> engagement, no ethical violation could occur if subsequent events, beyond the control of the lawyer, caused the fee to appear unfair or unreasonable.

Opinion 300 at fn 5; *see also* Restatement (Third) of the Law Governing Lawyers § 126, comment e (2000) ("Fairness is determined based on facts that reasonably could be known at the time of the transaction, not as the facts later develop.")

Applying these principles, any fee arrangement that calculates fees in cryptocurrency, or that allows or requires a client to either provide an advance fee or accept a settlement payment from a third party in cryptocurrency, should be assessed for fairness at the time that it is agreed upon, based on the facts then available. For so long as the value of digital currency remains predictably volatile, this is a fact the lawyer must ensure that his or her client understands.

The information that must be disclosed to a particular client in writing under Rule 1.8(a) will, of course, vary. As a general matter, in addition to terms concerning billing rates and frequency, a lawyer accepting cryptocurrency should consider including a clear explanation of how the client will be billed (*i.e.* in dollars or cryptocurrency); whether and how frequently cryptocurrency held by the lawyer will be calculated in dollars, or otherwise trued-up or adjusted for accounting purposes and whether, upon that accounting, market increases and decreases in the value of the cryptocurrency triggers obligations by either party; whether the lawyer or the client will be responsible for cryptocurrency transfer fees (if any); which cryptocurrency exchange platform will be utilized to determine the value of cryptocurrency upon receipt and, in the case of advance fees, as the representation proceeds (*i.e.*, as fees are earned) and upon its termination; and who will be responsible if cryptocurrency accepted by the lawyer in settlement of the client's claims loses value and cannot satisfy third party liens.[9]

3. Competently Safeguarding Cryptocurrency

Rule 1.15(a) requires, among other things, that a lawyer "appropriately safeguard" the property of clients and third parties.[10] Paragraph (e) addresses advance fees, and provides that "advances of unearned fees and unincurred costs shall be treated as property of the client pursuant to paragraph (a) until earned or incurred unless the client gives informed consent to a different arrangement," and, that, even if the client does consent to a different arrangement,[11] any unearned or unincurred portion of an advance fee must be returned upon termination of the lawyer's services. *See also* Rule 1.16(d).[12] These rules, of course, apply to all advance fees, regardless of how they are funded. But, as with issues related to valuation, safeguarding cryptocurrency raises unique challenges.

The first rule of professional conduct is that lawyers must provide competent representation to their clients. See Rule 1.1. Although the Comments to Rule 1.1 do not specifically reference technology, we agree with ABA Comment [8] to Model Rule 1.1 that, to be competent, "a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology." Consistent with D.C. Bar Legal Ethics Opinion 371, which addressed lawyers' use of social media, a lawyer must have the skill required to exercise reasonable professional judgment regarding the use of technology, including digital currency, within the lawyer's legal practice.

In the case of cryptocurrency, competence requires lawyers to understand and safeguard against the many ways cryptocurrency can be stolen or lost. Because blockchain transactions are unregulated, uninsured, anonymous, and irreversible, cryptocurrency is regularly targeted for digital fraud and theft. For example, cryptocurrency online wallets and exchange platforms may be fraudulent; legitimate wallets and platforms may be subject to security breaches; and private keys used to transfer cryptocurrency out of a person's wallet are vulnerable to network-based threats like hacking and malware if stored in a hot wallet (a device or system connected to the internet). Additionally, private keys that are stored in a cold wallet (hardware, offline software, or paper) can be irretrievably lost, in which case the associated digital currency is likely permanently inaccessible. Just as with fiat currency or any client property, a lawyer must use reasonable care to minimize the risk of loss.

Conclusion

We do not perceive any basis in the Rules of Professional Conduct for treating cryptocurrency as a uniquely unethical form of payment. Cryptocurrency is, ultimately, simply a relatively new means of transferring economic value, and the Rules are flexible enough to provide for the protection of clients' interests and property without rejecting advances in technologies. So long as the fee agreement between a lawyer and her client is objectively fair and reasonable (and otherwise complies with Rules 1.5 and 1.8), and the lawyer possesses the requisite knowledge to competently safeguard the client's digital currency, there is no prohibition against a lawyer accepting cryptocurrency from or on behalf of a client.

Published June 2020

Opinion 379

Attorneys' Charging Liens and Client Confidentiality

An attorney whose fees are secured by a charging lien against the client's future recovery in a matter may give notice of the existence of the charging lien to successor counsel or another likely holder of the property subject to the lien if the attorney's representation in the matter is terminated before there is a recovery. Absent the former client's consent, however, the notice must not contain information about the client's lack of resources, the client's past refusals to pay, or any other information gained in the professional relationship that would be embarrassing, or likely to be detrimental, to the client. Any further efforts to enforce the lien or collect the fees must

[9] The lawyer bears the burden of proving that the transaction was fair and the client was adequately informed, and ambiguities will be construed in favor of the client. *See, e.g. In re Martin*, 67 A.3d 1032, 1041 (D.C. 2013) ("[A]ny ambiguity in the [contingent fee] agreement would be interpreted against Martin, who drafted the agreement. *See Capital City Mortg. Corp. v. Habana Vill. Art & Folklore, Inc*., 747 A.2d 564, 567 (D.C. 2000) (stating that ambiguities in contracts will be 'construed strongly against the drafter.' ")); ABA Opinion 00-418.

