Attorneys' Retaining Liens

It often happens that a client may be unhappy with the course of litigation and desire to discharge his present counsel or the attorney may wish to withdraw. This dissatisfied client may refuse to pay his now former attorney for services rendered. Among the various remedies available to the attorney, one of the seemingly simple is the attorney's retaining lien.

The retaining lien—also called the general or possessory lien—was recognized as early as 1734 by the English courts.[1] It has been codified in several states and is recognized at common law in most of the other states.[2] The retaining lien statutes generally codify the common law.[3] The basic elements comprising the retaining lien are well established.

An attorney claiming payment from a recalcitrant former client may assert a retaining lien on all papers, books, documents, money and other property which have come into his hands in the course of professional employment by that client.[4] He may maintain possession until the client pays him, or in some situations, unitl security is given by the client.[5] The possessory lien is a passive lien in that it is asserted simply by maintaining possession of the property and is not actively enforced.[6] It may be utilized to collect a general balance due, so it is not necessary that the prop-

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1. *Ex parte* Bush, 7 Vin. Abr. 74, 22 Eng. Rep. 93 (Ch. 1734).

2. *See generally* 1 JONES, LAW OF LIENS §§ 113-52 (1888); Note, *Attorney's Retaining Lien Over Former Client's Papers*, 65 COLUM. L. REV. 296 (1965); Note, *Attorney v. Client: Lien Rights and Remedies in Tennessee*, 7 MEM. ST. L. REV. 435 (1977).

3. Note, *Attorney's Retaining Lien Over Former Client's Papers*, 65 COLUM. L. REV. 296, 301 (1965). *But see* Academy of Cal. Opt., Inc. v. Superior Court, 51 Cal. App. 3d 999, 124 Cal. Rptr. 668 (1975) (existence of common law retaining lien in that state questioned); Akers v. Akers, 233 Minn. 133, 46 N.W.2d 87 (1951) (statutory retaining lien found not to be merely declaratory of common law lien).

4. *See, e.g.*, Morse v. Eighth Judicial Dist. Court, 65 Nev. 275, ___, 195 P.2d 199, 202 (1948).

5. *See, e.g.*, The Flush, 277 F. 25, 30 (2d Cir. 1921), *cert. denied*, 257 U.S. 657 (1922).

6. *See, e.g.*, Smyth v. Fidelity & Deposit Co., 326 Pa. 391, ___, 192 A. 640, 643 (1937) (passivity of lien prevents sale of property).

erty relate to the matter for which counsel claims payment.[7] Even though the above elements are well established as components of a valid general lien, much litigation has taken place concerning these elements in particular fact situations.

An attorney-client relationship is absolutely essential to the existence of a retaining lien given the fact that the material to which the lien attaches must come into the lawyer's hands in the course of his professional employment.

In *Everett, Clarke & Benedict v. Alpha Portland Cement Co.*,[8] the Second Circuit modified the district court's order which required a law firm to turn over to the substituted attorneys papers necessary to the defense of a suit pending against its former clients upon the giving of security by the client.[9] The Second Circuit held, *inter alia*, that no security was required as no lien existed on those papers.[10] The law firm had been retained by an indemnity company to defend the former client in a lawsuit. The indemnity company was dissolved and its affairs placed in the hands of the state superintendent of insurance. The court rejected the firm's argument that the debt of the indemnity company was secured by a possessory lien on the client's papers because of the client's agreement to let the indemnity company retain counsel to defend them saying that, "The Indemnity Company had no right to use the papers for any other purpose, or to pledge them to secure a debt due from it alone."[11] While the law firm had been retained to defend the client and not the indemnity company, the debt was owed by the indemnity company. There was not the requisite attorney-client relationship necessary for the assertion of a retaining lien against the cement company. The Second Circuit recognized that:

> An attorney's general or retaining lien is a common law lien, which has its origin in the inherent power of courts over the relations between attorneys and their clients. The power which the courts have summarily to enforce the performance by the attorney of his duties toward his client enables the court to

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7. *See, e.g.*, Everett, Clarke & Benedict v. Alpha Portland Cement Co., 225 F. 931, 937 (2d Cir. 1915).

8. 225 F. 931 (2d Cir. 1915).

9. *Id.* at 940.

10. *Id.* at 939.

