

AUG 15 2006

HAROLD S. MARENUS, CLERK  
U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

In re:	)	BAP No.	CC-06-1037-PaBK
	)		
SUE ANN ALTER,	)	Bk. No.	SV 04-15464-GM
	)		
Debtor.	)	Adv. No.	SV 05-01534-GM
	)		
_____	)		
LYNBERG & WATKINS,	)		
	)		
Appellant,	)		
	)		
v.	)	<b>MEMORANDUM<sup>1</sup></b>	
	)		
DAVID SEROR,	)		
	)		
Appellee.	)		
_____	)		

Argued and Submitted on July 14, 2006  
at Pasadena, California

Filed - August 15, 2006

Appeal from the United States Bankruptcy Court  
for the Central District of California

Honorable Geraldine Mund, Bankruptcy Judge, Presiding.

\_\_\_\_\_  
Before: PAPPAS, BRANDT and KLEIN, Bankruptcy Judges.

<sup>1</sup> This disposition is not appropriate for publication and may not be cited except when relevant under the doctrine of law of the case or the rules of res judicata, including issue and claim preclusion. See 9th Cir. BAP Rule 8013-1.

1 Law firm Lynberg & Watkins (the "Firm") appeals a summary  
2 judgment granted by the bankruptcy court in favor of chapter 7  
3 trustee David Seror ("Trustee") determining that the Firm's lien  
4 in the proceeds of recovery from a state court action under a  
5 written fee agreement with Debtor Sue Ann Alter ("Alter") was  
6 unenforceable, and therefore, that the Firm's claim was  
7 unsecured. We AFFIRM.

8  
9 **FACTS**

10 In early 2004, Alter retained both the Firm and the Coleman  
11 Law Group ("Coleman") to represent her in connection with a legal  
12 action stemming from her purchase and sale of a medical practice.  
13 Alter signed three retainer agreements with Coleman: one each on  
14 December 7, 2003, February 18, 2004, and April 14, 2004. She  
15 signed a separate retainer agreement with the Firm on April 19,  
16 2004.

17 The Firm's retainer agreement, which was accompanied by a  
18 transmittal letter dated April 16, 2004, detailed the parties'  
19 arrangement that fees for the Firm's services would be billed on  
20 an hourly basis. At paragraph 8, entitled "Lien," the agreement  
21 provided:

22 You [Alter] hereby grant us [the Firm] a lien  
23 on any and all claims or causes of action  
24 that are the subject of our representation  
25 under this Agreement. Our lien will be for  
26 any sums owing to us at the conclusion of our  
services. The lien will attach to any  
recovery you may obtain, whether by  
arbitration award, judgment, settlement or  
otherwise.

27 Although the agreement specified that the Firm would retain a  
28 lien in any settlement proceeds for unpaid billings, the

1 agreement contemplated that Alter would pay for charges incurred  
2 monthly.

3 The agreements Alter executed to retain Coleman contained  
4 similar terms and identical language granting Coleman a lien in  
5 any settlement proceeds. The lien language in all four  
6 agreements was identical to the language recommended by the  
7 California State Bar Association in its model fee agreement  
8 forms. However, the Coleman agreements included a cautionary  
9 introductory paragraph not found in the Firm's agreement. This  
10 language encouraged Alter "to consult with other counsel or  
11 advisors of your choice regarding these matters, and to consider  
12 fully the possible implications of our representation on the  
13 basis described."

14 The Firm and Coleman assisted Alter in ultimately  
15 negotiating a structured settlement resolving the litigation.  
16 Alter and the adverse parties executed a written settlement  
17 agreement on May 4, 2004. With Alter's consent, the settlement  
18 funds were paid to Coleman on Alter's behalf and deposited in its  
19 trust account.