[10] Rule 1.15(a) also requires that lawyers maintain trust funds to hold money belonging to clients or third parties. Because cryptocurrency has been designated by the IRS as property rather than money, and because it cannot be deposited into a trust fund without being converted to money, this requirement is not applicable.

[11] Any "different arrangement" must be fair to the client. "At a minimum, a lawyer must explain to the client 'the basis for this arrangement and . . . how [the client's] rights are protected by the arrangement.'" *In re Mance*, 980 A.2d 1196, 1207 (D.C. App. 2009), as amended (Oct. 29, 2009) (*quoting In re Sather*, 3 P.3d 403, 410 (Colo. 2000) (*en banc*)).

[12] *See also In re Mance*, *id.* at 1202.

comply with the Rules of Professional Conduct governing fee disputes between lawyers and clients. Disclosures of client confidences can be made only to the minimum extent necessary to collect the fees, and even then protective orders and filings *in camera* or under seal should be used to the maximum extent possible to protect client confidential information from exposure to third parties without a need to know.

Applicable Rules

- Rule 1.5 (Fees)
- Rule 1.6 (Confidentiality of Information)
- Rule 1.8(i) (Lawyer Liens)
- Rule 1.15 (Safekeeping Property)
- Rule 1.16 (Declining or Terminating Representation)

Discussion

Historically, an attorney's toolkit to collect fees included two different kinds of liens: (1) a "retaining lien" against client files and other client property in the lawyer's possession, and (2) a "charging lien" against the proceeds of a claim that the lawyer pursued on the client's behalf when the lawyer and the client "contracted with the understanding that the attorney's charges were to be paid out of the judgment recovered." *See generally Wolf v. Sherman*, 682 A.2d 194, 197 (D.C. 1996). "A charging lien does not depend upon an agreement that the attorney shall have a lien upon the judgment; in fact, only in the absence (or inadequacy) of an express lien does the question of a possible equitable lien arise." *Id.* at 198. As discussed below, an attorney's ability to use a retaining lien was substantially circumscribed by the adoption of the District of Columbia Rules of Professional Conduct in 1991. However, no specific changes were made with respect to charging liens. The question presented to the Committee here is whether a discharged lawyer's confidentiality obligation to the former client under Rule 1.6 precludes the lawyer giving notice of the lien to the former client's successor counsel or another likely custodian of the funds or property subject to the lien. The answer is no.

A. Retaining Liens

Where authorized, a retaining lien empowers a terminated attorney to hold hostage the client's file and other property in the lawyer's possession until the bill is paid or, in some jurisdictions, until a court orders release of the file. Such an order may be conditioned on the client posting a bond to secure the terminated attorney's fee claim, or by imposing a charging lien on the eventual proceeds of the case. *See, e.g., Security Credit Systems, Inc. v. Perfetto*, 662 N.Y.S.2d 674 (N.Y. App. Div. 1997) (discussing New York practice).

The greater the client's need for the file, the more effective the retaining lien is in motivating the client to pay quickly. In order to prevent harm to the client, however, some jurisdictions limit or eliminate the ability of attorneys to use retaining liens in the circumstances where the lien would be most effective.

The District of Columbia is such a jurisdiction. Since 1991, when the Rules of Professional Conduct replaced the earlier Code of Professional Responsibility, two of the then-new rules have circumscribed the ability to enforce a retaining lien. Under Rule 1.8(i):

> A lawyer may acquire and enforce a lien granted by law to secure the lawyer's fees or expenses, but a lawyer shall not impose a lien upon any part of a client's files, except upon the lawyer's own work product, and then only to the extent that the work product has not been paid for. This work product exception shall not apply when the client has become unable to pay, or when withholding the lawyer's work product would present a significant risk to the client of irreparable harm.

Under Rule 1.16(d):

> In connection with any termination of representation, a lawyer shall take timely steps to the extent reasonably practicable to protect a client's interests, such as . . . surrendering papers and property to which the client is entitled. . . . The lawyer may retain papers relating to the client to the extent permitted by Rule 1.8(i).

As discussed in Legal Ethics Opinion 230, file materials that are not "work product" are not subject to any retaining lien. We concluded in that opinion that the inquiring attorney in that matter could not retain the originals of promissory notes and a letter of credit.

While the first sentence of Rule 1.8(i) holds out the possibility of a retaining lien as to the lawyer's own work product to the extent that the client has not paid for it, the second sentence takes that option away if the client is "unable to pay" or when withholding the work product "would present a significant risk to the client of irreparable harm." Rule 1.8(i). As a practical matter, this takes the assertion of a retaining lien off the table in situations where such a lien would be the most powerful.

This was a substantial change from practice prior to 1991 under the Code of Professional Responsibility. As several of our earlier opinions illustrate, the former Code was much more permissive of the use of retaining liens, although there were some limits. *See generally* D.C. Legal Ethics Opinions 59, 90, 103 & 107.

