contractual right to payment. *Gordon v. Stewart*, 74 Nev. 115, 324 P.2d 234 (1958).

2. **Incidental Jurisdiction** – prior to *Argentena*, an attorney's appearance as counsel of record gave the trial court incidental jurisdiction to resolve disputes between an attorney and a client relating to the litigation before the trial court. *Dotson v. Las Vegas Auto Parts*, 73 Nev. 58, 307 P.2d 781 (1957).

3. **Conclusion** – the previous lien adjudication process permitted clients to have representation, and attorneys some reasonable assurance that they would eventually get paid for their efforts. All of which was intended to serve the Nevada Supreme Court's pronouncement that the purpose of NRS 18.015 is to secure attorney's fees and to "encourage attorneys to take cases of those who could not otherwise afford to litigate." *Muije v. A. North Las Vegas Cab Co.*, 106 Nev. 664, 667, 799 P.2d 559, 561 (1990); *see Ber-Wachs v. Law Offices of Logar & Pulver*, 123 Nev. 71, 157 P.2d 704 (2007).

II. ***ARGENTENA CONSOL. MINING CO. v. JOLLEY URGA*, 125 Nev. 527, 216 P.3d 779 (2009) (Trevor)** – the Nevada Supreme Court effectively made it more difficult for attorneys to collect on either retaining or charging liens.

A. **Primary Holding** – in the absence of an enforceable charging lien (which is generally non-existent in divorce cases, especially in this economy), a client's request to liquidate a retaining lien, or a client's consent to the district court's adjudication of a retaining lien, the district court lacks jurisdiction to adjudicate an attorney/client dispute as to fees owed.

B. **What This Means** – by the *Argentena* Court partially overruling precedent from the past 50 years, the Court found that no valid charging lien could be applied when no recovery was obtained for the client (as when the client's case was purely defensive, and no money judgment was obtained from the opponent).

1. **Reversible Error** – the Court also found that any summary adjudication would constitute reversible error in the absence of a "basis for its decision in awarding the fees" as to reasonableness of the fees charged in light of the factors recited in *Brunzell* and *Wilfong*.

2. **Summary Adjudication** – finally, the Court found that the summary adjudication process would be "entirely improper" if a malpractice claim was pending by the client (a fee dispute with the State Bar also seems to qualify as some Judges will not rule on an attorney's lien until a State Bar fee dispute is concluded).

C. **When the Dust Settled** – *Argentena* hindered or eliminated altogether the attorney's ability to effectively and inexpensively get paid for services rendered. This has

resulted in attorneys withdrawing earlier and more aggressively in a wide variety of family law actions – which results in more proper person litigants.

1. **What the *Argentena* Court Suggested as an Alternative** – in somewhat cavalier fashion, the *Argentena* Court suggested that the attorney could always file an independent suit against the client. The problem with this is that such suits are essentially prohibited by most polices of malpractice insurance (many companies ask on their applications whether counsel sues clients for fees, and refuse to offer policies at all if the answer is "yes").

III. HOW TO AVOID PROBLEMS PRESENTED BY *ARGENTENA* AND A/R (Marshal)

A. Always Monitor Funds on Retainer – we know that with your schedules this can prove nearly impossible; however, designating one person to be responsible for looking at retainer funds (i.e., Firm Administrator) can help dramatically.

1. **What We Do**

   a. **Evergreen Retainers** – requirement of always having money on retainer. Forms include deposit held until final cycle, or requirement of replenishment of deposit at each cycle.

   b. **Solid Retainer Agreement** – Clear, plain English, and incentives to avoid fee disputes at all (unbilled work conversion, time-to-dispute clauses).

   c. **Knowledge** – we generally have weekly or bi-weekly meetings to discuss potential problems with depleting retainers, potential problems with individual clients.

   d. **Exposure Containment: Billing Cycles** – Possibly the best suggestion we ever received was to increase our billing frequency from once to twice per month – for a particularly intensive case, you could go weekly; trading a couple of hours of staff time per month for elimination of tens of thousands in accrued A/R each year before you realize you have a problem requiring a solution.

B. Exit Case if Client Refuses to Replenish – we know how difficult this is, but we have become much more stringent on this policy in an effort to reduce A/R.

1. **How to Properly Exit Case:**

   a. **Notice of Withdrawal (SCR 46)** – only proper if no appearance has been made or after judgment or final determination.

b. **Motion to Withdraw (SCR 46)** – to be used after appearance has been made or case is ongoing.

c. **Substitution of Attorney** – appropriate at any time of case; however, having a client substitute in as "attorney" of record is not proper (although, many courts have simply accepted this kind of substitution).

