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Lien guide for the trial attorney

A COMPENDIUM ON ATTORNEY LIENS FOR CONTINGENT FEES – INCLUDES APPLICATION OF NEW ETHICS RULES EFFECTIVE NOVEMBER 1

[*Editor's note: This compendium primarily concerns lien claims for attorney contingent fees. Lien claims for advanced costs are discussed in the last section.*]

New ethics rules applicable to attorney liens for fees and costs

Attorney ethics rules are officially entitled "California Rules of Professional Conduct" (CRPC). On May 10, 2018, the California Supreme Court officially approved 69 new and revised CRPC rules. The 112 pages of CRPC rules utilize a new numbering system. The rules go into effect on November 1, 2018.

Many of the new CRPC rules significantly impact attorney lien claims for fees and costs. The application of the new CRPC rules to attorney lien claims is explained throughout this compendium, and, where necessary, the new rules are compared to the old CRPC rules. For an understanding of disputed attorney lien rights, this writer suggests reading *Carroll v. Interstate Brands Corporation* (2002) 99 Cal.App.4th 1168.

Statutory lien definitions

Civil Code section 2872: "A lien is a charge imposed in some mode other than by a transfer in trust upon specific property by which it is made security or the performance of an act."

Civil Code section 2881 states a lien is created by contract of the parties or by operation of law.

Civil Code section 2883, subdivision (a), states: "An agreement may be made to create a lien upon property not yet acquired by the party agreeing to give the lien, or not yet in existence. In that case the lien agreed for attaches from the time when the party agreeing to give it acquires an interest in the thing, to the extent of such interest."

Attorney fee sharing agreements – referring attorney's lien claim

***Pure referral fee*:** California is one of a few states that permit attorneys to be compensated for referring a case to another attorney, *without* requiring the referring attorney's participation in case preparation or presentation. The referring attorney is not a lien claimant against the client's recovery. Rather, a pure referral fee is a contractual right created against the second attorney and perhaps a lien claim against that recovery.

No work on the case need be done by the referring attorney to obtain a pure referral fee. The objective is to encourage referrals to more competent attorneys for a particular matter. (See *Moran v. Harris* (1982) 131 Cal.App.3d 913, 921-922, cited by our highest court in *Chambers v. Kay* (2002) 29 Cal.4th 142, 149, 156-157.)

***California bar ethics rules allow pure referral fees*:** Pure referral fee sharing is controlled by bar ethics rules. Former CRPC rule 2-200(A), is entitled "Financial Arrangements Among Lawyers." Subdivision (A) provided:

> A member shall not divide a fee for legal services with a lawyer who is not a partner of, associate of, or shareholder with the member unless:
>
> (1) The client has consented in writing thereto after a full disclosure has been made in writing that a division of fees will be made and the terms of such division; and
>
> (2) The total fee charged by all lawyers is not increased solely by reason of the provision for division of fees and is not unconscionable as that term is defined in rule 4-200.

The requirement that the client consent in writing to the division of fees allows for the client to be assured the fee percentage charged is reasonable and the attorney representing the client's case will be adequately compensated for competent representation. (*Chambers, supra.*)

In *Mink v. Maccabee* (2004) 121 Cal.App.4th 835, a referring attorney claiming breach of a pure referral fee agreement was allowed to bring a breach of contract action against the second attorney who performed the work. The court cited compliance with former CRPC rule 2-200(A), even though the two attorneys did not enter into a written contract and the client's written informed consent was not obtained until conclusion of the client's case. Former CRPC rule 2-200(A) did not require a written agreement between the attorneys, nor did it require a time limit to obtain the client's written approval of the fee split.

***New bar ethics rule affecting pure referral fees*:** New CRPC rule 1.5.1, is entitled "Fee Divisions Among Lawyers." It has strict compliance requirements, but the new rule continues to allow pure referral fees. It, however, severely modifies former CRPC rule 2-200(A).

New CRPC rule 1.5.1 states:

> (a) Lawyers who are not in the same law firm shall not divide a fee for legal services unless:
>
> (1) the lawyers enter into a written agreement to divide the fee;
>
> (2) the client has consented in writing, either at the time the lawyers enter into the agreement to divide the fee or as soon thereafter as reasonably practicable, after a full written disclosure to the client of:
>
> (i) the fact that a division of fees will be made;
>
> (ii) the identity of the lawyers or law firms that are parties to the division; and

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(iii) the terms of the division; and

(3) the total fee charged by all lawyers is not increased solely by reason of the agreement to divide fees.

(b) This rule does not apply to a division of fees pursuant to court order.

The comment to new rule 1.5.1 states: "The writing requirements of paragraphs (a)(1) and (a)(2) may be satisfied by one or more writings."

***Violation of rule 1.5.1 may bring disciplinary action by State Bar*:** The "Executive Summary" that accompanied new rule 1.5.1, when it was a "proposed" rule, states that rule 1.5.1 would establish a *disciplinary standard*. That disciplinary standard is set forth in new CRPC Rule 8.4, entitled "Misconduct." New rule 8.4 states in part: "It is professional misconduct for a lawyer to: (a) violate these rules or the State Bar Act . . .."

In *Mark v. Spencer* (2008) 166 Cal.App.4th 219, 226, fn. 4, the court acknowledged that former CRPC rule 2-200 does not specify any penalty for its violation, but under the California Rules of Professional Conduct, violation of the rule can subject an attorney to State Bar disciplinary action (presumably for failing to obtain client consent before fee-splitting.)

***Referring attorney can receive a monetary gift for a case referral without complying with rule 1.5.1*:** Prior CRPC rule 2-200(B) allowed a referring lawyer to receive a "gift or gratuity" for making a recommendation to another lawyer "provided the gift or gratuity was not offered in consideration of any promise, agreement, or understanding that such a gift or gratuity would be forthcoming or that referral would be made or encouraged in the future.

New CRPC rule 7.2(b)(5) has a similar provision. It states:

[A] lawyer may . . . offer or give a gift or gratuity to a person or entity having made a recommendation resulting in the employment of the lawyer or the lawyer's law firm, provided that the gift or gratuity was not offered or given in consideration of any promise, agreement, or understanding that such a gift or gratuity would be forthcoming or that referrals would be made or encouraged in the future.

