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Ethical Enforcement of Attorney's Liens – Avoiding Traps for the Unwary

By SUZANNE BURKE SPENCER



Spencer

Noting the mischief and leverage over a client's funds that even a false notice of attorney's lien gives an attorney, the Court of Appeal in *Carroll v. Interstate Brands Corp.*, 99 Cal. App. 4th 1168, 1178 (2002) called on the legislature to adopt statutory procedures for the expeditious resolution of attorney's liens. Ten years later, no such statutory procedures have been provided. Much of the "mischief" feared by the *Carroll* court, however, can be avoided if an attorney abides by the ethical rules and duties already in place. Those rules and duties are the subject of this article.

An attorney's lien is contractual in nature

An attorney's lien (also known as a "charging" lien) is a lien that secures an attorney's compensation against the funds or judgment recovered by the attorney for the client. *Fletcher v. Davis*, 33 Cal. 4th 61, 66 (2004).

An attorney's lien is not automatically created upon the lawyer's provision of legal services to a client, but requires a contract for its creation. *Carroll*, 99 Cal. App. 4th at 1172. Once created, an attorney's lien grants the attorney a security interest in the proceeds of the litigation in which he represented the client. *Fletcher*, 33 Cal. 4th at 67.

With hourly fee agreements, a valid attorney's lien is created only if the attorney complies with California Rules of Professional Conduct, Rule 3-300. *Id.* at 69. Rule 3-300 requires the attorney to "explain the transaction fully, to offer fair and reasonable terms, to provide a copy of the agreement, to give the client an opportunity to seek independent legal advice [and to advise the client in writing that he may do so], and to secure the client's written consent. *Id.* at 71; Rule 3-300.

Compliance with Rule 3-300, however, is not required in a contingent fee arrangement, because the lien "is an equitable corollary to, and thus inherent in, a *contingency* fee contract." Cal. Form. Opn. 2006-170 (emphasis in original). In a contingent fee arrangement, a written contingent fee agreement in compliance with Business and Professions Code § 6147 and which expressly provides for a lien against the client's recovery is generally sufficient to create a valid attorney's lien. A lien may also be implied where the retainer agreement requires the attorney to look to the proceeds of the litigation for payment. *See Cetenko v. United California Bank*, 30 Cal. 3d 528, 531 (1982). Though not required to perfect the lien, an attorney may also file a notice of lien in the case against which he asserts the lien. *Carroll*, 99 Cal. App. 4th at 1172.

The right to enforce does not exist until the contingency occurs

An attorney's lien is created and takes effect when the fee agreement giving rise to the lien is executed. *Cetenko*, 30 Cal. 3d at 534. Such a lien has priority over other liens created after the attorney-client fee agreement was entered into. *Carroll*, 99 Cal. App. 4th at 1175. An attorney's lien, however, must generally be enforced in a separate legal proceeding. The court in which the case is pending and in which a notice of lien may be filed lacks jurisdiction to determine the validity or amount of any attorney's lien. *Carroll*, 99 Cal. App. 4th at 1176-77.

There is a difference between the right to claim an attorney's lien and the right to payment of a fee. The right to claim an attorney's lien depends only upon whether the lien was validly created in the contract between the attorney and client. By contrast, the right to be paid a fee depends on the occurrence of the contingency defined in the agreement giving rise to the right to be paid a fee (e.g., judgment or settlement of the case). Thus, the creation of a lien does not itself give the attorney the right to claim payment, but rather gives the attorney only the right to be paid from a specific source of funds should a fee otherwise be earned. Until a fee is earned, no right to enforce the claim of lien exists. *Fracasse v. Brent*, 6 Cal. 3d 784, 792 (1972). If the contingency never occurs, no fee is earned, and the lien is of no value. *Id.*

Non-contracting attorneys may not enforce

MCLE SELF-ASSESSMENT TEST

July 2013

SAMPLE TEST QUESTIONS

BELOW ARE SAMPLE QUESTIONS FROM THIS MONTH'S MCLE SELF-ASSESSMENT TEST.

1. An attorney's lien may be validly created in an hourly fee agreement without complying with Rule 3-300 of the California Rules of Professional Conduct.

True False

2. An attorney's lien is created automatically when an attorney provides legal services to a client.

True False

3. An attorney's lien is created and effective as of the date of the attorney-client fee agreement containing lien language.

True False

To complete the test, you must pay a \$25 fee online. Click the button below and follow the onscreen instructions.