C. **Alternate Security** – Is a security interest in the client's real property permissible?

1. **Yes.** Formal Opinion # 37, Feb. 1, 2007. Requirement of compliance with SCR 158 (now NRPC 1.8).

2. **Special Problem with Community Property.** Possibility of transfer of property during litigation to other spouse.

IV. COPING WITH *ARGENTENA* (PROTECTING YOURSELF BEFORE IT'S TOO LATE) (Trevor)

A. **Adjusting Fee Agreements** – the language in *Argentena* suggests that some defensive actions could be taken by counsel to prevent going unpaid for their work, although ***none*** of these solutions have been tested on appeal.

1. **Three Essentials to Fee Agreements:**

a. **Clearly Express Reasonableness of Fees** – words to the effect:

Client agrees that these fees are reasonable on the basis of Attorney's ability, training, education, experience, professional standing and skill, and the difficult, intricacy, importance, and time and skill required to perform the work to be done.

(1) NOTE: this language mirrors the necessary considerations for an attorney's fee award under *Brunzell* and *Wilfong*.

b. **There Must be a Section on Liens and Adjudication** – our model language reads:

Client hereby grants Attorney a lien on any and all claims or causes of action that are related to the subject of Attorney's representation under this Agreement. Attorney's lien will be for any sums due and owing to Attorney at the conclusion of Attorney's services. The lien will attach to any recovery Client may obtain, whether by arbitration award, judgment, settlement, or otherwise. Any amounts received by Attorney's office on Client's behalf may be used to pay Client's account.

Attorney will retain possession of Client's file and all information therein until full payment of all costs, expenses, and fees for legal services, subject to turnover or destruction of the file as set out in Paragraph 9. Client consents to the district court's adjudication of any such lien in the underlying action without requiring the filing of a separate action, regardless of whether any other action might be or has been filed by either Attorney or Client against the other, including any action alleging malpractice.

(1) NOTE: there is language within *Argentena* indicating that if the client wishes to assert a malpractice claim against an attorney, the summary adjudication procedure is not available. The question has been raised as to why that could not be made a matter of contract, as well. Presuming it's allowable, the last sentence outlined in our model language covers it.

c. Always Include a Clear and Strongly Worded Warning at the end of the Agreement so There is No Confusion – our model language reads:

This Agreement is a formal legal contract for Attorney's services. It protects both you and your attorney, is intended to prevent misunderstandings, and it may vary the law otherwise applicable to attorney's liens and resolution of fee disputes. **DO NOT SIGN THIS AGREEMENT UNTIL YOU HAVE READ IT THOROUGHLY AND ARE SURE YOU UNDERSTAND ITS TERMS.** If you do not understand it or if it does not contain all the agreements discussed, please call it to our attention and be sure this written Agreement contains **all** terms you believe are in effect between us. You have an absolute right to discuss this agreement with independent counsel (or any other advisor) before entering into this agreement, and we encourage you to do so.

2. Why Do All This? – the purpose of all this additional language is to jump through the hoops set out in *Argentena* by way of advance agreement by contract. An open question is whether a Court might require that any agreement to adjudication be made at the time of the adjudication, rather than at the outset of representation.

3. Our Experience at District Court Level – a substantial majority of judges at the District Court level have determined that our fee agreement successfully navigates the restrictions and pitfalls of *Argentena*, thereby permitting prompt and efficient judicial adjudication of our attorney's liens.

a. However – anecdotal reports continue to circulate that some departments, for unknown reasons, still refuse to adjudicate liens under any circumstances. If true, those departments would appear to

be both ducking their responsibility and ignoring the actual directions of the Nevada Supreme Court holdings.

B. **Just Altering the Retainer is Not Enough** – in addition to making changes to your retainer agreement, a motion seeking adjudication of an attorney's lien, and the resulting order, are now required to be much more detailed.

1. **Steps for Adjudication:**

a. File *Lien for Attorney's Fees* (pursuant to NRS 18.015) with a copy of your Retainer Agreement and Billing Statements.

b. File *Motion to Adjudicate – Motion* Must Include:
(1) Representations and application of factors under *Brunzell* and *Wilfong*.

c. If Court Adjudicates, Make Sure Order Also Details Reasonableness of Fees.
(1) Always ask for additional fees for having to adjudicate (note distinction of contracted-for billing and common law ability to bill for collection/dispute of fees).