B. Charging Liens

Charging liens exist under common law in some jurisdictions and by statute in others. Case law in New York memorably describes that state's charging lien as "a device to protect counsel against 'the knavery of his client,' whereby through his effort, the attorney acquires an interest in the client's cause of action." *Butler, Fitzgerald & Potter v. Sequa Corp.*, 250 F.3d 171, 177 (2d Cir. 2001) (quoting *In re City of New York*, 157 N.E.2d 587, 590 (N.Y. 1959)). "The lien is predicated on the idea that the attorney has by his skill and effort obtained the judgment, and hence 'should have a lien thereon for his compensation, in analogy to the lien which a mechanic has upon any article which he manufactures.'" *Id.* (quoting *Williams v. Ingersoll*, 89 N.Y. 508, 517 (1882)).

The charging lien in the District of Columbia is a creature of local common law:

> At common law an attorney had what is known as a charging lien on the judgment or decree obtained for his client for services rendered in procuring it to the extent of his taxable costs and expenses. In many of the United States an attorney's charging lien is created by statute, and is, of course, limited by its terms. In some of the states in which there is no statute the attorney's lien has been extended by court decision to cover reasonable compensation for his services, and in those jurisdictions it is held that such lien may be enforced by resort to equity.
>
> In the District of Columbia there is no statute, but the rule on the subject has been stated to be that it is an indispensable condition to the establishment of an attorney's lien on a particular fund — not in possession — that there should be a distinct appropriation of the fund by the client, or an agreement that the attorney should be paid out of it. This rule is now the established law in this jurisdiction.

Pink v. Farrington, 92 F.2d 465, 466 (D.C. Cir. 1937). *Accord Wolf v. Sherman*, 682 A.2d at 197 ("The District's rule on charging liens is narrower than the English common law rule.").

The lien may be asserted by giving notice to successor counsel or to others who are likely to have control of the encumbered property before it is distributed to the client. In *D.C. Redevelopment Land Agency v. Dowdey*, for example, prior counsel successfully enforced a charging lien against a government agency that condemned property that the lawyer had saved from foreclosure. 618 A.2d 153 (D.C. 1992). The original landowner in that case had retained the attorney to delay foreclosure until the property was condemned. The attorney's fee agreement entitled him to one-third of the property's equity value, *e.g.,* the proceeds of the eventual condemnation to the landowner. Despite having had notice of the attorney's charging lien, the condemning authority paid the prior landowner without joining the attorney to the litigation that was intended to adjudicate entitlement to those proceeds. The court held that the condemning authority bore the risk of having to make a double payment in those circumstances under condemnation law. *See id*. at 162.[1]

C. Attorneys' Fee Issues When A Client Changes Counsel in the Middle of a Contingent Fee Representation.

"A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services." Rule 1.16 cmt. [4]. However, "where a [terminated] lawyer has a valid lien covering undisputed amounts of property or money, the lawyer may continue to hold such property or money to the extent permitted by the substantive law governing the lien asserted." Rule 1.16 cmt. [11] (citing Rules 1.8 and 1.15(b)).

In contingent fee representations, a lawyer who is discharged without cause is generally entitled to a fee if the client ultimately prevails in the underlying matter. In the District of Columbia, the amount of that fee depends on how much work the lawyer did before being discharged. If the discharged attorney "had substantially performed" and was "at all times ready, able and willing to complete what remained to be done," "the attorney is entitled to the full amount of his fee" if the client subsequently recovers. *Kaushiva v. Hutter,* 454 A.2d 1373, 1375 (D.C. 1983) (citations omitted) However, "[w] here an attorney, before discharge, has performed only inconsequential services of little benefit to the client, even if these services were all that could have been expected of him, he may recover only in *quantum meruit*." *In re Waller*, 524 A.2d 748, 750 (D.C. 1987) (citing *Friedman v. Harris*, 81 U.S.App.D.C. 317, 318, 158 F.2d 187, 188 (1946) (attorney who had merely filed suit entitled only to *quantum meruit*)).[2]

The client's potential liability to predecessor counsel for any recovery in a contingent fee case is so well understood that successor counsel may have an affirmative obligation to warn the client about it in their initial negotiations about successor counsel's fee. Such was the conclusion of the American Bar Association's Standing Committee on Ethics and Professional Responsibility in ABA Formal Opinion 487 (2019).

The ABA's conclusion focused on the requirements of Model Rules 1.5(b) and (c). Under the former, "the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation." The latter authorizes contingent fees where not prohibited but requires contingent fee agreements to be in a writing "signed by the client" and to disclose a number of things, including "the method by which the fee is to be determined," "litigation and other expenses to be deducted from the recovery," "whether such expenses are to be deducted before or after the continent fee is calculated," percentages accruing to the lawyer in the event of settlement, trial or appeal, and "any expenses for which the client will be liable" even if not the prevailing party.

