Fordham Law Review

Volume 72 | Issue 4 Article 2

2004

Against Lawyer Retaining Liens

John Leubsdorf

AGAINST LAWYER RETAINING LIENS

*John Leubsdorf**

INTRODUCTION

Suppose your former lawyer claims a fee that you think is more than you owe. The lawyer can withhold any of your papers or other property that happen to be in his or her possession, even if you need them urgently for a pending lawsuit or transaction. Ordinarily, your only options are to pay what the lawyer claims, to abandon your papers or property, or to pay another lawyer to challenge the fee claim in court. Because a court challenge is cumbersome and costly, if your papers or property have any value, you will probably wind up paying your former lawyer more than you think you owe, no matter how reasonable your own view is.

The right of a lawyer to assert in this way what is called a retaining lien over a client's papers and property is deeply offensive to professional values and the public interest. Its effect—indeed, its purpose—is to inconvenience clients to pressure them into paying whatever their lawyers claim. It gives lawyers, who already have advantages in fee disputes, additional advantages over their clients. It penalizes clients who do just what the legal profession encourages by entrusting their documents and property to their lawyers. And yet the help it gives lawyers in collecting justly due fees is random at best. Far less objectionable and more useful ways of protecting lawyers' proper interest in payment are available.

Despite the retaining lien's flaws, authority in all but a few states upholds it,[1] and lawyers continue to use it.[2] Rules of professional responsibility allow valid liens to prevail against a lawyer's obligation

* Professor of Law, Rutgers Law School-Newark. The Dean's Research Fund of Rutgers School of Law-Newark provided funding for this Article. Jonathan Rose, Keith Sharfman and Mark Weiner provided helpful comments. The author was Associate Reporter for the Restatement of the Law Governing Lawyers and was the primary drafter of its treatment of attorney liens, but does not write here in that capacity.

1. *See* discussion *infra* Part I.

2. A LEXIS search reveals 288 reported federal and state opinions in the 1991-2000 decade in which the phrase "retaining lien" appears, almost all of them involving such a lien. There are probably many more instances in which assertion of a lien does not give rise to a reported opinion, for example because the client pays the sum in dispute.

to return papers and property to a client when a representation ends.[3] Scholars of professional responsibility have almost totally neglected the retaining lien[4] as they have neglected some other aspects of the financial relationship between clients and lawyers. The Restatement of the Law Governing Lawyers rejects lawyer retaining liens not authorized by statute, but it remains to be seen what influence this rejection will have.[5]

This Article urges the abolition of the retaining lien. After describing the operation of the lien, I set forth its various drawbacks. I then consider some other ways in which lawyers may collect fees, ways less offensive and at least as effective as retaining liens. Finally, I discuss some other problems concerning access to client files that abolition of the retaining lien would bring into greater prominence.

I. THE RETAINING LIEN AND ITS OPERATION

The law of the retaining lien displays a certain amount of ambivalence. On the one hand, the lien is well established. On the other, various anomalies and exceptions suggest some underlying disquiet, for which it will later appear there are good reasons.

Retaining liens are by no means a universal perquisite of the world's legal professions. In France, for example, "an advocate may not retain documents to obtain the payment of his fees" and this prohibition may well extend to client funds.[6] India's Supreme Court recently forbad retaining liens on litigation files.[7] Some other nations allow retention of funds or of documents when reasonable in the circumstances.[8] Even in England, the source of our own lawyer lien law, the law has been a bit more ambivalent than might be thought. Barristers have never been entitled to liens, and indeed have been prohibited from suing clients for fees–not a great hardship, because

3. Model Rules of Prof'l Conduct R. 1.8(j)(1), 1.16(d) (2000) (providing a lawyer may "acquire a lien granted by law to secure the lawyer's fee or expenses" and "may retain papers relating to the client to the extent permitted by other law"); Model Code of Prof'l Responsibility, DR 5-103(A)(1), 9-102(B)(4) (1969) (similar).

4. *But see* Joseph M. Perillo, *The Law of Lawyers' Contracts is Different*, 67 Fordham L. Rev. 443, 467-72 (1998) (describing retaining and charging liens, although not written by a teacher of professional responsibility); Note, *Attorney's Retaining Lien Over Former Client's Papers*, 65 Colum. L. Rev. 296 (1965); Comment, *Oregon Attorneys' Liens: Their Function and Ethics*, 27 Willamette L. Rev. 891 (1991).

5. Restatement (Third) of the Law Governing Lawyers § 43(1) & cmt. b (2000). *See also* Roscoe Pound, American Trial Law. Found., Comm'n on Prof'l Responsibility, The American Lawyer's Code of Conduct R. 5.5 (Public Discussion Draft 1980) (forbidding retaining lien, but allowing lawyers to retain unpaid-for work product).

6. Jacques Hamelin & André Damien, Les Règles de la Profession d'Avocat 373 (8th ed. 1995).

7. RD Saxena v. Balram Prasad Sharma, (2000) 7 S.C.C. 264 (India).

8. William B. Fisch, *Professional Services*, *in* 8 Int'l Encyc. Comp. L. 9-161 (Werner Lorenz ed., 1999).

solicitors are professionally obligated to ensure payment of barristers they instruct.[9] Solicitors, by contrast, may assert a retaining lien,[10] but their right to do so was still unclear at the outset of the eighteenth century[11] and was established definitively only during that century.[12]

The United States (or at least its legal profession) enthusiastically adopted the retaining lien, in some states by statute[13] and in others under the common law,[14] just as it adopted the solicitor's right to sue clients for fees.[15] There are, however, some exceptions. Five jurisdictions reject the lien, five limit it, and five appear to have no relevant authority.[16] In a handful of cases, federal legislation has been held to preempt state retaining lien law.[17]

---

9. Rondel v. Worsley, [1969] 1 A.C. 191 (H.L. 1969), *overruled in other respects*, Arthur JS Hall & Co. v. Simons, [2000] 3 W.L.R. 543 (H.L. 2000); Ronald F. Roxburgh, Rondel v. Worsley: *The Historical Background*, 84 L.Q. Rev. 178 (1968); The Guide to the Professional Conduct of Solicitors 367-68 (8th ed. 1999) (discussing solicitors' liability for barristers' fees). *See also* Code of Conduct of the Bar of England and Wales 307(f) (7th ed. 2000) (stating that a barrister may not receive or handle client money or other assets).

10. *See, e.g.*, Bentley v. Gaisford, [1997] 1 All E.R. 842 (C.A. 1996); The Guide to the Professional Conduct of Solicitors 251-52 (8th ed. 1999); 1 Cordery on Solicitors ¶¶ 933-1100 (9th ed. 1996).

11. *See* Anonymous, 91 Eng. Rep. 1393 (K.B. 1694) (Holt, C.J., at nisi prius) (stating that attorney may not detain executed deed); *Ex parte* Bush, 22 Eng. Rep. 93 (Ch. 1734) (recognizing lien); Wilkins v. Carmichael, 99 Eng. Rep. 70, 72 (K.B. 1779) (Mansfield, C.J.) (noting that lien is "not very ancient"); Commerell v. Poynton, 36 Eng. Rep. 273 (Ch. 1818) (Eldon, Ch.) (holding that lien may not be used to keep from client documents needed in pending litigation). The holding of *Commerell* was later read as limited to cases in which the lien was asserted by a solicitor who withdrew from a representation. *See, e.g.*, *In re* Faithful, 6 L.R.-Eq. 325 (V.C. 1868).

12. *See, e.g.*, Joseph Story, Commentaries on the Law of Agency § 383 (1st ed. 1839) (listing English precedents and noting that practice in the United States was variable); Whitley Stokes, A Treatise on the Liens of Attornies, Solicitors, and Other Legal Practitioners 3-4 & n.(c) (1860).

13. *E.g.*, Alaska Stat. § 34.35.430 (Michie 2002); Neb. Rev. Stat. § 7-108 (1997); Or. Rev. Stat. § 87.430 (1987).

14. *E.g.*, Marsh, Day & Calhoun v. Solomon, 529 A.2d 702 (Conn. 1987); State *ex rel.* Okla. Bar Ass'n v. Cummings, 863 P.2d 1164 (Okla. 1993); *see generally* Restatement (Second) of Agency § 464(b) (1958); Restatement of Security § 62(b) (1941); 2 Robert L. Rossi, Attorneys' Fees 232-46 (2d ed. 1995). For earlier authority, see *In re* Paschal, 77 U.S. 483 (1870); Hutchinson & Buchannan v. Howard, 15 Vt. 544 (1843).

15. *See* John Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, Law & Contemp. Probs., Winter 1984, at 9, 16.

16. See Restatement (Third) of the Law Governing Lawyers § 43, cmt. b, Reporter's Note (citing authority) (2000), to which should be added Mont. R. Prof'l Conduct 1.8(a)(2), 1.8(j)(3), 1.16(d) (2002); N.D. R. Prof'l Conduct 1.19 (2003). *See also* Haw. S. Ct. Disciplinary Bd. Op. 28 (as updated 2001) (holding that in absence of authority recognizing lien, lawyers should not assert it), *at* http://hsba.hostme.com/Disc/disc.htm.

17. *E.g.*, Resolution Trust Corp. v. Elman, 949 F.2d 624 (2d Cir. 1991) (holding that federal legislation allows federal agency to obtain papers of insolvent financial institution despite lawyer's lien); Wynn v. AC Rochester, GM Corp., 982 F. Supp. 926 (W.D.N.Y. 1997) (noting that in some cases, federal attorney fee statute preempts lien, although this case itself was not determined to be governed by a federal statute).

The essence of the retaining lien is that a lawyer claiming to be entitled to a fee may impound a client's papers, money, or other property that are in the lawyer's possession until the fee has been paid.[18] The lien only applies to the client's property, as opposed to that of third parties, and the lawyer loses it by voluntarily surrendering possession of the property without a safeguarding court order or similar provision.[19] But the lawyer may impound all client property in his or her possession, not just property related to the fee claim.[20] The retaining lien should be distinguished from the charging lien, to be discussed later, which in many states protects a lawyer's right to be paid out of money he or she has recovered for a client.[21]

A client may recover the impounded property by paying what the lawyer claims or by securing an adjudication that a smaller sum is due and paying that sum. When the fee dispute concerns a pending litigation, in some jurisdictions the court before which the case is pending may resolve the dispute summarily.[22] Alternatively, the client may bring a separate action to recover the impounded papers or property, in the course of which the fee claim will be resolved. In at least ten jurisdictions, a client may compel a lawyer to arbitrate a fee dispute.[23]

If the fee dispute concerns a pending litigation, the client may ask the court to order the lawyer to release the impounded property upon the client's posting bond in an amount set by the court.[24] This is often done when one lawyer replaces another during a case.[25] The client must still have the merits of the fee claim adjudicated in order to

18. The lien also may give the lawyer who properly asserts it priority over other creditors of the client. *Compare, e.g., In re* Hodes, 239 B.R. 239 (Bankr. D. Kan. 1999) (upholding priority) *with, e.g., In re* Coronet Ins. Co., 698 N.E.2d 598 (Ill. App. Ct. 1998) (rejecting priority). *See also infra* note 101.

19. *See, e.g.*, Indus. Network Sys., Inc. v. Armstrong World Indus., Inc., 54 F.3d 150 (3d Cir. 1995); Flake v. Frandsen, 578 P.2d 516 (Utah 1978).

20. *See, e.g.*, Mones v. Smith, 486 So. 2d 559 (Fla. 1986); Greek Catholic Union of Russian Bhds. of the United States v. Russin, 17 A.2d 402 (Pa. 1941).

21. *See, e.g.*, Mass. Gen. Laws ch. 221, § 50 (1999); N.Y. Jud. Law § 475, 475-a (1983); Restatement (Third) of the Law Governing Lawyers § 43(2) & cmts. d-g (2000); *see infra* Part III.A.

22. *See, e.g.*, Wash. Rev. Code § 60.40.030 (1990); Jenkins v. Weinshienk, 670 F.2d 915 (10th Cir. 1982) (relying on federal ancillary jurisdiction, but concluding that when lawyer impounds papers in action before court to enforce payment of fee claimed in another matter the court may not adjudicate that fee claim); Restatement (Third) of the Law Governing Lawyers § 42(1) (2000).

23. Cal. Bus. & Prof. Code § 6200(c) (West 2003); D.C. Bar R. XIII (2003); Ga. State Bar R. 6-101 to 6-106 (2003); Mont. Rules on Arbitration of Fee Disputes R. 5.3, 5.5 (2002); 22 N.Y.C.R.R. § 137.11 (2003); Mark Richard Cummisford, *Resolving Fee Disputes and Legal Malpractice Claims Using ADR*, 85 Marq. L. Rev. 975, 995-99 (2002); *see* Model Rules for Fee Arbitration (1995).

24. *E.g.*, S.D. Codified Laws § 16-18-24 (Michie 1995); N.D. Cent. Code § 27-13-06 (1991) (noting that release may be granted even if no case is pending).