2. **You Must Make Representations as to the Required Factors Under *Brunzell* and *Wilfong* in Your *Motion*** – any order adjudicating a lien should include corresponding findings, as to:
a. ***The qualities of the advocate.***
b. ***The character of the work to be done.***
c. ***The work actually performed by the lawyer.***
d. ***The result.***

C. **Is it Worth It?** – although all this extra work is a burden, it is still a lot faster, easier, and cheaper than filing a separate action for recovery against a client.

1. **Also, it may be necessary.** Again, many malpractice insurance companies do not ***permit*** the filing of such actions, forcing counsel to choose between getting paid and having insurance.

V. **STATE BAR FEE DISPUTE MECHANISM (ALTERNATIVE TO SUMMARY ADJUDICATION) (Marshal)** – although never specifically mentioned in *Argentena*, the holding in that case led to far greater interest in the State Bar of Nevada's fee dispute process. Unfortunately, the State Bar's promise of an efficient, timely, and economically feasible system has yet to manifest itself.

A. **State Bar Fee Dispute Jurisdiction** – State Bar has jurisdiction over ANY disagreement between client and attorney concerning fees and/or costs (in other

words, an attorney can initiate).

1. **Limitation** – Claim must be filed within 6 years of end of the attorney/client relationship.

2. **Lack of Jurisdiction** – Committee does not have jurisdiction over:

   a. Disputes already filed in District Court.

   b. Claims for affirmative relief against attorney for malpractice.

   c. Any claim for less than $250.00.

B. How to File a Fee Dispute

1. **Petition** – Complete "Petitioner's Agreement for Arbitration of Fee Dispute" and submit to State Bar's Las Vegas Office.

   a. Time Frame for Response – respondent is given 25 days to respond after being served with Petition and supporting documentation (usually Fee Agreement, billing statements, and pay-up letters).

      (1) NOTE: Respondent may be given 24 day extension to respond.

   b. If No Response – Petitioner may proceed ex parte or withdraw fee dispute.

C. By-Laws – By-Laws offer detailed explanation of process in both mediation and arbitration – mediation is mandatory for all disputes $5,000 or less. If unsuccessful, case proceeds to Arbitration upon request of Petitioner.

D. Problems with Fee Dispute Process

1. **Inefficient** – our most recent case took over a year to arbitrate, despite the fact that it was completely unopposed. There is no reason that unopposed fee disputes should take longer than 30 days.

   a. What Bar Reports – the Fee Dispute Program is a rousing success and they recently cut time-frames for resolving fee disputes from 211 days to 95 (as of December 2011).

2. **Even When Judgment is Rendered in Attorney's Favor, Some Judges Will Still Not Enforce** – this despite the fact that Section XII(B) of By-Laws states that any award rendered may be enforced by ***any*** court of competent

jurisdiction and the fact that both parties consented to ***binding*** arbitration.

VI. SOME PUBLIC POLICY IMPLICATIONS OF *ARGENTENA* (Trevor)

1. State Bar is Being Flooded w/ Fee Disputes.

2. What is it, precisely, that makes the same judge, in the same case, any less capable or informed to resolve fee disputes between a lawyer and client?

a. **From Another Perspective** – requiring some other court to learn all that the judge presiding over the trial already knows is a massive waste of time contradictory to any notion of judicial economy.

b. ***Landreth*** – may have solved this apparent problem, for family court attorneys, but only time will tell.

3. **Access to Justice is Being Lost** – because *Argentena* eliminated nearly all practical means for obtaining payment for their services, many attorneys are forced to withdraw, increasing the burden on pro bono and self-help facilities.

VII. SOME REMAINING QUESTIONS AFTER *ARGENTENA* (Marshal) – all of which have never been satisfactorily answered by the Nevada Supreme Court.

1. What if the client does nothing when an attorney asserts a lien? (e.g., is silence consent?)

2. Is a dispute as to the amount to be adjudicated equal to a consent to the process of adjudication?

3. If a client asserts no opposition to the adjudication of the lien – just to the sum actually owed, is that not consent to jurisdiction as well?

4. If *Argentena* is taken at face value – as a finding of lack of "subject matter jurisdiction" – does that mean that all lien adjudications for the past 50 years since *Gordon* in 1958 (or at least those still within the statute of limitations) are subject to collateral attack?

   a. Have all such awards been retroactively invalidated?

5. Is obtaining client consent at the onset of representation sufficient to allow adjudication of the sums owed by the client to the lawyer? If not, ***why*** not?

6. Can, after *Argentena*, a "charging lien" be found to exist at all in a divorce

case, since arguably both parties to such a case are already, co-owners of all property to be distributed, so that no "recovery" is ***ever*** actually obtained for the client in a divorce case?