11. *Id.* at 938.

protect the rights of the attorney as against his client.[12]

Even though the law firm was engaged to provide professional services for the defense of the cement company, the firm's "client" was seen as the indemnity company.

It is also necessary for the requisite attorney-client relationship that the lawyer provide services as an *attorney* to the debtor against whom the lien is asserted.

In *Jovan v. Starr*,[13] a stockholder in a corporation had given earnest money through an agent to the corporation's counsel in an attempt to purchase the outstanding stock of the corporation. The attorney attempted to assert a retaining lien on the money for fees owed him by the corporation based on the fact that the money belonged to a stockholder in the corporation. The Appellate Court of Illinois, in affirming the lower court's decision in favor of the estate of the then deceased stockholder, emphasized that no attorney-client relationship existed between the stockholder and the attorney, the latter being merely an escrowee who had not even been aware initially of the actual source of the money, having received it through an agent.[14] The court did not find it necessary to analyze further the retaining lien and its application in the corporate setting.

This was explored in *Sorin v. Shahmoon Industries, Inc.*,[15] a stockholders' derivative suit. The former attorneys of the defendant corporation and defendant president of the corporation, having consented to a substitution, asserted a possessory lien over corporate documents for fees owed them by the president personally and filed a motion to quash a subpoena duces tecum served upon them by the present attorney. The Supreme Court, Special Term, noted the close ties between the corporation and the president and also noted that the corporation in a stockholders' derivative suit is a nominal defendant.[16] It found the president and corporation to be inseparable and the attorney-client relationship to exist so that the former attorneys might assert a general lien over corporate documents where the only claim for fees was against the president

12. *Id.* at 935.
13. 87 Ill. App. 2d 350, 231 N.E.2d 637 (1967).
14. *Id.* at 355-56, 231 N.E.2d at 640.
15. 20 Misc. 2d 149, 191 N.Y.S.2d 14 (Sup. Ct. 1959).
16. *Id.* at 154, 155, 191 N.Y.S.2d at 20, 21.

personally.[17]

Assuming there is an attorney-client relationship, the attorney must have possession of the property of his client in order to establish a retaining lien. Possession is the key element of the general lien and a major distinguishing feature from the other attorney's lien, the charging lien, which may attach to a judgement obtained by the efforts of the attorney on behalf of the client.[18] Loss of possession means, in most cases, the loss of the lien. A conflict occurs when a court orders the attorney to turn over the documents upon the giving of security.

In *Leviten v. Sandbank,*[19] the Court of Appeals of New York established that it had the power to order the turnover of documents by the discharged counsel claiming a lien, if security is given to the attorney.[20] The court noted:

> The "control by the courts of their own officers and their power to compel attorneys to act equitably and fairly towards their clients," is not open to challenge. [citation omitted] It is a continuing control and the power may be exercised at any time when occasion arises. Retaining liens were created by the courts for the protection of its officers but a court should not permit an attorney to insist upon his retaining lien when such insistence is unfair and unequitable [sic]. "Where the retention of papers by an attorney serves to embarrass a client the attorney should be required to deliver up the papers upon receiving proper security for his compensation, because insistence upon his lien under such circumstances is not in accordance with the standard of conduct which a court may properly require of its officers." [citation omitted][21]

The court went on to note that such power to compel delivery "is a discretionary power and may be invoked only upon proof that insistence by the attorney upon retention of the papers would be un-

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17. *Id.* at 155, 191 N.Y.S.2d at 21. Despite this finding, the court went on to require the firm to turn over the documents upon the president's giving security. *See* notes 77-79 *infra.*

18. *See generally* 1 L. JONES, LAW ON LIENS §§ 153-240 (1888); Lustig, *Attorney's Liens,* 7 CLEV.-MAR. L. REV. 502 (1958); Note, *Attorney v. Client: Lien Rights and Remedies in Tennessee,* 7 MEM. ST. L. REV. 435 (1977).

19. 291 N.Y. 352, 52 N.E.2d 898 (1943).

20. *Id.* at 357, 52 N.E.2d at 901.