25. *E.g.*, Joseph Brenner Assocs., Inc. v. Starmaker Entm't, Inc., 82 F.3d 55 (2d Cir. 1996).

recover any overcharge, but in the meantime need not forgo the use of property whose worth to the client may be even more than the claimed fee.[26] A few courts have released documents to clients who cannot pay but who have an extraordinary need to use them, although even then the lien continues to exist.[27] Financial need in itself, however, is apparently not enough to obtain such a modification.[28]

Under a vague exception, a client willing and able to go to court sometimes can have a retaining lien nullified because the lawyer held the property assertedly covered by the lien for a special purpose. This exception includes property that the lawyer holds under a trust or escrow arrangement inconsistent with use of the property to pay the lawyer's fee.[29] But courts have also applied it–sometimes to the extent of disciplining the lawyer for claiming a lien–when a lawyer receives documents to be introduced into evidence, or receives funds to be used to pay a settlement or a court reporter's anticipated fee or to post bond in a pending proceeding.[30] Granted such rulings, one might think that all documents and property entrusted to a lawyer should be considered given for a special purpose inconsistent with diversion to the lawyer–to wit, use for the client's interests—unless the client specifically expresses a purpose of paying the lawyer's fee. Yet whatever the theoretical merit of this argument, in practice the "special purpose" exception often does not prevent the lawyer from asserting a retaining lien. Whether papers or property were given for

26. *But see* Or. Rev. Stat. § 87.435(2)(a) (1987) (requiring bond for 150% of claimed fee).

27. Britton & Gray, P.C. v. Shelton, 69 P.3d 1210 (Okla. Civ. App. 2003) (requiring judicial balancing); Miller v. Paul, 615 P.2d 615 (Alaska 1980); Hauptmann v. Fawcett, 276 N.Y.S. 523 (App. Div. 1935), *modified by* 277 N.Y.S. 631 (App. Div. 1935) (regarding murder prosecution); Frenkel v. Frenkel, 599 A.2d 595 (N.J. Super. Ct. App. Div. 1991) (regarding matrimonial action). For supporting dictum, see, for example, Pomerantz v. Schandler, 704 F.2d 681, 683 (2d Cir. 1983).

28. *In re* San Juan Gold, Inc., 96 F.2d 60 (2d Cir. 1938); Andrew Hall & Assocs. v. Ghanem, 679 So. 2d 60 (Fla. Dist. Ct. App. 1996); *In re* Liquidation of Mile Square Health Plan, 578 N.E.2d 1075 (Ill. App. Ct. 1991); *see* Rotker v. Rotker, 761 N.Y.S.2d 787 (Sup. Ct. 2003) (holding that normal exigencies of litigation do not warrant release of lien on case file). *But see* Lucky-Goldstar Int'l (America), Inc. v. Int'l Mfg. Sales Co., 636 F. Supp. 1059 (N.D. Ill. 1986) (stating that lawyer should forego lien). In South Carolina, one of the states that has limited the retaining lien, a lawyer may not assert a retaining lien against a client unable to pay. *In re* Anonymous Member of S.C. Bar, 335 S.E.2d 803, 805 (S.C. 1985).

29. *E.g.*, United States v. J.H.W. & Gitlitz Deli & Bar, Inc., 499 F. Supp. 1010 (S.D.N.Y. 1980); Home Sav. of Am., SSB v. Malart, Inc., 632 A.2d 827 (N.J. App. Div. 1993). Perhaps the rulings of some courts that child support payments are not subject to attorney retaining liens can be explained on the similar theory that such payments reach the lawyer subject to the law's special purpose of helping children. *See* Gary L. Garrison, Annotation, *Alimony or Child-Support Awards as Subject to Attorneys' Liens*, 49 A.L.R. 5th 595 (1997).

30. *E.g.*, Nat'l Sales & Serv. Co. v. Superior Court, 667 P.2d 738 (Ariz. 1983); Fla. Bar v. Bratton, 413 So. 2d 754 (Fla. 1982); Comm'n on Prof'l Ethics and Conduct v. Nadler, 445 N.W.2d 358 (Iowa 1989); State *ex rel.* Okla. Bar Assoc. v. Cummings, 863 P.2d 1164 (Okla. 1993).

a special purpose within the meaning of the law is often subject to dispute,[31] and until the dispute is resolved the lawyer continues to impound them and the client continues to be pressured to pay what the lawyer claims.

Another exception likewise waters down the impact of retaining liens, but less than might be thought. Some courts deny a lien to a lawyer who has withdrawn from a case or has been discharged for cause by a client.[32] Such rulings can best be explained as following from the principle recognized by some courts that withdrawal or discharge for cause forfeits a lawyer's right to a fee.[33] When there is no fee, there is no lien.[34] But again, when a lawyer has some basis to claim a fee, in practice there is a lien until a court rejects the claim. In most jurisdictions, there is much room to dispute the scope of fee forfeiture, the relationship between fee forfeiture and lien forfeiture, and the existence of cause to discharge counsel.[35] Unless large sums are in question, the client is likely to settle the fee claim under pressure from the lien before a court resolves the dispute.

II. WHY THE RETAINING LIEN IS UNFAIR

The attorney's retaining lien offends basic principles of professional responsibility. It invites lawyers to make money by hurting their former clients, gives lawyers an unreasonable advantage over clients in fee disputes, and penalizes clients who trust their lawyers. And with all these obnoxious features, it does little to fulfill its purpose of helping lawyers collect fees that are justly due.

A. *Biting the Hand that Does Not Feed You Enough*

A lawyer's assertion of a retaining lien over a client's property in the lawyer's possession can expose the client to substantial harm. When the fee dispute arises from pending litigation, as in many of the reported cases, the client will not be able to use his or her documents in the litigation, or even to obtain access to them through discovery,[36]

---

31. *E.g.*, *Nat'l Sales & Serv. Co.*, 667 P.2d at 738.

32. *E.g.*, Jenkins v. Weinshienk, 670 F.2d 915 (10th Cir. 1982); People *ex rel.* MacFarlane v. Harthun, 581 P.2d 716 (Colo. 1978); Marsh, Day & Calhoun v. Solomon, 529 A.2d 702 (Conn. 1987); *In re* Kaufman, 567 P.2d 957 (Nev. 1977).

33. *E.g.*, Estate of Falco v. Decker, 233 Cal. Rptr. 807 (Ct. App. 1987); Teichner by Teichner v. W. & J. Holsteins, Inc., 478 N.E.2d 177 (N.Y. 1985). *But see* Restatement of the Law Governing Lawyers § 40 & Reporter's Note (2000) (adopting a different rule for impact of termination on fee and discussing authority); *id.* § 43, cmt. h & Reporter's Note (distinguishing fee forfeiture and lien forfeiture).

34. *E.g.*, Indus. Network Sys., Inc. v. Armstrong World Indus., Inc., 54 F.3d 150 (3d Cir. 1995).

35. See, for example, *Ismail v. Butler*, 2 All E.R. 506 (Q.B. 1996), where the client claimed the solicitors had forfeited their lien by withdrawing, but the solicitors nevertheless asserted a lien, claiming to have been discharged.

36. Bulk Oil Transps. v. Robins Dry Dock & Repair Co., 277 F. 25 (2d Cir. 1921);

until the fee dispute is resolved. When the lien covers the client's money, the client will be deprived of its use, and may be stymied in a pending transaction. As one of the few courts to reject the retaining lien noted, the lien enforces a lawyer's "right to damage his client's cause . . . unless the client pays him the disputed fees in full and foregoes his right to honestly litigate the dispute."[37]

Inflicting disproportionate harm on the client is not an unwanted by-product of the lien—it is precisely the way the lien is meant to work. The lawyer usually has no use for impounded documents, and is forbidden to use impounded funds during the fee dispute.[38] The benefit the lawyer obtains from the lien is the ability to harm the client until the client settles the fee dispute. And settlement is most likely to occur when the client faces harm from the lien that is greater than the fee in dispute.

Courts have been strikingly candid, if not gleeful, in explaining that inconveniencing clients is "the essence—the power and the bite—of the attorney's retaining lien" and that reducing the harm "would emasculate the retaining lien."[39] It seems that biting an occasional client is a small price to pay for preserving the lien's effect. The purpose of the lien is to provide "leverage over a client,"[40] and "the effectiveness of the lien is proportionate to the inconvenience of the client in being denied access to his property."[41] The lien is even better when it can be used to obstruct access to the truth: "[W]here the adversary has access to documents to which the client does not, the inconvenience to the client is increased, thereby enhancing the value of the lien."[42] Questioning the propriety of this method of collecting

---

Anthony v. Bitler, 911 F. Supp. 341 (N.D. Ill. 1996); Tri-Ex Enters. v. Morgan Guar. Trust Co., 583 F. Supp. 1116 (S.D.N.Y. 1984); Rathburn v. Policastro, 703 So. 2d 537 (Fla. Dist. Ct. App. 1997). *But see* Jenkins v. Dist. Court, 676 P.2d 1201 (Colo. 1984) (stating that a lawyer suing client for fees may be required to produce documents for inspection); Michael J. Fingar, P.A. v. Braun & May Realty, Inc., 807 So. 2d 202 (Fla. Dist. Ct. App. 2002) (similar). Even if a client litigating with a third party were able to obtain documents from her former lawyer by discovery, doing so might entitle the third party to see them and hence waive the protections of the work product doctrine and attorney-client privilege.

37. Acad. of Cal. Optometrists, Inc. v. Superior Court, 124 Cal. Rptr. 668, 672 (Ct. App. 1975).

38. *E.g.*, Model Rules of Prof'l Conduct R. 1.15(c) (2000) (stating that lawyer must keep separate property in dispute); *In re* Webster, 776 N.E.2d 1210 (Ind. 2002); Attorney Grievance Comm. v. Sheridan, 741 A.2d 1143 (Md. 1999); *In re* Stein, 483 A.2d 109 (N.J. 1984); *see also infra* note 91.

39. Jenkins v. Weinshienk, 670 F.2d 915, 920 (10th Cir. 1982).

40. *Anthony*, 911 F. Supp. at 343.

41. Brauer v. Hotel Assocs., Inc., 192 A.2d 831, 835 (N.J. 1963).

42. Tri-Ex Enters. v. Morgan Guar. Trust Co., 583 F. Supp. 1116, 1117-18 (S.D.N.Y. 1984). *Accord* Pomerantz v. Schandler, 704 F.2d 681, 683 (2d Cir. 1983) (quoting *In re* San Juan Gold, Inc., 96 F.2d 60, 61 (2d Cir. 1938)). A bankruptcy court may require a bankrupt's lawyer to turn over papers covered by a lien, although security for payment of the underlying fee claim may be required. 11 U.S.C. § 542(e) (1997); *In re* Matassini, 90 B.R. 508 (Bankr. Ct. M.D. Fla. 1988).

fees for lawyers does not seem to have occurred to such courts, despite the power and duty of the courts to regulate the bar.[43]

A recent case demonstrates how retaining liens can operate. A large firm representing the defendant in a class action was allowed to withdraw for unstated reasons, and the trial court decided that the client owed the firm more than $500,000 in legal fees and expenses. To ensure payment, the law firm kept the client's files.[44] Faced with this situation, the client took about three months to find new counsel prepared to defend the class action. In the meantime, the plaintiffs in that action secured a default judgment against the lawyerless client for more than $22,000,000, which the trial court declined to vacate. Note that the coercion exerted by the law firm's retaining lien was less egregious here than in some other cases, because it was based not on a mere fee claim, but rather on the court's adjudication that the fee was actually due. Nevertheless, the lien probably contributed to the default judgment by depriving the client of access to relevant documents. The default judgment in turn increased the constraint on the client to find a way to pay the fee in order to mount a more effective challenge to the default judgment. Faced with the prospect of losing $22,000,000, the client was under enormous pressure to settle the fee matter on any terms it could. As it turned out, the client eventually succeeded in persuading the Court of Appeals to vacate the default judgment. Other clients, either less determined or less evasive,[45] simply would have settled the fee claim on whatever terms they could, freeing them to resist the demand for a default judgment with the aid of new counsel and unimpounded documents.

In another case, the client was less fortunate, with the Supreme Court itself administering the final blow. A District Court dismissed an antitrust case because of the plaintiff's repeated failure to file adequate answers to interrogatories.[46] Part of the plaintiff's excuse was the unavailability of the case files, withheld by its previous lawyer who had asserted a retaining lien to enforce his claim to a fee of $1,000,000. The Court of Appeals upheld that excuse,[47] only to be reversed by the Supreme Court, which concluded that the District

43. *See generally* Thomas M. Alpert, *The Inherent Power of the Courts to Regulate the Practice of Law: An Historical Analysis*, 32 Buff. L. Rev. 525 (1983).

44. Pecarsky v. Galaxiworld.com Ltd., 249 F.3d 167 (2d Cir. 2001). The law firm also obtained a court order requiring the client to pay the sum due by a stated date and restraining it from transferring any funds until it did so, relief that an ordinary creditor would have been unlikely to secure. *Id.* at 169.