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As a creature of contract, to enforce a lien "a direct contractual relationship between the attorney and the client is essential. When the client enters into a retainer agreement with one particular attorney, a lien in favor of another attorney, albeit associated, is neither express nor implied and does not exist." *Carroll*, 99 Cal. App. 4th at 1172. Attempts by discharged employees, associates, contract attorneys or co-counsel to enforce a lien against a firm client have repeatedly been rejected by the courts. See *Trimble v. Steinfeldt*, 178 Cal. App. 3d 646, 651-52 (1986) (former employee); *Kenneally v. Bosa Cal. LLC*, No. 09-CV-2039, 2011 WL 2118255 (S.D. Cal. May 26, 2011) (co-counsel); *Huskinson & Brown v. Wolf*, 32 Cal. 4th 453, 465 (2004) (referring attorney with invalid fee splitting agreement). In such situations, the attorney must look to the contracting attorney or firm, not the client, for payment. See *Beydoun v. Strong*, 166 Cal. App. 4th 1398 (2008).

Similarly, a former partner who leaves a firm and brings a client with her may not directly assert a lien for services performed while the client was represented by the former firm. Rather, only the former firm can enforce that lien. The departing partner's right to compensation is governed by the partnership or other compensation agreements between the departing partner and the former firm. See *City of Morgan Hill v. Brown*, 71 Cal. App. 4th 1114 (1999).

Duties to clients regarding enforcement

Even after an attorney is discharged by a client, with or without cause, the discharged attorney "continue[s] to owe [the client] a fiduciary duty of utmost good faith and fair dealing with respect to, at least, the subject matter of [the attorney's] prior representation of [the client], including [the attorney's] express lien for his attorney's fees." *In re Feldsoff*, 3 Cal. State Bar Ct. Rptr. 754, 757 (Rev. Dep't 1997). If an attorney attempts to enforce a lien for his attorney's fees in violation of the legal or ethical principles governing attorney's liens, the lawyer is in breach of his fiduciary duties to his former client.

Rule 4-100(B)(4) requires an attorney to promptly pay, at the client's request, any funds in the attorney's possession which the client is entitled to receive. An attorney's duties under that rule are not extinguished by termination of the attorney-client relationship. Cal. Form. Opn. 2009-177.

Thus, where an attorney is asserting lien rights against less than all of the funds recovered, the attorney "has a duty to promptly take reasonable steps to pay or deliver to the client the portion of the proceeds that are not in dispute," promptly make a "reasonable determination" of the amount of fees claimed under the lien, and "promptly offer reasonable suggestions" for disbursement of any remaining funds belonging to the client. Cal. Form. Opn. 2009-177; *In re Feldsoff*, 3 Cal. State Bar Ct. Rptr. 754 (Rev. Dept. 1997); *Fletcher v. Davis*, 33 Cal. 4th 61, 69 (2004); *Friedman v. State Bar*, 50 Cal. 3d 235, 240-41 (1990).

Such duty does not require the attorney to abandon valid lien rights in order to ensure disbursement, provided the attorney acts reasonably to assert those rights while offering reasonable alternatives for disbursement of the undisputed amount. *In re Feldsoff*, 3 Cal. State Bar Ct. Rptr. 754 (Rev. Dept. 1997).

In the context of hourly fees secured by an attorney's lien, the amount of the attorney's lien would generally be the balance due on the client's account. Provided the lien amount is not asserted in excess of that amount, the attorney has complied with his ethical obligations. *Cf. Grossman v. State Bar*, 34 Cal. 3d 73, 79-80 (1983) (attorney properly disciplined where he retained client funds in excess of the fixed fee provided in the contract).

In the context of contingent fee representation, however, calculation of the lien amount is somewhat more complicated. A contingent fee attorney discharged (with or without cause) before the representation is concluded is entitled to receive no more than the reasonable value of the attorney's services, "quantum meruit," up to the time of discharge. *Fracasse*, 6 Cal. 3d at 792; *Weiss v. Marcus*, 51 Cal. App. 3d 590, 598 (1975). Determination of the quantum meruit value of an attorney's services depends upon many factors, including the results achieved, time spent on the matter, the risk taken, and reasons for discharge. Where an attorney is discharged before the matter is complete, the attorney is generally not entitled to the full amount of compensation called for in the contract "since that amount may reflect neither value received nor services performed and could result in double payment of fees first to the discharged and then to a new attorney." *Spires v. American Bus Lines*, 158 Cal. App. 3d 211, 216 (1984). Asserting a lien in the full contract amount would generally violate the attorney's ethical and fiduciary duties to her client. Instead, the attorney is entitled to receive no more than the reasonable value of his services, with an upper limit of the contract contingent fee pro rated to reflect the partial performance of the contract. *Cazares v. Saenz*, 208 Cal. App. 3d 279, 289 (1989). For example, if the discharged attorney performed half of the contract before being discharged, the upper limit of the attorney's compensation would be one half of the full contract price.