21. *Id.* at 357, 52 N.E.2d at 900-01.

fair if security is otherwise given to the attorney."[22] This power is utilized even though its exercise will destroy the retaining lien.[23]

In *Morse v. Eighth Judicial District Court*,[24] the Supreme Court of Nevada sought to determine if a lower court had exceeded its jurisdiction in ordering attorneys claiming a possessory lien to deliver to a substituted attorney various papers deemed necessary to litigation in which the former clients were involved without also ordering security.

The court found that the effectiveness of the retaining lien lies in the fact that it causes embarrassment to the client.[25] The courts may order the attorney to turn over the papers but the lower court had exceeded its jurisdiction in not providing for security for the former attorneys.[26] In the course of the opinion, however, the court stated flatly, "That the lien would be destroyed by delivery of the papers in compliance with the [lower court's] order cannot be questioned."[27] These cases illustrate that a court may destroy the lien to protect the client's interests but do so only upon requiring security for the attorney, thereby protecting the attorney's interest. Some courts, however, have held that surrender of documents pursuant to a court order is an involuntary surrender and does not destroy the possessory lien.

In *Brauer v. Hotel Associates, Inc.*,[28] a receiver had been appointed for a New Jersey law firm's corporate client. Among other reasons, the receiver argued that the firm did not have a retaining lien on books and records and that its claim for fees was a general claim because the firm had surrendered the documents to the receiver following a court order.[29] The Supreme Court of New Jersey rejected this argument because the firm's delivery of the documents was "pursuant to a court order, and hence, an involuntary surrender of possession. Therefore, its right to a lien was not relinquished."[30] The court further noted that although the trial court did not order security to be given by the receiver, "its order that

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22. *Id.* at 358, 52 N.E.2d at 901.
23. *Id.* at 357, 52 N.E.2d at 901.
24. 65 Nev. 275, 195 P.2d 199 (1948).
25. *Id.* at ___, 195 P.2d at 207.
26. *Id.*
27. *Id.* at ___, 195 P.2d at 202.
28. 40 N.J. 415, 192 A.2d 831, *cert. denied*, 387 U.S. 944 (1963).
29. *Id.* at ___, 192 A.2d at 835.
30. *Id.*

possession be surrendered subject to Shanley & Fisher's claim to a retaining lien was sufficient to preserve the right of the firm to the lien."[31]

In *Kysor Industrial Corp. v. D.M. Liquidating Co.*,[32] the plaintiff corporation filed suit against the defendant corporation claiming defendant had fraudulently inflated its profits in a reorganization agreement with the plaintiff in which defendant received a master certificate for 225,000 shares in the plaintiff corporation. The day suit was filed the court ordered the attachment of defendant's property including the master certificate which was in the possession of the defendant's lawyers. The law firm intervened and claimed a retaining lien on the certificate. The trial judge ordered the turnover of the certificate to the sheriff but further ordered that custody of the certificate was subject to a retaining lien of the attorneys from the day the firm was retained until the day the sheriff attempted to attach the certificate.[33] The Court of Appeals of Michigan agreed with the trial court that "the taking possession of the stock certificate owned by the defendant corporation does not deprive the intervenor law firm of its attorney's retaining lien, i.e., only its voluntary release will defeat the lien."[34]

These last two cases illustrate the courts' unwillingness to destroy the lien. The cases may be distinguished from those finding surrender pursuant to court order to cause loss of the lien by the fact that in neither were the papers to be turned over to the clients but instead to a receiver and a sheriff. The rationale for destruction of the lien is not as strong where the client's interests are not directly involved.

It is interesting to note that the lien is given priority over other interests in both *Brauer* and *Kysor*. In *Brauer*, the receiver claimed that the appointment of a receiver should dissolve any retaining lien. The Supreme Court of New Jersey analogized the situation to one involving a trustee in bankruptcy, observing that:

> However, it has been firmly established that a trustee in bank-

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31. *Id.*

32. 11 Mich. App. 438, 161 N.W.2d 452 (1968).

33. *Id.* at ___, 161 N.W.2d at 454.

34. *Id.* at ___, 161 N.W.2d at 457. The Court of Appeals thought the retaining lien was paramount to the attachment of the plaintiff for the period beginning with the day the firm was retained until the day the attachment was effective not the day the sheriff first attempted attachment.

