FLETCHER V. DAVIS, A DRAMATIC AND ILL-ADVISED DEPARTURE FROM DECADES OF CALIFORNIA JURISPRUDENCE, SHOULD NOT BE EXTENDED TO REQUIRE RULE 3-300 COMPLIANCE FOR CHARGING LIENS IN CONTINGENCY FEE CONTRACTS

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I. INTRODUCTION

Once upon a time, there was a boy who ran into town and cried, "Wolf!" In many respects, the United States, and California in particular, has become a "Cry Wolf" society where we receive so many warnings that it is impossible to discern when we really need to take protective action. For example, almost no Californian can complete a day's work or shopping without being confronted with:

WARNING
This Area Contains Chemicals Known to the State of California
To Cause Cancer and Birth Defects or Other Reproductive Harm

Warnings of this nature are, of course, universally ignored as our economy and way of life would collapse if people took them seriously. Imagine the raised eyebrows if a lawyer came to an office for a deposition and said: "I'm sorry, my client and I can't enter this building because it contains chemicals known to cause birth defects and cancer."

The tale of the boy who cried wolf teaches us that excessive and universally ignored warnings do have a downside: they dull our self-protective senses so that we don't recognize the need to act when the wolf really does come to town. Hence, the legislature and the courts need to thoughtfully consider the proliferation of warnings that serve no reasonably justifiable purpose, that are consistently disregarded, and that desensitize us to issues of danger or concern.

So what has all of this to do with the California Supreme Court's decision in *Fletcher v. Davis*?[2] In *Fletcher*, the Supreme Court held that a lawyer who seeks to secure payment of an *hourly* fee with a charging lien must comply with Rule of Professional Conduct ("Rule") 3-300. If the application of *Fletcher* were limited to the

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[2] 33 Cal.4th 61 (2004)

factual context in which it arose – charging liens in *hourly* fee cases – there would be limited cause for concern because charging liens are relatively uncommon in that context. However, in part because of the broad analytical framework of the opinion, it has not been limited to its particular factual context. Instead, trial courts in California have started using *Fletcher* to invalidate charging liens in *contingency* fee contracts that fail to incorporate all of the warnings required by Rule 3-300.

The expansion of the reach of *Fletcher* is troublesome on numerous fronts. First, as virtually every contingency fee contract includes a charging lien, the real world effect is to require lawyers in every contingency fee case not only to warn their clients of the effects of charging liens, but also to advise their clients to consult with, and presumably pay, independent counsel. Of course, all an honest second lawyer could ever tell the prospective client would be that every contingency fee contract contains a charging lien, and that such liens have historically and universally been recognized as fair and reasonable. Thus, the application of *Fletcher* to contingency fee contracts creates another in a long line of meaningless warnings that will, in short order, be consistently ignored. And, as it becomes part of the culture to have every fee agreement inform clients of the right to independent counsel, a likely ramification is that clients will become desensitized and thereby fail to recognize the need to consult with independent counsel when the need truly exists.

Second, as discussed in Part III below, *Fletcher* constituted a dramatic departure from over 60 years of California jurisprudence concluding that charging liens were *not* interests adverse to a client. Thus, prior to the publication of *Fletcher*, very few lawyers in the state recognized any need to have their fee agreements comply with Rule 3-300 simply because of the inclusion of a charging lien. As such, and as the import of the decision is only slowly being disseminated within the profession, retroactive application of *Fletcher*, particularly to contingency fee agreements, is likely to benefit only the unscrupulous client who decides not to pay his or her lawyer for the efforts that led to their judgment or settlement. In fact, the author has already been counsel in a case where a client attempted to force full distribution of a settlement to himself because his lawyer had not advised him in writing of his right to consult with independent counsel when he signed a contingency fee agreement back in 2002.

Third, there is no compelling legal, ethical or equitable reason why *Fletcher* should be extended to *contingency fee* contracts. Instead, in applying *Fletcher*, trial courts and intermediate courts of appeal should limit the decision to its own factual context – requiring Rule 3-300 compliance for charging liens only when they are part of *hourly* fee agreements.

II. FLETCHER V. DAVIS

A. Facts of the Underlying Case[3]

In 1995, Master Washer and Stamping Co., Inc. ("Master Washer") retained attorney Freddie Fletcher to defend against a breach-of-lease action and to commence a conversion action against its landlord, Gilbert. Master Washer orally agreed to pay Fletcher's fee of $200 dollars per hour. In lieu of a cash retainer, Master Washer granted Fletcher a charging lien, that is, a lien on any judgment or settlement obtained from the litigation against Gilbert. Fletcher reduced the terms of the oral retainer agreement to a written memorandum sent to Master Washer, whose president, Scallon, agreed to sign a written retainer agreement but never did.