20 On August 13, 2004, with the settlement money still held by  
21 her attorneys, Alter filed a petition seeking relief under  
22 chapter 13<sup>2</sup> of the Bankruptcy Code. Her bankruptcy case was  
23 later converted to a chapter 7 case on January 4, 2005, and  
24 Trustee was appointed. At this time, Coleman held \$160,000 in

---

25  
26 <sup>2</sup> Unless otherwise indicated, all chapter, section, and  
27 rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-  
28 1330 and to the Federal Rules of Bankruptcy Procedure, Rules  
1001-9036, prior to the effective date of the Bankruptcy Abuse  
Prevention and Consumer Protection Act of 2005 ("BAPCPA"), Pub.  
L. 109-8, 119 Stat. 23 (Apr. 20, 2005).

1 Alter settlement proceeds in its trust account, which the  
2 bankruptcy court ordered turned over to Trustee on January 26,  
3 2005.

4 The Firm filed a proof of claim in Alter's bankruptcy case  
5 on May 11, 2005, for unpaid fees and costs associated with the  
6 litigation in the amount of \$59,758, asserting that, under the  
7 retainer agreement, its claim was secured by a lien in the  
8 settlement proceeds.

9 On October 17, 2005, Trustee commenced an adversary  
10 proceeding against the Firm, objecting to its status as a secured  
11 creditor and seeking declaratory relief from the bankruptcy court  
12 that the lien provision in the Firm's retainer agreement was  
13 unenforceable and therefore unsecured. Trustee commenced a  
14 separate adversary proceeding against Coleman for similar relief.

15 On November 15, 2005, Trustee filed a motion for summary  
16 judgment in the action against the Firm. He argued that, by not  
17 including a provision in the retainer agreement concerning  
18 Alter's right to consult independent counsel, the Firm had  
19 violated Rule 3-300 of the California Rules of Professional  
20 Conduct. As a result, under Fletcher v. Davis, 33 Cal. 4th 61  
21 (2004), a recent California Supreme Court decision interpreting  
22 the Rule, Trustee argued that the Firm's lien was unenforceable.

23 The Firm argued that Fletcher, decided after the retainer  
24 agreement was signed, effectively created new law concerning  
25 attorney's charging liens in California and should not be applied  
26 to the Alter transaction. Alternatively, the Firm argued that  
27 because Alter signed the Coleman agreements at the same time as  
28 she executed the Firm's agreement, and because Coleman's

1 agreements advised her of her rights under Rule 3-300, the Firm's  
2 lien should not be invalidated. Finally, the Firm argued it also  
3 held a possessory lien in the litigation proceeds since Coleman  
4 received and held the settlement funds on its behalf.

5 Based upon a tentative ruling, and after issuing detailed  
6 findings and conclusions at a hearing held on December 21, 2005,  
7 the bankruptcy court granted Trustee's motion. The court  
8 concluded that Fletcher had not "created" new law, but had merely  
9 interpreted existing law. Applying Rule 3-300, the bankruptcy  
10 court concluded that the Firm's retainer agreement was defective  
11 for purposes of creating a lien in the settlement proceeds  
12 because neither the agreement nor the accompanying transmittal  
13 letter advised Alter that she could seek the advice of  
14 independent counsel. Absent compliance with the Rule, which the  
15 bankruptcy court observed was enacted to protect clients, it  
16 concluded that the Firm's lien was unenforceable, even if Alter  
17 may have understood her right to consult separate counsel at the  
18 time she executed the agreement.<sup>3</sup>

19 As for the Firm's claim to a possessory lien, the bankruptcy  
20 court determined that the Firm never had possession of any funds  
21 from the settlement. Therefore, the bankruptcy court concluded  
22 the Firm had no possessory lien in the funds turned over to  
23 Trustee.

---

24  
25 <sup>3</sup> The bankruptcy court reached an opposite conclusion  
26 regarding Coleman's consensual lien in the settlement proceeds  
27 because its retainer agreements contained the requisite advisory  
28 provisions concerning Alter's right to confer with independent  
counsel. Trustee has appealed this ruling, which is now pending  
before the district court. Seror v. Coleman Law Group, PC (In re  
Alter), No. CV 06-01872-RGK (C.D. Cal. filed March 29, 2006).

1 The bankruptcy court entered its order granting Trustee's  
2 motion for summary judgment on January 10, 2006; the Firm timely  
3 appealed on January 19, 2006.

