Chapter 13

COLLECTING FEES

Ross W. Pulkrabek, Esq.
Starrs Mihm & Caschette LLP

SYNOPSIS

§ 13.1 INTRODUCTION

§ 13.2 ATTORNEYS' LIENS

§ 13.2.1—Overview
§ 13.2.2—Charging Liens
§ 13.2.3—Retaining Liens
§ 13.2.4—Other Security Interests In Client Property
§ 13.2.5—Who Owns The File?

§ 13.3 COLLECTION ACTIONS

§ 13.4 ARBITRATION AND MEDIATION OF FEE DISPUTES

§ 13.1 • INTRODUCTION

This Chapter deals with a subject near and dear to every lawyer's heart: getting paid. Significant attention is given to the arcane subjects of *charging liens*, which provide lawyers with a security interest in claims and judgments belonging to their clients, and *retaining liens*, which give lawyers the right to withhold client documents and property in an effort to coerce the client to pay his or her bill. Issues relating to fee litigation, arbitration, and mediation are discussed later in the Chapter.

§ 13.2 • ATTORNEYS' LIENS

§ 13.2.1—Overview

Colorado lawyers may assert two types of attorneys' liens when seeking to collect on an unpaid bill for legal services: a *charging lien* and a *retaining lien*.[1] The *charging lien* gives a lawyer a security interest in claims that he or she is handling for the client, judgments he or she helps to obtain for the client, and claims of the client that are "in suit."[2] The lawyer can reduce his

or her charging lien to a judgment, which, in turn, can be enforced to acquire title to money or other property to satisfy the lawyer's unpaid bill for costs and fees associated with the particular claim or judgment subject to the lien.[3]

The *retaining lien*, on the other hand, gives the lawyer a right to retain possession of a client's money, property, and papers that have come into the lawyer's possession during the course of his or her professional employment until the client pays the lawyer's general balance of compensation due for legal services.[4] The inconvenience or potential harm that a client will suffer due to the deprivation of his or her property is "the essence — the power and the bite — of the attorney's retaining lien."[5]

The charging lien and retaining lien exist strictly by virtue of two statutes — namely, C.R.S. §§ 12-5-119 and -120 (2005) — that have been on the books in their current form since 1903.[6] (Colorado does not recognize a common law attorney's lien.[7]) As courts and commentators repeatedly have observed over the past century, these two statutes tend to blur traditional differences between charging liens and retaining liens, resulting in a good deal of confusion among lawyers.[8] Generally speaking, however, the charging lien is codified in C.R.S. § 12-5-119, while the retaining lien is derived from both C.R.S. §§ 12-5-119 and -120.

§ 13.2.2—Charging Liens

A lawyer may assert a charging lien on a client's interest in the following: (1) "choses in action, claims and demands in [the lawyer's] hands"; (2) "any judgment [the lawyer] may have obtained or assisted in obtaining, in whole or in part"; and (3) "any and all claims and demands in suit."[9] The lawyer's right to assert a charging lien is based upon "the equity of an attorney to be paid . . . fees and disbursements out of the judgment obtained as a result of [the attorney's] service and skill."[10] A charging lien only secures payment of fees earned by the lawyer and any costs or other disbursements advanced by the lawyer in connection with the particular liened claim or judgment.[11] It does not secure payment of costs or fees associated with unrelated legal services that the lawyer may have rendered for the client.[12] The lien starts to accrue from the moment the lawyer begins to provide compensable services.[13]

The charging lien on "choses in action, claims and demands in [the lawyer's] hands" provides the lawyer with a security interest in claims that he or she is handling on behalf of the client at the time the lien is asserted. Completion of a settlement agreement resulting in the release of the client's claim will extinguish the lawyer's charging lien, as he or she no longer will have a claim "in [his or her] hands."[14] Further, the lien does not attach to specific property received by the client pursuant to a settlement of the claim.[15] Accordingly, a lawyer seeking to protect his or her charging lien on "choses in action, claims, and demands in [the lawyer's] hands" should structure any settlement so that money or property transferred pursuant to the settlement can be held in trust by the lawyer, and thus become subject to the lawyer's retaining lien, pending payment of the lawyer's bill.

The lawyer's charging lien on "any judgment [the lawyer] may have obtained or assisted in obtaining, in whole or in part" is not limited to money judgments. In the early case of *Fillmore*

v. Wells, the Colorado Supreme Court, interpreting the predecessor of C.R.S. § 12-5-119, held that a lawyer could enforce a charging lien on a judgment preserving the client's interest in real property and, after reducing the lien to judgment, could execute against the real property to satisfy payment of the attorney's fee.[16] The *Fillmore* court construed the term *any judgment* to mean "all kinds of judgments, regardless of the subject-matter to which they relate."[17] The same rule has been found to apply to C.R.S. § 12-5-119, and courts have held that the charging lien permits the lawyer to reach "the fruits of the judgment" to satisfy the unpaid bill for costs and fees.[18] Thus, to the extent a judgment preserves the client's interest in identifiable property, the lawyer's charging lien extends to that property. For example, a lawyer may assert a charging lien on securities obtained for the client by way of a judgment.[19] One notable exception to the general rule that the charging lien permits a lawyer to reach "the fruits of the judgment," however, is that a lawyer may not assert a charging lien on child support payments.[20]

The lawyer's charging lien on "any and all claims and demands in suit" is most frequently invoked when the lawyer has withdrawn from representation or has been fired by the client and the claim no longer can be said to be in the lawyer's hands. A claim or demand is not "in suit" unless and until a complaint has been filed "in a court of justice."[21] Threats of litigation and the preparation of a summons and complaint are insufficient to place a claim or demand in suit.[22]

Notice is required to perfect the charging lien as against third parties without knowledge of the lien.[23] Under C.R.S. § 12-5-119, notice of a lawyer's charging lien on a judgment or on claims or demands "in suit" is provided simply by filing written notice with the clerk of the court where the judgment was entered or the claim is pending.[24] To give notice of a charging lien on a chose of action or on a claim or demand that the lawyer is handling for the client but is not yet "in suit," the lawyer should deliver written notice to the adverse party as well as other persons or entities that may claim an interest in chose of action, claim, or demand. Formal notice is not a necessary prerequisite to perfection of the charging lien as against third parties with actual knowledge of the lien.[25] Similarly, a third party's knowledge of the client's inability to pay or intent not to pay the lawyer places the third party on notice of the lawyer's charging lien.[26] The lawyer is not required to take any action to make the lien enforceable as against the client.[27]

C.R.S. § 12-5-119 provides little guidance with respect to what information the notice must contain in order to be effective. At a minimum, however, the notice must set forth specifically the fee agreement between the lawyer and client.[28] The best practice would be to attach a copy of the written fee agreement as an exhibit to the notice.