7. If a charging lien can be found to exist in a divorce case (since the attorney's services are obviously required for the client to obtain property, alimony, etc., which is a "recovery"), what about ancillary family law cases without property, such as straight custody, or paternity cases?

8. Was the *Argentena* analysis intended to apply in the family court context at all?

9. What if the Judge refuses to adjudicate?

VIII. RECENT DEVELOPMENTS (Marshal)

A. ***Schuck v. Signature Flight Support*, 126 Nev. ___, 245 P.3d 542 (Adv. Opn. No. 42, Nov. 4, 2010)** – added further fuel to the fire created by *Argentena* by adding the requirement, in the absence of a client's request for or consent to adjudication of fee disputes, that the client's underlying litigation be ***completed*** prior to the adjudication.

B. ***Landreth v. Malik*, 127 Nev. ___, 251 P.3d 163 (2011)** – because Family Court Judges have been deemed District Court Judges, they should be able to hear fee disputes in the underlying case.

C. **Pending Legislation (Tom Standish's work with State Legislature)** – Section 5 of proposed legislation restores to trial courts pre-*Argentena* incidental jurisdiction to resolve dispute.

D. **Pending Appeal (Sherry Bowers)** – brought appeal that is currently set for oral argument to determine viability of attorney's lien post-*Argentena*, and availability of post-judgment collateral attacks on attorney's liens based upon lack of purported subject matter jurisdiction.

IX. HYPOTHETICALS (Trevor)

A. **Hypothetical 1** – client comes to you for purposes of drafting a motion to modify physical custody. Knowing that the court is almost certainly going to set the matter for an evidentiary hearing, you set the retainer at $10,000. After drafting and filing the Motion (which cost $2,000) and the client receives her first bill, you get absolutely no response from the client. You follow-up with the client two weeks after they receive their first bill to request replenishment and the client refuses. What do you do?

B. **Hypothetical 2** – After a long and ugly divorce that cost $50,000 to litigate and you

were only paid $15,000 by your client, and you file an attorney's lien with the Court. Shortly thereafter you filed and properly served your motion to adjudicate your attorney's lien and receive no response from your former client. The matter is currently set for hearing before a Judge you know will adjudicate an attorney's lien so long as the client executed a fee agreement that specifically obtains client consent for adjudication in the District Court. Unfortunately, because the divorce process was initiated in early 2009 and your fee agreement does not contain any such consenting provision – what can you do? Is your attorney's lien salvageable?

1. **Proposed Answer to What Can You Do?** – there is not much you can do outside of claiming that the former client's non-opposition should be deemed as consent to adjudicate the attorney's lien. *Argentena* is silent on that subject and does not state with any specificity whether or not the former client has to affirmatively object to the attorney's lien to remove jurisdiction from the respective court.

    a. **Has This Non-Opposition Argument Worked?** – yes, it has worked in every court we have tested it; however, one Court did require a former client's in-person consent when they arrived at the hearing (that was a strange proceeding).

2. **What You Can Do To Prevent This Problem** – we acknowledge that there are numerous fee agreements out there, pre-*Argentena* that could, if left unchecked, hinder your ability to practice. However, you, and the attorney listed in the hypothetical could presumably fix this problem before the conclusion of all current representation by having the client execute a ***new*** fee agreement with the appropriate lien/consent language.

X. QUESTIONS???

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MATERIALS

1. Sample *Retainer Agreement*.

2. Sample *Lien for Attorney Fees*, *Motion to Adjudicate*, *Order*, and *Notice of Entry of Order*.

3. Legal Note (Vol. 3): *Attorney Liens* (November 2009).

4. Legal Note (Vol. 13): *The State Bar Fee Dispute System* (July 2010).

5. Legal Note (Vol. 39): *Landreth, Argentena, and Other Updates* (May 2011).

6. Legal Note (Vol. 49): *Fee Disputes, Specialization, Militants, and Pro Bono* (February 2012).

7. Marshal S. Willick, Esq., *Getting Paid Through an Attorney's Lien After Argentena* (23 Nev. Fam. L. Rep., Winter, 2010).

8. Proposed modification to NRS 18.015 and copy of existing statute.

9. *By-Laws for the Fee Dispute Arbitration Committee State Bar of Nevada* (amended August 22, 2012).

10. *Reference List of Family Court Judges Who Will/Will Not Adjudicate and Attorney's Lien*.

11. Formal Opinion No. 37, State Bar of Nevada Standing Committee on Ethics and Professional Responsibility (February 1, 2007).

12. Copy of NRPC 1.8.

For additional information on this subject, please visit our website at www.willicklawgroup.com.