Note that a "gift or gratuity" is not a fee split that would fall under CRPC rule 1.5.1. Thus, most likely, there is no contractual recovery or lien claim by the referring attorney.

New CRPC rule 7.2(b)(4) allows for reciprocal referral arrangements that are not exclusive, so long as the client is informed of the existence and nature of the arrangement. Such a reciprocal referral arrangement does not comport with the fee split requirements of new CRPC rule 1.5.1. Most likely, therefore, such arrangement does not have a contractual component or lien right without the performance of work on the referred case by the referring attorney.

***Complying with new CRPC rule 1.5.1 most likely allows the referring attorney to enforce breach-of-contract and lien rights claims for a pure referral fee*:** Under prior CRPC rule 2-200(A), courts recognized that compliance with that rule created a contractual right between the referring attorney and the client's retained attorney.

Compliance with former CRPC rule 2-200(A) did not require the fee-split agreement between attorneys to be in writing. The only writing required was a knowing consent by the client to the identifiable attorney's fee split. That consent could be obtained at any time, even after representation of the client. Thus, under former CRPC rule 2-200 an oral agreement between attorneys to share fees was ethical, contractual and enforceable if the client properly consented in writing. (*Mink*, 121 Cal.App.4th 835.)

Margolin v. Shemaria (2000) 85 Cal.App.4th 891, 903, involves a pure referral fee. The client *orally* agreed to the fee split. An oral consent was held not in compliance with the *written* consent requirement of former CRPC rule 2-200 (A), and such noncompliance "rendered the fee sharing agreement [contractually] unenforceable." The court upheld the trial court finding that ". . . plaintiffs do not have a *viable* contract [with defendant] for fee sharing because the contract does not comply with rule 2-200 . . ., which prohibits such sharing of fees unless certain specified conditions are met." [Italics in original.] (*Id.* at p. 894.)

Under new CRPC rule 1.5.1., a pure referral fee agreement is most likely contractually enforceable if the six basic requirements of new rule 1.5.1 are met:

(i) the fee split agreement between the lawyers is in writing;

(ii) identity of the lawyers is set out in the written agreement;

(iii) terms of the fee split division are set out in the written agreement;

(iv) the client consents in writing to the prospective fee split either on the written agreement executed by the lawyers or on a separate writing with the terms of the fee split and identification of the lawyers set out;

(v) all of the requirements must be met *early-on* in the referral process; and

(vi) the gross fee charged by all lawyers is not increased solely by reason of the fee split agreement.

For attorney lien rights, see *Carroll v. Interstate Brands Corporation* (2002) 99 Cal.App.4th 1168. *Carroll* is a commonly cited case requiring privity of contract between the claiming lawyer and the client. *Carroll* further holds a pure referral fee contract should be found to exist if the lawyers follow the requirements of new CRPC rule 1.5.1.

It seems unlikely that a referring lawyer seeking enforcement of a pure referral fee needs to file a declaratory relief action against the client to establish the referring lawyer's lien claim amount, as required in *Mojtahedi v. Vargas* (2014) 228 Cal.App.4th 974. *Mojtahedi*, concerns a *non*-pure referral fee case. A declaratory relieve action was required in *Mojtahedi* to establish the validity and value of complaining attorney's lien claim. In a pure fee referral matter that fully comports with new CRPC rule 1.5.1, the amount of the referring lawyer's

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lien claim is predetermined by written agreement.

Client's consent in writing to a pure fee split is mandatory

Failing to obtain a written consent by the client to a fee split has been the subject of great consternation and litigation by attorneys who are not paid in accordance with the fee split agreement. To that end, the California Supreme Court has ruled on this issue three times, as follows:

a. *Chambers v. Kay* (2002) 29 Cal.4th 142, 150, holds a non-retained attorney (Chambers), assisting a retained attorney (Kay), may not recover a contracted percentage fee split *or* a quantum meruit fee against case recovery. Neither attorney obtained the client's informed written consent to the pure referral fee split, as required by former CRPC rule 2-200(A)

Chambers applies former CRPC rule 2-200(A) beyond a pure referral fee dispute. It holds the rule also requires a client's informed written consent to a fee split, where *work* for the client is divided between attorneys. The Court, however, allowed a quantum meruit claim by Chambers against the first attorney, Kay.

b. *Huskinson & Brown v. Wolf* (2004) 32 Cal.4th 453, 456, allowed the first attorney to recover *quantum meruit* fees for work performed, but not the contracted percentage agreed to between the attorneys. Percentage fee recovery can only be obtained if the attorneys comply with former CRPC rule 2-200(A) and obtain the client's informed written consent to the percentage fee split. "[R]ule 2-200 does not preclude quantum meruit recovery when its client disclosure and consent requirements are not met . . ."

Huskinson further states: "Notably . . . rule 2-200 does not purport to restrict attorney compensation on any basis other than a division of fees. Nor does it suggest that attorneys or law firms are categorically barred from making or accepting client referrals, from agreeing to a division of labor on a client's case, or from actually working on a case where labor is divided." (*Id.* at p. 458.)

c. *Fletcher v. Davis* (2004) 33 Cal.4th 61, 64, holds that an oral contingent *hourly* fee agreement is a charging lien that creates an adverse interest on the client's property rights and thereby violates former CRPC rule 3-300 [now rule 1.8.1]. Such a lien, to be enforceable, requires a client's informed written consent. This rule, however, has no application to a charging lien that secures payment of a contingent fee. (See *Plummer v. Day/Eisenberg* (2010) 184 Cal.App.4th 38.)

In both *Chambers* and *Huskinson*, the client did not consent to the attorneys' contractual fee split, and the court found an attorney seeking quantum meruit fees can only recover such fee calculation from the retained attorney.

Equitable estoppel may prevent retained attorney from denying pure referral split

In a pure referral fee case involving a class action, the retained attorney was equitably estopped from denying a fee split agreement with referring attorney. After new class representatives were brought into class, retained class-action attorney failed to obtain new class member consents to fee-split, as then required under former CRPC rule 2-200, refused to allow referring attorney to obtain class clients consent to referral fee split, and failed to disclose to court fee-splitting agreement with referring attorney, as then required under former CRPC 3.769.