Master Washer admitted liability for breach of the lease and stipulated to an $85,000 judgment in favor of Gilbert. Fletcher then tried the conversion action against Gilbert to a mistrial. Subsequently, as Fletcher prepared for the second trial of the conversion action, he was discharged by Master Washer and replaced by attorney Joseph Fischbach. The second trial resulted in a judgment in favor of Master Washer and against Gilbert in excess of $600,000.

A few weeks later, Carlyle Davis filed a collection action against Gilbert, Master Washer and Scallon seeking to stay disbursement and to satisfy a judgment he held against Scallon. Davis, Gilbert, Master Washer and Scallon then stipulated to a disbursement of the judgment to themselves and attorney Fischbach; attorney Fletcher was not included in the stipulated disbursement.

Upon learning of the proposed distribution, Fletcher filed an action against all those named in the stipulation alleging they were on notice of his lien when they stipulated to the disbursement of the proceeds from the Master Washer judgment. The

[3] As *Fletcher* was decided on demurrer the facts pleaded in the complaint were presumed true.

trial court sustained the defendants' demurrers and dismissed the action on the grounds that Fletcher could not plead facts showing the perfection of his lien or that the defendants had knowledge of his lien. The Court of Appeal reversed, holding that Fletcher's lien did not have to be in writing to be valid, and that Fletcher did not have to obtain a judgment before asserting his lien against the Master Washer recovery. The Supreme Court of California granted review.

B. The Supreme Court Holds That Attorney Charging Liens Constitute an Interest Adverse to Clients in the Context of *Hourly* Fee Agreements

The *Fletcher* court framed the issue before it as follows: "When an attorney wishes to secure payment of *hourly* legal fees and costs of litigation by obtaining a charging lien[4] against a client's future recovery, must the attorney obtain the client's consent in writing?"[5] The court preliminarily noted that in California charging liens are created only by contract, and that they may be used to secure either contingency or hourly fees.[6]

The court then began its analysis by finding that "An attorney's charging lien is a '*security* interest' in the proceeds of the litigation."[7] The court therefore undertook an analysis of whether the charging lien was subject to Rule 3-300, which applies when an attorney acquires a security interest that is "adverse to a client."[8]

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[4] The court defined an attorney's charging lien as a lien upon the fund or judgment the attorney recovers for compensation in recovering the fund or judgment. *Id.* at p. 66.

[5] 33 Cal.4th at p 64.

[6] See, *Cetenko v. United California Bank* (1982) 30 Cal. 3d 528, 531-532.

[7] 33 Cal.4th at p. 67, citing *Isrin v. Superior* Court (1965) 63 Cal.2d 153, 158.

[8] Rule 3-300 provides:

"A member shall not enter into a business transaction with a client; or knowingly acquire an ownership, possessory, *security*, or other pecuniary *interest adverse to a client*, unless each of the following requirements has been satisfied:

"(A) The transaction or acquisition and its terms are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which should reasonably have been understood by the client; and

"(B) The client is advised in writing that the client may seek the advice of an independent lawyer of the client's choice and is given a reasonable opportunity to seek that advice; and

In evaluating whether a charging lien is "adverse to a client" the *Fletcher* court cited *Eschwig v. State Bar*[9] for the proposition that its determination should be made in the context that: "'[T]here are no transactions respecting which courts . . . are more jealous and particular, than dealings between attorneys and their clients.'"[10] Relying upon *Ames v. State Bar* (1973) 8 Cal.3d 910, 920, the court then set the test as whether "it was reasonably foreseeable the charging lien could become detrimental to the client."[11] The court answered this inquiry in the affirmative, first noting that, "a charging lien could significantly *impair* the client's interest by delaying payment of the recovery or settlement proceeds until any dispute over the lien can be resolved."[12] Using unnecessarily broad language, the court held:

> "In sum, a charging lien grants the attorney considerable authority to detain all or part of the client's recovery whenever a dispute arises over the lien's existence or its scope. That would unquestionably be detrimental to the client. (*Cf. Brockway v. State* Bar (1991) 53 Cal.3d 51, 64-65 [278 Cal.Rptr. 836, 806 P.2d 308] (an adverse interest exists where the fee arrangement 'gives the attorney an ownership interest in client property that has a value *greater* than the amount absolutely agreed upon in fees,' italics added].) A charging lien is therefore an adverse interest within the meaning of rule 3-300 and thus requires the client's informed written consent."[13]

"(C) The client thereafter consents in writing to the terms of the transaction or the terms of the acquisition.

"Discussion:

"Rule 3-300 is not intended to apply to the agreement by which the member is retained by the client, unless the agreement confers on the member an ownership, possessory, security, or other pecuniary interest adverse to the client. Such an agreement is governed, in part, by rule 4-200.

