

Ethically Pursuing Fees from Former Clients Short of Litigation

John Martin and Kathryn Heinrichs

You have arrived at the end of the road with your client. The payments promised for months haven't materialized. After repeatedly advising your client that you could not continue your representation unless progress was made, you've finally received permission from the court to withdraw. You applied the retainer you were careful enough to demand at the outset of the representation to your outstanding invoices (in accordance with your engagement agreement), but are still left with a balance that is more than you (or your partners) are comfortable writing off, particularly given the excellent service you provided. While you're mindful of the substantial risk of a malpractice suit should you actually sue your client, you'd like to take some further action to collect the amount that is due you. As an ethical lawyer, what are your options?

Lawyers are, of course, entitled to charge and collect reasonable fees in exchange for their services. *See generally* Model Rules of Prof'l Conduct R. 1.5. Indeed, the Model Rules recognize that nonpayment of fees (like other failures by the client substantially to fulfill obligations to the lawyer regarding the lawyer's services) may be cause for a lawyer's termination of the attorney-client relationship. Model Rule 1.16(b)(5) & cmt. [8]. Still, the fact that you no longer represent the client does not entitle you to act like any other creditor when your bills have gone unpaid. To the contrary, the ethics rules continue to impose responsibilities on lawyers even after a failure to pay has led the lawyer to terminate the representation, and those responsibilities place some restriction on a lawyer's ability to pursue payment even outside the courtroom.

Kind Words and Careful Threats

Prior to taking any other action, you will probably want to write your client to (again) demand payment and see if some resolution to the problem can be reached. As a litigator, however, you know that a mere request for payment may be ignored unless it is accompanied by some threat of action. In the immortal words of Alphonse Gabriel Capone, "you can get much farther with a kind word and a gun than you can with a kind word alone." While the rules do not prohibit you from adding "or else . . ." to your letter, they do impose some basic limits on the "guns" that can be used by lawyers to persuade their clients to resolve an unpaid balance.

Threatening criminal action. No matter how much you may think about "theft of services" or "fraud" when confronted with a former client who persuaded you to render services for which you have not been paid, threatening a former client with criminal proceedings for failure to pay legal bills is not a good idea. The old Model Code of Professional Responsibility explicitly prohibited lawyers from presenting, participating in presenting, or threatening to present criminal charges solely to obtain an advantage in a civil matter. Model Code of Prof'l Responsibility DR 7-105(A) (1980). While that prohibition was not expressly continued in the Model Rules, several states have carried forth that prohibition into their version of those rules. *See, e.g.,* Alabama Rule of Prof'l Conduct R. 3.10; New Jersey Rule of Prof'l Conduct R. 3.4(g). Even in jurisdictions that lack an express prohibition against threatening criminal action, such threats are frequently seen as violating prohibitions against asserting frivolous contentions (Model Rule 3.1), using means that have no substantial purpose other than to embarrass, delay, or burden third persons (Model Rule 4.4), or general prohibitions against engaging in acts that involve dishonesty, are prejudicial to the administration of justice, or suggest an ability to influence government officials (Model Rule 8.4). *See, e.g.,* Prof'l Ethics of the Florida Bar, Op. 89-3 (1989); New Mexico State Bar, Ethics Advisory Op. 1987-5; Comm. on Legal Ethics of the West Virginia State Bar, Op. 2000-01 (2000). While some authorities allow an attorney simply to state the applicable criminal penalties for certain actions such as writing a bad check, *see, e.g.,* Florida Ethics Op. 89-3, that permission is often contingent on the attorney's state of mind in making the statements—such that even a limited statement would be impermissible if the attorney meant it as a threat.

Reporting to credit bureaus. You should also not suggest that you will be reporting your client to a credit bureau. Reporting clients to credit bureaus for failing to pay fees is considered unethical in most jurisdictions in view of the confidentiality requirements of Model Rule 1.6 and its state counterparts. While Rule 1.6(b) allows disclosure of information relating to a representation in certain circumstances, including to establish a claim or defense in a lawyer-client dispute (Model Rule 1.6(b)(5)), most authorities to consider the issue have rejected the contention that reporting a former client to a credit bureau falls within that exception. As one ethics committee has pointed out, a report to a credit bureau "is not necessary for establishing the lawyer's claim for compensation, it risks disclosure of confidential information, and it smacks of punishment in trying to lower the client's credit rating." South Carolina Bar, Ethics Advisory Op. 94-11 (May 1994); *see also* State Bar of South Dakota, Ethics Op. 94-23 (1994).