4  
5 **JURISDICTION**

6 The bankruptcy court had jurisdiction via 28 U.S.C. §§ 1334  
7 and 157(b)(2)(B) and (K). We have jurisdiction under 28 U.S.C.  
8 §§ 158(a)(1) and (b).

9  
10 **ISSUE**

11 Whether the bankruptcy court erred by declining to recognize  
12 the validity of the Firm's lien under Rule 3-300 of the California  
13 Rules of Professional Conduct, as interpreted by Fletcher v.  
14 Davis, and by concluding that the Firm did not hold an enforceable  
15 possessory lien in the settlement proceeds.

16  
17 **STANDARD OF REVIEW**

18 A bankruptcy court's decision to grant summary judgment is  
19 reviewed de novo to assess whether there is a genuine issue of  
20 material fact and whether the moving party is entitled to judgment  
21 as a matter of law. Thrifty Oil Co. v. Bank of Am. Nat. Trust &  
22 Sav. Ass'n, 322 F.3d 1039, 1046 (9th Cir. 2003); Gertsch v.  
23 Johnson & Johnson Fin. Corp. (In re Gertsch), 237 B.R. 160, 165  
24 (9th Cir. BAP 1999).

25 //

26 //

27 //

28 //

1 DISCUSSION

2 A. Fletcher v. Davis and the charging lien.

3 State law governs the nature, extent and validity of a lien  
4 in bankruptcy proceedings. Diamant v. Kasparian (In re S. Cal.  
5 Plastics, Inc.), 165 F.3d 1243, 1248 (9th Cir. 1999). "A lien is  
6 a charge imposed in some mode other than by a transfer in trust  
7 upon specific property by which it is made security for the  
8 performance of an act." CAL. CIV. CODE § 2872. Traditionally,  
9 attorneys' liens are of two types: charging liens and possessory,  
10 or "retaining," liens. Evans v. Stockton & Hing (In re Sw.  
11 Restaurant Sys., Inc.), 607 F.2d 1243, 1246 (9th Cir. 1979). A  
12 charging lien attaches to a specific fund or other property  
13 created or secured through the attorney's efforts; a possessory or  
14 retaining lien allows the attorney to retain a client's records or  
15 other property until the client pays for the legal fees owed. Id.  
16 at 1246 (citing RESTATEMENT OF SECURITY § 62(B) and cmt. (j);  
17 RESTATEMENT 2D OF AGENCY § 464(b)).

18 In California, liens may only be created by contract of the  
19 parties or by operation of law. CAL. CIV. CODE § 2881. However,  
20 attorneys are required to enter into a written contract with the  
21 client setting forth "[a]ny basis of compensation, including, but  
22 not limited to, hourly rates, statutory fees or flat fees, and  
23 other standard rates, fees, and charges applicable to the case" in  
24 any case in which it is reasonably foreseeable that the client's  
25 expenses will exceed \$1,000. CAL. BUS. & PROF. CODE § 6148(a)(1).  
26 As a result, an attorney's lien to secure payment for legal  
27 services of significant value may only be created by contract,  
28 either by an express provision in the attorney fee contract, or by

1 implication when the retainer agreement specifies that the  
2 attorney is to look only to the judgment for payment for legal  
3 services provided. Carroll v. Interstate Brands Corp., 121 Cal.  
4 Rptr. 2d 532, 536 (Cal. Ct. App. 2002) (citing Cetenko v. United  
5 Cal. Bank, 30 Cal. 3d 528, 531 (1982) and Wagner v. Sariotti, 133  
6 P.2d 430, 432 (Cal. Ct. App. 1943)); Law Offices of Stanley J.  
7 Bell v. Shine, Browne & Diamond, 43 Cal. Rptr. 2d 717, 721 (Cal.  
8 Ct. App. 1995).