"Rule 3-300 is not intended to apply where the member and client each make an investment on terms offered to the general public or a significant portion thereof. For example, rule 3-300 is not intended to apply where A, a member, invests in a limited partnership syndicated by a third party. B, A's client, makes the same investment. Although A and B are each investing in the same business, A did not enter into the transaction "with" B for the purposes of the rule.

"Rule 3-300 is intended to apply where the member wishes to obtain an interest in client's property in order to secure the amount of the member's past due or future fees." (Emphasis added.)

[9] 1 Cal.3d 8, 16 (1969).
[10] 33 Cal.4th at p. 67..
[11] *Id.* at p. 68.
[12] *Id.* at pp. 68-69
[13] *Id. at p. 69*

As attorney Fletcher had not complied with Rule 3-300, the court concluded that his charging lien was unenforceable.[14]

Its broad sweeping rationale notwithstanding, the court expressly stated that it was not deciding whether rule 3-300 applied to charging liens in contingency fee contracts:

> "We are presented here only with a lien to secure *hourly* fees and thus do not decide whether rule 3-300 applies to a *contingency* fee arrangement coupled with a lien on the client's prospective recovery in the same proceeding. (Cf. Bus. & Prof. Code, §6147.)"[15]

The legal profession and the public would have been better served had the court noted the long line of cases finding that charging liens were not interests adverse to clients, at least in contingency fee contracts (see Part III below), and discussed the important distinctions between charging liens in hourly fee contracts v. contingency fee contracts (see Part IV below). Instead, the court's silence has left trial courts with little guidance, and thereby set the stage for trial courts to expand the spread of *Fletcher* to contingency fee cases. The remainder of this article will be devoted to explaining why the holding of *Fletcher* should be strictly limited to its factual setting – charging liens in *hourly* fee contracts.

III. *FLETCHER V. DAVIS*: A DRAMATIC DEPARTURE FROM, AND FAILURE TO ADDRESS, DECADES OF JUDICIAL DECISIONS CONCLUDING THAT CHARGING LIENS WERE NOT "ADVERSE TO CLIENTS."

As noted, the *Fletcher* court began its analysis relying upon *Eschwig v. State Bar* for the proposition that there are no transactions about which courts are more jealous and particular than dealings between attorneys and their clients.[16] However, unlike the situation in *Fletcher*, the *Eschwig* case did not concern an initial fee agreement between an attorney and a client, or a provision as benign as a charging lien. Instead, *Eschwig* was a case involving an attorney who took control over an elderly client's house in exchange for agreeing to care for her for the balance of her life. It is therefore curious that the court chose to apply the principles of *Eschwig*, and at the same time chose to

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[14] See, *Chambers v. Kay* (2002) 29 Cal.4th 142, 158.
[15] *Id.* at fn.3, page 70; emphasis added.
[16] 1 Cal.3d 8, 16 (1969)

ignore the long line of cases evaluating general attorney-client fee agreements in a more neutral light. In that line of cases, the courts recognized that the confidential relationship between an attorney and client does not exist until the contract creating the relationship and fixing compensation is made, and that *in agreeing upon the terms of the contract, the attorney and client deal at arm's length*.[17] As the court of appeal for the first appellate district noted in *Ramirez v. Sturdevant*:

> "We begin by recognizing that, in general, the negotiation of a fee agreement is an arm's length transaction. (Citations omitted.) Sturdevant accordingly was entitled to negotiate the terms on which he would accept employment as he wished, and, absent issues of duress, unconscionability, or the like, Ramirez has no cause to complain that the terms Sturdevant negotiated were favorable to him." [18]

More importantly, however, the *Fletcher* court's decision ignored more than 60 years of case law consistently concluding that charging liens contained in attorney-client fee agreements were not "adverse to a client."

Before 1975, the counterpart to Rule 3-300 was Rule 4, which stated: "A member of the State Bar shall not acquire an interest adverse to a client." Thus, until the adoption of revised Rule 5-101 in 1975,[19] the rule regarding acquisition of adverse interests was *absolute* in its terms, forbidding the acquisition of any interest adverse to the client notwithstanding consent of the client.[20]

Yet, in case after case issued before 1975, the Supreme Court and the intermediate courts of appeal consistently upheld the validity of charging liens, therefore necessarily concluding that such liens were not interests "adverse to a client." In fact, before *Fletcher*, there was not one single reported decision in California that even intimated that an attorney's charging lien was an interest adverse to a client and thereby subject to Rule 3-300 or its predecessors, Rule 5-101 or Rule 4.