The ABA committee concluded that "[a] contingent fee agreement that fails to mention that some portion of the fee may be due to or claimed by the first counsel . . . is inconsistent with the requirements of Rule 1.5(b) and (c)." ABA Formal Opinion 487, at 2. The ABA highlighted the concern if this were to occur with the following illustration:

> Assume, for example, that a client retains a lawyer in a matter and enters into a written fee agreement in which the lawyer is entitled to one-third of any recovery. The client then decides to terminate the lawyer, without cause, and hires new counsel. The successor counsel takes the matter on the same terms as the predecessor counsel (one-third of any recovery) but the successor counsel's written fee agreement is silent on whether that one-third is in addition to or in lieu of the one-third specified in the predecessor counsel's fee agreement, and no such disclosure is made in a separate document provided to the client. In these circumstances, the client may not know whether the client must pay one or both lawyers or the amount of the fees owed. The client may be aware of the right to terminate a lawyer's representation at any time but may not be aware that termination does not necessarily extinguish an obligation to pay prior counsel for the value of the work performed – the *quantum meruit* claim – or in some cases a termination amount specified in the predecessor counsel's fee agreement. If the predecessor counsel was not terminated for cause, that lawyer may be entitled to payment for the fair value contributed to the case before being terminated. Under those circumstances, "a contingency client should be advised by the successor attorney of the existence and effect of the discharged attorney's claim for fees on the occurrence of the contingency as part of the terms and conditions of the employment by the successor attorney."

ABA Formal Opinion 487 at 3 (footnotes omitted).

[1] In some jurisdictions, charging liens are available in non-contingent fee matters in which the attorney is to be paid on an hourly basis without regard to whether the litigation is successful. *See generally* John C. Martin, *Attorney Charging Liens: A Primer* (2016), available at https://www.sfgh.com/siteFiles/News/Attorney%20Charging%20Liens.pdf. That appears not to be the case in the District of Columbia given the requirement of an express or implicit agreement with the client that the attorney is to be paid from the proceeds of the representation. Accordingly, the rest of this opinion will focus on contingent fee representations. We note, however, that the availability of a common law charging lien is irrelevant and unnecessary if the attorney's agreement with the client gives the attorney an express lien on any proceeds of the representation as security for the attorney's fee claim. *See Wolf v. Sherman,* 682 A.2d at 198 & 200-201. The existence and elements of a charging lien claim are, of course, questions of law beyond the purview of this Committee.

[2] However, "[a] client has the ultimate authority to control his affairs; thus, he may settle a claim regardless of his attorney's efforts to prosecute it." *King & King, Chartered v. Harbert Int'l, Inc.,* 503 F.3d 153, 156 (D.C. Cir. 2007) (citing *Barnes v. Quigley*, 49 A.2d 467, 468 (D.C. 1946)). Similarly, there can be no *quantum meruit* compensation when the client chooses to discontinue a case because of his reasonable assessment that there is no chance of recovery. *Id.* at 157. "Otherwise, a contingent-fee client, convinced he had no chance of success, would have to continue his case just to avoid *quantum meruit* liability. Such a policy would encourage litigants to take unwarranted risks and prolong litigation simply to avoid paying attorney fees—a predicament that mocks the ideal of client control." *Id.*

D.C. Rules 1.5(b)[3] and (c)[4] differ in some respects from their counterparts in the Model Rules. On this issue, however, we believe that our Rule 1.5 also requires successor counsel in a contingent fee matter to alert the client that prior counsel may have a claim to a fee from any eventual recovery. Absent such disclosure, many clients would not fully understand the basis or rate of the fees for which they might ultimately be liable.

The ABA opinion also discussed certain obligations that successor counsel would have to prior counsel under the "Safekeeping Property" obligations of Rule 1.15:

> Where a disagreement persists between the predecessor counsel and the client, or predecessor counsel and successor counsel, about the amount of the predecessor counsel's fees from the proceeds obtained by the successor counsel, the successor counsel must comply with Rule 1.15 and substantive law in notifying predecessor counsel of the receipt of the funds and in deciding how to handle the funds. . . . If there is a dispute as to whether some or all of those funds should be paid to the predecessor counsel by the client but there is a claim to the proceeds by that counsel, the successor counsel must hold the disputed portion of the funds in a client trust account pursuant to Rule 1.15(e).

ABA Formal Opinion 487 at 6-7.

D.C. Rule 1.15 imposes similar obligations to the extent that successor counsel is aware of prior counsel's claim against funds recovered for the client:

> (a) A lawyer shall hold property of clients or third persons that is in the lawyer's possession in connection with a representation separate from the lawyer's own property. Funds of clients or third persons that are in the lawyer's possession (trust funds) shall be kept in one or more trust accounts maintained in accordance with paragraph (b). Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.
>
> * * *
>
> (c) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property, subject to Rule 1.6.
>
> (d) When in the course of representation a lawyer is in possession of property in which interests are claimed by the lawyer and another person, or by two or more persons to each of whom the lawyer may have an obligation, the property shall be kept separate by the lawyer until there is an accounting and severance of interests in the property. If a dispute arises concerning the respective interests among persons claiming an interest in such property, the undisputed portion shall be distributed and the portion in dispute shall be kept separate by the lawyer until the dispute is resolved. Any funds in dispute shall be deposited in a separate account meeting the requirements of paragraph (a) and (b).