In *Barnes, Crosby, Fitzgerald & Zeman, LLP v. Ringler et al* (2012) 212 Cal.App.4th 172, the court held that under the former rule,

> [A]n attorney may be equitably estopped from claiming a fee-sharing contract is unenforceable due to noncompliance with [former] rule 2-200 or [former] rule 3.769, where attorney is responsible for such noncompliance and has unfairly prevented another lawyer from complying with the rules' mandates. [Brackets added.]

Client must be in privity of contract to be liable to non-retained attorney

A client is not liable for fees to any attorney with whom the client is not in privity of contract. In *Strong v. Beydoun* (2008) 166 Cal.App.4th 1398, the first attorney retained attorney Strong to assist with the case. The first attorney and Strong had a fee sharing agreement that was not signed by the client, nor did the client in any way agree to a contract with Strong. Strong sued client and first attorney for quantum meruit. Court held no contractual agreement with client; client is not obligated to Strong on any of the stated counts; and Strong's only claim was against the first attorney for provable quantum merit fees.

Retained attorney's contingent fee lien claim against case proceeds

***Charging lien*:** A retained attorney's lien for fees and costs against a client's interest is a "charging lien." In California, a charging lien can only be imposed if the client has executed an informed written retainer consent to fee division, after written disclosure of its terms; i.e., the creation of a written contract. A charging lien is typically found to be created in contingent fee retainer contracts for personal injury matters. A charging lien can be claimed in certain probate matters involving contingency recoveries for the estate. In such matters, the probate court is required to order payment of the contingency directly to the successful attorney, and the attorney is not required to file a creditor's claim. (See *Novak v. Fay* (2015) 236 Cal.App.4th 329.)

Statutory contractual retainer fee requirements can be found in Business and Professions Code sections 6146 (med-mal fee), 6147 (tort contingent fee) and 6148 (hourly fee). State Bar ethic rules also have requirements for contingent and hourly fee contract terms. (See new CRPC rule 1.5 and former CRPC rule 4-200(A).)

Hourly fee retainer contracts require adherence to new CRPC rules 1.5 and 1.8.1 [former CRPC rules 4-200 and 3-300]. New rule 1.8.1 has restrictions for

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lawyers who have business dealings with clients. (See *Fletcher v. Davis* (2004) 33 Cal.4th 61, 71 for application of former CRPC rule 3-300.) "A charging lien is . . . an adverse interest within the meaning of CRPC rule 3-300 and thus requires the client's informed written consent." *Fletcher* refused to enforce an *oral* contingent *hourly* fee agreement. (*Id.* at p. 64.)

The *Fletcher* court held that *without* a client's written informed consent to an *hourly* contingent fee agreement, an adverse interest in the client's property is created and former CRPC rule 3-300 is violated. A *percentage* contingent fee contractual retainer, however, is not held to fall under the requirements of former CRPC rule 3-300. (*Plummer v. Day/Eisenberg* (2010) 184 Cal.App.4th 38, 49.)

A charging lien is typically a "secret lien," in that it is contractual and typically not publicized. A non-secret lien is typically one that is filed with some government body, such as a real estate lien filed with a county recorder.

***Written contract required*:** Unlike other states, where an attorney's lien for fees and costs can be created by operation of law, California requires a written contract between the attorney and client. California does recognize certain liens, such as mechanics liens and service liens, are created by operation of law. (*Fletcher, supra,* at p. 61-62.) An attorney lien on a judgment is not automatic, but it may be created by contract. (*Del Conte Masonry Co. v. Lewis* (1971) 16 Cal.App.3d 678, 680.)

Centenko v. United California Bank (1982) 30 Cal.3d 528, 531, holds an attorney fee contract is *usually* an express provision in a retainer contract, but "it may be implied if the retainer agreement between the lawyer and client indicates that the former is to look to the judgment for payment of his fee." *Centenko* notes that a charging lien can secure either an hourly or contingent fee. (*Id.* at pp. 531-532.)

Attorney lien claimant must be privity of contract with client: Associate attorney employed by law firm that contracts with a client has no lien claim on the recovery, even though the employing attorney and the associate attorney have a mutual contract granting the associate a percentage of the recovery. (*Trimble v. Steinfeldt* (1986) 178 Cal.App.3d 646; see also *Carroll,* 99 Cal.App.4th 1168, which is a commonly cited case requiring privity of contract between the claiming attorney and client.)

In *Carroll,* a lawyer in the plaintiff attorney's office sought a lien for fees owed by his attorney employer for work on the underlying plaintiff's case. The claiming lawyer was not in contract with the client and had no enforceable lien rights. The *Carroll* case provides an explanation of attorney lien claims and is a good source of information on the issue.

Where an associate attorney was *named* in the retention contract executed by the client and contracting attorney, the associate attorney was held to be in contract privity with the client. The contract also supported a conversion cause of action against a subsequently retained attorney. (See *Plummer,* 184 Cal.App.4th 38, 48.) In *Plummer,* attorney Plummer was a named payee on the settlement check, yet the subsequent attorney deposited the check in its client trust account without Plummer's endorsement and failed to distribute any portion of the attorney fee to Plummer.

Attorney lien claimant is an equitable assignee

"While a contingent fee contract with creation of a lien in favor of counsel does not operate to transfer to counsel any part of the client's cause of action, it does give him a lien upon the recovery, and the attorney is regarded as an equitable assignee of the judgment or settlement to the extent of fees and costs which are due him for services." [Citations omitted.]. (*Siciliano v. Fireman's Fund Ins. Co.* (1976) 62 Cal.App.3d 745, 752.) This old rule most probably assures that an attorney representing a plaintiff will have the attorney's name placed on a settlement check issued by the tortfeasor's insurance carrier. The attorney's lien rights are protected, however, even if a lien notice is not served on the opposing party or insurance company.