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[17] *Coolery v. Miller & Lux* (1909) 156 Cal. 510, 524; *Setzer v. Robinson* (1962) 57 Cal.2d 213, 216-217.

[18] 21 Cal.App.4th 904, 913 (1994)

[19] Rule 5-101, the immediate predecessor to Rule 3-300, in effect from 1975 until 1989, provided: "A member of the State Bar shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless (1) the transaction and terms in which the member of the State Bar acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in manner and terms which should have reasonably been understood by the client, (2) the client is given a reasonable opportunity to seek the advice of independent counsel of the client's choice in the transaction, and (3) the client consents in writing thereto."

[20] *Ames v. State Bar*, *supra*, 8 Cal.3d at p. 915.

In its 1941 decision in *Haupt v. Charlie's Kosher Market*, issued when former Rule 4 absolutely prohibited an attorney from acquiring any interest adverse to a client, the Supreme Court recognized the validity of an attorney's contractual charging lien in a contingency fee agreement.[21] In that case, the court expressly found that an attorney's contractual charging lien was "decisive as to its existence and amount," and constituted "a valid equitable assignment of the judgment *pro tanto* and creates a lien upon the specific fund."[22] The court therefore concluded that the attorney's lien against the recovery took priority over the lien of the client's judgment creditor.

In the 1952 case of *Bartlett v. Pacific National Bank,*[23] the court of appeal for the first appellate district expressly stated that an attorney's charging lien could be created by contract, and could be either express or implied, with the real question in each case being,

> ". . . whether or not the parties have contracted that the lawyer is to look to the judgment he may secure as security for his fee. If so, an equitable lien is created . . . *The courts look with favor upon equitable liens and frequently such liens are employed to do justice and equity and to prevent unfair results*."[24]

In its 1965 decision in *Isrin v. Superior Court,*[25] the California Supreme Court expressly recognized the need for charging liens to protect attorneys with contingent fee contracts from unscrupulous clients desirous of retaining all of the proceeds of litigation without paying for the services of the lawyer who was responsible for obtaining the proceeds:

> "As contingent fee contracts are subject to the normal rules of construction of fiduciary agreements (citation omitted) a charging lien will be imposed if the parties have manifested an intention that the attorney shall look to the judgment as security for his fee even though the word 'lien' has not been used (citation omitted); and in some cases the evidence held to demonstrate such an intent has been slight indeed. (Citations omitted.) Another line of decisions, while not speaking in terms of a 'lien,' holds that the mere execution of a contingent fee contract transfers *ipso facto* to the attorney a 'vested equitable interest' in his proportionate share of the proceeds**."**[26]

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[21] 17 Cal.2d 843, 845 (1941).
[22] *Id.*
[23] 110 Cal.App. 2d 683 (1952).
[24] *Id.* at p. 689; emphasis added.
[25] 63 Cal.2d 153 (1965).
[26] *Id* at p. 157.

The court went on to state:

> "[I]n whatever terms one characterizes an attorney's lien under a contingent fee contract, it is no more than a *security* interest in the *proceeds* of the litigation. As explained in one of the leading treatises on the subject, the attorney's lien is 'an equitable right to have the fees and costs due him for services in a suit *secured to him out of the judgment or recovery* in the particular action, the attorney to the extent of such services being regarded as an equitable assignee of the *judgment. It is based, as in the case of a lien proper, on the natural equity that a party should not be allowed to appropriate the whole of a judgment in his favor without paying for the services of his attorney in obtaining such judgment. . .* [C]ontingent fee contracts 'do not operate to transfer a part of the cause of action to the attorney but only give him a lien upon his client's recovery.'"[27]

Thus, at a time when attorneys were absolutely prohibited by former Rule 4 from obtaining any interest adverse to a client, the California Supreme Court as well as the intermediate courts of appeal consistently upheld the validity of charging liens. The only logical or rational interpretation of these authorities is that the courts consistently concluded that charging liens were *not* interests adverse to a client. In so holding, the courts correctly recognized that charging liens in contingency fee contracts are based on precepts of fairness and "natural equity."[28]

In its 1982 decision in *Cetenko v. United California Bank*, the Supreme Court reviewed the law pertaining to charging liens (citing numerous cases, all of which dated back to the period when, under former Rule 4, an attorney was absolutely prohibited form obtaining an interest adverse to a client, even with the client's consent) and held:

> "*A lien in favor of an attorney upon the proceeds of a prospective judgment in favor of the client for legal services rendered has been recognized in numerous cases*. Such a lien may be created either by express contract, as in the present case (*Haupt v. Charlie's Kosher Market* (1941) 17 Cal.2d 843, 846 [112 P.2d 627]; *Tracy v. Ringole* (1927) 87 cal.App.549, 551 [262 P. 73]; see *Isrin v. Superior* Court (1965) 63 Cal.2d 153, 157 [45 Cal.Rptr. 320, 403 P.2d 728]), or it may be implied if the retainer agreement between the lawyer and the client indicates that the former is to look to the judgment for payment of his fee (*Bartlett*