In Legal Ethics Opinion 293, we provided guidance on the disposition of the property of clients and others where ownership of that property is in dispute. We concluded:

> In certain situations, a lawyer is obligated to safeguard funds that come into the lawyer's possession where ownership interests are claimed by both the lawyer's client and a third party or parties. If the third party has a "just claim" to the property that the lawyer has a duty under applicable law to protect against wrongful interference by the lawyer's client, the lawyer must hold any disputed portion of the property until the dispute has been resolved.[5]

Legal Ethics Opinion 293.

We gave extensive guidance on what would and would not be a "just claim" that the lawyer needed to respect in considering distributions of funds:

> In general, a "just claim" that the lawyer must honor pursuant to Rule 1.15 is one that relates to the particular funds in the lawyer's possession, as opposed to merely being (or alleged to be) a general unsecured obligation of the client. The problems addressed by this opinion most commonly arise in the context of the disbursement of settlement funds or proceeds of a transaction, such as the sale of real estate. In those cases, several types of claims that frequently are received by lawyers are illustrative of "just claims" that would require the lawyer to give notice, make disbursement promptly where there is no dispute, and safeguard the funds in the event of a dispute until the dispute is resolved. These are:
>
> 1. an attachment or garnishment arising out of a money judgment against the client (or ordered judicially prior to judgment) and duly served upon the lawyer, regardless of whether the attachment or garnishment is related to the matter being handled by the lawyer…;
>
> 2. a statutory lien that applies to the proceeds of the suit being handled by the lawyer…;
>
> 3. a court order relating to the specific funds in the lawyer's possession…; and
>
> 4. a contractual agreement made by the client and joined in or ratified by the lawyer to pay certain funds in the possession of the lawyer (e.g., client expenses in consideration of the supplier's agreement to forebear collection action during the pendency of the lawsuit) to a third party, regardless of whether such an agreement arises

[3] "When the lawyer has not regularly represented the client, the basis or rate of the fee, the scope of the lawyer's representation, and the expenses for which the client will be responsible shall be communicated to the client, in writing, before or within a reasonable time after commencing the representation."

[4] "A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial, or appeal, litigation, other expenses to be deducted from the recovery, whether such expenses are to be deducted before or after the contingent fee is calculated, and whether the client will be liable for expenses regardless of the outcome of the matter. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter, and if there is a recovery, showing the remittance to the client and the method of its determination."

[5] The source of the phrase "just claim" is Comment [8] to Rule 1.15:

> Third parties, such as a client's creditors, may have just claims against funds or other property in a lawyer's custody. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client, and accordingly may refuse to surrender the property to the client. However, a lawyer shall not unilaterally assume to arbitrate a dispute between a client and the third party.

> from the matter being handled by the lawyer….

Legal Ethics Opinion 293 (citations omitted).

"Where such a 'just claim' exists, the lawyer is ethically obliged to disregard her client's demand for the property. Thus, this rule concerning 'just claims' is an exception to the general principle of client loyalty." *Id*. (citations omitted).

We have no doubt that a charging lien is a "just claim" that successor counsel cannot ignore in disbursing the proceeds of the representation.[6] However, we noted in Opinion 293 that Rule 1.15 "does not apply to claims of which the lawyer lacks knowledge." The issue for this opinion is whether prior counsel's confidentiality obligation to the client precludes prior counsel from giving notice of the charging lien to successor counsel or other likely custodians of encumbered funds or property. The answer is no.

D. Confidentiality Obligations Generally in Matters Relating to Unpaid Fees and Terminations of Representations

Rule 1.6 defines a lawyer's confidentiality obligation to the lawyer's current and former clients. The obligation extends to both "confidences" and "secrets."

> "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate, or the disclosure of which would be embarrassing, or would be likely to be detrimental, to the client.

Rule 1.6(b).

This rule is broader than the attorney-client privilege because it includes both privileged information (defined as a "confidence") and non-privileged information gained within the professional relationship that fits within the rule's definition of a "secret." While encompassing more than is covered by the evidentiary privilege, the confidentiality obligation in D.C. has outer limits. If some specific bit of information gained in the professional relationship is neither a "confidence" nor a "secret," the rule's confidentiality obligations do not apply to it.[7]

There is an exception to the confidentiality obligation for fee disputes: "A lawyer may use or reveal client confidences or secrets: . . . to the minimum extent necessary in an action instituted by the lawyer to establish or collect the lawyer's fee." Rule 1.6(e)(5). However, this exception is limited to "an action instituted by the lawyer" to collect or establish the fee. The client's mere refusal to pay does not trigger this confidentiality exception. Disclosure can only be made within the context of that "action."