45. The client in question was apparently not a good guy. *See In re* Gaming Lottery Sec. Litig., No. 96 Civ. 5567, 2001 U.S. Dist. LEXIS 1204, at *14-*18 (S.D.N.Y. Feb. 8, 2001); Silva Run Worldwide Ltd. v. Gaming Lottery Corp., No. 96 Civ. 3231, 2002 U.S. Dist. LEXIS 8307, at *3-*17, *30-*31 (S.D.N.Y. May 8, 2002), No. 96 Civ. 3231, 2003 U.S. Dist. LEXIS 5472, at *29-*30 (S.D.N.Y. Apr. 4, 2003).

46. *In re* Prof'l Hockey Antitrust Litig., 63 F.R.D. 641 (E.D. Pa. 1974).

47. *In re* Prof'l Hockey Antitrust Litig., 531 F.2d 1188 (3d Cir. 1976).

Court did not abuse its discretion by dismissing the suit.[48] The Court did not mention the retaining lien that had impeded the plaintiff's efforts to answer the interrogatories. Whether or not the former lawyer was ever paid, he could presumably find satisfaction in having punished his recalcitrant client by extinguishing the very claim he had been retained to prosecute.

As these examples show, the operation of the retaining lien is often wholly irreconcilable with the principle that "a lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer" and "should act with commitment and dedication to the interests of the client."[49] That principle does have limits: A lawyer need not serve for nothing a client who has undertaken to pay. But it is one thing to claim a fee, and another to menace a client with disaster unless the claimed sum is paid. Even when a client fails to pay a fee that is actually due, a lawyer may withdraw from the representation only if the breach is substantial and the client has received reasonable warning; and failure to comply with these requirements risks complete forfeiture of the lawyer's compensation as well as malpractice liability.[50]

By contrast, the rationale of the retaining lien is precisely that threatening to injure the client will and should enforce the lawyer's fee claim. The larger the harm facing the client by comparison to the fee claimed, the more effective the lien. Likewise, the larger the number of essential papers and the greater the value of client assets that the lien immobilizes, the more it restricts the client's freedom to choose a new lawyer, a freedom that other branches of the law seek to protect.[51] It remains only to add that, the more effective the retaining lien is in these ways, the more unjustifiable it is for lawyers to use it and for courts to enforce it.

The contradiction between the retaining lien and the ideals of the legal profession is particularly jarring because of the strong emphasis that those ideals place on protecting clients' papers and property. The rules requiring lawyers to safeguard such papers and property and return them when requested are among the more stringently enforced of the professional regulations, with violations often leading to disbarment.[52] Except, that is, when a lawyer keeps client property in order to enforce a fee demand. Then, the ethical rules and the

48. Nat'l Hockey League v. Metro. Hockey Club, Inc., 427 U.S. 639 (1976).

49. Model Rules of Prof'l Conduct R. 1.3 cmt. 1 (2000).

50. *Id.* at R. 1.16(b)(4); Restatement (Third) of the Law Governing Lawyers § 31 Reporter's Note cmt. f, § 32 cmt. k, § 37, § 40 cmt. e & Reporter's Note (2000).

51. *E.g.*, Reid, Johnson, Downes, Andrachick & Webster v. Lansberry, 629 N.E.2d 431 (Ohio 1994); *In re* Cooperman, 633 N.E.2d 1069 (N.Y. 1994); Restatement (Third) of the Law Governing Lawyers § 40 (2000).

52. *E.g.*, Model Rules of Prof'l Conduct R. 1.15 (2000); *In re* Wilson, 409 A.2d 1153 (N.J. 1979); Charles W. Wolfram, Modern Legal Ethics 175-84 (1986).

policies they embody politely step aside, giving precedence to lawyers' financial interests.[53]

The limited power of the courts to lift the retaining lien by no means redeems it. To seek the court's aid, a client who has failed to pay the fee demanded by one lawyer must first find and pay another lawyer willing to take the case. If the matter from which the claimed fee arose is not a pending court proceeding, the client must then institute a new suit, with further trouble, delay and expense. Except in very unusual circumstances, the client must also post security for the claimed fee in order to secure the release of the impounded papers or property. Mere inability to pay the claimed fee does not exempt a client from these requirements.[54] Meanwhile, the lawyer can simply sit tight on the papers or property as the lien continues to bite. Surely this is not a pattern for client-lawyer dealing that the profession or the courts should continue to endorse.

B. *A Thumb on the Scales*

The retaining lien shifts the burden of resolving fee disputes from lawyers to clients. A lawyer who has impounded client property having sufficient value need not sue the client to recover the claimed fee. Rather, it is the client who must sue, settle, or lose the use of the property. This means that an opportunistic lawyer can often force the client to pay more than the correct fee because the client will be willing to pay any amount that is less than the cost of removing the lien by litigation or the cost to the client of doing without the impounded property. And doing without may be costly indeed when the impounded property consists of papers that the client cannot replace elsewhere.

The burden of taking action, which always is hard to bear, raises special problems for a client disputing a former lawyer's fee demand. As noted above, such a client must find and pay a new lawyer, who is likely to be suspicious of a potential client who resists the previous lawyer's fee claims. A client who has just endured the shipwreck of one lawyer-client relationship is unlikely to be eager to embark on a second one. That most of the relevant documents are likely to be covered by the lien, and therefore unobtainable until the dispute goes to court, makes the client's plight still harder. In addition, a lawyer sued by a client may disclose client confidences relevant to the dispute, perhaps exposing the client to embarrassment or worse.[55] Some of these burdens may be reduced in the approximately ten states where clients may compel their lawyers to arbitrate fee

53. Model Rules of Prof'l Conduct R. 1.8(j)(1), 1.15(b) (2000).

54. *See supra* text accompanying notes 27-28.

55. Authorities cited *infra* note 74. For a colorful example, see *Morganroth & Morganroth v. DeLorean*, 123 F.3d 374 (6th Cir. 1997).

disputes,[56] but at what disillusioned clients may consider the price of bringing the dispute before a tribunal dominated by other lawyers. Indeed, simply by asserting a lien a lawyer is likely to deprive the client of the right to trial by jury in the fee dispute.[57] The client's choice is then between an arbitrator and a judge exercising summary jurisdiction.

For a lawyer, by contrast, the burden of litigating a fee dispute is less than that of other litigants even without the boost of a retaining lien. The lawyer may be able to represent himself, or turn to another member of the same firm. At the very least, lawyers will find it easier than nonlawyers to choose and negotiate with competent counsel. They will also be more able to assist their counsel. And their legal sophistication and familiarity with fee matters should have enabled them to structure the underlying representation and its fee arrangements so as to facilitate establishment of their fee claims, for example by creating and preserving documentation. In addition, lawyers are repeat players in fee disputes, so that they may have an interest in making clear their willingness to go to court if necessary—although they also have an interest in avoiding a reputation for quarreling with clients.[58]

Giving still more leverage to lawyers by allowing retaining liens could be justified only were it established that, when lawyers and clients disagree about fees, the lawyers are usually correct and the clients wrong. For such a proposition there is no evidence. Lawyers often tell anecdotes about abusive clients, but clients tell similar stories about abusive lawyers. Lawyer overbilling does occur.[59] When a lawyer-client relationship ends, both lawyers and clients may become upset and unreasonable. As one lawyer for a disciplinary agency has observed:

> It has been my experience that lawyers tend to be personally affronted by being fired and sometimes unfortunately are not

---

56. *See supra* note 23.

57. Petition of Rosenman & Colin, 850 F.2d 57 (2d Cir. 1988); Jarman v. Hale, 731 P.2d 813 (Idaho Ct. App. 1986).

58. *See generally* Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 Law. & Soc'y Rev. 95 (1974); Special Issue, *Do the "Haves" Still Come Out Ahead?*, 33 Law. & Soc'y Rev. 795 (1999).

59. On lawyer overbilling, *see* Susan Saab Fortney, *Soul for Sale: An Empirical Study of Satisfaction, Law Firm Culture, and the Effects of Billable Hour Requirements*, 69 U.M.K.C. L. Rev. 239, 246-60, 275-81 (2000); Lisa G. Lerman, *Blue-Chip Bilking: Regulation of Billing and Expense Fraud by Lawyers*, 12 Geo. J. Legal Ethics 205 (1999); William G. Ross, *Kicking the Unethical Billing Habit*, 50 Rutgers L. Rev. 2199 (1998); William G. Ross, *The Ethics of Hourly Billing by Attorneys*, 44 Rutgers L. Rev. 1, 12-22, 92-93 (1991). For instances in which lawyers were disciplined for misuse of retaining liens, usually the assertion of a lien when no fee was due, see Thomas G. Fischer, Annotation, *Attorney's Assertion of Retaining Lien as Violation of Ethical Code or Rules Governing Professional Conduct*, 69 A.L.R. 4th 974 (1989).

> professional in dealing with those particular clients. This leads to Bar complaints [about fees].[60]

Unfortunately for clients, it is not the clients but the lawyers—in practice, on the bench, or in the legislature—who have written the retaining lien rules.

The use of retaining liens to disadvantage clients in fee disputes with lawyers is inconsistent with the logic of lawyers' fiduciary duties, which is based on clients' need for special protection.[61] It is also inconsistent with the emphasis the legal profession and the legal system place on removing economic barriers hampering clients' access to the law.[62] Unfortunately, many of the rules meant to protect clients from lawyers are so arcane that only another lawyer can make them work.[63] Empirical investigation suggests that most clients who object to lawyers' bills eventually give in and pay.[64] The retaining lien makes this situation still worse.

The imbalance between lawyer and client that the retaining lien exacerbates strikes hardest at clients with smaller fee disputes, who are more likely to be poorer clients. When the amount in controversy in a fee dispute is $100,000, it may well be worthwhile for a client to retain a new lawyer and start a new proceeding to challenge the lawyer's demands. Clients who incur bills giving rise to disputes of this size are likely to be wealthy and sophisticated. But when the amount in controversy is $5,000, litigation does not pay.[65] Placing the burden of hiring a new lawyer and going to court on the client then virtually ensures that he or she simply will give in, paying what the lawyer seeks in order to retrieve impounded papers or property.

---

60. Robert W. Bare, *10 Most Common Bar Complaints . . . and How to Avoid Them*, Nev. Law., July 1997, at 5.

61. *See* Robert C. Clark, *Agency Costs Versus Fiduciary Duties*, *in* Principals and Agents: The Structure of Business 55 (J. Pratt & R. Zeckhauser ed., 1985); Robert Cooter & Bradley J. Freedman, *The Fiduciary Relationship: Its Economic Character and Legal Consequences*, 66 N.Y.U. L. Rev. 1045 (1991); Tamar Frankel, *Fiduciary Law*, 71 Cal. L. Rev. 795 (1983).

62. *E.g.*, Bates v. State Bar of Ariz., 433 U.S. 350 (1977) (holding that First Amendment protects lawyer fee advertising); Goldfarb v. Va. State Bar, 421 U.S. 773 (1975) (holding that antitrust laws ban minimum fee scales); United Mine Workers of Am. Dist. 12 v. Ill. State Bar Ass'n, 389 U.S. 217 (1967) (holding that First Amendment freedom of association protects union group legal services arrangement); Legal Services Corporation, 42 U.S.C. § 2996a-l (2003); Model Rules of Prof'l Conduct R. 1.5 (2000) (barring unreasonably high fees); Restatement (Third) of the Law Governing Lawyers §§ 34-42 (2000); Wolfram, *supra* note 52, at chs. 9, 14-16; Richard Abel, American Lawyers 127-41 (1989).

63. Stephen Gillers, *Caveat Client: How the Proposed Final Draft of the Restatement of the Law Governing Lawyers Fails to Protect Unsophisticated Consumers in Fee Agreements with Lawyers*, 10 Geo. J. Legal. Ethics 581 (1997).

64. Eric H. Steele & Raymond T. Nimmer, *Lawyers, Clients, and Professional Regulation*, 1976 Am. Bar Found. Res. J. 917, 957-60.

65. See *Renner v. Chase Manhattan Bank*, No. 98 Civ. 926, 2000 U.S. Dist. LEXIS 16150, at *4 (S.D.N.Y. Nov. 2, 2000), in which the court suggested to the parties that a $17,000 fee claim was not worth fighting over.

C. *The Wages of Trust*

The legal profession has traditionally encouraged clients to confide in their lawyers, not just for the profession's benefit, but assertedly to encourage access to law.[66] The more a client responds to this invitation to trust a lawyer, the more exposed he or she becomes to the lawyer's retaining lien.

A trusting client will confide relevant documents to his or her lawyer. Much lawyer and judicial rhetoric emphasizes the importance of encouraging clients to share their knowledge with lawyers in order to obtain sound advice and adequate representation.[67] For this reason, a client's confidences must be protected even when he confesses to a crime and disclosing the confession might help others.[68] Although a client may not bring previously existing documents under the attorney-client privilege by conveying them to a lawyer,[69] the privilege, the lawyer's duty of confidentiality, and their purpose of encouraging client confidences are otherwise fully applicable to documents.[70]

Often, a client must likewise entrust funds to a lawyer in order to accomplish the purposes of the representation. The law and the legal profession seek to encourage this through detailed rules requiring lawyers to set up special trust accounts, preserve accurate records, provide an accounting when a client so requests, keep client funds strictly separate from lawyer funds, and promptly disburse funds to which a client or third party is entitled.[71] Some states audit lawyers' accounts or establish client protection funds for further assurance.[72]

---

66. *But see* Robert A. Burt, *Conflict and Trust Between Attorney and Client*, 69 Geo. L.J. 1015 (1981) (advocating bringing lawyer-client conflicts into the open); Douglas E. Rosenthal, Lawyer and Client: Who's In Charge? (1974) (presenting evidence that active clients get better results than passive ones).