[27] *Id.* at pp. 158-159 (emphasis added and in the original).
[28] See also *Jones v. Martin* (1953) 41 Cal.2d 23.

v. Pacific Nat. Bank (1952) 110 Cal.App.2d 683, 389 [244 P.2d 91]; *Wagner v. Sariotti* (1943) 56 Cal.App.2d 693, 697-698 [133 P.2d 430]).”[29]

The *Cetenko* court then upheld a charging lien in an *hourly* fee contract, stating that the lien had priority over the lien of a judgment creditor. In reaching this conclusion the court expressly noted the public policy favoring its conclusion, to wit, if an attorney’s lien did not take priority over the subsequent lien of a judgment creditor, people with meritorious claims might well be deprived of legal representation – a result detrimental both to prospective litigants and their creditors.

In *Bluxome Street Associates v. Woods*, the court of appeal for the first appellate district upheld an attorney’s contractual charging lien even where the lien’s purpose was to secure payment of attorney fees for services unrelated to the litigation that generated the proceeds against which the lien attached.[30] Even more recently, in *Epstein v. Abrams*, the court of appeal for the second appellate district reiterated that an attorney’s charging lien is an equitable right to be paid for services rendered based “‘on the natural equity that a party should not be allowed to appropriate the whole of a judgment in his favor without paying for the services of his attorney in obtaining such judgment.’ (Citations omitted.)” [31] The *Epstein* court went on to characterize the client’s effort to avoid paying the attorney who created a judgment in his favor as an act “plainly undeserving of court approval.”[32]

In *Fletcher*, the Supreme Court chose not to rely upon, not to analyze, not to distinguish, and not to overrule any of these decisions, each of which necessarily assumed that charging liens were not interests adverse to a client. Instead, the court relied upon three disciplinary cases (*Ames v. State Bar*,[33] *Silver v. State Bar*,[34] and *Hawk v. State Bar*[35]), none of which involved charging liens or factual situations in any way analogous to charging liens.

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[29] 30 Cal.3d 528, 531(1982) (emphasis added).
[30] 206 Cal.App.3d 1149, 1153-1154 (1988)
[31] 57 Cal.App.4th 1159, 1169 (1997)
[32] *Id.* at p. 1170
[33] 8 Cal.3d 910 (1973)
[34] 13 Cal.3d 134 (1974)
[35] 45 Cal.3d 589 (1988)

In *Ames,* the court held that two attorneys' purchase of a note secured by a first deed of trust against property was an acquisition of an adverse interest under former Rule 4 because the clients held a second deed of trust against the same property. The court held that the interest was adverse for two reasons: (1) the attorneys could sell the property pursuant to their senior lien and thereby extinguish the client's junior lien; and (2) the attorneys had obtained an interest in the subject matter of the litigation contrary to the duty of undivided loyalty.[36]

In *Silver,* the attorney was held to have violated former rule 4 when he chose to levy on his own writ for fees against the client's ex-husband instead of his client's writ for her judgment against her ex-husband.[37] Significantly, *Ames* and *Silver* were both decided when Rule 4 absolutely prohibited attorneys from obtaining interests adverse to clients, and when case law uniformly upheld the legality and equitable necessity of charging liens.

In *Hawk,* the court held that an attorney violated former rule 5-101 when he obtained a note secured by a deed of trust against the client's property. Throughout that decision the court noted that it was concerned with the attorney's ability to summarily extinguish the client's interest in the property.[38]

Thus, as the basis for its decision in *Fletcher,* the court chose to ignore the long line of well-reasoned cases upholding charging liens, including those cases decided when interests adverse to clients were absolutely prohibited by former Rule 4. Instead, the court chose to rely upon three disciplinary cases that raised issues not even arguably analogous to those presented by charging liens. Simply stated, in contrast to the issues presented in *Ames, Silver* and *Hawk,* the *pro tanto* assignment of, and resulting lien against, a prospective recovery to be obtained as a result of the attorney's efforts is easy to comprehend, fair and equitable, and perhaps most significantly, does not take from the client anything the client could reasonably expect to belong to him or herself.

The Supreme Court then suggested that its construction of Rule 3-300 was supported by ethics opinions published by the State Bar of California's Standing

[36] 8 Cal.3d at p. 917-919.
[37] 13 Cal.3d at p. 139-140.
[38] 45 Cal.3d at pp. 600,

Committee on Professional Responsibility and Conduct ("COPRAC")[39] and the Los Angeles County Bar Association.[40] Once again, however, the court's reliance does not withstand scrutiny.