Demanding releases. In the event that you suspect that your client is not merely unwilling to pay you but unable to do so, you might demand that your client release any claim against you in settlement of a claim to unpaid fees. Such a

demand, however, would fall squarely within the limitations of Model Rule 1.8(h), which prohibits a lawyer from limiting his or her malpractice liability either prospectively with a client or with an unrepresented client or former client, unless the client is advised in writing of the desirability of gaining independent counsel and providing the opportunity to find and consult such counsel. *See* Model Rule 1.8 cmt. [15]. Most states allow mutual releases *only* under these conditions, particularly emphasizing the requirement that the attorney advise the client to seek independent counsel to review the release. *See, e.g.*, New Hampshire Bar Ass'n, Ethics Advisory Op. 2011-12/4 (2011); Supreme Court of Ohio Board of Comm'rs on Grievances and Discipline, Op. 2010-3 (2010). Even then, settling a fee or malpractice dispute can never be conditioned on the client's promise not to file a grievance against the lawyer or report the lawyer's misconduct to the appropriate disciplinary authority. *See People v. Moffitt*, 901 P.2d 1197 (Colo. 1990); *In re Freeman*, 835 N.E.2d 494 (Ind. 2005); *In re Wallace*, 518 A.2d 740 (N.J. 1986); *State ex rel. Okla. Bar Ass'n v. Colson*, 777 P.2d 920 (Okla. 1989).

Liening on the Client

Assuming that your letter fails to resolve matters, you may also want to consider asserting a lien. While attorneys are generally prohibited by Model Rule 1.8(h) from acquiring a proprietary interest in the cause of action or subject matter of litigation conducted for a client, Rule 1.8(h)(1) specifically allows an attorney to assert a lien for security of fees or expenses when such a lien is permitted by the law of that jurisdiction, and comment [16] to Rule 1.8 acknowledges that such liens may include those "granted by statute, liens originating in common law and liens acquired by contract with the client." To the extent the law *recognizes* those liens, however, the ethical rules typically place some limitations on their use.

Retaining liens. In many jurisdictions, a common-law retaining lien is available to lawyers whose clients have failed to pay outstanding bills. The attorney asserts a retaining lien simply by retaining possession of the former client's file or other property until payment is made or other security is given. Model Rule 1.16(d) states that upon termination of a representation, a lawyer should return the client's file and other property, except that the lawyer "may retain papers relating to the client to the extent permitted by other law."

While the rules recognize that a lawyer "may" retain client papers by use of a retaining lien, the ability to actually assert such a lien is limited by a lawyer's other ethical obligations to the former client. Rule 1.16(d)'s grant of permission to retain papers "to the extent permitted by other law" is balanced by a comment that notes that such papers may be retained "*only* to the extent permitted by law." Model Rule 1.16 cmt. [9] (emphasis added). In particular, lawyers need to be aware that Rule 1.16(d) requires lawyers upon termination to "take steps to the extent reasonably practicable to protect a client's interest" so as not to cause undue prejudice. For that reason, "State jurisdictions interpreting Rule 1.16(d) and the corresponding rule under the Model Code generally have held that a lawyer's legal right to execute a lien granted by law to secure a fee or expense is subordinate to ethical obligations owed to the client." Am. Bar Ass'n, *Annotated Model Rules of Prof'l Conduct* 253 (6th ed. 2007). *See also Defendant A v. Idaho State Bar*, 2 P.3d 147 (Idaho 2000); *Ferguson v. State*, 773 N.E.2d 877 (Ind. Ct. App. 2002).

As the result of this restriction, jurisdictions are divided about the proper use of retaining liens. Many states (including Massachusetts, Georgia, and Vermont) allow retaining liens in general but preclude their use when asserting it would prejudice the interests of the former client. Others consider retaining liens so disadvantageous to the client that they either advise against their use or prohibit them entirely: Minnesota (*see* Minn. Stat. Ann. § 481.13), Louisiana (*see* Rule of Prof'l Conduct 1.16(d)); North Dakota (*see* Rule of Prof'l Conduct 1.19(a)); North Carolina (*see* Rule of Prof'l Conduct 1.16 cmt. 10)); and New Jersey (*see* Rule of Prof'l Conduct 1.16(d) (amended 2013)). Such states typically do so on grounds that liens are in conflict with an attorney's ethical obligation not to prejudice his or her client's interests even after the termination of the representation. As the New Jersey Advisory Committee on Professional Ethics stated in its recommendation to abolish the lien in 2012, "[T]he lien is most effective when it causes prejudice to clients. A qualification that the lien should not be asserted when it causes prejudice to clients renders the lien ineffective as a method to obtain payment." While prohibition of retaining liens is clearly a minority position at this point, decisions in North Dakota and New Jersey to ban the practice could be an indication of future shake-ups in other states.