The discharged contingent fee attorney also shares the total contingent fee earned with successor counsel, as there may only be a single contingent fee paid by the client. If that contingent fee is insufficient to cover the full quantum meruit claims of discharged and existing counsel, the attorneys must allocate the fee between themselves based on a formula which pro rates the contingent fee among all discharged and existing attorneys "in proportion." *Spires*, 158 Cal. App. 3d at 216; see also *In re Van Sickle*, No. 99-O-12923, 2006 WL 2465633 (Rev. Dep't 2006).

Where the attorney and client cannot agree as to the fees owed, and the client requests release of funds in which the attorney claims an interest, "the attorney violates rule 4-100(B)(4) if he or she does not promptly take appropriate, substantive steps to resolve the dispute in order to disburse the funds." *In re Kroff*, 3 Cal. State Bar Ct. Rptr. 838, 853-54 (Rev. Dep't 1998). The attorney has an affirmative obligation to seek reasonable methods for delivering to the client the undisputed portion. This may include offering to place the disputed funds into a blocked account requiring signatures from the attorney and client, authorizing the disputed funds to be placed in successor counsel's trust account, or promptly commencing legal action or arbitration to resolve the dispute. *In re Feldsoff*, 3 Cal. State Bar Ct. Rptr. 754, 757 (Rev. Dep't 1997); *In re Kroff*, 3 Cal. State Bar Ct. Rptr. at 853-54; Cal. Form. Opn. 2009-177; see also Los Angeles Bar Ass'n Form. Opn. No. 438 (1985).

Where a fee dispute arises between lawyer and client, the attorney-client privilege is waived, but only to the extent necessary for the attorney to defend or prosecute his claims. Evid. Code § 958; *McDermott, Will & Emery v. Superior Court*, 83 Cal. App. 4th 378, 383-84 (2000).

Duties between counsel regarding enforcement

Successor counsel in the possession of settlement or other proceeds against which a predecessor attorney has asserted a lien has a fiduciary obligation to the attorney lienholder with respect to the funds. See *Johnstone v. State Bar*, 64 Cal. 2d 153, 155-56 (1966); *In re Respondent P*, 2 Cal. State Bar Ct. Rptr. 622, 632 (Rev. Dep't 1993); Cal. Form. Opn. 2008-175. That duty includes the duty to inform predecessor counsel of the fact and amount of settlement. *In re Riley*, 3 Cal. State Bar Ct. Rptr. 91, 111-15 (Rev. Dep't 1994); Cal. Form. Opn. 2008-175. Moreover, a third party (e.g., the defendant or the defendant's insurer) with notice of the plaintiff's former counsel's attorney's lien, may be civilly liable to the lienholder for paying out the funds directly to successor counsel and the plaintiff.

See *Levin v. Gulf Ins. Group*, 69 Cal. App. 4th 1282, 1287-88 (1999).

Where a dispute arises only between successor and predecessor counsel as to the pro-rata allocation of the fee earned, where the

client has not disputed the fee earned, the attorney may reveal to prior counsel the fact and amount of settlement, but that attorney must continue to otherwise maintain her duty of confidentiality to her client when attempting to reach an accord with prior counsel. Cal. Form. Opn. 2008-175. In litigation between counsel, "the presiding officer will be in a position to limit disclosure of confidential information to the greatest extent possible" *Id.* at 6.

Conclusion

In asserting an attorney's lien, following well-established ethical and fiduciary duties should eliminate or at least reduce any harm to the client. By reasonably and promptly quantifying liens, consenting to disbursement of undisputed funds and reasonably negotiating with successor counsel the allocation between attorneys of any contingent fee earned, attorneys should be able to resolve most lien disputes without court involvement. Such a result should be compelled not only by ethical considerations, but by practical considerations as well. Drawn out and costly legal battles over entitlement to fees and validity of liens tax not only the lawyers and clients involved, but the judicial system as a whole.

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