



Virginia Mechanic's Liens: Top Ten Considerations

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A memorandum of mechanic's lien appears so simple: a one-page form with requirements for basic information such as the names of the property owner and the lien claimant, a description of the property to be liened, and the amount claimed. Yet, as any attorney who regularly files or defends against mechanic's liens will tell you, there are numerous traps that must be avoided. Thus, we present 10 key points to consider in filing or challenging a lien.

1. **The "90-Day Rule."** A memorandum of lien must be recorded in the clerk's office of the circuit court where the property to be liened is located. A memorandum of lien may be filed at any time after work has begun or materials have been furnished to a construction project, but not later than 90 days from the last day of the month in which the claimant last performed labor or furnished materials for the project, and in no event later than 90 days from the date the project is completed or work on the project is terminated. If the lien claimant is working on or furnishing materials to the project when he files the lien, the 90-Day Rule will not be an issue. If the claimant has stopped or finished working or furnishing materials, however, he must first identify the last date on which he performed substantive work on or furnished materials to the project, then count forward 90 days (not three months). To be safe, the memorandum should be filed before the 90th day. If the project is not complete, and work thereon has not been terminated, the contractor can begin counting 90 days from the last day of the month in which he last performed work or furnished materials to determine the absolute deadline. Any lien filed outside of the 90-day window is invalid.
2. **The "150-Day Rule."** The 150-Day Rule dictates the amount that can be included in any memorandum of lien. Under this rule, no lien memorandum can include amounts for labor or materials furnished more than 150 days prior to the last day on which the claimant last performed work or provided materials. The claimant should again determine the last date on which he performed substantive work or furnished materials to the project. Beginning with the day preceding that date, the claimant must count back 150 days. The memorandum of lien can only include amounts due for labor or materials that actually were furnished to the project during this 150-day window. This rule requires the claimant to examine invoices, time cards, job cost reports, and other data to determine whether the

liened-for work was done or materials were furnished during the 150-day period. If a claimant includes any amount in his lien for work/materials furnished prior to the 150-day period, the entire lien is invalid. Note that retainage of up to 10 percent of the contract price is excluded from the 150-Day Rule.

3. **Notice.** Written notice is central to the mechanic's lien process. A lien claimant who is a general contractor (by definition, one who contracts directly with the owner of the project) must file with the clerk of the circuit court, along with a proper memorandum of lien, a certification that he has mailed a copy of the memorandum to the owner of the property at the owner's last known address. Failure to comply with this requirement renders the lien invalid.

A subcontractor (by definition, one who contracts with a contractor) must give written notice of the recording of the lien memorandum to the property owner. There is no time limitation for giving this notice, but, until the notice is given, the owner of the project may pay the general contractor for work performed or materials furnished without consequence. If the owner pays the general for the subcontractor's work or materials that are the subject of a lien before the owner has notice of the subcontractor's lien, the lien will be invalid to the extent of such payment. Therefore, the prudent subcontractor will send notice of his lien to the owner as soon as possible following the recording of the lien memorandum.

A sub-subcontractor (one who performs work or furnishes materials for a subcontractor) must give written notice of his lien to the owner and the general contractor. For the same reasons as the subcontractor's notice, the sub-subcontractor's notice should be sent promptly following the recording of the lien.

A lien claimant on a one- or two-family residential unit has an additional notice requirement. If the owner of that project has designated a mechanic's lien agent on the building permit, a potential lien claimant must give a specialized notice to that agent within the first 30 days of providing labor or materials or a lien filed later will be invalid.

4. **Property Identification.** The memorandum must reasonably identify the property to be liened. An inaccuracy in the property description will not invalidate the lien unless the wrong property is identified or the property description includes property not benefited by labor or materials that are the subject of the lien. The best practice is to research the title of the property and include its legal description in the memorandum. If the legal description includes multiple parcels, however, analysis must be performed to determine whether the liened-for work or materials were provided to all parcels on the deed or only some of the parcels. Including in the property description parcels on which work was not performed and materials were not furnished, liening for work performed or materials furnished outside of the boundary of the described property, or omitting parcels on which work was performed or materials were furnished, can render the entire lien invalid.
5. **Who Owns the Property?** The lien memorandum must name the legal owner(s) of the

property to be liened at the time the memorandum is recorded. Failure to name the correct owner or to include all owners of record is fatal. Again, the best practice in preparing the lien memorandum is to research the title to ascertain the owner of record. Once the memorandum is ready to be recorded, title should be checked again on the date of recording to make sure that the property has not changed hands since the initial title search was performed.