In addition to the fee agreement itself, the notice should include the following information to the extent applicable:

1) The name and number of the case in which the claims have been asserted or judgment entered;
2) The name, address, and telephone number of the lawyer, client, and any judgment debtor(s);
3) An identification of the judgment or claims subject to the charging lien;

4) A statement that the lawyer is asserting a charging lien on the judgment or claims pursuant to C.R.S. § 12-5-119;
5) A statement of the costs and fees then owing;
6) A statement that the costs and fees arise out of services rendered by the lawyer in the instant case; and
7) A statement that the charging lien applies to any costs incurred or fees earned in the future relating to the judgment or claims.

Some commentators also have suggested that the notice contain a statement that the lawyer has not previously waived the right to assert the charging lien.[29] A lawyer should give notice of the assertion of an attorney's lien as soon as it becomes apparent that the lawyer may need to look to the lien to recover fees and costs.

Once notice has been given, the lawyer may assert a claim against a person who, having notice of the lawyer's charging lien, pays money in satisfaction of the liened claim or judgment directly to the client.[30] The existence of a charging lien does not, however, prevent the client and a third party from entering into a settlement agreement or dismissing claims in litigation where the client acts in good faith, without any intention of depriving the lawyer of payment to which he or she is entitled.[31]

C.R.S. § 5-12-119 provides that a charging lien "may be enforced by the proper civil action."[32] Filing notice of a charging lien with the clerk of court does not constitute the commencement of a "proper civil action" to enforce the lien.[33] Rather, a lawyer may enforce his or her charging lien either by filing a motion to reduce the lien to judgment in the action that gave rise to the lien or by commencing an entirely separate lawsuit.[34] The lawyer bears the burden of proving that he or she has complied strictly with the requirements of C.R.S. § 12-5-119.[35]

Enforcing the charging lien by filing a motion in the action in which the claim was filed or judgment entered ordinarily will be preferable to commencing an entirely separate lawsuit. The court already will have jurisdiction over both the client and the judgment debtor and should be in a position to judge the reasonableness of the fee that the lawyer is seeking to collect.[36] Enforcing a charging lien as part of post-judgment proceedings almost always will be faster and less expensive than filing a separate lawsuit. Finally, a lawyer who commences a separate lawsuit to collect an unpaid bill from a client is likely to provoke a counterclaim for breach of contract or legal malpractice. By comparison, the client is likely to be far more constrained in his or her ability to assert a counterclaim when the lawyer seeks to enforce his or her charging lien in the action in which the liened claim was filed or judgment entered.[37]

In some circumstances, such as where the lawyer seeks to enforce a charging lien on a claim that was never "in suit," the lawyer will have no option but to file an independent lawsuit. Both the client and the judgment debtor or person against whom the liened claim was filed are necessary parties to such an action. There is no right to a jury trial in proceedings to enforce a charging lien.[38]

A lawyer may lose his or her charging lien if he or she does not seek to enforce it promptly.[39] Unfortunately, there is no readily apparent statute of limitations prescribing the period within which a lawyer must seek to enforce a charging lien, and the existing cases provide little guidance. Courts merely have held that a lawyer must seek to enforce his or her charging lien "within a reasonable time."[40]

As a general rule, a charging lien will take priority over rights asserted by third parties, such as judgment liens, tax liens, or assignments of claims or judgments, only to the extent that the lawyer gave proper notice before the third party acquired or asserted its right.[41] Put differently, the priority of the lawyer's charging lien does not relate back to the date services were commenced.[42] For example, the Colorado Supreme Court held in *In re Estate of Benney*[43] that a lawyer's charging lien would take priority over the State of Colorado's claim for recoupment of costs and fees incurred in providing a criminal defense for the client in separate proceedings only if the lawyer filed notice of the charging lien before the state reduced its claim for recoupment to judgment. Similarly, a lawyer's charging lien on a judgment will take priority over the judgment debtor's right to set off an opposing judgment against the lawyer's client if the lawyer gave notice of the charging lien before the judgment debtor filed its motion to offset the opposing judgments.[44]

A lawyer can waive his or her right to assert a charging lien. For example, in *In re Marriage of Rosenberg*,[45] the court held that a law firm waived its right to assert a charging lien by proceeding to represent the client after she expressly deleted the following term from the law firm's engagement letter: "To secure payment of past due fees, costs and late charges, to which no written objection has been made within the 30-day period referred to above, you hereby grant us a lien against all assets owned by you, and agree that we may proceed to obtain or perfect and record such lien without notice to you." Asserting a charging lien that a lawyer previously waived may be grounds for disciplinary action.[46]

A lawyer asserting a charging lien must be careful to avoid a number of ethical pitfalls that could result in adverse disciplinary action. First and foremost, the existence of a charging lien does not authorize the lawyer to convert or dispose of money or property in which the client may claim an interest, such as funds received in satisfaction of a judgment obtained for the client.[47] Under C.R.S. § 12-5-119, the lawyer must first reduce the charging lien to a judgment. The lawyer may then proceed to execute on that judgment as he or she would on any other judgment.