67. *E.g.*, Upjohn Co. v. United States, 449 U.S. 383 (1981) (defining attorney-client privilege); Swidler & Berlin v. United States, 524 U.S. 399 (1998) (similar); Model Rules of Prof'l Conduct R. 1.6 cmts. 1-6 (2000) (regarding duty of confidentiality); *see* Wolfram, *supra* note 52, at 242-47 (1986) (summarizing rationale and critiques of confidentiality).

68. *E.g.*, State v. Macumber, 544 P.2d 1084 (Ariz. 1976) (holding that privilege bars lawyer from testifying to deceased client's confession to murder for which another is on trial); People v. Belge, 372 N.Y.S.2d 798 (Onondaga County Ct. 1975), *aff'd*, 376 N.Y.S.2d 771 (App. Div. 1975), *aff'd*, 359 N.E.2d 377 (N.Y. 1976) (holding that lawyer properly kept secret client's confession to unsolved murders and location of bodies). *But see* Model Rules of Prof'l Conduct R. 1.6(b)(1) (2000) (amended in 2001 to allow disclosure to prevent reasonably certain death or substantial bodily harm); Restatement (Third) of the Law Governing Lawyers §§ 66, 67 (2000) (stating that a lawyer may disclose confidences to prevent death or client's crime or fraud).

69. *E.g.*, John W. Strong et al., McCormick on Evidence § 89 (5th ed. 1999).

70. *E.g.*, Fisher v. United States, 425 U.S. 391 (1976); Restatement (Third) of the Law Governing Lawyers §§ 46(1), 59 cmt. b, 69 cmt. j (2000).

71. *E.g.*, Cal. Rules of Prof'l Conduct R. 4-100 (1988); N.Y. Code of Prof'l Responsibility, DR 9-102 (1999); Rules Regulating the Florida Bar R. 4-1.15 (2002); *see also supra* note 52 and accompanying text.

72. *E.g.*, N.J. Ct. R. 1:21-6, 1:28-1 (2003); Model Rules for Lawyer Disciplinary

The lawyer retaining lien's most stringent effect is reserved for clients who accept the invitation of the profession and the law by entrusting documents, funds or other property to their lawyers. Should a fee dispute arise, their lawyers will then find more to grab. For the few clients who know about the lien in advance, it thus operates to discourage desirable conduct. More broadly, the lien disseminates a message of lawyer hypocrisy and penalizes clients who trust their lawyers.[73]

The retaining lien somewhat resembles, but is less defensible than, the rule that allows lawyers to disclose client confidences when necessary to collect a fee or defend against a malpractice suit.[74] Both can be attacked as placing lawyer profit before the protection of client confidences. But the disclosure rule has a justification: When a controversy between lawyer and client must be adjudicated, finding out what happened often necessitates proof of what the client and lawyer communicated to each other. No such necessity justifies the retaining lien, whose only purpose is to help lawyers collect disputed fees.

The lien not only punishes trusting clients but gives lawyers perverse incentives to provide defective service. A lawyer is supposed to keep a client informed of the progress of a representation;[75] but a lawyer who properly does so by sending a client copies or originals of important documents thereby reduces the value of the lien that the lawyer might later assert should a fee dispute arise. A lawyer is supposed to deliver funds and other property promptly when they are due;[76] but a lawyer who does so reduces the client funds and property that the lawyer holds and hence reduces the value of the retaining lien that the lawyer might later wish to assert. Very likely those lawyers who are the most likely to make unwarranted fee claims are also most likely to disregard their duties by retaining the papers and property that could increase the coercive power of their liens.

D. *Fruitless Sin*

With all its obnoxious features, the retaining lien is not even very useful in enforcing valid fee claims. It works only in a small group of claims: those in which the client leaves documents or property of

---

Enforcement R. 29-30 (1989); Model Rules for Lawyers' Funds for Client Protection R. 1-19 (2002); Lawyers' Manual on Prof'l Conduct 45:1001-1208 (1997).

73. *Cf.* Abraham S. Blumberg, *The Practice of Law as Confidence Game*, 1 Law & Soc'y Rev. 15 (1967).

74. Model Rules of Prof'l Conduct R. 1.6(b)(2) (2000); Restatement (Third) of the Law Governing Lawyers §§ 64, 65, 83 (2000); Henry D. Levine, *Self-Interest or Self-Defense: Lawyer Disregard of the Attorney-Client Privilege for Profit and Protection*, 5 Hofstra L. Rev. 783 (1977).

75. *E.g.*, Model Rules of Prof'l Conduct R. 1.4 (2000).

76. *Id.* at R. 1.15(b).

significant value with a lawyer; a fee dispute arises while the documents or property remain in the lawyer's possession; the lawyer is willing to lose any possibility of again being retained by the client; the client needs to reclaim the documents or property soon; and the value of the documents or property to the client is large compared to the portion of the fee in dispute.

For these reasons, most comprehensive discussions of fee collection methods for practitioners disregard the retaining lien altogether[77] or note that it is usually of little use.[78] One, admittedly from a state that has limited use of the lien, even notes that "good lawyers understand that retaining liens are for the birds."[79] Another comments that retaining liens "tend to cause more trouble in many instances than they are worth."[80] Authors of such works typically recommend other ways to collect fees: reaching fee agreements at the outset of a representation, regular billing and reminders, staying in touch with clients, and the security devices to be discussed later in this Article.[81]

The point can also be made in another way. If the retaining lien did not already exist, it is highly unlikely that informed clients and lawyers would create it by contract.[82] From a lawyer's point of view, a retaining lien clause would rarely provide any benefit and would also tend to alienate an informed client. Better methods of collecting fees are available. From the point of view of a client who was aware of how a retaining lien works, a lien clause would be like a possible lightning bolt, unlikely to strike but fatal if it did. Being unable to diversify this risk over a portfolio of cases, most clients would tend to be risk-averse and would expect greater concessions in return for such a clause than lawyers would be willing to offer. Indeed, any lawyer

77. *E.g.*, J. Harris Morgan, How to Draft Bills Clients Rush to Pay (Julie Tamminen ed., 1995); Edward Poll, Attorney and Law Firm Guide to The Business of Law (1994); Theda C. Snyder, Running a Law Practice on a Shoestring 9-13 (1997); Edward Poll, *12 Tips for Collecting Accounts Receivables*, Acct. for Law Firms, Nov. 2000, at 1; Brenda Sapino & Diane Burch Beckham, *Make Way for the Enforcer*, Tex. Law., July 9, 1990, at 44; Thom Weidlich, *Law Firms Try to Get Tougher on Deadbeat Clients*, Nat'l L.J., Mar. 21, 1994, at A1.

78. *See* Linda J. Ravdin, *The Solo's Guide to Collecting Fees*, *in* Flying Solo: A Survival Guide for the Solo Lawyer 186, 196 (Joel P. Bennett ed., 2d ed. 1994) ("[E]ven if the lien is theoretically available, it may not be very useful."); Comment, *Oregon Attorneys' Liens: Their Function and Ethics*, 27 Willamette L. Rev. 891, 899 (1991) (stating that liens serve "only nuisance value"). *But see* Laurie Berke-Weiss, *Getting Paid: Good Ideas that Work and Are Ethical*, *in* Serving Clients Well: Avoiding Malpractice and Ethical Pitfalls in the Practice of Law 143, 150-51 (1999) (mentioning lien briefly but without disapproval).

79. John Freeman, *Turning Over "The File,"* S.C. Law., July/Aug. 1998, at 10. For South Carolina's restrictions on use of the lien, see *In re* Tillman, 462 S.E.2d 283 (S.C. 1995).

80. John W. Toothman & William G. Ross, Legal Fees: Law and Management 104 (2003).

81. *See supra* notes 77-78; *infra* Part III.

82. *But cf.* Acad. of Cal. Optometrists, Inc. v. Superior Court, 124 Cal. Rptr. 668 (Ct. App. 1975) (invalidating contractual retaining lien).

who asked for a retaining lien clause would be likely to awake the suspicions of an informed client. In short, informed clients and lawyers would rarely agree ex ante to the clause, even though lawyers today do sometimes benefit from imposing a lien ex post on a previously unsuspecting client. In addition, any informed client who had knowingly accepted a lien clause would have an especial incentive to frustrate it by keeping property out of the lawyer's hands.

A similar analysis explains why it is no paradox to conclude that the retaining lien is harmful to clients at the same time as it does little for lawyers. A lawyer, considered as an economic actor, seeks to maximize profit. Retaining liens contribute little toward this end because they work only unpredictably and haphazardly. The lawyer would be better advised to implement in advance more broadly effective and less abrasive ways of ensuring payment. But each client against whom a lawyer deploys a retaining lien suffers harm ranging from exasperating inconvenience to crushing loss. It is no consolation to a client that many other clients are not coerced in the same way.

From a broader perspective, the retaining lien reduces lawyer prosperity because it injects into the lawyer-client relationship a confrontational approach best confined to dealings with an opposing party, and often counterproductive even there.[83] "Success of legal fee collection litigation most often carries with it the fallout of lost clients, additional costs, decreased income, lost opportunities, bad reputation, and misplaced priorities."[84] Those who discuss lawyering as a business find the keys to success in effective marketing, good client relations, efficient firm management, creative fee arrangements, and quality services.[85] A reputation for grabbing clients' property in order to get them to pay whatever fee you claim rather than lose the very matter in which they came to you for help just does not fit into this approach. In the long run, it is no more good business than it is good ethics.

Lawyers, in short, have no more need of retaining liens than do members of other professions, who have not found them necessary. Obstetricians, for example, have no custom of collecting their bills by refusing to release babies from the hospital.[86] "Medical reports should

---

83. *E.g.*, Robert H. Mnookin et al., Beyond Winning: Negotiating to Create Value in Deals and Disputes (2000); Jonathan M. Hyman, *Trial Advocacy and Methods of Negotiation: Can Good Trial Advocates Be Wise Negotiators?*, 34 U.C.L.A. L. Rev. 863 (1987).

84. Henry W. Ewalt, Through the Client's Eyes: New Approaches to Get Clients to Hire You Again and Again 67 (1994).

85. *E.g.*, Austin G. Anderson, Marketing Your Practice (1986); Frank Brennan, Focusing on Profitability (1994); Morgan, *supra* note 77; Richard C. Reed, Billing Innovations: New Win-Win Ways to End Hourly Billing (1996); Hollis Hatfield Weishar, Marketing Success Stories (1997); Strengthening Your Firm: Strategies for Success (Arthur G. Greene ed., 1997); ABA Committee on Lawyer Business Ethics, *Business and Ethics Implications of Alternative Billing Practices: Report on Alternative Billing Arrangements*, 54 Bus. Law. 175 (1998); *supra* notes 77-78.

86. Before the abolition of imprisonment for debt, some English solicitors

not be withheld because of an unpaid bill for medical services,"[87] although in some states physicians enjoy a lien on a patient's personal injury claim against a third party,[88] and legislation recognizing a patient's right to inspect and copy medical records contains no exceptions for unpaid bills.[89] Accountants likewise are obliged to return a client's documents when requested, regardless of a pending fee claim.[90] Nonprofessionals such as automobile mechanics may often invoke statutory liens, but their situation is distinguishable because they lack the fiduciary duties that the law recognizes for the protection of those obliged to place themselves in the hands of professionals whose performance cannot easily be monitored.[91] The same distinction applies to creditors holding security interests, whose rights are also set forth in a contract usually arising from an arm's length transaction.[92]

III. OTHER WAYS TO PROTECT FEES

The retaining lien is not the only way lawyers can seek to ensure that their fees will be paid, but are the alternatives any better? Some of them are. Abolishing the retaining lien would not commit us to forbidding its superior siblings.

---

attempted to assert liens on the bodies of their clients, but without success. Whitley Stokes, A Treatise on the Liens of Attornies, Solicitors, and Other Legal Practitioners 12-13 (1860).

87. American Medical Association Council on Ethical and Judicial Affairs, Code of Medical Ethics 158 (2002-03 ed.). *Accord* Person v. Farmers Ins. Group of Cos., 61 Cal. Rptr. 2d 30, 32-33 (Ct. App. 1997).

88. American Medical Association Council on Ethical and Judicial Affairs, *supra* note 87, at 215; *see, e.g.*, Okla. Stat. tit. 42, § 46 (2001); Cirrincione v. Johnson, 703 N.E.2d 67 (Ill. 1998); Nelsen v. Grzywa, 618 N.W.2d 472 (Neb. Ct. App. 2000); Jay M. Zitter, Annotation, *Physicians' and Surgeons' Liens*, 39 A.L.R. 5th 787 (1996).