Ownership is also important in determining the status of the lien claimant. For instance, if the owner sets up a limited liability company to contract for the work, that company becomes the "general contractor" under the mechanic's lien statutes, and the contractors performing the work and furnishing materials assume subcontractor or sub-subcontractor status. As already noted, a claimant's status establishes the requirements it must satisfy to have and enforce lien rights.

6. **Amount of the Lien.** First and foremost, time and effort must be spent to comply with the 150-Day Rule. Beyond this analysis, however, a lien claimant can only lien for labor or materials furnished to the subject project. Amounts due on other projects should never be included and could jeopardize the entire lien. Similarly, attorney's fees or expenses incurred for reasons unrelated to adding value to the subject property should not be included. Interest on the liened amount is properly included in a lien and should be noted on the memorandum with reference to the date that interest begins to run and the rate of interest, if known.
7. **Enforcement of the Lien.** A lawsuit is required to enforce a mechanic's lien. A suit must be filed within six months from the date on which the memorandum is recorded or 60 days after completion or termination of the project, whichever is later. Failure to file the suit on time renders the lien invalid. It is vital to name as defendants all parties claiming an interest in the property. The courts refer to such parties as "necessary parties." Examples include the owner of the property, beneficiaries and trustees on any deed of trust, judgment lienholders, the party who contracted with the lien claimant, other mechanic's lienors who have filed lien memoranda and the holders of any tax liens. If a lien claimant fails to name all necessary parties in his suit, and the time for filing suit has expired, it may be too late to amend the suit to add the missing party or parties, and the suit will be dismissed. Again, it is critical to research the title just before filing suit to make sure that all necessary parties are named as defendants.
8. **Lien Waivers.** The right to file a lien can be waived by agreement even before work begins or materials are furnished. It is not unusual to find that a general contractor or subcontractor has signed a contract that includes a waiver of all lien rights. Typically, lien rights are also waived in return for progress payments. These "partial lien waivers" must also be reviewed carefully. Oftentimes a partial lien waiver will not only include a waiver of lien rights for all work performed or materials furnished up through the date of payment, but will also include a waiver of all claims to date. Thus, any unresolved change orders or other open issues existing prior to the date of the lien waiver can be waived unless careful

attention is paid to the wording of the waiver.

9. **Owner's Defenses.** If the owner is required to complete the project as a result of failure or refusal of the general contractor to finish the work, the amounts that the owner expends to complete have priority over all mechanic's liens against the project. That is, these amounts are set off against the amount attributable to the owner's property for payment against valid mechanic's liens.

The owner also has a defense to the mechanic's lien of a subcontractor or sub-subcontractor if he has paid the general contractor for the liened-for work or materials before receiving notice of the lien. This is commonly known as the owner's "payment defense" and is designed to protect the owner from having to pay twice - once when he pays the general contractor for the lower-tier contractors' work, and a second time for the lower-tier lien claimants. On the other hand, an owner loses his payment defense if he pays the general contractor for work or materials having previously received written notice of a lower-tier claimant's lien as to such work or materials.

10. **Lien Priority.** A mechanic's lien can be a powerful remedy for unpaid contractors. For new construction, a valid mechanic's lien has priority over previously filed deeds of trust against the improvements. For repair or improvement projects, a valid mechanic's lien does not have priority over an existing deed of trust on the improvements. A mechanic's lien will have priority over all judgment liens regardless of the time they are recorded. As for priority among lien claimants on the same project, sub-subcontractor liens have priority over subcontractor and general contractor liens; next in line are subcontractor liens; and last are the liens of general contractors. The timing of the lien has no bearing on priority.

Mechanic's liens are a tricky business, and this article addresses only the larger issues in Virginia mechanic's lien law. Numerous fine points underlie all of these basics.

For more information about this topic, please contact the author or any member of the [Williams Mullen Construction Team](#).

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