A related ethical problem arises when a lawyer tries to enforce a charging lien by recording a lien against real property with a county clerk and recorder's office.[48] In *People v. Smith*,[49] the Colorado Supreme Court disciplined a lawyer for recording a lien on real property where the lawyer had not assisted in obtaining a judgment preserving the client's rights in the property. At least one commentator has interpreted *Smith* as a blanket prohibition against a lawyer recording a lien on real property, regardless of whether the lawyer has a valid charging lien on the property.[50] Given the uncertainty surrounding the scope of the holding in *Smith*, a lawyer asserting a charging lien on a judgment preserving his or her client's rights in real property should move to enforce the lien as soon as practicable after entry of judgment. Once the lawyer has moved to enforce the charging lien, he or she may record a notice of *lis pendens* against the real property pursuant to C.R.S. § 38-35-110.

A lawyer also must be cautious not to assert a charging lien for more than the fees, costs, and other disbursements related to the liened claim or judgment. The charging lien is easily confused with the retaining lien, which, as discussed below, permits a lawyer to retain client documents and property until the general balance of fees due from the client is paid. Some commentators have suggested, incorrectly, that a lawyer also may assert a charging lien until the general balance of fees due from the client is paid, regardless of whether the fees relate to the liened claim.[51] However, asserting a charging lien for fees earned on a matter unrelated to the liened claim clearly has been found to be a violation of the Rules of Professional Conduct and grounds for disciplinary action.[52] The Colorado Supreme Court's decision in *People v. Mills* is illustrative.[53] In *Mills*, a lawyer was disciplined for asserting a *charging lien* on $4,079.83 in settlement proceeds that he had received for the client, despite the fact that the general balance for legal services rendered to the client exceeded that amount and despite the fact that the lawyer's *retaining lien* on the full $4,079.83 was unchallenged. The court found that the lawyer engaged in misconduct because the amount of his valid *charging lien* was limited to only $500.[54]

The Ethics Committee of the Colorado Bar Association has opined that it would be unethical for a lawyer, such as a special advocate, guardian *ad litem*, or criminal defense lawyer, to assert a charging lien where the representation does not involve obtaining money or property for the client.[55] This may be a largely theoretical concern, however, given that a lawyer is unlikely to assert a charging lien in cases where there is no money or property to lien.

Finally, it bears note that a lawyer holding funds subject to a claim of a charging lien by another lawyer subjects himself or herself to disciplinary action as well as potential civil liability by disbursing the funds without making provisions for the charging lien.[56] Under such circumstances, a lawyer must keep any property subject to a disputed claim of lien separate until the respective interests of the lawyer claiming the lien, the client, and any other interested parties are resolved.[57]

§ 13.2.3—Retaining Liens

Under Colorado law, a lawyer has the right to assert a retaining lien for the general balance of compensation owed by the client on any money, securities, books, papers, files, or other property belonging to the client that has come into the lawyer's possession during the course of his or her professional employment.[58] The lien attaches once an attorney has completed compensable work.[59] The lawyer has a right to withhold such property from the client until the client has paid the lawyer's bill in full.[60] The retaining lien derives its power from the inconvenience or harm that the client will suffer so long as he or she is deprived possession of the liened property.[61] The stronger the client's need for the liened files or other property, the more likely he or she will be "persuaded" to pay the bill. The retaining lien properly has been analogized to a hostage situation.[62]

The retaining lien does not entitle the lawyer to convert client property to his or her own use, and any liened property must be held in escrow.[63] Client funds subject to a retaining lien must be kept in an interest-bearing trust account.[64] Likewise, the lawyer must not lose or mishandle any liened property.[65]

At the outset of this section, it was noted that, "generally speaking," C.R.S. § 12-5-119 sets forth the lawyer's charging lien, and C.R.S. § 12-5-120 sets forth the retaining lien. Each statute, however, describes certain elements of both types of liens. To the extent that C.R.S. § 12-5-119 provides the lawyer with a lien on "money [or] property . . . in [the lawyer's] hands," it is describing a retaining lien, not a charging lien. By the same token, although a plain reading of C.R.S. § 12-5-120 would appear to give a lawyer "a lien for a general balance of compensation . . . upon money due to his client in the hands of the adverse party in an action or proceeding in which the attorney was employed from the time of giving notice," courts have interpreted this language as creating a charging lien, not a retaining lien.[66]

A lawyer is not required to give formal notice of his or her retaining lien. Physical possession of the client's property is sufficient to perfect the lawyer's retaining lien as against third parties. Likewise, a lawyer need not take any formal action to enforce a retaining lien. The lawyer enforces the lien simply by refusing to return the client's papers or other property. As the goal is to persuade the client to pay the bill, the lawyer should explain his or her right to assert a retaining lien under Colorado law and the reasons for asserting the lien.

There are few recognized exceptions to the lawyer's right to assert a retaining lien. One such exception is that a lawyer's retaining lien will yield to a valid subpoena issued on behalf of a third party seeking discoverable documents.[67] Of course, a court should not enforce a subpoena issued by subsequent counsel for the client seeking discovery of the client's own files when doing so would frustrate the lawyer's retaining lien.

A lawyer may waive his or her right to assert a retaining lien. In *People v. Brown*,[68] for example, a lawyer was found to have waived his right to assert a retaining lien on papers where the lawyer's associate had given assurances that the papers would be returned. Likewise, a lawyer who files a collection suit against her or his client to recover unpaid costs and fees waives a retaining lien on papers that are relevant to the fee dispute.[69]

A court may require a lawyer to release his or her retaining lien on client property if the client is willing to post a bond large enough to cover the entire unpaid bill for fees and costs.[70] Courts in other jurisdictions have held that the lawyer's right to assert a retaining lien must yield when an important personal liberty interest of the client is at stake, as when the papers are essential to the defense of a criminal charge.[71] Courts in other jurisdictions also have recognized an exception to the lawyer's right to assert a retaining lien when the client is financially unable to post a bond or pay the lawyer's bill.[72]

Frequently, a lawyer will assert a retaining lien when the client terminates the lawyer's services and employs a new lawyer to handle the matter. A lawyer may not assert a retaining lien against a client's files if he or she has been discharged or removed from a particular case due to "serious" professional misconduct in the handling of the client's affairs.[73] Similarly, a lawyer loses the right to assert a retaining lien on his or her client's files if the lawyer engages in conduct resulting in suspension or disbarment.[74] In such cases, the release of the client's files does not prejudice the lawyer's right to assert a claim for unpaid fees or costs.[75] The lawyer may also

waive the right to assert a retaining lien when the lawyer withdraws without just cause or reasonable notice.[76] A lawyer does not waive his or her right to assert a retaining lien over the client's files or other property when the withdrawal results from mere disagreements with the clients.[77]