Lien right is best to be specified in retainer contract

Although some cases hold an attorney's lien for fees and costs may be *implied* by the general language of a retainer contract (*Gelfand, Greer, Popko & Miller v. Shivener* (1993) 30 Cal.App.3d 364, 371), it is best to explicitly specify an attorney's lien rights within the retainer contract.

Former attorney's quantum meruit lien claim

Where an attorney is discharged, justifiably withdraws from representing a client or where the contingency contract is voidable due to the failure of including all the provisions listed under Business and Professions Code section 6147(a), the discharged attorney is entitled to a quantum meruit recovery. Many times in such matters disputes arise between a first and second attorney as to the amount each is legally entitled to receive from a client's recovery. (See *Weiss v. Marcus* (1975) 51 Cal.App.3d 590, 598.)

Quantum meruit defined

Quantum meruit is a legal principle that implies a promise to pay for services that were not gratuitously put forth. The burden is on the party seeking compensation to prove value of services rendered and that the services were provided at the request of the party to be charged. "To recover in quantum meurit, a party need not prove the existence of a contract [citations], but it must show the circumstances were such that 'the services were rendered under some understanding or expectation of both parties that compensation therefore was to be made.'" (*Strong,* 166 Cal.App.4th 1398, 1404.)

Establishing quantum meruit rights of competing attorneys

A lien for fees is to be established on a quantum meruit reasonable value

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basis. *Fracasse v. Brent* (1972) 6 Cal.3d 784, is the seminal case recognizing that a contingent fee attorney discharged prior to recovery of an award or settlement may recover the reasonable value of services rendered up to the time of discharge.

"An attorney's contingent fee contract does not operate to transfer part of the cause of action to the attorney but only gives him a lien on his client's recovery. . . . Compensation must be sought in an independent action by the attorney against the client, and not by application to the court in which litigation is pending." [Citations omitted.] This holding is the basic rule requiring a dismissed attorney to file a separate action for quantum meruit fees against his/her former client, and it does not permit the attorney to intervene in the underlying case for a fee claim. (*Hendricks v. Superior Court* (*Sefton*) (1961) 197 Cal.App.2d 586, 589.)

But, see *Law Offices of Stanley J. Bell v. Shine, et al.*, (1995) 36 Cal.App.4th 1011, where attorney allowed trial judge in underlying case to rule on an attorney lien claim. In a separate action to collect on the lien claim, the court estopped collection as being barred by res judicata due to the underlying case judgement.

Second attorney liability

In *Olsen v. Harbison* (2010) 191 Cal.App.4th 325, the court found no viable right by the first attorney against the second attorney for quantum meruit, fraud and deceit, interference with contractual relations, breach of contract, unjust enrichment or constructive trust – the entire burden for the first attorney's fee is upon the client who agreed to the fee split and then fired the first attorney.

A contrary holding can be found in *Plummer,* 184 Cal.App.4th 38, where the court allowed causes of action for conversion and intentional interference with prospective economic damages against the second attorney. The second attorney deposited the settlement check with Plummer's name as payee, not obtaining Plummer's signature on the check and not paying Plummer any portion of the fee.

Separate action against client required before second attorney can be sued

The cases are clear that a court in an *underlying* case, where a first lawyer seeks to assert a lien claim for fees, has no power to determine the amount of the lien nor to order payment of the lien to the complaining attorney. That determination is a separate action by the first lawyer against the former client, and the former client can assert defenses to the dismissed attorney's lien claim. (*Bandy v. Mt. Diablo Unified School District* (1976) 56 Cal.App.3d 230 and *Valenta v. Regents of University of California* (1991) 231 Cal.App.3d 1465.)

Unless there is privity of contract with a second attorney regarding attorney-fee sharing, an action to recover attorney fees in a separate action for breach of contract (and probably any action) by a dismissed attorney must be brought only against the client with whom the complaining attorney had a contract for attorney services. (See *Brown v. Superior Court* (*Cyclone*) (2004) 116 Cal.App.4th 320, 328-330, where the attorney sought lien priority over a judgement creditor's lien.) *Brown* is widely cited as authority in contingent fee lien claim cases. (But see *Weiss,* 51 Cal.App.3d 590, 598, where the court recognized a direct lawsuit by the discharged attorney against the client's newly retained attorney.)

Declaratory relief action against client is first step

". . . Compensation must be sought in an independent action by a complaining attorney against the client, and not by application to the court in which the underlying litigation is pending." (*Hendricks v. Superior Court* (*Sefton*) (1961) 197 Cal.App.2d 586, 589, which is widely cited as the basic rule requiring a dismissed attorney to file a separate action against the client to establish quantum meruit fees. It does not permit the dismissed attorney to intervene in the underlying case for his or her fee claim. [Citations omitted.])

A significant ruling holds that before a first attorney can claim a lien and sue a second attorney for a portion of fees obtained on a contingency recovery, an action for declaratory relief must be brought against the client to determine the lien's validity, value and enforceability. (See, *Mojtahedi,* 228 Cal.App.4th 974, where the dismissed attorney wrongly brought an action against the second attorney to recover quantum meruit fees instead of against the former client; But see *Southern California Gas Co. v. Flannery* (2016) 5 Cal.App.5th 476, 496, where tortfeasor interplead settlement funds and both client and former attorney were named parties; held former attorney's response to interpleader action with motion for attorney fees was adequate for court to determine validity and value of former attorney's lien claim.)

Declaratory relief actions are allowed under Code of Civil Procedure section 1060 et seq. for "an actual controversy" to seek a judicial declaration of rights and duties before there is any breach of an obligation regarding the declaration sought. The declaratory relief can operate prospectively in the interests of prospective justice and to establish rights. (See *Parsons v. Tickner* (1995) 31 Cal.App.4th 1531, 1533, holding that a declaratory relief action can depend on the outcome of a pending action.) Note that a declaratory relief action is entitled to trial setting priority, but a declaratory relief action combined breach of contract action is not granted the priority. The breach action is to be conducted at a later time. (Code Civ. Proc., § 1062.3)

Discharged attorney's rights after declaratory relief action is second step

Mojtahedi, supra, states: "[T]he [discharged] attorney's lien is only enforceable after the attorney adjudicates the value and validity of the lien in a separate action against his client" * * * "Plaintiff provided the services to the clients, not to Defendant [second attorney] . . . Plaintiff must thus litigate with the clients to determine the reasonable cost of the services provided to them."

