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Lien guide for the trial attorney

ATTORNEY LIENS FOR FEES AND ADVANCED CASE COSTS – THE FINAL PART OF A TWO-PART ARTICLE

When plaintiffs' attorneys refer contingent-fee cases to other attorneys, presumably more experienced or better financed trial attorneys, there is normally a contractual agreement for a referral fee pursuant to California State Bar rules. This article discusses liens on such referral fees including Ethical Rules effective November 2018. The first part of this article appeared in Advocate's October 2018 issue.

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 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

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
November 2018

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" 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.

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
November 2018

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 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

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
November 2018

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 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

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
November 2018

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.