Even when it applies, the fee dispute exception does not authorize unfettered use by the lawyer of every confidence and secret obtained from the delinquent client. Disclosures may be made in "the action" only "to the minimum extent necessary" to establish or collect the fee. As explained in the comments to Rule 1.6:

> Subparagraph (e)(5) permits a lawyer to reveal a client's confidences or secrets if this is necessary in an action to collect fees from the client. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary. Subparagraph (e)(5) should be construed narrowly; it does not authorize broad, indiscriminate disclosure of secrets or confidences. The lawyer should evaluate the necessity for disclosure of information at each stage of the action. For example, in drafting the complaint in a fee collection suit, it would be necessary to reveal the "secrets" that the lawyer was retained by the client, that fees are due, and that the client has failed to pay those fees. Further disclosure of the client's secrets and confidences would be impermissible at the complaint stage. If possible, the lawyer should prevent even the disclosure of the client's identity through the use of John Doe pleadings.
>
> If the client's response to the lawyer's complaint raised issues implicating confidences or secrets, the lawyer would be permitted to disclose confidential or secret information pertinent to the client's claims or defenses. Even then, the rule would require that the lawyer's response be narrowly tailored to meet the client's specific allegations, with the minimum degree of disclosure sufficient to respond effectively. In addition, the lawyer should continue, throughout the action, to make every effort to avoid unnecessary disclosure of the client's confidences and secrets and to limit the disclosure to those having the need to know it. To this end the lawyer should seek appropriate protective orders and make any other arrangements that would minimize the risk of disclosure of the confidential information in question, including the utilization of in camera proceedings.

Rule 1.6 cmts. [26] & [27].

Lawyers may terminate representations of clients who do not pay their fees. Under Rule 1.16(b)(3), "a lawyer may withdraw from representing a client if . . . [t]he client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled." If the matter is before a court or other tribunal, however, the tribunal's

[6] We understand that the engagement agreements of some lawyers include an explicit lien in the lawyer's favor on any proceeds of the representation to the extent that the lawyer's fees are not paid or otherwise secured. As noted above, an equitable charging lien is unnecessary when there is an express lien. *See generally Wolf v. Sherman,* 682 A.2d at 198 & 200-201. Such an express lien would also be a "just claim" for purposes of Rule 1.15 whether the lien claimant had agreed to work on an hourly fee, a flat fee, or a contingent fee.

[7] The "confidences" and "secrets" approach used in D.C. Rule 1.6 differs from Model Rule 1.6, which makes confidential "information relating to the representation of a client." The ABA's "confidentiality rule . . . applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source." Model Rule 1.6 cmt. [3]. In the mid-1980s, when the District was considering whether to adopt the Model Rules of Professional Conduct, the District rejected the ABA approach as "broader than warranted" and recommended retention of Disciplinary Rule (DR) 4-101 approach from the District's then-controlling Code of Professional Responsibility. *Proposed Rules of Professional Conduct and Related Comments Showing the Language Proposed by the American Bar Association, Changes Recommended by the District of Columbia Bar Model Rules of Professional Conduct Committee, and Changes Recommended by the Board of Governors of the District of Columbia Bar* at 52, ¶ 38 (Nov. 19, 1986). DR 4-101 used the "confidences" and "secrets" formulation now reflected in D.C. Rule 1.6(b). A number of other jurisdictions also retained the confidences and secrets formulation of the confidentiality obligation or its functional equivalent. The rules in New York and Virginia, for example, deleted the defined terms "confidence" and "secret" but replaced them with the phrases that the Code of Professional Responsibility used to define those words. *See* New York Rule 1.6(a) (" 'Confidential information' consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential."); Virginia Rule 1.6(a) ("A lawyer shall not reveal information protected by the attorney-client privilege under applicable law or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client…."). *See also* California Bus. & Prof. Code § 6068(e)(1) ("It is the duty of the attorney to do all of the following: . . . To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.").

permission to withdraw may also be required. Rule 1.16(c).

Rule 1.6 limits what a lawyer can say in a motion seeking to withdraw from a representation. Unlike "an action instituted by the lawyer" to collect a fee, there is no specific exception to Rule 1.6 for withdrawal motions. In *In re Gonzalez*, 773 A.2d 1026 (D.C. 2001), a lawyer was admonished for revealing too much in a motion to withdraw from a representation. *Accord In re Ponds*, 876 A.2d 636 (D.C. 2005). The lawyer in the *Gonzalez* case had made no attempt to keep sensitive client information away from opposing counsel and out of public filings. The court noted that:

> Gonzalez could have submitted his documentation in camera, and that he could also have made appropriate redactions of the material most potentially damaging to his clients (e.g., his allegations that A.A. had misrepresented facts to him and his suggestion, in one of the letters, that a demand of $90,000 by the plaintiffs in the underlying litigation might be reasonable).

773 A.2d at 1032.

ABA Formal Opinion 476 (2016) provides extensive guidance about confidentiality issues in withdrawal motions under the Model Rules. It concluded:

> In moving to withdraw as counsel in a civil proceeding based on a client's failure to pay fees, a lawyer must consider the duty of confidentiality under Rule 1.6 and seek to reconcile that duty with the court's need for sufficient information upon which to rule on the motion. Similarly, in entertaining such a motion, a judge should consider the right of the movant's client to confidentiality. This requires cooperation between lawyers and judges. If required by the court to support the motion with facts relating to the representation, a lawyer may, pursuant to Rule 1.6(b)(5), disclose only such confidential information as is reasonably necessary for the court to make an informed decision on the motion.