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Mojtahedi explains that a declaratory relief action against the former client is recognized as a procedure to establish a dismissed attorney's lien claim and cited *Brown v. Superior Court* (*Cyclon*),116 Cal.App.4th 320, 328-330. *Mojtahedi* was not clear whether the new second attorney and a paying insurance company or defendant in the underlying case can be a party defendant in the declaratory relief action. The court hinted that an action against the second attorney may be appropriate *after* the establishment of the "existence, amount, and enforceability of his lien on the settlement money." "If successful in a declaratory relief action regarding the reasonable value of his services, Plaintiff's fees will be paid out of the clients' settlement proceeds." (*Id.* at p. 978.) But see *Southern California Gas Co. v. Flannery* (2016) 5 Cal.App.5th 476, 496, where tortfeasor interplead settlement funds and both client and former attorney were named parties; held former attorney's response to interpleader action with motion for attorney fees was adequate for court to determine validity and value of former attorney's lien claim.

Mandatory fee arbitration correlation

Be aware that any action against a client or former client for a fee dispute must comply with California's Mandatory Fee Arbitration Act (MFAA), set forth in Business and Professions Code section 6200 et seq. A must reading of an attorney's travail and loss after successfully winning an MFAA arbitration award is *Loeb v. Record* (*Bardat & Edwards*) (2008) 162 Cal.App.4th 431. (See also *Mardirossian & Associates v. Ersoff* (2007) 153 Cal.App.4th 257, fn.3; see also Formal Opinion No. 2009-177 of the State Bar Standing Committee of Professional Responsibility and Conduct for suggestions on how to correlate with the MFAA.)

Quantum meruit recovery

In order to have a quantum meruit recovery, the attorney must have been in privity of contract with the client. Thus, in *Strong v. Beydoun* (2008) 166 Cal.App.4th 1398, the second attorney was brought into the case by the first attorney. They had a contract to split fees. Second attorney never contracted with client. Second attorney sued client for fees, but court found no privity of contract between second attorney and client; therefore, first attorney and not client was responsible for fees, as there was privity of contract between the two attorneys.

Calculation of quantum meruit amount

Most attorneys representing personal-injury clients do not keep time records. That makes it difficult to prove time spent on a client's case before discharge. The court recognized such a problem in *Mardirossian & Associates v. Ersoff* (2007) 153 Cal.App.4th 257, 269. ("[T]here is no legal requirement that an attorney supply billing statements to support a claim for attorney fees." [Citation omitted.] Note also that neither Bus. and Prof. Code, § 6146 nor 6147 require a contingent fee attorney to maintain time sheets or billing records.)

Ersoff allows a discharged attorney to testify as to the *estimated* amount of time spent on each element of representation prior to discharge. The court also holds there are three elements in proving quantum meruit: (1) the number of hours reasonably expended multiplied by a reasonable hourly rate; (2) provable evidence supporting the hours worked and the claimed rate; and (3) proof with expert testimony that the total fees incurred were reasonable. Reasonableness includes the nature of the litigation, its difficulty, the amount involved, skill required in handling the matter, employed skill, attention given to the issues, the success or failure of the attorney's efforts, age, experience, skill and learning of the attorney handling the matter. (*Id.* at p. 272.)

An egregious violation of State Bar ethics rules or violation of law can preclude an attorney from recovering quantum meruit fees. (See *Pringle v. La Chapelle* (1999) 73 Cal.App.4th 1000.)

Disputed attorney fees are subject to proration

Quantum meruit need not be an hourly calculation. It can be *prorated*, dependent and adjusted for contingency matters, costs expended, time delays and other factors. A good discussion on proration as a determination of reasonable value is found in *Cazares v. Saenz* (1989) 208 Cal.App.3d 279. Factors establishing proration can create a value greater than a mere calculation of expended hours. Thus, when the total fee value exceeds the recovered amount, fee proration is determined in proportion to the efforts put forth by the dueling attorneys. "[T]he proper application of the *Fracasse* rule is to use an appropriate pro rata formula which distributes the contingent fee among all discharged and existing attorneys in proportion to the time spent on the case by each." (*Spires v. American Bus Lines* (1984) 158 Cal.App.3d 211, 216.)

Cost recovery

Unless the contract provides for payment of costs immediately upon discharge, advanced costs will be deferred until resolution of the case. (*Kroff v. Larson* (1985) 167 Cal.App.3d 857.)

Retention of monetary lien claim

As to what happens to the liened money or property is not explained in the cases. In no event should a client's agreed portion of the settlement be withheld pending the resolution of the fee dispute or should the disputed fee be placed in the client trust account. (*Shalant v. State Bar* (1983) 33 Cal.3d 485; but see section below entitled "Ethical considerations regarding settlement checks.")

Client's duty to protect attorney's fee

A client's conduct cannot interfere with an attorney's right to secure the contracted fee. For a review of the client's duties to the attorney, and liability for breach of that duty, see *Little v. Amber Hotel Co.* (2011) 202 Cal.App.4th 280.

Discharged attorney's lien claim for fees

***Quantum meruit recovery*:** A client

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has the absolute power and right to discharge an attorney at any time with or without cause. (*Fracasse*, 6 Cal.3d 784, 790.) Under *Fracasse*, where the attorney fee was contingent on recovery, the court ruled the discharged attorney had a fee right limited to a quantum meruit recovery for the reasonable value of services rendered to the time of discharge, regardless if the discharge was with or without cause.

***Discharge on courtroom steps*:** In *Fracasse*, the court stated: "To the extent that such discharge occurs 'on the courthouse steps,' where the client executes a settlement obtained after much work by the attorney, the factors involved in a determination of reasonableness would certainly justify a finding that the entire [contingent] fee was the reasonable value of the attorney' services." (*Id.* at pp. 790-791.) Note that under *Fracasse*, the cause of action to recover claimed compensation does not accrue until the stated contingency occurs, not at the time of discharge. (*Id.* at p. 792.)