A lawyer's retaining lien does not authorize him or her to move client funds out of an interest-bearing trust account to the firm's operating account or personal account without the client's prior approval or a judgment permitting him or her to do so.[78] Mishandling or conversion of retained money or property is grounds for disciplinary action.[79]

Further, a lawyer may not ethically assert a retaining lien unless the client has failed to perform his or her obligations under the fee agreement.[80] The assertion of an unfounded retaining lien is grounds for disciplinary action.[81] The improper assertion of a retaining lien may subject the lawyer to civil liability, including claims for negligence or conversion.[82] Before asserting a retaining lien, the lawyer should make sure that any conditions precedent to the lawyer's right to payment have been satisfied and that the client is in default on the bill for costs and fees.[83]

Where the lawyer is representing the client on a contingent fee basis and the relationship terminates prior to the occurrence of the contingency, the lawyer may assert a retaining lien only for unpaid costs and, to the extent the lawyer provided some initial notice to the client of his or her right to seek recovery in *quantum meruit*, for the reasonable value of the lawyer's services.[84] A lawyer's use of a retaining lien to coerce payment of a greater fee than the lawyer is entitled to receive can be grounds for suspension or disbarment.[85]

§ 13.2.4—Other Security Interests In Client Property

C.R.S. §§ 12-5-119 and -120 do not, in and of themselves, limit the types of security interests that a lawyer may acquire in client property. Thus, with some exceptions discussed below, a lawyer may acquire a security interest in client property not in the lawyer's possession, such as a mortgage on real property.[86]

When acquiring a security interest in client property other than the statutory liens created by C.R.S. §§ 12-5-119 and -120, the lawyer must comply with Rule 1.8(a) of the Rules of Professional Conduct.[87] Any agreement provided the lawyer with such a security interest must be "fair and reasonable to the client" and must be "fully disclosed and transmitted in writing to the client in a manner which can reasonably be understood by the client."[88] In addition, the lawyer must inform the client that independent counsel may be advisable and must give the client a reasonable opportunity to seek such independent counsel.[89] Finally, the client must consent to the agreement in writing.[90]

Colo. RPC 1.8(j) limits the circumstances under which a lawyer ethically may acquire an interest, including a lien, on claims belonging to the client or property that is the subject matter of litigation that the lawyer is conducting for a client. Colo. RPC 1.8(j) provides:

> A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:
>
> (1) acquire a lien granted by law to secure the lawyer's fee or expenses; and
> (2) contract with a client for a reasonable contingent fee in a civil case.

Accordingly, C.R.S. §§ 12-5-119 and -120 provide the exclusive means by which a lawyer may ethically acquire a security interest in a cause of action or subject matter of litigation in which the lawyer is representing the client.[91]

The prohibition created by Colo. RPC 1.8(j) is not limited to claims in litigation; rather, it applies whenever the client has consulted the lawyer about a right that is genuinely disputed and likely to become the subject of litigation, and the lawyer agrees to pursue the claim.[92] Colo. RPC 1.8(j) does not prohibit a lawyer from acquiring an interest in claims or the subject matter of litigation in which he or she is *not* representing the client.

Other types of security arrangements may implicate other Rules of Professional Conduct. For example, although it is generally agreed that a lawyer may accept an equity interest in a client in lieu of cash fees, a lawyer doing so must comply with Rules 1.5(a), 1.7(b) and (c), and 1.8(a) of the Rules of Professional Conduct.[93] In general, the ethical considerations present where a lawyer acquires an equity interest in his or her client also will be implicated where payment of the lawyer's fee is secured by stock in a corporate client. The lawyer may not acquire such a security interest if doing so will create a conflict between the lawyer's interests and those of the client. Colo. RPC 1.8(j) would operate to prohibit the lawyer representing a corporate client in litigation from acquiring a security interest in the client's stock.

§ 13.2.5—Who Owns The File?

Colo. RPC 1.16(d) provides, in relevant part, "Upon termination of representation, a lawyer shall take 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 law."[94] Unless the lawyer is asserting a valid retaining lien, failure to surrender papers to which the client is entitled is grounds for disciplinary action.[95]

Although the client clearly is entitled to documents that he or she provided to the lawyer, the client is not necessarily entitled to every document that may be in the lawyer's files. In evaluating whether the client is entitled to a particular document, the focus of the inquiry is whether the client reasonably needs that document to protect his or her interests.[96]

In general, end-product documents prepared for the client, such as contracts, wills, articles of incorporation, pleadings, and so forth must be surrendered. Even documents that qualify as attorney work product in the classic sense — legal research and memoranda, drafts of pleadings and correspondence, and notes of client or witness interviews — must be delivered to the client.[97] To the extent that the lawyer has kept drafts of documents prepared for the client, they should be

surrendered as well. Any doubts as to whether the client is entitled to a particular document should be resolved in favor of the client.

A lawyer may refuse to surrender papers to the extent that doing so would violate a duty of confidentiality or nondisclosure under the Rules of Professional Conduct or otherwise imposed by law.[98] For example, the lawyer may have used a document originally created for a previous client as a template or basis of a document prepared for the client demanding surrender of the file. The lawyer need not — and, indeed, should not — surrender the original document created for the previous client. Documents stored in electronic format, such as Microsoft Word® or WordPerfect® files, pose a particular problem in this regard. When a file created for one client is modified for another client and then saved, the modified document may contain hidden "metadata" from the original document. Before surrendering an electronic document to the client, the lawyer should verify that any metadata referring to other clients or confidential information has been stripped from the document.