> ruptcy takes only such title as the bankrupt has, subject to all liens and equities existing upon or against the property, including an attorney's retaining lien for services rendered prior to the bankruptcy proceedings. [citations omitted] This rule is equally applicable to situations identical with the present case, where an insolvency receiver has been appointed for a corporate debtor.[35]

In *Kysor*, the retaining lien was held superior to the sheriff's attachment at least for the period from the date of retention of the attorneys up to the effective date of the attachment.[36]

It should be noted that the Bankruptcy Reform Act of 1978 specifically deals with conflicts between the attorney asserting a retaining lien over a client's documents and a trustee in bankruptcy. Subsection 542(e) provides that a court, after a notice and hearing, may order an attorney to turn over to a trustee recorded information relating to a debtor's property or financial affairs.[37] This has been interpreted to mean that attorneys otherwise protected by state law may not assert a lien in order to receive payment ahead of other creditors.[38]

There are other situations in which the retaining lien will not be given priority. In *Micheller v. Oberfrank*,[39] the plaintiff-creditor obtained a judgement against the defendant-debtor. Shortly after a writ of execution and discovery order were issued, the judgement debtor gave his attorney $1200 which the attorney deposited in his trust account. The attorney then apparently attempted to bargain for a settlement with the plaintiff using his alleged retaining lien as leverage. The trust account was levied on, and the defendant argued that the retaining lien of the attorney should have been recognized and the levy prevented. The appellate court stated simply, "Whatever status such a claim would have as between attorney

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35. 40 N.J. at ___, 192 A.2d at 834-35.

36. 11 Mich. App. at ___, 161 N.W.2d at 457.

37. 11 U.S.C. § 542(e) (Supp. III 1980).

> Subject to any applicable privilege, after notice and a hearing, the court may order an attorney, accountant, or other person that holds recorded information, including books, documents, records, and papers, relating to the debtor's property or financial affairs, to disclose such recorded information to the trustee.

38. H.R. 8200, H.Rep. No. 595, 95th Cong., 1st. Sess. 369-70; *See also* COLLIER ON BANKRUPTCY ¶ 542.06 (15th ed. 1980).

39. 153 N.J. Super. 33, 378 A.2d 1162 (1977).

and client, it is not of such a nature as to be accorded priority over the claims of other creditors."[40]

While the attorney may retain possession of the property to which he claims a general lien has attached, he may waive or lose the right to assert the lien.

In *Ross v. Wells*,[41] the attorney instituted a suit for his fees and the client-defendants responded with a subpoena duces tecum on all documents over which the attorney claimed a lien. The appellate court observed that a lawyer should be protected and not be compelled to produce documents to the detriment of his lien "in any proceeding other than a suit by the attorney to recover his fees."[42] The court reasoned that the attorney should be willing to produce the documents where he has a claim for fees because of the duty to completely disclose such transactions and for the maintenance of a high professional standard.[43]

Two grounds for forfeiture of the retaining lien were asserted by the defendant client in a plenary suit by an attorney for compensation in *Goldman v. Rafel Estates*.[44] One, as in *Ross v. Wells*, was that the plaintiff attorney forfeited his retaining lien by instituting a plenary suit for his fees. The appellate court reversed the trial court and held that such a suit did not cause the lien to be lost. The court pointed out that since the lien is a passive one, instituting a separate suit was the only affirmative action the attorney could take.[45] The other ground for forfeiture of the retaining lien asserted by the defendant client was that the attorney withdrew as attorney during pendency of a suit against his client. The court distinguished withdrawal without cause from withdrawal with cause, the former causing forfeiture. It has been alleged by the attorney that his withdrawal was because of a lack of confidence in him displayed by his client. The court found this sufficient cause for withdrawal and held that the attorney did not thereby forfeit his lien.[46]

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40. *Id.* at ___, 378 A.2d at 1163.
41. 6 Ill. App. 2d 304, 127 N.E.2d 519 (1955).
42. *Id.* at 308, 127 N.E.2d at 520.
43. *Id.* at 309, 127 N.E.2d at 521.
44. 269 A.D. 647, 58 N.Y.S.2d 168 (1945).
45. *Id.* at 649, 58 N.Y.S.2d at 171.
46. *Id.* The court, nevertheless, reaffirmed the courts' power to compel delivery of papers before payment upon security being given and noted that upon surrender the lien is lost. It modified the lower court's order of delivery to require

In an older case, *The Flush,*[47] the Second Circuit in considering whether a client, having discharged his counsel without cause, could inspect the papers over which the former attorney claimed a possessory lien, observed that there was a dearth of authority on the question in this country. It noted that in England a distinction was drawn between a situation in which the solicitor withdrew, in which case an order for delivery of the papers would be given, and the situation in which the solicitor was discharged, the latter case involving no obligation to deliver the papers.[48] The Second Circuit did not distinguish between withdrawal for cause by the attorney and withdrawal for no cause, but the case involved an attorney who was discharged so the court may not have felt the need to go into such a distinction.