89. *E.g.*, 45 C.F.R. § 164.524 (2003); Minn. Stat. Ann. § 144.335 (West Supp. 2004); Unif. Health-Care Info. Act, §§ 3-101, 3-102 9 U.L.A. 212, 214-15 (1999); Jonathan P. Tomes, Healthcare Records Management Disclosure and Retention 301-44 (1993); *see* Wheeler v. Comm'r of Soc. Servs., 662 N.Y.S.2d 550 (App. Div. 1997).

90. Perillo, *supra* note 4, at 470-71.

91. *E.g.*, Ark. Code Ann. § 18-44-101 (Michie 2003) (describing availability of liens on boats); Restatement (Second) of Agency § 464 (1957); Restatement of Security § 61 (1941). A mechanic's lien is also usually limited to the property the mechanic's labor has improved, and is therefore less comparable to the lawyer retaining lien than to the right to withhold a lawyer's work product for which the client has not paid, discussed in Part III *infra*. *See, e.g.*, N.H. Rev. Stat. Ann. § 451-A:1 (2002) (repairing radio or television). Many mechanic's liens also differ from attorney retaining liens because they are imposed on real property, and until foreclosed do not prevent the owner from using that property. *See, e.g.*, Ohio Rev. Code Ann. §§ 1311.01 to 1311.22 (Anderson 2003). On the controverted desirability of such liens, see George Lefcoe, Real Estate Transactions 817-19 (2d ed. 1997).

92. *See* U.C.C. § 9-609 (stating that secured creditor may take possession and sell collateral when debtor defaults).

A. *The Charging Lien*

Because lawyers' retaining and charging liens have similar historical roots[93] and confusingly similar names, it is important to make clear why the charging lien is a useful institution although the retaining lien is not.

The charging lien attaches to funds recovered by a lawyer for a client or in some jurisdictions to the client's claim for such funds.[94] With rare exceptions,[95] it is invoked by the lawyer for a plaintiff in a civil action, typically a lawyer retained on a contingent fee. The lien thus helps make it possible for a plaintiff with no other way of assuring payment to find counsel. Although some states recognize common law charging liens,[96] most have authorizing statutes, which may require a contractual lien clause or notice to the court as conditions for the lien's validity.[97]

A lawyer may use a charging lien in two ways to help collect a fee. First, if the funds recovered for the client come into the lawyer's possession, the lawyer may detain the amount claimed as a fee. This use has some similarity to a retaining lien, except that the lawyer may keep only proceeds of the matter in which the fee is claimed,[98] and only the amount so claimed.[99] Second, the lawyer may bind the defendant from whom the property is to be recovered by giving it proper notice. If the defendant then pays the judgment directly to the plaintiff, the plaintiff's lawyer may recover his or her fee directly from

---

93. On the origins of the charging lien, see Welsh v. Hole, 99 E.R. 155 (K.B. 1779); Martin v. Hawks, 15 Johns. 405 (N.Y. Sup. Ct. 1818); Edward P. Weeks, A Treatise on Attorneys and Counsellors at Law § 370 (2d ed. 1892).

94. *See* Ross v. Scannell, 647 P.2d 1004, 1008-09 (Wash. 1982) (stating that lien does not cover realty).

95. On the availability of a charging lien in some arbitrations, see *In re Varat Enterprises*, 81 F.3d 1310 (4th Cir. 1996); *E. Marv Laxer Associates, Inc. v. Moredall Realty Corp.*, 533 F. Supp. 8 (S.D.N.Y. 1981); *Mahesh v. Mills*, 602 N.W.2d 618 (Mich. Ct. App. 1999). *See also* United States v. Fidelity Phila. Trust Co., 459 F.2d 771 (3d Cir. 1972) (involving a claim to lien on fund obtained through negotiation); Schroeder, Siegfried, Ryan & Vidas v. Modern Elec. Prods., Inc., 295 N.W.2d 514 (Minn. 1980) (enforcing a lien on "proceeds" of patent application).

96. *E.g.*, Eleazer v. Hardaway Concrete Co., 315 S.E.2d 174 (S.C. Ct. App. 1984); Stasey v. Stasey, 483 N.W.2d 221 (Wis. 1992) (holding that common law lien survives statute).

97. *Ross*, 647 P.2d at 1008; Restatement (Third) of the Law Governing Lawyers § 43 cmts. d, e & Reporter's Note (2000) (citing authority).

98. *E.g.*, Ins. Corp. of Hannover, Inc. v. Latino Americana de Reaseguros, 868 F. Supp. 520 (S.D.N.Y. 1994); Grayson v. Bank of Little Rock, 971 S.W.2d 788 (Ark. 1998); Erez v. Aigon Taxi, Inc., 679 N.Y.S.2d 143 (App. Div. 1998). Similarly, the lawyer may not keep property the client already owned. *E.g.*, St. Cloud Nat'l Bank & Trust Co. v. Brutger, 488 N.W.2d 852 (Minn. Ct. App. 1992); Cole, Schotz, Bernstein, Meisel & Forman, P.A. v. Owens, 679 A.2d 155 (N.J. Super. Ct. App. Div. 1996).

99. People v. Gray, 35 P.3d 611 (Colo. 2001); *In re* Haar, 698 A.2d 412 (D.C. 1997).

the defendant.[100] It is also possible that a properly perfected charging lien will give the lawyer priority over other creditors of the client.[101]

The charging lien lacks most of the objectionable features of the retaining lien. Because the charging lien is limited to the amount the lawyer claims as a fee, its assertion rarely threatens harm to the client disproportionate to that amount. Rather than depriving the client of property the client may well have owned before letting the lawyer hold it, the charging lien simply withholds from the client some part of what the lawyer has helped the client recover. A charging lien's impact on the client is hence likely to be less than that of a retaining lien.[102] The charging lien does not punish a client for entrusting papers or property to a lawyer. And, rather than providing an incentive for lawyers to keep clients uninformed and to delay transferring property to them, the charging lien encourages lawyers to maximize clients' recovery: the larger the recovery, the larger the fee (at least in contingent fee cases) and the more the property to which the lien can attach.

One objection to the retaining lien does apply to the charging lien. By asserting such a lien, a lawyer makes it more likely that a client will have to sue him, rather than waiting for the lawyer to sue for his fee. The charging lien thus makes fee disputes more burdensome for clients, who are already likely to find them more burdensome than do lawyers. Yet this effect is limited. Because the lawyer who asserts the charging lien may impound only a sum equal to the lawyer's fee claim, and because this sum has never been in the client's possession, the client is under less pressure to settle or sue than are many victims of the retaining lien. And, because the lawyer asserting the charging lien may detain the sum in dispute but not spend it,[103] that lawyer may have to bring a fee suit if the client does not go to court first.

As with retaining liens, the client may be able to reduce the burden of litigation through fee arbitration or through the court's power to resolve the fee dispute summarily.[104] In addition, charging liens are most significant in cases where the lawyer asserting the lien is replaced by another during a pending action and wishes to ensure payment when the action is tried or settled. In such situations, if the two

100. *E.g.*, Potter v. Schlesser Co., 63 P.3d 1172 (Or. 2003); Schneider, Kleinick, Weitz, Damashek & Shoot v. City of New York, 754 N.Y.S.2d 220 (App. Div. 2002); Levin v. Gulf Ins. Group, 82 Cal. Rptr. 2d 228 (Ct. App. 1999); 2 Robert L. Rossi, Attorneys' Fees 288-89 (2d ed. 1995).

101. *E.g.*, *In re* Hagen, 922 F.2d 742 (11th Cir. 1991); Wolf v. Sherman, 682 A.2d 194 (D.C. 1996); *see supra* note 18.

102. *See* Jeffrey J. Rachlinski, *Gains, Losses, and the Psychology of Litigation*, 70 S. Cal. L. Rev. 113 (1996).

103. People v. Gray, 35 P.3d 611 (Colo. 2001); *In re Haar*, 698 A.2d at 412; *In re* Conduct of Starr, 952 P.2d 1017 (Or. 1998). This is also true in the case of a retaining lien. *See supra* note 38.

104. *See supra* text accompanying notes 22-23.

lawyers cannot work out a fee settlement, the court before which the action is already pending may impose a solution in order to speed the litigation.[105]

In situations involving replacement counsel, the charging lien might appear to cause another problem. Former counsel's lien may make it harder for the client to afford new counsel. But the problem here is not the charging lien but the fee that it helps collect. So long as the client owes one lawyer a fee, whether or not it is backed by a lien, the client will face difficulties in finding the resources to retain a second lawyer. The solution to this problem is hence to be found through fee regulation, not lien regulation. Thus, in contingent fee cases, many states now protect the client's ability to change counsel by ruling that the first lawyer's right to a fee does not accrue until the contingency occurs, and even then is limited to the lower of the contractual fee and the fair value of the lawyer's services.[106] Similar formulas have been applied in non-contingent fee cases.[107]

All in all, the charging lien performs a function useful to lawyers and even to clients, without exacting an unreasonable price. It should be accompanied by safeguards,[108] but not abolished.

B. *Other Fee Collection Techniques*

It would be pointless to give a complete list of fee collection methods. Some, such as selling or financing law firm accounts receivables, are still being developed.[109] Others such as prompt and regular billing or keeping in touch with clients raise few problems. Still others fall in the broad realm of sleazy collection methods that lawyers have occasionally used.[110] This discussion will therefore focus on three important collection techniques.

---

105. *E.g.*, Butler, Fitzgerald & Potter v. Sequa Corp., 250 F.3d 171 (2d Cir. 2001); K.E.C. v. C.A.C., 661 N.Y.S.2d 715 (Sup. Ct. 1997); *see* Joseph Brenner Assocs., Inc. v. Starmaker Entm't, Inc., 82 F.3d 55 (2d Cir. 1996).

106. *E.g.*, Rosenberg v. Levin, 409 So. 2d 1016 (Fla. 1982); Reid, Johnson, Downes, Andrachik & Webster v. Lansberry, 629 N.E.2d 431 (Ohio 1994).

107. Provanzano v. Nat'l Auto Credit. Inc., 10 F. Supp. 2d 44 (D. Mass. 1998); Olsen & Brown v. Englewood, 889 P.2d 673 (Colo. 1995); *see* Cohen v. Radio-Electronics Officers Union, 679 A.2d 1188 (N.J. 1996); Restatement (Third) of the Law Governing Lawyers § 40 (2000).

108. *See* Restatement (Third) of the Law Governing Lawyers § 43(2), (3) (2000) (requiring written lien contract, lawyer's duty not to impede resolution of fee disputes, power of court where action pending to prevent abuse).

109. *See generally* Cadle Co. v. Schlichtmann, 267 F.3d 14 (1st Cir. 2001); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 320 (1968); Assoc. of the Bar of the City of New York, Ethics Op. 1995-1 (1995).

110. *E.g.*, *In re* Nelson, 327 N.W.2d 576 (Minn. 1982) (involving a lawyer who made groundless charges against client to tax officials); *In re* Jaffe, 623 N.Y.S.2d 615 (App. Div. 1995) (involving a lawyer who tried to collect fees through improper direct communications after entering into fee settlement); *In re* Boelter, 985 P.2d 328 (Wash. 1999) (involving a lawyer who falsely claimed to have recorded damaging

1. Advance Payment

Advance payment must be the most common, and very likely the most effective, of collection methods. It can take various forms, notably complete payment of a lump sum fee or a deposit against hourly charges, refreshed when it is used up. Obviously, advance payment can only be used with clients who have money or the ability to raise it.

Requiring prepayment gives clients clear (painfully clear) notice at the outset of representations of the financial impact of their fee arrangements. This distinguishes prepayment from the retaining lien, which works best when a lawyer can spring it on an unsuspecting client, and from other arrangements known only to clients who read the fine print of contracts with lawyers. Because the client is aware of the request for prepayment, lawyer and client may negotiate about whether prepayment is necessary and what its terms should be. Clients with sufficient access to funds to make prepayment an option are likely to be more sophisticated and assertive than other clients, so the possibility of negotiation is more than an economist's fantasy. Strengthening the current feeble requirements for advance disclosure of fee arrangements[111] would further increase the likelihood of negotiation.

In other respects as well, prepayment is free of defects that attend the retaining lien. Prepayment has no tendency to penalize clients for trusting their lawyers, except in the sense that a distrustful client might not accept a prepayment arrangement to begin with. Nor does prepayment inflict disproportionate harm on clients to coerce them to settle fee disputes.

Paying in advance, however, can exert excessive pressure to settle on clients if the amount paid is more than the fee turns out to be. A client may be willing to pay a lawyer's excessive fee claim just to get back the remainder of his or her deposit. How often this occurs is hard to say. I suspect that relatively few lawyers dare to ask for prepayments or refreshers much larger than their fees turn out to be. It is more likely that they underestimate what they will charge. In any event, asking for clearly excessive prepayment should be, and perhaps is, a disciplinary violation.[112]

A related problem is that prepayment may be accompanied by various contractual provisions designed to let the lawyer keep the payment even though the lawyer-client relationship comes to an untimely end. The result may be overcharging as well as inappropriate discouragement of a client's exercise of the right to

admissions by client); Restatement (Third) of the Law Governing Lawyers § 41 (2000).