A lawyer also may refuse to surrender "personal attorney work product" that may be contained in the client's file.[99] Documents that fall into the category of personal attorney work product include conflicts checks, personnel assignments, calendars, to-do lists, billing records, and other internal law-office administration documents that the client would not reasonably need to protect his or her interests.[100] Occasionally, the file may contain notes or messages written by a lawyer or staff member that reflect purely personal observations not intended to be shared with persons outside the office. Such notes or messages may be withheld unless disclosure is reasonably necessary to protect the client's interests. The lawyer may also summarize or redact such personal observations as appropriate to protect the interests of both the lawyer and client.[101]

A lawyer should make copies of any documents before surrendering them to the client if there is even the slightest possibility of the client asserting a malpractice claim in the future. Absent an agreement to the contrary, the lawyer must bear the costs of making copies of any documents that he or she wishes to retain.[102] Although provisions in fee agreements that condition surrender of the file upon the client's payment of copying costs are presumed to be enforceable, any copy costs charged to the client must be reasonable.[103] Moreover, a lawyer may not condition surrender of documents necessary to the protection of the client's interests under the following circumstances:

- The lawyer has been suspended or disbarred from the practice of law;
- The client terminated the relationship due to serious professional misconduct in handling the client's affairs;
- The client needs the documents to protect an important liberty interest; or
- The client is financially unable to pay copying charges.

Ordinarily, a lawyer is required to surrender papers only after the client requests them.[104] This is particularly the case where the matter in which the lawyer represented the client has been resolved and no further work needs to be performed. Assuming no retaining lien is being asserted, a lawyer must surrender papers to the client promptly after being asked.[105] A lawyer may request

a reasonable period of time to produce papers to which the client is entitled unless immediate production is necessary to protect the client's interests.

Because Colo. RPC 1.16(d) imposes an obligation on lawyers to take steps to protect the client's interests, circumstances may require a lawyer to take affirmative measures to identify and surrender papers that the client reasonably needs. For example, where representation is terminated while a matter is pending and the client will need the file to meet imminent deadlines, the lawyer should surrender papers to which the client is entitled without awaiting a specific request.[106]
A lawyer who has been suspended or disbarred is required to deliver to each client all papers and property to which the client is entitled.[107]

§ 13.3 • COLLECTION ACTIONS

It is normal for a lawyer to be incensed by a client's refusal to pay the bill, and the lawyer's instinct often is to sue the client. After all, lawyers are trained to resolve such disputes through litigation. There is no ethical prohibition against filing a lawsuit against a client who has failed to pay his or her bill or assigning claims to a collection agency.[108]

Nevertheless, filing a collection action against a client should be viewed as a last resort. As lawyers so often tell their clients, litigation is expensive, time consuming, and stressful. Occasionally, a client who has been served with a complaint actually will pay the bill or will default, leaving the lawyer to track down the client's assets. All too frequently, however, filing a collection action against a client results in a counterclaim for legal malpractice against the lawyer.[109] The lawyer then must notify his or her insurance carrier, which will appoint counsel to defend against the counterclaim and require the lawyer to pay the costs of defense up to his or her deductible. Regardless of whether the malpractice claim is meritorious, it is likely to eclipse the collection claim and become the primary focus of the case. The net result is that the lawyer finds himself or herself embroiled in a lawsuit that demands vastly more time, money, and emotional energy than anticipated. Before suing a client, a lawyer should carefully weigh the costs of litigation, in terms of time, money, and stress, against the amount of the judgment that the lawyer is likely to obtain and be able to collect. There is no point in spending countless hours and thousands of dollars suing a client who truly lacks the financial ability to pay the lawyer's bill.

Typically, a lawyer suing a client to collect an unpaid bill will assert claims for both breach of contract and unjust enrichment, also known as *quantum meruit.* Due to the fiduciary relationship between the lawyer and client, the proof required to prevail on a claim for breach of a fee agreement is greater than that required of a plaintiff in an ordinary contract case.[110] In addition to proving the ordinary elements of a claim for breach of contract — namely, the existence of a valid contract, the lawyer's performance of any conditions precedent to the client's duty to pay the lawyer's fee, and the client's failure to pay the lawyer's fee due under the contract — the lawyer must demonstrate the following: (1) the fee agreement was fairly and openly made; (2) the client

was given full knowledge of the relevant facts and his or her legal rights; and (3) the services performed by the lawyer were reasonably worth the fees due under the agreement.[111]

Where the lawyer completed the services he or she was hired to perform under a non-contingent fee agreement, the lawyer will be entitled to recover the fees due under the agreement, provided such fees are not unreasonable.[112] If, for reasons other than misconduct by the lawyer, the client-lawyer relationship is terminated before the lawyer has completed the services that he or she was hired to perform, then the lawyer generally may recover the lesser of the reasonable value of services rendered or compensation due under the fee agreement.[113] A judge or arbitrator may award the ratable proportion of compensation due under the fee agreement to the extent that the lawyer has performed severable services and that such compensation would not burden the client's choice of counsel or ability to replace counsel.[114] A lawyer is not entitled to fees for services that had not yet been performed at the time he or she withdrew from representation or was discharged.[115] In a litigation matter, for example, it would be appropriate for a court to award compensation due under an hourly rate fee agreement for time that the lawyer spent performing discrete tasks, such as preparing motions and pleadings, drafting or responding to written discovery, and taking or defending depositions. A more difficult question concerns the lawyer's right to compensation for time spent familiarizing himself or herself with the facts of the case or applicable law. If the amount of time spent studying the file or applicable law is disproportionately large in view of the limited tasks that the lawyer completed for the client, then allowing compensation for such time at an hourly rate would burden the client's ability to obtain replacement counsel because the client would have to pay twice for the same work.[116]

A contingent fee agreement generally may be enforced through a claim for breach of contract as long as the agreement substantially complies with the requirements of Chapter 23.3 of the Colorado Rules of Civil Procedure.[117] An issue that arises frequently is the amount of compensation, if any, a lawyer may recover if representation under a contingent fee agreement is terminated prior to settlement or entry of judgment. A contingent fee agreement must contain "a statement of [any] contingency upon which the client is to be liable to pay compensation otherwise than from amounts collected for him by the attorney."[118] For example, the contingent fee agreement may require the client to pay the lawyer a flat fee or on an hourly rate or on a *quantum meruit* basis if the representation is terminated before settlement or entry of judgment. Assuming the fee agreement substantially complies with Chapter 23.3 of the Colorado Rules of Civil Procedure, terms providing an alternative reasonable fee will be enforceable through a claim for breach of contract.[119]