Even where liens are permitted, they can be overturned by court action. A court determining whether to order an attorney to surrender client files will typically consider whether there was just cause for discharging the attorney, whether the attorney initiated the withdrawal, the client's ability to provide security or pay the fee, the importance of the files to the client, the ethical obligations of the attorney, whether the fee is disputed, whether the amount due the attorney is contingent or fixed, and whether part of the sum due is for costs advanced by the attorney that may justify reimbursement before ordering release of the files. *Miller v. Paul*, 615 P.2d 615 (Alaska 1980). Additionally, there is authority in several states that holds that if the client fails to pay legal bills due to an inability to pay rather than an unwillingness to pay, the lawyer may not retain the client's property as security for payment (*see Atl. & Great Lakes*

S.S. Corp. v. Steelmet, Inc., 431 F. Supp. 327, 328 (S.D.N.Y. 1977)). Thus, retaining liens can be powerful tools but must be used with caution with attention to both the client's needs and your state's applicable law.

Charging liens. Another option in some cases is to assert a charging lien, which requires unpaid fees to be paid out of any recovery achieved by the former client in the action. An equitable remedy at common law, charging liens have now been codified into statute in many states.

There are, however, two obvious difficulties with a charging lien. First, not all matters will have a recovery that a lien will attach to: In those situations, an attorney would still have to pursue fees through other routes. *See, e.g., Goldstein, Goldman, Kessler & Underberg v. 4000 East River Road Assocs.*, 409 N.Y.S.2d 886 (N.Y. App. Div. 1978) (no proceeds to which lien could attach in matter where client's tax bill was reduced); *McGinley v. United States*, 942 F. Supp. 1239 (D. Neb. 1996) (stock certificates not equivalent to a judgment when ruling in underlying state-court action was interlocutory). Second, charging liens are not self-executing and can be challenged by a client who wishes to challenge the amount of fees charged or your entitlement to them. Because a charging lien is not an adjudication of the rights between the lawyer and client, clients may contest the validity of a charging lien in court or assert an affirmative defense or counterclaim (including claims for malpractice) in response to a lawyer's action to enforce the lien. *See Paramount Eng'g Grp., Inc. v. Oakland Lakes, Ltd.*, 685 So. 2d 11, 12 (Fla. Dist. Ct. App. 1996); *Jarman v. Hale*, 112 Idaho 270, 731 P.2d 813, 814 (Idaho Ct. App. 1986); *Coughlin v. SeRine*, 507 N.E.2d 505, 508 (Ill. Ct. App. 1987); *Neylan v. Moser*, 400 N.W.2d 538, 540 (Iowa 1987).

Again, the imposition of charging liens is also limited by ethical considerations. Because an attorney's lien must be "confined to the judgment or fund recovered by him as an attorney," *Trickett v. Laurita*, 674 S.E.2d 218, 226 (W. Va. Ct. App. 2009), an attorney may not seek to impose a charging lien on client property that is not recovered from the lawsuit the lawyer initiated. *See People v. Razatos*, 636 P.2d 666 (Colo. 1981). Similarly, an attorney may not ethically assert a charging lien on a recovery when not entitled to do so under the state's statutory or common-law provisions. Assertion of an improper lien either by sending notice to a third party such as an insurer or to the court risks disciplinary proceedings. *See State Bar of Michigan, Ethics Op. CI-758* (2000) (an attorney may notify an insurer of a charging lien only when his or her right to such a lien is clear, and then only for the amount to which he or she is clearly entitled); *see also In re Ilonka Howard*, Grievance Comm. of the North Carolina State Bar, No. 06G0496 (2008) (attorney reprimanded for, among other charges, improperly asserting a charging lien without a good-faith basis in law or fact in violation of Rule 3.1.).

Don't Go It Alone

While the foregoing spells out some of the ethical basics, the old saying "a man who is his own lawyer has a fool for a client" applies with particular force to fee disputes—where lawyers' obvious interests in seeing their bills paid can prevent them from offering themselves the same objective analysis of claims and defenses and weighing of risks and benefits that they provide to other clients. Getting assistance from another attorney provides you with a specialist who can be objective and mediate any concerns that may arise in the course of your matter. Mark Bassingthwaite, [Rules Regarding the Billing & Collection of Fees](#) (Attorney Liability Protection Society, Inc., Educational Services, 2012). Particularly given the considerable malpractice risks associated with pursuing a former client (*see, e.g., Chubb & Sons, Inc., Managing Legal Malpractice: A Professional Liability Risk Management Guide for Lawyers* (2005)), it makes sense to bring in outside counsel to help establish that there were no facets of your work that were handled negligently or unethically, and hopefully flag any potential future malpractice claims or counterclaims by the client. Anthony Davis & Michael Downey, [Exercise Care When Suing for Unpaid Fees](#) (Paragon Int'l Ins. Brokers 2010). Dealing with fee collection can be one of the most difficult aspects of running a legal practice; get help dealing with it. That way, whatever fallout may occur from your collection activity will hopefully not involve a report to your local disciplinary authorities.