111. Model Rules of Prof'l Conduct R. 1.5(b) (2000); *see* Gillers, *supra* note 63.

112. *In re Jaffe*, 623 N.Y.S.2d at 615.

change counsel. The solution to this problem is regulation of this kind of fee provision. Some states forbid at least some such provisions as "nonrefundable retainers."[113] Others nullify them when they amount to unreasonable fees for what the lawyer undertakes to do,[114] or when they do not adequately notify clients of nonrefundability.[115] If a representation comes to an end, a lawyer must refund any unearned fees–and that includes fees claimed under an invalid fee provision.[116]

Like both retaining and charging liens, prepayment arrangements tend to shift the burden of initiating litigation onto the client, who must go to court to recover any excess of the funds held by the lawyer over the correct fee. This burden is mitigated in ways already mentioned: The lawyer may keep only the amount claimed and must segregate it until the fee dispute is resolved, and the client may be able to procure summary court adjudication or in some states compel the lawyer to arbitrate.[117] It would be useful to require the lawyer to initiate a fee determination procedure within a stated period after the fee dispute arises, unless the client agrees to an extension.[118]

Although prepayment does raise problems, on balance its simplicity and usefulness and the opportunity to negotiate its terms justify its legitimacy. So long as lawyers are required to keep client funds in separate trustee accounts but clients are not, it would be hard to warrant prohibition of payment in advance. Prepayment should be improved but not abolished.

2. Mortgaging Client Property

When a client has no liquid assets and seeks a lawyer in a matter that will not give rise to monetary recovery, mortgaging the client's land or placing a security interest on other property may make it easier for the client to retain counsel. Unlike some other fee collection methods, this one does not always shift the burden of initiating litigation. The client may stay in possession until the lawyer institutes and secures relief in a foreclosure proceeding. But most

---

113. *In re* Cooperman, 633 N.E.2d 1069 (N.Y. 1994); Cuyahoga County Bar Ass'n v. Okocha, 697 N.E.2d 594 (Ohio 1998). *Compare* Lester Brickman & Lawrence A. Cunningham, *Nonrefundable Retainers: Impermissible Under Fiduciary, Statutory and Contract Law*, 57 Fordham L. Rev. 149 (1988), *with* Steven Lubet, *The Rush to Remedies: Some Conceptual Questions About Nonrefundable Retainers*, 73 N.C. L. Rev. 271 (1994).

114. *In re* Sather, 3 P.3d 403 (Colo. 2000); Restatement (Third) of the Law Governing Lawyers § 34 cmt. e & Reporter's Note (2000) (citing authority); *id.* § 40.

115. *Id.* § 38(3)(c) cmt. g & Reporter's Note (citing authority).

116. *In re Sather*, 3 P.3d at 403; Haskins v. Bell, 129 N.W.2d 390 (Mich. 1964); Model Rules of Prof'l Conduct R. 1.16(d) (2000).

117. *See supra* text accompanying notes 22-23, 38.

118. *See* Comm. on Prof'l Responsibility and Prof'l Discipline, *A Suggestion for a More Equitable Retaining Lien*, 54 Rec. Ass'n of the Bar of the City of New York 180 (1999) (making similar proposal for retaining liens).

states allow contractual clauses giving mortgagees a power of sale when default occurs.[119]

Unfortunately, foreclosure can inflict disproportionate harm on the client. The lawyer recovers at most the sum due unless he or she buys the property at the foreclosure sale and later resells it at a profit. If the property is worth more than the lawyer's fee, its sale in the foreclosure proceedings should yield a surplus payable to the client. But foreclosure sales tend to yield less than the market value of the property, and involve costs that will be paid out of the proceeds.[120] A client who cannot find cash or another buyer thus faces considerable pressure to settle the fee dispute on whatever terms the lawyer will accept.

Mortgage and security interest arrangements also have a considerable potential for abusing a client's trust, albeit not in the same way as retaining liens. They involve complex contractual provisions that many clients will find hard to understand, and may simply accept on a lawyer's word. The clients who are likely to need to offer mortgage security to retain a lawyer are likely to be relatively unsophisticated, and almost certain not to hire a second lawyer to explain the mortgage agreement. The lawyer's duty to explain such provisions conflicts with the lawyer's interest in keeping the bad news from a client. Once the arrangement goes into effect, moreover, it may create further conflicts of interest between the lawyer and the client. The lawyer, for example, might wish to schedule the matter in which he or she was retained to be able to foreclose at the moment most propitious for him, or might wish to handle the matter so as to maximize the chances of foreclosing.

For these reasons, mortgage and security interest agreements providing security for fees are regulated as business transactions between lawyer and client. The lawyer must be able to show that the agreement was fair and reasonable to the client, and that the client consented to it in writing after receiving full disclosure of the terms and problems of the arrangement as well as an opportunity to seek independent advice.[121] Otherwise, the lawyer is subject to professional

119. 1 Grant S. Nelson & Dale A. Whitman, Real Estate Finance Law 580-81, 609-13 (3d ed. 1994).

120. Basil H. Mattingly, *The Shift from Power to Process: A Functional Approach to Foreclosure Law*, 80 Marq. L. Rev. 77 (1996); Philip Shuchman, *Profit on Default: An Archival Study of Automobile Repossession and Resale*, 22 Stan. L. Rev. 20 (1969); Steven Wechsler, *Through the Looking Glass: Foreclosure by Sale as* De Facto *Strict Foreclosure—An Empirical Study of Mortgage Foreclosure and Subsequent Resale*, 70 Cornell L. Rev. 850 (1985); *see* Luize E. Zubrow, *Rethinking Article 9 Remedies: Economic and Fiduciary Perspectives*, 42 UCLA L. Rev. 445 (1994). *But see* Debra Pogrund Stark, *Facing the Facts: An Empirical Study of the Fairness and Efficiency of Foreclosures and a Proposal for Reform*, 30 U. Mich. J.L. Reform 639 (1997).

121. Model Rules of Prof'l Conduct R. 1.8(a) (2000); ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 02-427 (2002).

discipline,[122] and the client may rescind the agreement.[123] These restrictions contrast strikingly with a lawyer's freedom to impose a retaining lien, even in the absence of a contract so providing, disclosure to the client, or a showing of fairness.

Lawmakers should add at least one more restriction. A lawyer should be allowed to include a mortgage or security interest provision in a fee agreement[124] only when a reasonable client might have chosen to accept such an arrangement.[125] Only when that is so can the arrangement be considered fair and reasonable to the client, as required by law.[126] When a mortgage or security interest provision meets this standard, it will usually be because the client had no other reasonable method of securing a paid lawyer's services. In such a situation, invalidating the provision would harm clients. In other situations, a provision might be upheld if it were superior to available alternatives, such as arrangements offered by other lawyers of comparable qualifications. And when a client is sophisticated, as in the case of a corporation with house counsel, it should be free to consent to almost any fee or financing arrangement.[127] It is the unsophisticated clients who face loss of their homes as a result of an overreaching fee security arrangement.

3. Litigation and Arbitration

A lawyer's right to sue a client for fees, traditionally rejected as below the dignity of legal professions in some nations, has been recognized in the United States for almost two centuries.[128] Clients

122. Hawk v. State Bar of Cal., 754 P.2d 1096 (Cal. 1988); *In re* Taylor, 741 N.E.2d 1239 (Ind. 2001); *In re* Snyder, 35 S.W.3d 380 (Mo. 2000), *modified on denial of reh'g*, No. SC82299 (Mo. Feb. 13, 2001); Office of Disciplinary Counsel v. Levin, 517 N.E.2d 892 (Ohio 1988).

123. Duvall v. Laws, Swain & Murdoch, P.A., 797 S.W.2d 474 (Ark. Ct. App. 1990); Petit-Clair v. Nelson, 782 A.2d 960 (N.J. Super. Ct. App. Div. 2001); Cotton v. Kronenberg, 44 P.3d 878 (Wash. Ct. App. 2002); *see* John S. Dzienkowski & Robert J. Peroni, *The Decline in Lawyer Independence: Lawyer Equity Investments in Clients*, 81 Tex. L. Rev. 405, 444-58 (2002).

124. Different considerations apply when a client gives a mortgage after a representation ends, as security for a settlement of the fee dispute. *See* Twachtman v. Hastings, 1997 Conn. Super. LEXIS 2014 (Super. Ct. 1997).

125. *Cf.* Restatement (Third) of the Law Governing Lawyers § 18 cmt. e (2000) (stating similar requirement for lawyer-client contracts entered during a representation).

126. Model Rules of Prof'l Conduct R. 1.8(a)(1) (2000).

127. *E.g.*, Ryan v. Butera, Beausang, Cohen & Brennan, 193 F.3d 210 (3d Cir. 1999); Brobeck, Phleger & Harrison v. Telex Corp., 602 F.2d 866 (9th Cir. 1979) (per curiam); *see* Richard W. Painter, *Rules Lawyers Play By*, 76 N.Y.U. L. Rev. 665, 706-07 (2001).

128. *See* John Leubsdorf, Man In His Original Dignity: Legal Ethics in France 16-23 (2001); *supra* notes 6-17 and accompanying text.

may likewise sue lawyers to recover excessive fees that they have paid.[129]

Although litigation must remain available to adjudicate fee disputes, and although it lacks the special disadvantages of the retaining lien, it brings with it expense and delay. As already mentioned, its burdens are heavier for a client who has lost a former lawyer than for a lawyer more accustomed to legal matters, despite the law that places on lawyers the burden of persuasion for many disputed facts in fee litigations.[130] Fee litigation may also bring publicity harmful to both parties. The lawyer may disclose lurid client confidences relevant to the dispute,[131] while the client may bring a malpractice counterclaim against the lawyer.[132]

Clients and lawyers can seek to avoid these problems by agreeing to arbitrate after a fee dispute arises,[133] and some jurisdictions enforce predispute arbitration clauses in retainer agreements.[134] As already mentioned, at least ten jurisdictions compel lawyers to arbitrate fee disputes when a client wishes;[135] many more sponsor voluntary fee arbitration for clients and lawyers who choose to rely on them.[136] Methods for resolving fee disputes out of court are also commonplace in foreign legal systems.[137]

Fee arbitration may be a mixed blessing for clients. It does provide more privacy than litigation. It may also be cheaper, at least when conducted by court or bar programs that provide volunteer arbitrators without charge. The rub is that these arbitrators are likely to be

---

129. Restatement (Third) of the Law Governing Lawyers § 42(1) & Reporter's Note (2000) (citing authority).

130. *Id.* § 42(2) cmt. c & Reporter's Note (citing authority); *see* Cooter & Freedman, *supra* note 61.

131. *See supra* note 74. For a dramatic example, see Morganroth & Morganroth v. DeLorean, 123 F.3d 374 (6th Cir. 1997).

132. *E.g.*, Milbank, Tweed, Hadley & McCloy v. Boon, 13 F.3d 537 (2d Cir. 1994); Tom Riley Law Firm, P.C. v. Glass, 620 N.W.2d 252 (Iowa 2000); 1 Ronald E. Mallen & Jeffrey M. Smith, Legal Malpractice 164-70, 193-95 (5th ed. 2000).

133. *E.g.*, Harkleroad v. Stringer, 499 S.E.2d 379 (Ga. Ct. App. 1998).

134. ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 02-425 (2002); Matthew J. Clark, Note, *The Legal and Ethical Implications of Pre-Dispute Agreements Between Attorneys and Clients to Arbitrate Fee Disputes*, 84 Iowa L. Rev. 827 (1999).

135. *See supra* note 23.

136. *See* Wolfram, *supra* note 52, at 556-58; Jonathan Lippman, *Welcome Fee Dispute Arbitration Program: Long-troublesome Area Is Addressed*, N.Y.L.J., Jan. 22, 2001, at S1 (stating that 46 states have arbitration programs of one sort or another, 35 of them statewide).

137. *E.g.*, Solicitors' (Non-Contentious Business) Remuneration Order 1994, (1994) SI 1994/2616; Andrew Boon & Jennifer Levin, The Ethics and Conduct of Lawyers in England and Wales 300-02 (1999) (noting that procedures are costly for clients and rarely used); Fisch, *supra* note 8, at 9-165. In nations that prescribe fee tariffs, there may be less room for dispute. *See id.* at 9-146 to 9-153; Marianne Roth, *Towards Procedural Economy: Reduction of Duration and Costs of Civil Litigation in Germany*, 20 Civ. Just. Q. 102, 120-24 (2001).

lawyers or friends of lawyers. Clients may reasonably fear that the arbitrators will tend to side with lawyers.[138] Some clients might therefore prefer trying a fee dispute in court, where there is usually a right to jury trial,[139] or at least bringing it before a judge exercising summary jurisdiction.[140]

I conclude that those jurisdictions that allow clients but not lawyers to compel fee arbitration have reached the correct result. But we know virtually nothing about how fee arbitration actually works. Do clients with fee disputes know about it? How long does it take? How much does it cost? How many clients use lawyers to present their cases, and what difference does that make in the result? How do arbitrators resolve disputes of fact? Do they correctly apply the law of attorney fees? Empirical research is badly needed. Regulating fee collection methods can do only limited good if the procedures for adjudicating fee disputes are inadequate.