In *Joseph E. Di Loreto, Inc. v. O'Neill* (1991) 1 Cal.App.4th 149, a case in which the client discharged attorney after judgment was entered but before appeal, the court awarded the full contracted contingent fee.

"If the ultimate recovery is insufficient to pay both the discharged attorney and current attorney, proportional recovery may be appropriate." (*Hansen v. Haywood* (1986) 186 Cal.App.3d 350, 356.) The value of the quantum meruit extends from date of retention until date of discharge. (*Salopek v. Schoemann* (1942) 20 Cal.2d 150 156.)

***Action against client not against new attorney*:** When a client discharges an attorney, the action is against the discharging client, not against the new attorney representing the client. *In Olsen v. Harbison* (2010) 191 Cal.App.4th 325, Olsen was retained by client. Olsen associated attorney Harbison to proceed with the litigation. Client agreed in writing to the retention and fee sharing agreement between Olsen and Harbison. Subsequently, client fired Olsen and proceeded with Harbison. Harbison settled the case. Olsen sued Harbison for his contracted portion of the attorney fee. Court held client breached the fee-sharing agreement, not Harbison, and Olsen's only action was against client for quantum meruit.

***Rights against successor attorney*:** A discharged attorney can maintain an action for money had and received, conversion, constructive trust and intentional interference with a contractual relationship against the client's successor attorney who fails to honor the first attorney's lien. (*Weiss*, 51 Cal.App.3d 590, 598.) Note, however, that *Weiss* is an old case that must be viewed in light of *Mojtahedi*, 228 Cal.App.4th 974.) *Mojtahedi* requires a declaratory relief action against the client to establish lien validity and valuation of the discharged attorney. Under *Mojtahedi*, once the discharged attorney's lien valuation and validity are established, the discharged attorney can seek recovery against the offending attorney.

Withdrawing attorney's lien claim for fees

Former CRPC rule 3-700 allowed for mandatory and permissive representation withdrawal by an attorney, provided the withdrawing attorney followed proper procedures. New CRPC rule 1.16 follows the basic rules established in former CRPC rule 3-700. This new rule should be reviewed prior to any attempt to withdraw from client representation.

Justifiable reasons for withdrawal

Attorney withdrawal for ethical reasons will justify a quantum meruit fee, but an attorney who unjustifiably withdraws is considered to have abandoned the case and forfeits fee rights. (*Hensel v. Cohen* (1984) 155 Cal.App.3d 563, 567.) *Hensel* holds an attorney retained under a contingent fee contract may not ". . . determine that it is not worth his time to pursue the matter, instruct his client to look elsewhere for legal assistance, but hedge his bet by claiming a part of the recovery if a settlement is made or a judgment obtained . . . ."

Estate of Falco (1987) 188 Cal.App.3d 1004, set forth a five-prong test to determine whether there was "justifiable cause" for an attorney to withdraw from representation and thereby obtain quantum meruit fees. The court stated: ". . . the attorney has the burden of proof to show: (1) counsel's withdrawal was mandatory, not merely permissive, under statute or state bar rules; (2) the overwhelming and primary motivation for counsel's withdrawal was the obligation to adhere to these ethical imperatives under statute or state bar rules; (3) counsel commenced the action in good faith; (4) subsequent to counsel's withdrawal, the client obtained recovery; and (5) counsel has demonstrated that his work contributed in some measurable degree towards the client's ultimate recovery." (Also see *Southern California Gas Company v. Flannery* (2016) 5 Cal.App.5th 476, 496-497.)

Unjustified attorney withdrawal

Estate of Falco, *supra*, further held a client's refusal to settle does not in itself constitute cause for withdrawal justifying fees. (But see *Pearlmutter v. Alexander* (1979) 97 Cal.App.3d Supp.16 (disapproved by *Estate of Falco*, *supra*).) That a case that lacks merit is probably not a basis for a justifiable withdrawal. (*Kirsch v. Duryea* (1978) 21 Cal.3d 303, 309-310.)

A more recent case discussing attorney withdrawal is *Rus, Milband & Smith v. Conkle & Olesten* (2003) 113 Cal.App.4th 656. In *Rus*, the Rus firm represented the client on a contingency against a malpractice insurance carrier. Rus found the work daunting and claimed a "breakdown of communications" in a motion to be relieved as counsel. Motion granted, and client was forced to find another law firm.

The new law firm settled the case for nearly $2 million, and Rus claimed a quantum meruit attorney fee of over $800,000. The fee request was denied, in that the withdrawal was not "justifiable"

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to allow Rus to return and demand an attorney fee. "To allow an attorney under a contingency fee agreement to withdraw without compulsion and still seek fees from any future recovery is to shift the time, effort and risk of obtaining the recovery from the attorney, who originally agreed to bear those particular costs in the first place, to the client." (*Id.* at pp. 675-676.)

For another case regarding a withdrawing attorney's claim for attorney fees, see the complicated matter of *Duchrow v. Forrest* (2013) 215 Cal.App.4th 1359.

Priority among lien claim holders

Civil Code section 2897 deals with priority of liens. The code states: "Other things being equal, different liens upon the same property have in relevant part priority according to the time of their creation . . . ." Exceptions affecting priority in personal injury cases are the statutory lien rights given to hospitals providing emergency/hospitalization services under Civil Code section 3045.1 (Hospital Lien Act) and other *statutory* lien claimants. Otherwise, an attorney's lien has priority. (See the seminal case of *Cetenko*, 30 Cal.3d 528; see also *Wujcik v. Wujcik* (1994) 21 Cal.App.4th 1790, where the attorney and health care providers had priority liens over the judgment lien of the plaintiff's former wife.)

For issues regarding attorney lien priority in other matters, see *Waltrip v. Kinberlin* (2008) 164 Cal.App.4th 517, which held a commercial tort claim had priority over a judgment creditor.