In a recent case, *In re Kaufman,*[49] in which the Board of Governors of the State Bar had recommended a public reprimand for an attorney who had withdrawn as counsel without notice to his client three days before a court deadline for filing answers to interrogatories, the Supreme Court of Nevada held that an attorney should not withdraw except for good cause. It held that the client's lack of cooperation in answering the interrogatories was not sufficient cause particularly in the light of subsequent events in which the lawyer asserted a possessory lien over unexpended money advanced for costs and the files of the lawsuit in an attempt to induce his participation in any fee the client's new attorney might receive.[50] The court held that any lien was lost, and in addition, the lawyer had violated A.B.A. Disciplinary Rule 2-110(A)(2)[51] because of improper notice.

Finally, in *People ex rel. MacFarlane v. Harthun,*[52] a dis-

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security to be given by the client.

47. 227 F. 25 (2d Cir. 1921).

48. *Id.* at 30.

49. 93 Nev. 452, 567 P.2d 957 (1977).

50. *Id.* at ___, 567 P.2d at 959-60.

51. A.B.A. CODE OF PROFESSIONAL RESPONSIBILITY [hereinafter cited as A.B.A. CODE], Disciplinary Rule [hereinafter cited as DR] 2-110(A)(2):

> In any event, a lawyer shall not withdraw from employment until he has taken reasonable steps to avoid foreseeable prejudice to the rights of his client, including giving due notice to his client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, and complying with applicable laws and rules.

52. 195 Colo. 38, 581 P.2d 716 (1978).

barred attorney asserted a retaining lien over some documents of former clients. The Supreme Court of Colorado held that a retaining lien was lost when an attorney was discharged or removed for misconduct, although if no suspension or disbarment were involved, the attorney might be able to assert a lien where no misconduct was involved.[53] This court found A.B.A. Disciplinary Rule 2-110(A)(2) implicated in this situation so that the disbarred attorney was required to return all papers and property to which the client was entitled.[54] The court saw the forfeiture of the lien in this situation as a natural result of balancing the clients' interests against the interests of the attorney who has misconducted himself professionally.[55]

Even if the attorney has possession of some property of the client and there has been no waiver or loss of the retaining lien, there may be no lien asserted against certain property. If the property is received by the attorney for a special purpose, it cannot be the subject of a general lien.

In *Torphy v. Reder*,[56] the attorney filed a petition to establish a lien pursuant to a state statute. The attorney had represented his client in a dispute with the client's wife over the ownership of certain property. Pending the final decision in that case, the stock certificates and bank books involved were placed in a safe deposit box and could only be removed with the permission of both attorneys. It had never been decided whether there was, in fact, a possessory lien in Massachusetts, but the court avoided the issue by holding that even if there were such a lien in Massachusetts, there could be no retaining lien in this case. The court found that even though the property was received by the attorney in the course of his professional employment, it was being held for a special purpose and the arrangement was in the nature of a trusteeship.[57] The reason for such a rule was that, "To permit one who has so acted to assert a possessory lien on the property as security for professional services would not only discourage similar arrangements in the future, but would be inconsistent with the fiduciary duty vol-

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53. *Id.* at ___, 581 P.2d at 718.

54. *Id.*

55. *Id.* at ___, 581 P.2d at 719.

56. 357 Mass. 153, 257 N.E.2d 435 (1970).

57. *Id.* at ___, 257 N.E.2d at 438. *See* Akers v. Akers, 233 Minn. 133, 46 N.W.2d 87 (1951); Brauer v. Hotel Assoc., Inc., 40 N.J. 415, 192 A.2d 831 (1963); Micheller v. Oberfrank, 153 N.J. Super. 33, 378 A.2d 1162 (1977).

untarily assumed by the attorney."[58]

Other limitations on the property over which a retaining lien may be asserted involve the amount of the fees claimed and the value of the property retained.