In the event that the fee agreement is found to be unenforceable, the lawyer may be able to recover fees in *quantum meruit* under a theory of unjust enrichment. Generally, a lawyer is entitled to the reasonable value of his or her services if he or she withdrew for a justifiable reason or if the client terminated the lawyer without cause.[120] Special rules apply to the recovery of fees in *quantum meruit* where the lawyer represented the client under a contingent fee agreement found to be unenforceable, such as an oral contingent fee agreement. A lawyer who successfully completes the services for which he or she was retained under an unenforceable contingent fee agreement is entitled to recovery in *quantum meruit*.[121] Where representation under a contingent

fee agreement is terminated prior to settlement or entry of judgment, however, the lawyer may recover fees in *quantum meruit* only if the client received notice of that possibility in the fee agreement or a subsequent written agreement.[122]

To recover in *quantum meruit*, a lawyer must prove the following: (1) at the lawyer's expense, (2) the client received a benefit, (3) under circumstances that would make it unjust for the client to retain the benefit without paying.[123] A "benefit" denotes any form of advantage obtained by the client.[124]

The following factors are considered in determining the reasonable value of a lawyer's services, whether the lawyer is pursuing a claim for breach of contract or seeks recovery of fees in *quantum meruit*:

1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
3) The fee customarily charged in the locality for similar legal services;
4) The amount involved and the results obtained;
5) The time limitations imposed by the client or by the circumstances;
6) The nature and length of the professional relationship with the client;
7) The experience, reputation, and ability of the lawyer or lawyers performing the services; and
8) Whether the fee is fixed or contingent.[125]

Expert testimony usually is required to establish the reasonableness of the lawyer's fee.[126] Although the lawyer who rendered services can give expert testimony regarding the reasonableness of his or her own fee, the finder of fact is likely to give greater weight to testimony by a lawyer without a stake in the litigation. It is unnecessary, and in some instances may be harmful, to hire a lawyer who is recognized as a specialist in his or her field to give expert witness on the reasonableness of a fee. Ideally, a lawyer hired to give expert testimony will have similar credentials to the lawyer seeking to recover his or her fee.

If the lawyer's damages are liquidated — that is, readily determinable by multiplying an hourly rate set forth in the contract by the number of hours worked, and adding any itemized expenses or disbursements authorized by the contract — the limitations period for commencing an action for breach of contract against the client is six years.[127] However, if the amount of the lawyer's damages are not liquidated, then any claim for breach of contract against the client is subject to a three-year statute of limitations.[128] Likewise, the limitations period on a claim for *quantum meruit* is only three years.[129] Consequently, lawyers seeking to collect their fees should assert claims for both breach of contract and *quantum meruit*, and any action against the client should be filed within the shorter, three-year limitations period. The lawyer may gain a strategic advantage by delaying filing a lawsuit against a former client until the expiration of the two-year limitations period applicable to any counterclaim by the client sounding in legal malpractice.

§ 13.4 • ARBITRATION AND MEDIATION OF FEE DISPUTES

The Rules of Professional Conduct encourage lawyers to consider alternatives to litigation, such as arbitration or mediation, to resolve fee disputes with clients. The official comments to Colo. RPC 1.5 provide, in part, "If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the bar, the lawyer should conscientiously consider submitting to it."[130] Clauses in fee agreements requiring the lawyer and client to arbitrate fee disputes generally will be enforced.[131]

There are a number of reasons to prefer arbitration or mediation of a fee dispute to litigation. Arbitration and mediation are faster and usually less expensive means of resolving a fee dispute than litigation. Both lawyers and clients may appreciate that proceedings in arbitration and mediation, unlike litigation, are confidential and do not become a matter of public record.

The Colorado Bar Association offers fee arbitration services to Colorado lawyers and their clients. Participation in the fee arbitration program is voluntary, and only fee disputes greater than $100 are considered. A lawyer or client interested in arbitrating a fee dispute must send a letter to the Legal Fee Arbitration Committee at 1900 Grant Street, Suite 900, Denver, CO 80203-4336, stating the amount of the fee dispute, listing the full names and addresses of the parties, and requesting that the dispute be submitted for arbitration. The committee will notify the parties that it has received the request for fee arbitration and that the arbitration process will be suspended for 30 days to give the parties an opportunity to settle the dispute themselves. If no settlement is reached, the parties are asked to sign an agreement to submit the dispute to arbitration and to complete a form setting forth their positions in the fee dispute. If all parties agree to arbitration, a hearing will be set at which the parties may present witnesses and evidence. Following the hearing, the committee will issue a final written determination setting forth the amount of the fee, if any, that the client must pay. The committee's order then may be made an order of the court and enforced pursuant to the Federal Arbitration Act or Uniform Arbitration Act.[132]

NOTES

1. *See Donaldson, Hoffman & Goldstein v. Gaudio*, 260 F.2d 333, 335 (10th Cir. 1958); *Collins v. Thuringer*, 21 P.2d 709, 710 (Colo. 1933).
2. C.R.S. § 12-5-119; *see also In re Estate of Benney*, 790 P.2d 319, 322 (Colo. 1990); *Collins*, 21 P.2d at 710.
3. C.R.S. § 12-5-119; *Estate of Benney*, 790 P.2d at 322.
4. C.R.S. § 12-5-119; C.R.S. § 12-5-120; *Collins*, 21 P.2d at 710.
5. *Jenkins v. Weinshienk*, 670 F.2d 915, 920 (10th Cir. 1982).
6. 1903 Sess. Laws 172 §§ 1-2.
7. *Gaudio*, 260 F.2d at 337, n. 1; *In re Marriage of Mitchell*, 55 P.3d 183, 184 (Colo. App. 2002).
8. *See*, *e.g.*, *Collins*, 21 P.2d at 710.
9. C.R.S. § 12-5-119; *see also Estate of Benney*, 790 P.2d at 322; *Collins*, 21 P.2d at 710.
10. *Collins*, 21 P.2d at 710.