Creating the attorney lien

Cappa v. F & K Rock & Sand, Inc. (1988) 203 Cal.App.3d 172, holds an attorney's lien created at the time of execution of the contingent fee contract has priority over [non-statutory] after-created liens, and public policy supports the preferential treatment given to attorney liens. Also, see *Cetenko*, 30 Cal.3d 528, holding an attorney's contingent fee retainer contract either based on a percentage of recovery or calculated hourly fees has priority over non-statutory created liens, if created prior to the creation of other liens. (See below for exception regarding priority over first-created medical lien.)

Although an attorney's lien on a client's case may be implied, it is wise for an attorney to place in the retainer contract an "attorney lien" provision. (See for example *County of San Bernardino v. Calderon* (2007) 148 Cal.App.4th 1103, where the attorney's effective written lien date was given priority over a hospital's statutory lien claim under Civil Code section 3045.1. The client's signing of the attorney's retainer contract *preceded* the effective statutory notice date of the hospital's statutory lien claim for emergency care, even though the emergency care was provided before the client's attorney was retained.)

A client's attorney who is substituted out of a case has a lien on the proceeds of the case. (See *Weiss*, 51 Cal.App.3d 590.) The third-party insurance carrier should be noticed by the first attorney of the lien claim. (See *Siciliano*, 62 Cal.App.3d 745.)

Establishing attorney lien

To establish an attorney lien, the claiming attorney must be in privity of contract with the client. *Trimble v. Steinfeldt* (1986) 178 Cal.App.3d 646 holds an associate attorney who was to be paid on a percentage of the gross attorney employer's compensation could only seek recovery from his employer attorney. He had no lien rights against the client's recovery, as he was not in privity of contract with the client.

Statutory liens have priority

A statutory lien that is given lien priority in the statute trumps the attorney's contractual lien. (See *Cetenko*, 30 Cal.3d 528, 534: ". . . a lien created by contract and another created by statute, the text of the statute controls.")

Attorney liens have priority over medical liens

Based upon public policy encouraging attorney representation of personal injury clients on a contingent basis, the attorney's lien for fees and costs has priority over medical liens. "Accordingly, as a matter of law, the amount recovered by the plaintiff in a personal injury lawsuit always goes first to satisfy the attorney lien for fees and costs before it is used to satisfy medical liens." (*Gilman v. Dalby* (2009) 176 Cal.App.4th 606, 620.) The attorney's lien priority exists even if the contingent fee retainer contract is executed after the client signs a medical lien. (*Id.* at pp. 616-617.)

After the client's attorney's fees and costs are satisfied, medical liens must be satisfied before disbursement of funds to the client. (*Id* at p. 617.) Other than an attorney lien and *statutory* designated first liens, competing medical lien claims are prioritized based upon dates of creation. (Civ. Code, § 2897.) The client is last on the priority list.

Fee priority in minor's case

A fee dispute between attorneys involving a minor's personal injury settlement can be decided by the judge hearing the minor's compromise. The hearing is a probate matter, which the judge has power to decide. (See *Padilla v. McClellan et al.* 93 Cal.App.4th 1100.)

Notice of attorney lien claim

***Filing lien claim with court*:** There is a consensus that a notice of lien should be filed with the court, although it is not mandatory to perfect a lien. (See *Hansen v. Haywood* (1986) 186 Cal.App.3d 350, 358-359 and *Carroll*, 99 Cal.App.4th 1168, 1172.) Written notice of an attorney's lien claim for fees to the insurance carrier and to the opposing party is probably a good idea, but not mandatory. A loss of lien rights, however, is not a loss of contractual rights. (*Bree v. Beall* (1981) 114 Cal.App.3d 650.)

***Filing lien claim with third-party insurance company*:** An attorney dismissed by a client should notice the defendant's insurance carrier of the attorney's lien claim. *Siciliano*, 62 Cal.App.3d 745, overruled the tortfeasor carrier's demurrers to an action for

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damages by a relieved attorney who, in an underlying action, noticed the carrier of his attorney lien claim and the carrier failed to pay it.

Levin v. Gulf Insurance Group, et al. (1999) 69 Cal.App.4th 1282, 1287-1288 held: ". . . an insurer and the attorneys retained to defend the insureds are liable for intentional interference with the prospective economic advantage of a discharged attorney when, after receiving a notice of lien for attorney fees and costs filed in the case by the discharged attorney, they pay his former client and the latter's new attorney in settlement or in satisfaction of a judgment with knowledge of the lien."

Ethical considerations regarding settlement checks

***When two attorneys are payees on a settlement check*:** Attorneys faced with the dilemma of past and current attorneys both named as payees on a settlement check should read Formal Opinion No. 2009-177 of the State Bar of California Standing Committee on Professional Responsibility and Conduct. In essence, the opinion states: (a) A former attorney with valid lien rights in the settlement proceeds does not violate former CRPC rule 4-100 dealing with depositing of settlement funds in a client trust account, if the attorney takes prompt and reasonable action to resolve the fee dispute; (b) the amount in dispute is to be deducted from the settlement proceeds, and the client's portion is promptly paid to the client in agreement with the client; and (c) the attorney has an affirmative duty to seek resolution through arbitration or interpleading the money in court, if no agreement can be reached with the client.

The final sentence of the formal opinion states: "However, the attorney is not required to endorse a settlement check that is jointly payable to him or her, the client and successor counsel pending resolution of the dispute, because doing so would extinguish the attorney's charging lien under current California law."

In the Matter of Feldsott (Rev. Dept. 1997) 3 Cal. State Bar Ct.Rptr. 754, 757, the bar review court found no ethical violation by a first attorney payee offering to place the disputed funds into his trust account or into a separate blocked account. Such a solution would grant the client immediate payment of the client's settlement funds.

***Second attorney's ethical requirements*:** Although some law may favor the second attorney's ability to *not* honor the first attorney's lien claim, the second attorney should be mindful of the interpreted ethical standards. Additionally, if the first attorney is required to sue the client for fees (as some cases hold), the second attorney will most likely receive the wrath of the client.

For a second attorney's ethical obligation to the client's first attorney's lien claim, see Formal Opinion No. 2008-175 of the State Bar of California Standing Committee on Professional Responsibility and Conduct. In essence, the opinion requires the second attorney to (a) disclose to the first attorney a settlement; (b) disclose the amount held in trust; (c) pay a valid lien claim, even if the client requires the attorney to withhold notification to and payment of the first attorney's lien claim; and (d) to resolve any fee disputes so long as the disputed amount remains in the second attorney's client trust account.