In finding that some limited disclosure was possible if steps to avoid such disclosure were unsuccessful, the ABA opinion relied on Model Rule 1.6(b)(5), which allows a lawyer to reveal client confidential information "to the extent the lawyer reasonably believes necessary . . . to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client."

Although that section does not mention fee collection matters specifically, this is the part of Model Rule 1.6 that allows lawyers to use client confidential information in fee disputes with lawyers. In relying on that section to authorize some disclosures in the withdrawal context, the ABA opinion noted that "motions to withdraw based on a client's failure to pay fees are generally grounded in the same basic right of a lawyer to be paid pursuant to the terms of a fee agreement with a client." ABA Opinion 476, at 4.

E. Application of These Principles to Giving Notice of a Charging Lien

With that background, may an attorney seek to enforce his or her charging lien by giving notice of it to successor counsel or to another likely custodian of the funds or property to which the lien relates? We believe that the attorney may, for the reasons discussed below.

The District's confidentiality rule only applies to "confidences" and "secrets," as defined in Rule 1.6. Attorney fee agreements are not normally within the scope of the attorney-client privilege. *See generally* 1 Edna Selan Epstein, *The Attorney-Client Privilege and the Work-Product Doctrine* 131-40 (6th ed. 2017). Nor are billing statements, at least not when time entries containing privileged or confidential information are redacted. *Id*. at 157-62. The existence of the lien is certainly not a "confidence."

However, the existence of the lien would be a "secret" within the protections of Rule 1.6 if it were "information gained in the professional relationship that the client has requested be held inviolate, or the disclosure of which would be embarrassing, or would be likely to be detrimental, to the client." Whether something is a "secret" for purposes of Rule 1.6 depends on the facts and circumstances in a particular matter.

However, the client has the power to make any information gained in the professional relationship a "secret" for purposes of Rule 1.6 by "request[ing]" that the information "be held inviolate." We will assume for purposes of this opinion that the client has invoked that power with respect to the information that would need to be included in the notice of a charging lien. Indeed, a sophisticated client might even attempt to use that power to avoid having to pay for prior counsel's services by:

- Ordering prior counsel not to tell others about his or her charging lien; and
- Ordering successor counsel not to inform prior counsel that the client prevailed and that there is a fund from which prior counsel might be able to seek a fee.

Such skullduggery will not stand. "The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself." Rules of Professional Conduct: Scope cmt. [1].

We previously concluded in Opinion 293 that lawyers must disregard client instructions to ignore "just claims" by third parties to funds in the lawyer's possession. "Where such a 'just claim' exists, the lawyer is ethically obliged to disregard her client's demand for the property. Thus, this rule concerning 'just claims' is an exception to the general principle of client loyalty."[8]

More precisely on point is California Legal Ethics Opinion 2008-175 answering the question "What are a successor attorney's ethical obligations when her client in a contingency fee matter instructs her not to notify prior counsel, who has a valid lien against the recovery, of the fact or the amount of a settlement?" In that opinion, a client (Client) retained an attorney (A) to pursue a legal malpractice claim on a one-third contingent fee basis. After an investigation uncovered potential problems with the claim, A recommended that Client authorize a $150,000 pre-suit settlement offer. Believing the claim to be worth much more, Client fired A and retained another attorney (B) without A's knowledge on a one-third contingent fee basis. Client did mention A's earlier involvement to B. Then things got complicated:

> After months of intensive litigation, Client settles his malpractice case against Former Attorney for $150,000. Attorney A is not aware that the legal malpractice case has been filed so he has not filed a notice of lien. On the defense side, no one is aware of Attorney A's lien as he was discharged prior to suit being filed. As a result, the settlement check is made payable solely to Client and Attorney B.
>
> Having learned of the terms of the original fee agreement between Client and Attorney A, Attorney B presents Client with an accounting showing $100,000 payable to Client and $50,000 in attorney's fees to be divided between Attorney B and Attorney A.

[8] D.C. Legal Ethics Opinion 293 (2000).

> Client endorses the $150,000 check for deposit into Attorney B's Client Trust Account ("CTA"), demands the immediate payment of the $100,000 due him, and signs the accounting after adding the following handwritten statement: "I authorize the payment of $50,000 in attorneys' fees to Attorney B. I prohibit payment of any fee to Attorney A, and I prohibit Attorney B to disclose the fact or the amount of the settlement to Attorney A."

The California opinion concluded that, notwithstanding Client's instructions, Attorney B had to alert Attorney A of the fact and the amount of the settlement so that A could seek to enforce his charging lien as to up to one third of the recovery. Part of its analysis reflected an attorney's obligations to third party claimholders under California's equivalent of Rule 1.15. That analysis reached largely the same conclusions as our Opinion 293.

In order to permit that disclosure to Attorney A notwithstanding the client's instructions to the contrary, the California committee also had to find an exception to every California attorney's rigorous confidentiality obligation "to maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." Cal. Bus. & Prof. Code § 6060(e)(1). It found that exception in a California Supreme Court approved comment to then-California Rule 3-310 authorizing disclosure of client confidential information "as authorized or required by the State Bar Act, these Rules, or other law."