11. *Estate of Benney*, 790 P.2d at 323.

12. *Id.* at 323; *Collins*, 21 P.2d at 710-11; *see also Duncan v. Stickney Co*., 97 Colo. 9, 11, 46 P.2d 750, 751 (1935).

13. *See In re Marriage of Berkland*, 762 P.2d 779, 782 (Colo. App. 1988).

14. *See Gaudio*, 260 F.2d at 337.

15. *Id.*

16. *Fillmore v. Wells*, 10 Colo. 228, 232, 15 P. 343, 346 (1887).

17. *Id.*

18. *Dolan v. Flett*, 582 P.2d 694, 698 (Colo. App. 1978).

19. *Clark v. O'Donnell*, 68 Colo. 279, 288, 187 P. 534, 537 (1920).

20. *In re Marriage of Etcheverry*, 921 P.2d 82, 83 (Colo. App. 1996).

21. *Gaudio*, 260 F.2d at 337.

22. *Id.*

23. *People ex rel. MacFarlane v. Harthun*, 581 P.2d 716, 718 (Colo. 1978); *In re Marriage of Berkland*, 762 P.2d 779, 782 (Colo. App. 1988).

24. C.R.S. § 12-5-119.

25. *Clark*, 68 Colo. at 286, 187 P. at 536-37.

26. *Board of County Comm'rs v. Berkeley Village*, 580 P.2d 1251, 1257 (Colo. App. 1978).

27. *People ex rel. MacFarlane*, 581 P.2d at 718; *Marriage of Berkland*, 762 P.2d at 782.

28. C.R.S. § 12-5-119.

29. Leslie S. Klein and Curt Todd, "The Treatment of Attorney's Liens in Colorado," 16 *Colo. Law*. 623 (April 1987).

30. *In re Marriage of Smith*, 687 P.2d 519, 520-21 (Colo. App. 1984); *Miller v. Houston*, 27 Colo. App. 89, 96, 146 P. 786, 788 (1915).

31. *Gooding v. Lyon*, 63 Colo. 328, 331, 166 P. 564, 565 (1917).

32. C.R.S. § 5-12-119.

33. *In re Marriage of Mitchell*, 55 P.3d 183, 186 (Colo. App. 2002).

34. *Gee v. Crabtree*, 560 P.2d 835, 836 (Colo. 1977); *Marriage of Mitchell*, 55 P.3d at 185; *In re Marriage of Weydert*, 703 P.2d 1336, 1337 (Colo. App. 1985); *In re Marriage of Mann*, 697 P.2d 778, 780 (Colo. App. 1984).

35. *People v. Gray*, 35 P.3d 611, 618 (Colo. 2001); *Marriage of Mitchell*, 55 P.3d at 185.

36. *Gee*, 560 P.2d at 836.

37. *Cf. In re Marriage of Rosenberg*, 690 P.2d 1293, 1295 (Colo. App. 1984) (suggesting that the client may have the right to assert a counterclaim during post-judgment proceedings to enforce an attorney's lien, but finding that the trial court did not err by initially disallowing the client's counterclaim).

38. *Id.* at 1294.

39. *Marriage of Mitchell*, 55 P.3d at 185.

40. *Id.* at 186 (holding that a lawyer lost his right to enforce a charging lien by failing to seek enforcement of the lien until 19 years after judgment was entered); *see also Colorado State Bank v. Davidson*, 7 Colo. App. 91, 95, 42 P. 687, 688 (1895).

41. *Cottonwood Hill, Inc. v. Ansay*, 782 P.2d 1207, 1209 (Colo. App. 1989).

42. *In re Marlin Oil Co*., 67 Bankr. 284 (Bankr. D. Colo. 1986); *Ansay*, 782 P.2d at 1210.

43. *Estate of Benney*, 790 P.2d 319 (Colo. 1990).

44. *Dankwardt v. Kermode*, 68 Colo. 225, 230, 187 P. 519, 521 (1920); *Stiner v. Planned Mgmt. Servs*., 923 P.2d 186, 188 (Colo. App. 1995).

45. *Marriage of Rosenberg*, 690 P.2d at 1295.

46. *People v. Brown*, 840 P.2d 1085, 1088 (Colo. 1992).

47. *Gray*, 35 P.3d at 620.

48. *People v. Smith*, 830 P.2d 1003, 1005 (Colo. 1992). *See generally* Jamie Sudler, "Improper Recording of an Attorney's Charging Lien," 32 *Colo. Law*. 61 (Feb. 2003).

49. *Smith*, 830 P.2d at 1005.