***New CRPC rule 1.15 creates ethical duties to lienholder*:** This new ethics rule is entitled "Safekeeping Funds and Property of Clients and *Other Persons*." [emphasis added.] The function of this ethics rule is to establish a disciplinary standard with regard to dealing with lienholders. The rule *extends* to known lienholders certain ethical duties usually owed only to a client. It matters not that the client's attorney never consented orally or in writing to pay the known lien out of settlement proceeds.

Subdivision (a) of new CRPC rule 1.15 states: "All funds received or held by a lawyer or law firm for the benefit of a client, *or other person to whom the lawyer owes a contractual, statutory, or other legal duty* . . ." shall be deposited into an identifiable trust account.

Subdivision (d) of new CRPC rule 1.15 provides: "A lawyer shall:

> (1) promptly notify a client or *other person* of the receipt of funds, . . . *in which the lawyer knows or reasonably should know* the client *or other person has an interest*;
>
> * * *
>
> (4) promptly account in writing to the client or *other person* for whom the lawyer holds funds or property;
>
> * * *
>
> (7) promptly distribute, *as required by* the client or *other person*, any undisputed funds or property in the possession of the lawyer . . . that the client or *other person is entitled to receive*." [emphasis added.]

The Comment to new CRPC rule 1.15 deals with an attorney's ethical obligation to lienholders. In summary, the Comment states: (1) an attorney's duty to a lienholder depends on the relationship between the lawyer and third-party, contractual obligation or an independent statutory obligation; and (2) an attorney who violates a fiduciary duty to a third party may be subject to State Bar disciplinary action.

Attorney lien claim for advanced case costs

***Advancing case costs*:** It is a rare case when a client pays case costs in personal injury matters. Most clients expect the retained attorney to advance case costs, and most attorneys routinely do so with expectation of being reimbursed from the proceeds of case recovery.

Former CRPC rule 4-210 subd. (A) (3) allows:

> . . . advancing the costs of prosecuting or defending a claim or action or otherwise protecting or promoting the client's interests, the repayment of which may be contingent on the outcome of the matter. Such costs within the meaning of this subparagraph (3) shall be limited to all reasonable expenses of litigation or reasonable expenses in preparation

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for litigation or in providing any legal services to the client.

New CRPC rule 1.8.5 provides similar language. Specifically, new rule 1.8.5 (b)(3) states a lawyer may "advance the costs of prosecuting or defending a claim or action . . . the repayment of which may be contingent on the outcome of the matter." "Costs" defined in subdivision (c) of new rule 1.8.5 are those that "may include any reasonable expenses of litigation, including court costs, and reasonable expenses in preparing for litigation or in providing other legal services to the client."

Advancement of case costs by an attorney is not mandatory, even if the attorney has the financial ability to do so. In *Irsin v. Superior Court* (1965) 63 Cal.2d 153 the trial court would not accept a fee waiver for an indigent client's personal injury complaint filing. The trial court required the attorney representing the indigent client to pay the filing fee, in that the attorney had the financial ability to do so. On appeal, *Irsin* holds an attorney does not own the client's rights and only represents the client's rights. Therefore, mere representation of a client does not require court cost payments to be paid by the attorney of record.

Unless a contingent fee retainer contract provides otherwise, "[T]he obligation to reimburse the attorney for costs advanced, matures, if at all, only upon the occurrence of the agreed contingency, i.e., recovery by the client." (See *Kroff v. Larson* (1985) 167 Cal.App.3d 857, 861.)

***Calculating advanced case costs*:** Whether an attorney's contingent fee should be taken on the gross recovery (before case costs are deducted) or on the net recovery (after case costs are deducted) is not expressed in either former CRPC rule 4-210 or in new CRPC rule 1.8.5.

Business and Professions Code sections 6146 and 6147 have requirements for medical negligence retainer contracts and general tort retainer contracts, respectively. Regarding medical negligence matters, section 6146 subdivision (c)(1) requires case costs be deducted from the gross recovery before the attorney's contingent fee is calculated.

Section 6146 (medical negligence retainer contracts) predates the passage of section 6147 (general tort retainer contracts). Unlike section 6146, section 6147 is silent on whether an attorney's contingent fee is determined before or after case costs are deducted from the gross recovery. Thus, for section 6147 cases, there is no statutory restriction preventing an attorney's contingent fee to be deducted from the gross recovery; i.e., before case costs are deducted. This conclusion is followed in *Ramirez v. Sturdevant* (1994) 21 Cal.App.4th 904. *Ramirez* states at page 914, "although it appears that other attorneys . . . routinely calculate a contingency fee after deducting costs from any gross settlement, we cannot say that to do otherwise shocks the conscience."

In all personal injury retainer contracts, including those for medical malpractice actions, the following is required by section 6147, subdivision (a)(2): "A statement as to how disbursements and costs incurred in connection with the prosecution or settlement of the claim will affect the contingency fee and the client's recovery." Note: Placing interest charges in the retainer contract may require compliance with consumer protection laws.

***Attorney costs have priority lien rights*:** Case costs have the same lien priority as attorney fees. *Gilman v. Dalby* (2009) 176 Cal.App.4th 606, 618 holds attorney case costs have priority over medical lien rights unless the lien rights are statutory.

***Tax consequents*:** Tax consequences may prevail on advanced costs. (See *James Boccardo v. Commissioner* (9th Cir. 1995) 56 F.3d 1016.)

In 2015, Michael Fields retired from the active practice of law after a 47-year career as a plaintiff's personal injury trial attorney. He remains a licensed member of the California State Bar. He frequently writes and lectures on tort liens and other subjects. He has developed several compendiums on tort liens under the general title of "Lien Guide for the Trial Attorney." Mr. Fields was the 2003 CAALA president, and he received CAALA's 2015 Ted Horn Memorial Award for his many contributions to the profession. Mr. Fields can be contacted at msflb@aol.com.