In State Bar Formal Opinion 1981-62, the issue considered was: "[W]hether an attorney may ethically use promissory notes or security interests to protect attorney's fees for services."[41] In discussing the need to comply with Rule 5-101 when the attorney takes a lien against property of the client, the committee relied upon *Ames v. State Bar*[42] and *Academy of California Optometrists, Inc. v. Superior Court*[43]. As noted, *Ames*, involved attorneys purchasing a senior lien allowing them to extinguish the clients' junior lien.[44]

In *Academy of California Optometrists,* the court ruled that an attorney cannot assert a *retaining* lien against the client's files and thereby refuse to return the files to the client until the attorney is paid. In fact, in issuing its ruling in *Academy*, the court of appeal for the third appellate district expressly distinguished an attorney's *retaining* lien from an attorney's *charging* lien:

> "Two kinds of attorneys' liens to secure expenses and fees are recognized in most jurisdictions: (1) A *general retaining* (possessory) lien on papers and personal property of the client coming into the attorney's possession. (2) A *specific charging* (nonpossessory) *lien* or equitable right to satisfy his expenses and fees out of the *judgment* recovered. (Citations omitted.)
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> "*In California, a charging lien* is authorized by statute in a few special situations (citation omitted) and *may be freely created by contract* (citations omitted).
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> "There is no such statutory or judicial authorization for the *retaining* lien, however."[45]

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[39] 1 Cal. Compendium on Professional Responsibility State Bar, Formal Opinion No. 1981-62. In 1981, the predecessor to Rule 3-300, Rule 5-101 was in effect.
[40] 3 Cal. Compendium on Professional Responsibility, L.A. County Bar Association Formal Opinion No. 416 (October 25, 1983). In 1983, the predecessor to Rule 3-300, Rule 5-101 was in effect.
[41] State Bar Formal Opinion 1981-62
[42] 8 Cal.3d 910 (1973)
[43] 51 Cal.App.3d 999 (1975)
[44] 8 Cal.3d 910.
[45] *Id.* at p. 1003; emphasis added.

The State Bar then noted that the factual context of its opinion was analogous to the *Academy of California Optometrists* case concerning *retaining liens rather than charging liens*:

> "The fact situation in this opinion involves a lawyer who drew up a stipulation and agreement for his client and thereafter was not paid. He asked if he could withhold the partly signed stipulation and agreement in order to place leverage on the client to pay the fee, or at least part of it, thus presenting a situation similar to that in *Academy of California Optometrists, Inc. v. Superior court, supra.*"[46]

It therefore follows that State Bar Formal Opinion 1981-62 cannot reasonably be cited as authority supporting the application of Rule 3-300 to contractual charging liens.

In L.A. County Bar Opinion 416, the committee stated, relying upon *Ames v. State Bar,*[47] that a fee payable to new counsel entirely out of the proceeds to be realized from a judgment the client had already obtained while represented by former counsel would be permissible provided there was compliance with Rule 5-101. Thus, this opinion also fails to provide support for the proposition that compliance with Rule 5-101 was required in a fee agreement where the client grants the attorney a charging lien on proceeds to be *prospectively* obtained as a result of the attorney's efforts. Moreover, the fact that the committee did not intend its decision to reach a charging lien against the client's prospective recovery in the same matter in which the legal services were being provided is apparent from the committee's subsequent opinion expressly noting that Rule 3-300 had never been held to apply to contingency fee agreements coupled with charging liens.[48] Similarly, the Bar Association of San Francisco issued an ethics opinion concluding that an attorney's contractual charging lien does not trigger Rule 3-300.[49]

Furthermore, as recently as 2001, the Review Department of the State Bar of California held:

> "There can be no question that contingent attorney retainer agreements are permitted in California. (Citation omitted.) Under such an agreement, an attorney employed to handle a contingent fee matter may properly obtain

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[46] State Bar Formal Opinion 1981-62.
[47] 8 Cal.3d 910 (1973).
[48] 3 Cal. Compendium on Professional Responsibility, L.A. County Bar Association Formal Opinion No. 496 (Nov. 16, 1998).
[49] 2 Cal. Compendium on Professional Responsibility, Bar Association of San Francisco, Ethics Opinion 1997-1.