50. Sudler, *supra* n. 48, at 63.

51. *See* Tami D. Cowden and Serge L. Herscovici, "Perfection and Enforcement of Attorney's Liens in Colorado," 26 *Colo. Law*. 57 (March 1997); Klien and Todd, *supra* n. 29.
52. *People v. Mills*, 861 P.2d 708, 711 (Colo. 1993).
53. *Id.*
54. *Id.*
55. *See* Ethics Committee of the Colorado Bar Association, Formal Opinion 110 (Jan. 2002).
56. *People v. Egbune*, 58 P.3d 1168, 1173 (Colo. PDJ 1999).
57. Colo. RPC 1.15(c).
58. C.R.S. § 12-5-120; *Collins*, 21 P.2d at 710.
59. *People ex rel. MacFarlane*, 581 P.2d at 718.
60. C.R.S. § 12-5-120; *Collins*, 21 P.2d at 710.
61. *Jenkins,* 670 F.2d at 920.
62. *Id.* at 917.
63. *Gray*, 35 P.3d at 619.
64. *Id.* at 619-20.
65. *People v. Koeberle*, 810 P.2d 1072, 1074 (Colo. 1991).
66. *Collins*, 21 P.2d at 710-11 ("[W]hile the provisions concerning the two classes of liens are not so clearly separated as might be desired, it was not the intention of the Legislature to abolish the well-established distinction between the two classes of liens, and to create a lien upon a judgment and its proceeds to secure the payment of attorneys fees earned in matters not at all connected with the suit in which the judgment is rendered.").
67. *Jenkins*, 670 F.2d at 920.
68. *Brown*, 840 P.2d at 1088.
69. *Jenkins v. District Court of Eighth Judicial Dist*., 676 P.2d 1201, 1204-05 (Colo. 1984).
70. *Id.* at 920.
71. *Id.* at 919-920 (*citing Hauptmann v. Fawcett*, 243 A.D. 613, 276 N.Y.S. 523, *modified* 243 A.D. 616, 277 N.Y.S. 631 (App. Div. 1935)).
72. *Id.* at 920 (*citing Hernandez v. Nierenberg*, 15 Misc.2d 818, 179 N.Y.S.2d 322 (Sup. Ct. 1958)).
73. *People ex rel. MacFarlane*, 581 P.2d at 718.
74. *Id.* at 719.
75. *Id.*
76. *Weinshienk*, 670 F.2d at 920.
77. *Id.*
78. *Gray*, 35 P.3d at 619.
79. *Id.*; *Koeberle*, 810 P.2d at 1074.
80. *People v. Garnett*, 725 P.2d 1149, 1154-55 (Colo. 1986).
81. *People v. Razatos*, 636 P.2d 666, 671 (Colo. 1981).
82. *Gray*, 35 P.3d at 619.
83. *Garnett*, 725 P.2d at 1154-55.
84. *Dudding v. Norton Frickey & Assocs*., 11 P.3d 441, 444 (Colo. 2000); *Elliott v. Joyce*, 889 P.2d 43, 46 (Colo. 1994); *People v. Radinsky*, 512 P.2d 627, 628 (Colo. 1973).
85. *Radinsky*, 512 P.2d at 628.
86. *Restatement (Third) of the Law Governing Lawyers*, § 43 cmts. a, b, i (2000).
87. Ethics Committee of the Colorado Bar Association, Formal Opinion 110 (Jan. 19, 2002).
88. Colo. RPC 1.8(a)(1).
89. Colo. RPC 1.8(a)(2).
90. Colo. RPC 1.8(a)(3).
91. Colo. RPC 1.8(j).
92. *People v. Mason*, 938 P.2d 133, 136 (Colo. 1997).
93. *See generally* Ethics Committee of the Colorado Bar Association, Formal Opinion 109 (May 19, 2001).
94. Colo. RPC 1.16(d).

95. *People v. Ain*, 35 P.3d 734, 736-37 (Colo. PDJ 2001); *People v. Holmes,* 951 P.2d 477, 478 (Colo. 1998).
96. Colorado Bar Association Ethics Committee, Formal Opinion 104 (April 17, 1999).
97. Colorado Bar Association Ethics Committee, Formal Opinion 104 and n. 5 (April 17, 1999).
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.*
102. Colorado Bar Association Ethics Committee, Formal Opinion 104 (April 17, 1999).
103. *Id.*
104. *Id.*
105. *People v. Reynolds*, 933 P.2d 1295, 1301 (Colo. 1997).
106. *In re Price*, 18 P.3d 185, 189 (Colo. 2001).
107. C.R.C.P. 251.28(b).
108. Colorado Bar Association Ethics Committee, Formal Opinion 20 (April 23, 1961, addendum issued 1995).
109. Ronald E. Mallen and Jeffrey M. Smith, *Legal Malpractice*, § 2.15 at 194-95 (West 2005).
110. *Bryant v. Hand*, 404 P.2d 521, 523 (Colo. 1965).
111. *Jenkins v. District Court of Eighth Judicial Dist*., 676 P.2d 1201, 1204-05 & n. 4 and 5 (Colo. 1984); *Bryant*, 404 P.2d at 523; *Rupp v. Cool*, 362 P.2d 396, 398 (Colo. 1961).
112. *Restatement (Third) of the Law Governing Lawyers*, § 34 (2000).
113. *Olsen & Brown v. City of Englewood*, 889 P.2d 673, 677 (Colo. 1995); *Restatement (Third) of the Law Governing Lawyers*, § 40 (2000).
114. *Restatement (Third) of the Law Governing Lawyers*, § 40 (2000).
115. *Olsen & Brown*, 889 P.2d at 676.
116. *Id.* at 677.
117. C.R.C.P. Ch. 23.3, Rule 6.; *Elliott*, 889 P.2d at 46.
118. C.R.C.P. Ch. 23.3, Rule 5(d).
119. *Cf. Feiger, Collison & Killmer v. Jones*, 926 P.2d 1244, 1252-53 (Colo. 1996) (holding that contingent fee agreement that converted to a lodestar rate if the law firm withdrew "does not facially reflect a clearcut public policy violation").
120. *Olsen & Brown*, 889 P.2d at 677. *See generally Restatement (Third) of the Law Governing Lawyers*, §§ 39 and 40 (2000).
121. *Mullens v. HanselHenderson*, 65 P.3d 992, 999 (Colo. 2002).
122. *Elliott*, 889 P.2d at 45; *Dudding*, 11 P.3d at 444.
123. *Dudding*, 11 P.3d at 445.
124. *Id.*
125. *Law Offices of J.E. Losavio v. Law Firm of Michael W. McDivitt, P.C.*, 865 P.2d 934, 936 (Colo. App. 1993); *see also* Colo. RPC 1.5(a).
126. Ronald E. Mallen and Jeffrey M. Smith, *Legal Malpractice*, § 2.21 at 231 (West 2005).
127. *Rotenberg v. Richards*, 899 P.2d 365, 368 (Colo. App. 1995).
128. *Id.*
129. *Id.*
130. Colo. RPC 1.5.
131. *See McGuire, Cornwell & Blakey v. Grider*, 765 F. Supp. 1048, 1052 (D. Colo. 1991); *Restatement (Third) of the Law Governing Lawyers*, § 42 cmt. b(iv) (2000); *see also Ayers v. Prudential-Bache Secur., Inc.*, 762 P.2d 743, 744 (Colo. App. 1988).
132. 9 U.S.C. §§ 1, *et seq.*; C.R.S. § 13-22-201; *see also McNaughton & Rodgers v. Besser*, 932 P.2d 819, 822 (Colo. App. 1996).