In *Brauer v. Hotel Associates, Inc.*,[59] a receiver who had been appointed for an attorney's insolvent client attacked an attorney's retaining lien on the basis that the documents involved were of no intrinsic value. The New Jersey Supreme Court rejected this argument noting that the inconvenience caused is what makes the retaining lien effective and said, "The focal point is not upon the objective worth of the property, but upon its subjective worth to the client and those who represent him."[60]

The plaintiffs in *Adams, George, Lee, Schulte & Ward v. Westinghouse*[61] cited *Brauer* to the Fifth Circuit Court of Appeals for the proposition that the value of the retaining lien is its embarrassment to the client.[62] The law firm was claiming a retaining lien on $300,000 which it had obtained for the client in another suit. The money had been placed in a trust account and the firm refused to turn over the money until fees of about $75,000, which the firm claimed were owed it, were paid. The client claimed that the retention of the money was a conversion. The Fifth Circuit looked with disfavor upon the plaintiffs' argument that the purpose of the lien is embarrassment. Rather, it seemed to view the lien, at least where there was such a gap between value of the property and fees claimed, as coercive.[63] The court went on to find that an attorney could not withhold money "over and above the maximum amount of the attorney's claim against the client" and in this case the law firm had converted the excess.[64]

The idea of the retaining lien being a method of coercion is seen also in *Academy of California Optometrists, Inc. v. Superior Court*,[65] a case involving a contractual retaining lien, where the property to which it attached was pleadings and papers of no intrinsic value to the attorney. The court noted that the sole benefit

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58. 357 Mass. at ___, 257 N.E.2d at 438.
59. 40 N.J. 415, 192 A.2d 831 (1963).
60. *Id.* at ___, 192 A.2d at 835.
61. 597 F.2d 570 (5th Cir. 1979).
62. *Id.* at 573.
63. *Id.*
64. *Id.* at 574.
65. 51 Cal. App. 3d 999, 124 Cal. Rptr. 668 (1975).

to the discharged attorney of the papers was their "coercive effect."[66] The ethical duties of the attorney overrode the right to a retaining lien. In particular, the court relied on A.B.A. Disciplinary Rule 2-110(A)(2)[67] to find a duty on the part of the attorney to avoid foreseeable prejudice to a client and a duty to deliver to the client all papers to which the client is entitled upon the attorney's withdrawal. The court made little of the fact that the attorney in this case was discharged and that DR 2-110(A)(2) only applies to withdrawal.[68] Finally, the court found that enforcement of the lien would violate the attorney's ethical duties, and the contractual retaining lien was void. The court said, "We hold that where the subject matter of an attorney's retaining lien is of no economic value to him, but is used only to extort disputed fees from his client, the lien is void."[69] It should be noted that the court specifically limited its holding to the facts of the case.[70]

In *Academy* there is a conflict between the traditional retaining lien and the A.B.A. Canons of Professional Ethics. Another recent case involved such a clash. In *Attorney Grievance Commission v. McIntire*,[71] there was a misunderstanding between the attorney and his client, whom he represented in a divorce action, concerning the lawyer's fees. The client's ex-husband sent the attorney a check to cover the attorney's fees set by the court and arrearages assessed against the ex-husband. The attorney applied the entire amount to a personal bank account. The Court of Appeals of Maryland found that the lawyer had violated (among others) A.B.A. Disciplinary Rule 9-102(B)(3).[72] The court did not really analyze the ramifications of this as it applies to the assertion of a retaining lien beyond the fact that the funds should have been put in an escrow account.[73]

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66. *Id.* at ___, 124 Cal. Rptr. at 671.
67. *See* note 51 *supra.*
68. 51 Cal. App. 3d at ___, 124 Cal. Rptr. at 672.
69. *Id.*
70. *Id.* at ___, 124 Cal. Rptr. at 671 n. 4.
71. 268 Md. 87, 405 A.2d 273 (1979).
72. A.B.A. CODE DR 9-102(B)(3):

> A lawyer shall:
> Maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accounts to his client regarding them.