> an interest for the value of his or her services in any recovery obtained for the benefit of the client. *It is equally clear that an attorney may properly obtain a lien for attorney's fees upon the prospective recovery sought on behalf of a client.* (Citations omitted.) *No case has been called to our attention requiring compliance with rule 3-300 by an attorney seeking to obtain a lien for attorney's fees on the prospective recovery of a client where that attorney is providing legal representation on a contingent fee basis, nor do we here suggest that such is required under rule 3-300.*"[50]

The *Fletcher* court also cited to the Restatement Third of the Law Governing Lawyers as in accord with its finding. However, the Restatement does not suggest that any jurisdiction requires compliance with the equivalent of Rule 3-300[51] for charging liens against a client's prospective recovery. Instead, the Restatement states the requirements for a charging lien as follows: (1) The client and lawyer must contract in writing for the lien to ensure the client has notice that the lawyer may detain part of any recovery although the writing need not use the word "lien." (2) To be enforceable against a third party, such as a judgment creditor, that person must receive notice of the lien.[52]

The decision of the Supreme Court to declare charging liens an adverse interest within the meaning of Rule 3-300 was, therefore, a departure from more than 60 years of jurisprudence in California,[53] and as far as this author has determined, from the jurisprudence of any other jurisdiction in the United States. This dramatic departure is also evidenced by the compelling fact that virtually every published form contingency fee agreement provided to lawyers in California included a charging lien provision, but did not include language to bring the agreement into compliance with Rule 3-300.[54] Thus, if extended to contingency fee contracts, *Fletcher* would likely undo virtually every contingency lawyer's charging lien, and leave contingency fee lawyers at the mercy of their clients.

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[50] *In the Matter of Silverton,* 4 Cal. State Bar Ct. Rptr. 252 (2001) (emphasis added).
[51] See, e.g., ABA Model Rule 1.8(a).
[52] Restatement Third of the Law Governing Lawyers (2000) §43, subdivision (2)(a), comment e.
[53] Yet, as noted, the court chose not to address, distinguish or overrule any of the authorities cited.
[54] The sample contingent fee agreement published by the State Bar includes a lien provision in paragraph 14, but makes no reference whatsoever to advising the client of the right to consult with independent counsel. Similarly, the sample contingent fee agreement published by the Rutter Group in its treatise on Professional Responsibility contains lien provisions in paragraph 13, but again makes no reference to advising the client to consult with independent counsel.

IV. *FLETCHER* SHOULD NOT BE EXTENDED TO REQUIRE COMPLIANCE WITH RULE 3-300 IN *CONTINGENCY* FEE CONTRACTS IN WHICH THE ATTORNEY'S RIGHT TO RECOVER FEES EARNED AND COSTS ADVANCED IS SECURED BY A CHARGING LIEN

The *Fletcher* court acknowledged that the issue before it was only the validity of oral liens to secure payment of an attorney's *hourly* legal fees.[55] Moreover, the court expressly added that its decision did not necessarily apply in the context of a lien to secure *contingent fees*: "We are presented here only with a lien to secure hourly fees and thus *do not decide whether rule 3-300 applies to a contingency fee arrangement coupled with a lien on the client's prospective recovery in the same proceeding.*" [56]

However, the court's failure even to discuss the numerous authorities upholding charging liens in contingency fee contracts, particularly when the acquisition of any interest adverse to a client was absolutely prohibited pursuant to former Rule 4, its failure to discuss the material distinctions between the role of charging liens in contingency fee and hourly fee contracts, and the broad brush with which the opinion was written, have led trial courts to extend the reach of *Fletcher* to contingency fee cases. This extension is neither legally nor equitably sound as it permits creditors and unscrupulous clients to reap the fruits of the attorney's labor while leaving the attorney without compensation for her or his efforts.

First, as discussed in Part III above, the foundation of the court's ruling is fatally flawed as it fails to address 60 years of established precedent that can only be interpreted as holding that a charging lien, at least in contingency fee contracts, is not an interest adverse to a client. Thus, trial courts have substantial authority from the Supreme Court as well as the intermediate courts of appeal upon which to rely in rejecting claims that Rule 3-300 compliance is required to sustain the validity of a charging lien in the context of a contingency fee contract.

Second, there are numerous material distinctions between charging liens in hourly fee contracts and charging liens in contingency fee contracts. Perhaps the most significant distinction is that in cases where attorneys charge by the hour, they can, and

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[55] 33 Cal.4th at p. 71

[56] 33 Cal.4th, fn. 3 at p. 70 (emphasis added)

typically do, protect their right to be compensated for services rendered and costs advanced by requiring an advance retainer and/or by requiring the client to pay on an as-you-go basis. Moreover, in situations where the client breaches a contractual obligation to pay the attorney an hourly fee on an on-going basis, the attorney has grounds to withdraw. [Rule 3-700(C)(1)(f).] Thus, in hourly fee arrangements, charging liens against any prospective recovery in the subject matter of the representation are neither common nor necessary to protect the attorney from an unscrupulous client seeking to obtain the benefit of the attorney's services without paying for those services.