IV. ABOLITION AND BEYOND

Should the lawyer retaining lien be reformed or abolished? If it is abolished, just what documents will clients be entitled to retrieve from their lawyers? What should be the status of unpaid-for work product? We must consider these questions to reach an improvement over current law.

A. *Halfway Measures*

An infinite number of compromises lie between present law and the total abolition of lawyer retaining liens. Here, I will discuss a few of them, finding them generally unsatisfactory with the exception of certain contractual liens.

1. Statutory Liens

Considered as a recommendation of what the law should be, there is nothing to be said for the Restatement of the Law Governing Lawyers' provision that retaining liens should be allowed when authorized by statute or rule but not otherwise.[141] Whether a lien

138. *See* Lester Brickman, *Attorney-Client Fee Arbitration: A Dissenting View*, 1990 Utah L. Rev. 277; Carrie Menkel-Meadow, *Do the "Haves" Come out Ahead in Alternative Judicial Systems?: Repeat Players in ADR*, 15 Ohio St. J. on Disp. Resol. 19 (1999); Alan Scott Rau, *Resolving Disputes Over Attorneys' Fees: The Role of ADR*, 46 SMU L. Rev. 2005, 2050-57 (1993).

139. Simler v. Conner, 372 U.S. 221 (1963); Jarman v. Hale, 731 P.2d 813 (Idaho Ct. App. 1986); 2 Edward M. Thornton, A Treatise on Attorneys at Law 960-61 (1914). *But see* Revson v. Cinque & Cinque, P.C., No. 97 Civ. 9236, 2001 U.S. Dist. LEXIS 514 (S.D.N.Y. Jan. 22, 2001); Ginberg v. Tauber, 678 A.2d 543 (D.C. 1996); *In re* LiVolsi, 428 A.2d 1268 (N.J. 1981).

140. *See supra* note 22.

141. Restatement (Third) of the Law Governing Lawyers §43(1) (2000).

derives from legislation or from precedent does not affect its merits. The author of this Article must confess that, in his capacity as Associate Reporter of the Restatement, he agreed to the distinction, fearing that otherwise the lien's condemnation might be abandoned altogether.[142] Presumably those who sought the compromise believed that half a lien is better than none, or that Restatements should restate precedents but not legislation. In any event, lawmakers should be suspicious of the retaining lien regardless of whether they sit in the legislature, on the bench, or on a rulemaking committee.

2. Contractual Liens

The strongest case for allowing a retaining lien concerns a lien accepted in advance by a client who otherwise would not be able to secure adequate legal representation; yet instances in which a lien makes the difference between ability and inability to retain counsel must be rare or nonexistent. The situation would have to be one in which: (a) the client has no present or future assets that could be used to guaranty payment but is nevertheless likely to become able in the future to pay the lawyer; (b) the representation will not yield proceeds subject to a charging lien, or lawyer work product that can be withheld if not paid for representation[143] but is nevertheless likely to leave lienable client assets in the lawyer's possession; and (c) the client cannot be trusted to pay without compulsion, but can nevertheless be trusted not to evade the lien clause by keeping property out of the lawyer's possession even though he or she is aware of that clause.

When a contractual retaining lien is not essential for a client to retain counsel, a lawyer and client might still prefer it to other security arrangements, but this too provides only dubious justification for lien contracts. As already explained, informed clients and lawyers would rarely agree in advance to a contractual retaining lien that provides lawyers with only haphazard benefits while threatening clients with substantial harm.[144] Lawyers, however, might well be able to obtain the advantage of springing a lien on an unsuspecting client by including a lien clause among the numerous provisions of a retainer agreement. Clients might sign the agreement without having read the lien clause or understanding its significance, or out of trust that their lawyers would safeguard their interests. Lawyers, after all, are fiduciaries for their clients precisely because clients need special protection against overreaching by lawyers. The reasons for that protection—the difficulty of monitoring a lawyer's performance, the

142. *See* American Law Institute, 69th Annual Meeting: Proceedings 1992, at 529-33 (1993) (implementing earlier agreement to recognize statutory liens in the black letter).

143. On charging liens, see *supra* Part III.A. On a lawyer's right to keep work product for which the client has not paid, see *infra* Part IV.C.

144. *See supra* Part II.D.

importance to clients of the matters confided to lawyers, and lawyers' ability to use the law for their own advantage—squarely apply to the creation of retaining liens.[145] The same reasons counsel against too great a willingness to allow lawyers to contract out of client protections.[146]

Freedom of contract should vanquish these considerations when clients really do make knowing decisions to accept retaining lien contracts. That would be the case for corporate clients with house counsel and for clients receiving independent advice on their retainer agreements.[147] Perhaps lien contracts should also be recognized to the same extent as business transactions between lawyers and clients, since both involve lawyer-client conflicts of interest, waiver of client rights, and complex transactions that a client may not understand. Accepting that approach would require a lawyer seeking to uphold a lien contract to bear the burden of showing that the contract was fair and reasonable to the client in the sense that the client had grounds for accepting the lien clause, that the client received full disclosure of the operation and risks of the clause, that the client was given a reasonable opportunity to obtain independent advice, and that the client consented in writing after receiving in writing the terms of the arrangement.[148] Beyond that point, claims of client agreement should not validate retaining lien provisions.

3. Case by Case Consideration

South Carolina's modification of the traditional retaining lien allows lawyers to assert a lien only after balancing a number of factors, including whether the client has clearly agreed to pay the fee, whether the client is able to pay, what less stringent means of enforcement are enforceable, and what prejudice the lien might cause.[149] Although this reform is better than none at all, it underestimates the ability of lawyers to persuade themselves that the balance tips in their favor.[150] The lawyers most likely to abuse the lien

145. *See* authorities cited *supra* note 61.

146. *See* Restatement (Third) of the Law Governing Lawyers § 19 (2000). For arguments supporting contracting out with varying degrees of enthusiasm, see Frank H. Easterbrook & Daniel R. Fischel, *Contract and Fiduciary Duty*, 36 J.L. & Econ. 425 (1993); Painter, *supra* note 127; Fred C. Zacharias, *Limits on Client Autonomy in Legal Ethics Regulation*, 81 B.U. L. Rev. 199 (2001).

147. On independent advice requirements, see *In re* Mercer, 652 P.2d 130 (Ariz. 1982); Goldman v. Kane, 329 N.E.2d 770 (Mass. App. Ct. 1975); Painter, *supra* note 127, at 706-07; Zacharias, *supra* note 146, at 216. For cases upholding fee contracts of independently represented corporations, see *supra* note 127.

148. *See* Model Rules of Prof'l Conduct R. 1.8(a) (2000); *supra* text accompanying notes 121-23.

149. *In re* An Anonymous Member of S.C. Bar, 335 S.E.2d 803 (S.C. 1985). *See* ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 80-1461 (1980) (urging lawyers to consider similar factors in deciding whether to assert a lien).

150. *See In re* Tillman, 462 S.E.2d 283 (S.C. 1995) (lawyer reprimanded for

to begin with are also those most likely to continue asserting it under the South Carolina approach. And when the lawyer's need to assert a lien does outweigh any resulting harm to the client, the lien will probably not have much effect in any event. The client will simply abide the relatively small harm that the lien inflicts. This is why courts observe that the lien works precisely by threatening harm to the client.[151] Hence, the already quoted observation of a South Carolina lawyer that "retaining liens are for the birds."[152] Forbidding assertion of a retaining lien against a client who is unable to pay[153] might likewise prevent some abuse, but some lawyers will easily persuade themselves that clients can pay. And if the client is really unable to pay, why would a rational lawyer bother to assert a lien to begin with?

4. Liens on Certain Kinds of Assets

A more promising reform would exclude client documents and evidentiary material from the scope of the retaining lien, limiting it to money and other valuables.[154] This would eliminate the most egregious use of the lien, in which a lawyer uses the documents a client has confided to him to obstruct the client in the very matter in which the lawyer was retained to assist. Yet a lawyer's seizure of money is also capable of imposing disproportionate pressure on a client to settle a fee dispute, of shifting to the client the burdens of litigation, and of punishing the client's willingness to entrust possession of the money to the lawyer. In addition, once documents are eliminated from the lien's reach, what remains of the lien will have few valid uses. If the money or valuables subject to the lien have been obtained for the client through the lawyer's efforts, a retaining lien is not needed because a charging lien will do the job in a less objectionable way.[155] If not, it is highly likely that the funds were entrusted to the lawyer for some specific purpose such as use in a transaction, and hence, are not subject to a retaining lien in any

---

asserting lien on basis of excessive fee claim; lawyer had himself filed charges against successor counsel for "claim jumping"); *In re* White, 492 S.E.2d 82 (S.C. 1997) (lawyer reprimanded for violations including assertion of lien on basis of fee claim never presented to client).

151. *See supra* text accompanying notes 39-42.

152. *See supra* text accompanying note 79.

153. D.C. Rules Prof'l Conduct R. 1.8(i) (2003); *In re An Anonymous Member of S.C. Bar*, 335 S.E.2d at 803.

154. *See* D.C. Rules Prof'l Conduct R. 1.8(i) (2003) (limiting liens on documents but not on other property); Mass. Rules Prof'l Conduct R. 1.16(e) (2001) (limiting liens on documents, but not mentioning other property); Acad. of Cal. Optometrists, Inc. v. Superior Court, 124 Cal. Rptr. 668, 671 n. 4 (Ct. App. 1975) (expressing no opinion on retaining liens on property of pecuniary value but rejecting liens on documents). However, there is no clear authority on whether retaining liens on property have ever existed in Massachusetts or California.

155. *See supra* Part III.A.

event.[156] And if the funds have reached the lawyer pursuant to a fee agreement, the lawyer may hold them during a bona fide fee dispute even without a retaining lien.

5. Abolition

In short, abolishing the lawyer retaining lien altogether is the ideal solution. The lien's effectiveness is inextricably linked to its egregious characteristics, it rarely makes sense as a collection method, and lawyers may use several preferable ways to ensure payment of their fees. At most, lawyers should be allowed to enter into written retaining lien contracts with clients enjoying independent representation or in other special circumstances. As we will now see, however, abolishing the retaining lien brings other issues into view.

B. *Client Rights in Lawyer Files*

A lawyer who can no longer rely on a retaining lien to justify keeping documents and other property relating to a client may still argue that the client was in any event not entitled to get the property. Professional rules require a lawyer to give a client "papers and property to which the client is entitled" when a representation ends,[157] but do not state just what those are.

In approaching this issue, one must distinguish documents from money and other items of pecuniary value. So far as money and the like is concerned, the lawyer is not much different from any other bailee or agent, and ordinary property and contract law provides usable principles for determining who is entitled to what. The lawyer's obligation is to deliver property to the person entitled to it, and in case of dispute to hold the property pending the dispute's resolution, on pain of being held liable to the person who turns out to be entitled.[158] Thus the lawyer must decide whether a third party claimant has a property interest, such as a lien, in the property the lawyer holds, in which case the lawyer must honor that interest,[159] or rather has a contractual or other claim against the client, in which case the lawyer should transfer the property to the client.[160]

Documents raise different issues, even on the assumption—which will for the present be adopted—that the client has paid all fees to

156. *See supra* text accompanying notes 29-30.

157. Model Rules of Prof'l Conduct R. 1.16(d) (2000).

158. *Id.* R. 1.15 (1983); Restatement (Third) of the Law Governing Lawyers § 45 (2000).

159. *E.g.*, Leon v. Martinez, 638 N.E.2d 511 (N.Y. 1994) (holding that a lawyer was liable for paying to client proceeds that client had validly assigned to another).

160. *E.g.*, Farmer Ins. Exch. v. Zerin, 61 Cal. Rptr. 2d 707 (Ct. App. 1997) (holding that a lawyer was not liable for paying funds to client when insurer had a claim against a client but no lien).

which the lawyer is entitled.[161] What originals or copies the client should be entitled to receive can hardly be resolved by reference to property law, which yields no clear answers. Is the owner of a document the person who paid for the paper, the person whose pen or printer placed words on it, or the person who formulated the words or shaped the ideas; or must some combination of these factors be employed? More importantly, issues of ownership can arise in different contexts calling for different solutions. For example, whether the lawyer or client should be able to reap the profits of selling copies of a legal analysis that the former has written for the latter is an issue quite distinct from what originals or copies a client should be able to retrieve after a representation ends.[162]

The factors that should be decisive in determining the client's rights are the lawyer's duty to provide the client with all relevant information relating to the representation and the lawyer's duty to promote the client's interests through lawful and proper means.[163] There might sometimes be some countervailing consideration, such as a lawyer's duty not to disclose confidences of another client. In the absence of such considerations, a lawyer should make files available for copying to clients wishing to see them, and should provide clients with original documents that are of use to them. The authorities generally support this approach.[164]

Most of the case law has arisen when a client—or a liquidator or trustee in bankruptcy standing in the client's shoes—is considering a malpractice suit against a lawyer who formerly represented that client. This is a trying situation for the lawyer, who has no wish to collaborate in his or her own destruction, and is likely to view the former client's complaints as unfounded, irrational, and greedy. Nevertheless, the duty to inform a client comprehends even the duty to disclose information that the client can use against the informing lawyer.[165] Once the malpractice action is filed, the client will be able

161. This assumption will be relaxed in *infra* Part IV.C.

162. On the former issue, see, for example, Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730 (1989) (discussing copyright "work made for hire" doctrine); Kevin Hopkins, *Law Firms, Technology, and The Double-Billing Dilemma*, 12 Geo. J. Legal Ethics 95 (1998).