73. 268 Md. at ___, 405 A.2d at 278; *but see* Crane Co. v. Paul, 15 Wash. App. 212, 548 P.2d 337 (1976) (holding there was no violation of A.B.A. DR 9-102(B)(4)

The courts in these more recent cases seem to disapprove of the concept of an attorney retaining property so as to inconvenience the client into paying the claimed fees. The language speaks of coercion and extortion from the clients. This is harsh language.

In the past, courts have had to deal with situations in which the assertion of a retaining lien would be drastically harmful to the client.

In *People v. Altvater*,[74] a criminal defendant was indicted for murder. His former attorney asserted a retaining lien over papers necessary for his defense by another attorney. The court ordered the attorney to make the papers available to present counsel for photocopying, but the originals were to be retained by the former attorney as evidence of his possessory lien. Thus, for all practical purposes, the lien was destroyed, but the court went out of its way to show it did not intend to do so.[75]

In *Atlantic & Great Lakes Steamship Corp. v. Steelmet, Inc.*,[76] the federal district court held that the retaining lien does not apply to exhibits used in a trial because the exhibits, which are usually filed with the court clerk, are in the attorney's possession because the court may allow it.

Although the court did not discuss the reasons for denying the lien, other courts have given emphasis to the balancing of interests necessary. In *Sorin v. Shahmoon Industries, Inc.*,[77] in which a subpoena duces tecum was issued for documents over which counsel claimed a retaining lien, the court, having recognized the "consistently strong pattern of legislative and judicial protection of an attorney's lien"[78] required the attorneys to produce the documents in question on the condition that the former client post security. The court stated:

> At the same time, I am of the view that the plea by Shahmoon—that he needs the documents withheld from him by his former attorneys in order adequately to defend the ac-

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where the attorney had offset a sum held in a trust account because when the attorney asserted the lien the clients were no longer "entitled to receive" the money.

74. 78 Misc. 2d 24, 355 N.Y.S.2d 736 (Sup. Ct. 1974).

75. *Id.* at 26, 355 N.Y.S.2d at 738. *See* Hauptmann v. Fawcett, 243 A.D. 613, 276 N.Y.S. 523, *order modified*, 243 A.D. 616, 277 N.Y.S. 631 (1935).

76. 431 F. Supp. 327 (S.D.N.Y. 1977).

77. 20 Misc. 2d 149, 191 N.Y.S.2d 14 (Sup. Ct. 1959).

78. *Id.* at 157, 191 N.Y.S.2d at 23.

> tion now being prosecuted against him—should not fall on deaf ears. When an attorney's valid retaining lien comes into conflict with a bona fide subpoena duces tecum, the court must reconcile the lawyer's interest in the collection of his fee with the client's interest in being able to submit at the collateral trial all available relevant evidence in his behalf. And not alone should there be a weighing of these conflicting interests, but there should, I think, be placed on the scales two more ingredients—the economic interest of the community in having all debts paid and the social interest of the community in having all relevant material presented to a court engaged in the resolution of a justiciable controversy.[79]

This balancing of the interests seems to underly the decisions of many courts. In many of the decisions, the courts compromise by requiring that security be given to the attorney.

In recent cases, the courts have evidenced hostility to the retaining lien, referring to the leverage gained as coercion.[80] The recent cases have also found the assertion of the lien to be in conflict with the A.B.A. Code of Professional Responsibility in certain situations.[81] While the retaining lien is still a useful tool for the protection of the attorney, the recent cases indicate a possible change in courts' attitudes due to the Code of Professional Responsibility. The few cases decided which involved both the retaining lien and the Code do not provide clear guidance as to when the attorney will be in conflict with a disciplinary rule when asserting a retaining lien.

Kathleen D. Britton

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79. *Id.*

80. *See, e.g.*, Adams, George, Lee, Schulte, & Ward v. Westinghouse, 597 F.2d 570 (5th Cir. 1979); Academy of Cal. Opt., Inc. v. Superior Court, 51 Cal. App. 3d 999, 124 Cal. Rptr. 668 (1975).

81. *See, e.g.*, Academy of Cal. Opt., Inc. v. Superior Court, 51 Cal. App. 3d 999, 124 Cal. Rptr. 668 (1975); Attorney Grievance Comm'n v. McIntire, 268 Md. 87, 405 A.2d 273 (1979).