In contingency fee contracts, on the other hand, attorneys have no available method to protect their right to be paid for services rendered other than a charging lien, as they do not receive, or even earn the right to receive, compensation until the very end of the representation. Thus, without the benefit of charging liens attorneys working under contingency fee contracts would be at the mercy of unscrupulous clients who could (1) use their attorney's services to win their cases or to obtain favorable settlements, (2) discharge their attorney at the eleventh hour, and (3) then demand that the defense exclude the attorney as a payee on any check. In that scenario, the contingency fee attorney would be left in the position of hoping the proceeds of the lawsuit would still be traceable when a judgment against the client was finally obtained.

Because charging liens represent the *only* means by which attorneys representing clients in contingency fee cases can protect the right to be paid for the fruits of their labor, they have been universally incorporated into contingency fee contracts and uniformly upheld by the courts as a fair and equitable term of such contracts. In this regard, for more than six decades the courts of California have expressly recognized that charging liens in contingency fee cases are based upon the "natural equity that a party should not be allowed to appropriate the whole of a judgment in his favor without paying for the services of his attorney in obtaining such judgment."[57] There is no legally or equitably justifiable reason to reverse that well established and well reasoned body of law.

Third, as noted in Part III, at least prior to *Fletcher,* there was no reasonable way for California contingency fee lawyers, who universally use charging liens, to have

[57] *Isrin v. Superior Court, supra,* 63 Cal.2d at p. 157

discerned a need to comply with Rule 3-300. As such, and because of the significant inequity that would follow from declaring such liens unenforceable, application of *Fletcher* to contingency fee contracts, particularly on a retroactive basis, would constitute a gross inequity and a terribly onerous burden on the legal profession. As previously noted, the author has already had one case in which a client relied upon *Fletcher* to attempt to defeat an attorney's lien against a substantial recovery gained through the attorney's exemplary efforts. In that case, the client argued that the lien was unenforceable because the attorney had not advised the client, in writing, of his right to consult with independent counsel pursuant to Rule 3-300 back when the contingency contract was signed in 2002.

It follows that application of *Fletcher* in the contingency fee context, particularly on a retroactive basis, would defeat the natural equity that a party should not be allowed to appropriate the whole of a recovery without paying for the services of the attorney who obtained the recovery, and would place courts in the position of coming to the aid of unscrupulous clients desiring not to pay their attorneys for services rendered.[58] No similar risk exists in the hourly fee context where attorneys have numerous means to ensure payment for their services.

Another significant distinction is that in hourly fee matters there is no set limit on the amount of fees the lawyer can charge in relation to the amount of the recovery. Hence, in the hourly fee context, the attorney's charging lien can essentially take the entirety of the recovery and even then leave the attorney with claims against the client for additional fees. In contingency fee cases, on the other hand, the amount of the lien is set as a percentage of the recovery, and is limited by the unconscionability provisions of Rule 4-200. Furthermore, while the hourly fee attorney is paid win-or-lose, the contingency fee attorney earns an interest in the fruits of her or his labors by sharing the risk of no recovery with the client.

Finally, and bringing us full circle, because charging liens are universally included in contingency fee agreements, the application of *Fletcher* in the contingency fee context would constitute one more "Cry Wolf!" warning. To state the issue simply:

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[58] *Isrin v. Superior Court, supra,* 63 Cal.2d at pp. 158-159; *Epstein v. Abrams, supra,* 57 Cal.App.4gh at p. 1169.

Why would a client who chooses to work with an attorney on a contingency fee basis want to pay an independent attorney to tell her or him that (1) contingency fee contracts have historically and universally included charging liens, (2) charging liens are both fair and equitable as they represent the only way that contingency fee lawyers can be assured of their right to be compensated for services rendered and costs advanced when the client obtains a recovery, and (3) they would be hard pressed to find a competent lawyer who would take a contingency fee case without a charging lien? In sum, the exercise is likely to be wasteful of client time, wasteful of client money, and potentially damaging to the client's trust in the contingency fee bar. And, of course, the story of the boy who cried wolf teaches us that if clients receive too many meaningless warnings, they will fail to take heed when they receive a warning to consult with independent counsel in a context where they should seriously consider doing so.

V. CONCLUSION

While the Supreme Court's decision in *Fletcher v. Davis* is seriously flawed, it is nevertheless a part of California jurisprudence. The purpose of this article is not to criticize the opinion for the sake of doing so, but instead to encourage trial courts, intermediate courts of appeal, and the Supreme Court when the time comes, to limit *Fletcher* to its particular factual context – charging liens in *hourly* fee contracts, and not to extend the reach of the case to charging liens in *contingency* fee agreements. A fair reading of the law, and principles of equity and public policy demand such a limitation of the case.