163. *E.g.*, Model Rules of Prof'l Responsibility R. 1.1-4 (2000); Restatement (Third) of the Law Governing Lawyers §§ 16, 20 (2000); *see* Restatement (Second) of Agency §§ 381, 385, 387 (1958) (discussing agent's duty to inform, obey, and act for benefit of principal).

164. *E.g.*, Swift, Currie, McGhee & Hiers v. Henry, 581 S.E.2d 37 (Ga. 2003); Ashcraft & Gerel v. Shaw, 728 A.2d 798 (Md. Ct. Spec. App. 1999); Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn LLP, 689 N.E.2d 879 (N.Y. 1997); Crawford v. Logan, 656 S.W.2d 360 (Tenn. 1983); Restatement (Third) of the Law Governing Lawyers § 46 (2000); *see* Unif. Health-Care Info. Act, §§3-101, 3-102 9 U.L.A. 212, 214-15 (1999) (applying a similar approach to medical records). On who pays the copying charges, see N.D. Rules of Prof'l Conduct R. 1.19(d), (f) (2003); *In re* X.Y., 529 N.W.2d 688 (Minn. 1995); Averill v. Cox, 761 A.2d 1083 (N.H. 2000).

165. *E.g.*, Hughes v. Consol-Pa. Coal Co., 945 F.2d 594 (3d Cir. 1991) (involving a

to use discovery procedures to inspect and copy the files, and the lawyer will not be able to rely on either the attorney-client privilege[166] or the work product doctrine[167] to prevent this. The client should, and usually does, enjoy equal access in deciding whether to bring the action.[168]

Policies concerning access to information have likewise governed the result in cases involving accountants, even though these have typically treated accountants as the owners of their work papers. The more recent cases involved attempts by the government to obtain access to clients' tax records. There, treating accountants as owners of work papers was simply a step toward the conclusion that clients should not be able to block access by pleading the Fifth Amendment.[169] One can tell that this conclusion controlled the property theory used to prop it by noting that the Fifth Amendment objection was no more successful when raised by the accountant or by a client to whom the accountant had returned the papers,[170] and that the Supreme Court later reached the same conclusion without mentioning the property theory.[171] Very likely the results in these cases were influenced by the belief that accountants should keep a greater distance from their clients than lawyers.[172] In any event, the ultimate issue was who should have access to what information, just as it is in cases involving lawyers' documents.

---

conflict of interest); Mayo v. State Bar, 587 P.2d 1158 (Cal. 1978) (involving lawyer's debt to client); Olds v. Donnelly, 696 A.2d 633, 643 (N.J. 1997) (dictum) (discussing malpractice claim); *In re* Tallon, 447 N.Y.S.2d 50 (App. Div. 1982) (sustaining malpractice claim).

166. *See, e.g.*, Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343 (1985) (holding that trustee in bankruptcy may waive attorney-client privilege with respect to pre-bankruptcy communications).

167. *E.g.*, Spivey v. Zant, 683 F.2d 881 (5th Cir. 1982); Clark v. Milam, 847 F. Supp. 424 (S.D.W. Va. 1994); *Ashcraft & Gerel*, 728 A.2d at 798. In California, it is unclear whether a client may obtain access to all lawyer work product. *See* Metro-Goldwyn-Mayer, Inc. v. Superior Court, 30 Cal. Rptr. 2d 371 (Ct. App. 1994).

168. *E.g.*, Resolution Trust Corp. v. H—, P.C., 128 F.R.D. 647 (N.D. Tex. 1989); Maleski v. Corporate Life Ins. Co., 641 A.2d 1 (Pa. Commw. Ct. 1994); *Sage Realty Corp.*, 689 N.E.2d at 879.

169. *E.g.*, United States v. Zakutansky, 401 F.2d 68 (7th Cir. 1968); Deck v. United States, 339 F.2d 739 (D.C. Cir. 1964). Even in older cases litigated between accountant and client, a tax dispute with the government lurks in the background. *See* Ablah v. Eyman, 365 P.2d 181 (Kan. 1961); Ipswich Mills v. Dillon, 157 N.E. 604 (Mass. 1927).

170. *E.g.*, United States v. Widelski, 452 F.2d 1 (6th Cir. 1971); United States v. Egenberg, 443 F.2d 512 (3d Cir. 1971).

171. Fisher v. United States, 425 U.S. 391 (1976); *see In re* Grand Jury Proceedings, 486 F. Supp. 1203 (D. Nev. 1980).

172. *See, e.g.*, 15 U.S.C. § 78j-1 (2000) (addressing auditor's duty to disclose certain illegal acts of audited corporation); United States v. Arthur Young & Co., 465 U.S. 805, 817-19 (1984) (holding that there is no work product protection for accountant papers in Internal Revenue Service proceeding).

C. *Unpaid-For Work Product*

So far the discussion has assumed that the client seeking access to a lawyer's files concerning its case has paid all relevant fees. When this has not occurred, some authority supports allowing the lawyer to withhold documents the lawyer prepared, not as a retaining lien to induce payment, but because the client is not entitled to that for which it has not paid.[173] Such documents are then referred to as work product. This is confusing, because it recalls the "work product doctrine" that protects a relatively broad range of material from discovery,[174] but that may not be invoked by a lawyer against his or her own client.[175] The problem of unpaid-for work product, however, is distinct and important.

The argument against allowing clients access to work product for which they have not paid is strongest in those unusual situations where clients agree to pay, as it were, by the piece. Thus, the Restatement provides a hypothetical illustration in which a client has contracted to pay every month for preparation of a series of memoranda, but stops paying after the second month.[176] It seems fair enough that the lawyer may decline to deliver without payment the memoranda prepared after that month, particularly if the client has no urgent need for them or is well able to pay the contractual price. But few real cases outside Restatementland will be that simple.

Determining which particular documents have not been paid for can be difficult. Clients and lawyers sometimes place a price on individual documents—say, $2,000 for the preparation of a will—but this is rare. If the parties agree on a lump sum fee for a representation that turns out to involve (among other tasks) the preparation of five documents, and the client fails to pay one fifth of the sum due, does that mean that the lawyer can designate one of the documents as not having been paid for? If the contractual fee was an hourly one, and the client claims that the lawyer overestimated the hours properly devoted to the representation and therefore does not pay one fifth of what the lawyer claims, should this too be considered a failure to pay for one of the documents? Does it make a difference in allocating payment to documents whether the lawyer's bills are sent every month or at the end of the representation? Can the client designate

---

173. Mass. Rules Prof'l Conduct R. 1.16(e) (2001); D.C. Rules Prof'l Conduct R. 1.8(i) (2003); N.D. Rules of Prof'l Conduct R. 1.19(e) (2003); Restatement (Third) of the Law Governing Lawyers §§ 43(1), 46(2) (2000); Roscoe Pound, Am. Trial Law. Found., *supra* note 5, at R. 5.5; *see* Nat'l Sales & Serv. Co. v. Superior Court, 667 P.2d 738 (Ariz. 1983) (allowing retaining lien on unpaid-for work product).

174. *E.g.*, Fed. R. Civ. P. 26(b) (3), (4); Hickman v. Taylor, 329 U.S. 495 (1947); Kevin M. Clermont, *Surveying Work Product*, 68 Cornell L. Rev. 755 (1983).

175. *See supra* note 167.

176. *See* Restatement (Third) of the Law Governing Lawyers § 43 cmt. c, illus. 1 (2000).

which part of the lawyer's services a payment covers? Contract law has dealt with questions such as these,[177] but trying to make the delivery of documents turn on them would lead to interminable wrangling, opportunities for abuse, and results having little to do with the principles that should govern the relationship between lawyers and clients.

Those principles provide further reasons for questioning the claim that a lawyer should be entitled to withhold documents for which a client has not paid. Lawyers, after all, can be required to serve without pay, for example by appointment of a court,[178] or when a court declines to allow a lawyer to withdraw even though a client has ceased paying.[179] Delivering a document for which a client has not paid is far less burdensome for a lawyer than accepting or continuing a representation. It requires no new work, and the lawyer remains free to sue the client for the unpaid fee.

Withholding a document, moreover, can be just as harmful to a client when based on failure to pay for that particular document as when based on a retaining lien. True, keeping documents for which a client has not paid does not deprive the client of documents that the lawyer did not write, and hence, does not penalize clients for entrusting their documents or other property to lawyers. But if documents are sufficiently important to the client, impounding them for failure to pay is surely capable of subjecting the client to disproportionate pressure, shifting the burden of litigation to the client, and coercing settlement on the lawyer's terms. It is easy to say that the client can avoid any problem by simply paying the bill; but the bill may be reasonably disputed, or the client out of funds, and there may be no time to find and retain another lawyer to recreate the documents. Society would not allow a physician to retain a biopsy or MRI for which a patient had not paid but had immediate need.[180] Is there any real need for lawyers to have the right to do the equivalent?

At the very least, lawyers should not be free to keep documents on the ground that they are work product for which the client has not

177. 3A Arthur Linton Corbin, Corbin on Contracts §§ 687-99 (rev. ed. 1993) (noting the possibilities of confusion); Restatement (Second) of Contracts § 240 (1981). For similar issues in billing by solicitors, see *Abedi v. Pennington*, 150 New L.J. 465 (C.A. 2000).

178. Model Rules of Prof'l Conduct R. 6.2 (2000); Wolfram, *supra* note 52, at 951-52; Geoffrey C. Hazard, Jr., *After Professional Virtue*, 6 Sup. Ct. Rev. 213 (1989); *see* Deborah L. Rhode, *Cultures of Commitment: Pro Bono for Lawyers and Law Students*, 67 Fordham L. Rev. 2415 (1999); Symposium, *Historical Perspectives on Pro Bono Lawyering*, 9 Am. U. J. Gender Soc. Pol'y & L. 59, 178 (2001).

179. Model Rules of Prof'l Conduct R. 1.16(c) (2000); *see* Pub. Defender Comm'n v. Williamson, 971 S.W.2d 835 (Mo. Ct. App. 1998) (holding that a public defender must continue with a case despite loss of job); Dewey v. R.J. Reynolds Tobacco Co., 536 A.2d 243 (N.J. 1988) (holding that a law firm with a conflict of interest must remain in a case without pay).

180. *See supra* text accompanying notes 86-89.

paid unless the assertedly unpaid fee is clearly allocable to the documents in question. Nor should withholding be allowed if the client cannot pay, or if withholding would significantly risk irreparable harm to the client.[181] Because the lawyer keeping the documents may not appraise correctly whether these conditions have been met, the lawyer should be required to agree to arbitrate the underlying fee dispute and the propriety of retaining documents if the client wishes to do so.[182] Alternatively, if the matter in question is pending before a court with jurisdiction to resolve these issues summarily, the lawyer could submit them to that court. And of course the lawyer remains free to sue for his fee.

CONCLUSION

Lawyers should be paid for their work. Usually they are.[183] When they are not, they should be able to assert their claims to compensation. Yet in an age when debt collection practices are subject to increasing regulation,[184] the liens of lawyers must be just as subject to reconsideration as the attachment of bank accounts[185] or the garnishment of wages.[186]

Reconsideration should spell the doom of the lawyer retaining lien. Assertion of that lien is inconsistent with the fiduciary duties of a lawyer to pursue a client's benefit, deserve a client's trust, conceal no relevant information from a client, and refrain from taking unfair advantage of a client's confidence or lack of knowledge. Even as a method of collecting fees, the lien is far too coercive and destructive, yet paradoxically haphazard and ineffective. Other methods for ensuring that lawyers will receive what they are entitled to are more reliable and less objectionable. The law and the legal profession should no longer retain the retaining lien.

---

181. For this requirement, see D.C. Rules Prof'l Conduct R. 1.8(I) (2003); Mass. Rules of Prof'l Conduct R. 1.16(e)(7) (2001); Restatement (Third) of the Law Governing Lawyers § 43(1) (2000).

182. *See* N. Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975) (holding that state garnishment of a bank account denies due process when garnishee is not offered speedy post-garnishment hearing); *supra* note 118 (proposing that lawyers asserting retaining lien should be required to institute judicial proceeding within ten days).

183. U.S. Census Bureau, 2001 Service Annual Survey: Professional, Scientific and Technical Services tbl. 6.1 (reporting law firm revenues for 2001 of $168,821,000,000), at www.census.gov/svsd/www/sas54.html.

184. *E.g.*, Fair Debt Collection Practices Act, 15 U.S.C. § 1692a-o (1993); *see* Heintz v. Jenkins, 514 U.S. 291 (1995) (applying Act to lawyers collecting debts for clients).

185. *N. Ga. Finishing*, 419 U.S. at 601; Cal. Code Civ. P. §§ 481.010 to 493.010 (West Supp. 2004).

186. Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969); 15 U.S.C. §§ 1671-77 (2001).