As explained below, the opinion found a "required by law" exception to confidentiality for the fact and the amount of the settlement, but also held that further disclosures potentially harmful to the client would be prohibited:

> Based upon the authorities cited in our discussion of [the trust account issue] above, we conclude that disclosure to Attorney A of the fact and amount of the settlement between Client and Former Attorney is both authorized and required under applicable ethical rules and case law.
>
> First, Attorney B is required by law to take affirmative steps to permit Attorney A to assert any claims he has pursuant to his valid lien against the $50,000 attorney's fee recovery. In this regard, Attorney B is required by law to disclose the fact and the amount of the settlement to Attorney A because, as a fiduciary to Attorney A, Attorney B has an affirmative duty to notify the lienholder of the settlement as well as an affirmative duty not to conceal material facts from Attorney A.
>
> Second, disclosure of the fact and amount of settlement to Attorney A is authorized by law. Attorney B cannot unilaterally decide what portion of the $50,000 total fee can be disbursed from trust to pay her own fee. Thus, without disclosure to Attorney A, Attorney B has no basis upon which to calculate and to remove from trust the portion of the fee she earned, leaving both attorneys uncompensated. In that regard, we note that under California law attorneys are expressly released from the duty to maintain client secrets in order to obtain compensation for services rendered.
>
> While Attorney B is both authorized and required to disclose the fact and the amount of the settlement, there is no justification for her to disclose to Attorney A, without Client's consent, privileged confidential information such as the Client's demand that the fact and the amount of the settlement be concealed from Attorney A. Thus, Attorney B must keep that statement confidential even though it could potentially work to Attorney B's advantage in negotiating with Attorney A over his *quantum meruit* claim.
>
> Once Attorney A has been notified of the settlement, both attorneys must remain mindful of their duty of confidentiality to Client in attempting to reach an accord, amicably or through legal process, on the proper allocation of fees. Moreover, should the attorneys resort to legal process to resolve any dispute over allocation of the fee, Attorney B should provide Client with notice and an opportunity to participate should Client so desire. In any legal proceeding, the presiding officer will be in a position to limit the disclosure of confidential information to the greatest extent possible.

California Opinion 2008-175, at 5-6 (citations omitted).

The D.C. Rules also have a "required by law" exception. Under Rule 1.6(e)(2)(A), "[a] lawyer may use or reveal client confidences or secrets . . . when permitted by these Rules or required by law or court order." While the adoption of the D.C. Rules of Professional Conduct in 1991 specifically limited rights that lawyers previously had with respect to retaining liens, as discussed above, none of the new rules purported to limit charging liens. Indeed, Rule 1.8(i) begins by authorizing a lawyer to "acquire and enforce a lien granted by law to secure the lawyer's fees or expenses." The remainder of that rule pares back the lawyer's prior rights with respect to retaining liens but does nothing to limit use of charging liens.

Given that historical background and our prior Opinion 293, we agree with the California opinion that client demands for secrecy cannot preclude all communications relating to the assertion and enforcement of charging liens. Thus:

- When the attorney with the charging lien reasonably believes it necessary to protect the lien to give notice of that lien to successor counsel or to another potential holder of the funds or property subject to the lien, that notice may be given even if the client objects to it.
- When successor counsel reasonably believes it necessary to give notice to prior counsel under our Opinion 293 respecting "just claims" by third parties to funds in the lawyer's possession, that notice must be given even if the client objects to it.

However, care should be taken before making any further disclosures. As in fee disputes between lawyer and client, disclosures should be made only "to the minimum extent necessary" to protect the lien claim. Rule 1.6(e)(5). *See also In re Gonzalez, supra* (respecting disclosures in a motion to withdraw from a representation). Moreover,

> the lawyer should . . . make every effort to avoid unnecessary disclosure of the client's confidences and secrets and to limit the disclosure to those having the need to know it. To this end the lawyer should seek appropriate protective orders and make any other arrangements that would minimize the risk of disclosure of the confidential information in question, including the utilization of in camera proceedings.

Rule 1.6 cmt. [26].[9]

Conclusion

An attorney whose fees are secured by a charging lien against the client's future recovery in a matter may give notice of the existence of the charging lien to suc-

9The standards for proving a fee claim at trial are typically different than what would be required initially to assert a charging lien for that fee. As such, we would question the ethical propriety of serving copies of invoices upon an opposing counsel as part of a charging lien notification package

cessor counsel or another likely holder of the property subject to the lien if the attorney's representation in the matter is terminated before there is a recovery. Absent the former client's consent, however, the notice must not contain information about the client's lack of resources, the client's past refusals to pay, or any other information gained in the professional relationship that would be embarrassing, or likely to be detrimental, to the client. Any further efforts to enforce the lien or collect the fees must comply with the rules governing fee disputes between lawyers and clients. Disclosures of client confidences can be made only to the minimum extent necessary to collect the fees, and even then protective orders and filings *in camera* or under seal should be used to the maximum extent possible to protect client confidential information from exposure to third parties without a need to know.

Published December 2020