9 In addition to complying with these statutory requirements,  
10 California lawyers must satisfy the ethical obligations of their  
11 profession in their dealings with the clients who engage them.  
12 Rule 3-300 of the Rules of Professional Conduct ("Rule 3-300"), an  
13 ethics rule entitled "Avoiding Interests Adverse to a Client,"  
14 provides:

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

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

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

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

26 CAL. RULES OF PROF'L CONDUCT R. 3-300 (emphasis added). This Rule is  
27 intended to apply to any agreement by which the attorney is  
28 retained by the client "if the agreement confers on the member

1 [attorney] an ownership, possessory, security, or other pecuniary  
2 interest adverse to the client." CAL. RULES OF PROF'L CONDUCT R. 3-300  
3 discussion note. The Rule "is intended to apply where the member  
4 wishes to obtain an interest in client's property in order to  
5 secure the amount of the member's [attorney's] past due or future  
6 fees." Id. With the exception of a single change in the title  
7 not relevant to this appeal, the Rule has remained unchanged since  
8 1989. CAL. RULES OF PROF'L CONDUCT R. 3-300 credits and historical  
9 notes.

10 The California Supreme Court decided Fletcher v. Davis, 33  
11 Cal. 4th 61 (2004), on June 10, 2004, just two months after Alter  
12 signed the Firm's retainer agreement. In its opinion, the court  
13 applied Rule 3-300 to invalidate an attorney's charging lien  
14 against a client's future judgment to secure payment of the  
15 attorney's hourly fees. The attorney had argued that his lien  
16 arose by virtue of an oral agreement with his client. The  
17 California Supreme Court held that "a charging lien is . . . an  
18 adverse interest within the meaning of rule 3-300 and thus  
19 requires the client's informed written consent." Fletcher, 90  
20 P.3d at 1221. In concluding that Rule 3-300 was intended to apply  
21 to an hourly fee agreement whereby the attorney claimed a lien to  
22 secure fees, the court relied upon the discussion notes quoted  
23 above, as well as several published ethics opinions all holding  
24 that it is unethical for an attorney to obtain a lien in the  
25 client's recovery unless the lawyer had complied with Rule 3-300.  
26 Fletcher, 90 P.3d at 1221.

27 The Fletcher court reasoned that because attorneys were  
28 statutorily required to put most client fee agreements in writing,

1 and to explain the terms of the agreement to the client,  
2 application of Rule 3-300 as a rule of substantive law in that  
3 case was not "unduly onerous" and not a "great deal more than is  
4 now required." Fletcher, 90 P.3d at 1222. Leaving no room for  
5 doubt, the court held that "an attorney who secures payment of  
6 hourly fees by acquiring a charging lien against a client's future  
7 judgment or recovery has acquired an interest that is adverse to  
8 the client, and so must comply with the requirements of rule 3-  
9 300." Fletcher, 90 P.3d at 1222. Because the attorney in that  
10 case did not comply with the Rule, the court held his lien could  
11 not be enforced against the client. Fletcher, 90 P.3d at 1223.  
12 See also BGI Assocs., LLC v. Wilson, 7 Cal. Rptr. 3d 140, 147  
13 (Cal. Ct. App. 2004) (invalidating an oral joint venture agreement  
14 between attorney and client when the attorney failed to comply  
15 with Rule 3-300 and provisions of the Probate Code, even though  
16 the client sought the advice of an independent attorney).

17 Although Fletcher is the first California Supreme Court  
18 decision employing Rule 3-300 to actually invalidate the terms of  
19 an attorney's contract with a client in a civil case, we do not  
20 believe any "new" law was created by the decision. As a result,  
21 nothing prevents the application of the principles announced in  
22 Fletcher to agreements executed beforehand.

23 When an appellate court judicially construes a statute, its  
24 construction is not regarded as "new" law, but rather as an  
25 "authoritative statement of what the statute meant before as well  
26 as after the decision of the case giving rise to that  
27 construction." Rivers v. Roadway Express, Inc., 511 U.S. 298,  
28 312-313 (1994). Once the court has spoken, it is "the duty of

1 other courts to respect that understanding of the governing rule  
2 of law.” Rivers, 511 U.S. at 312. Only the legislative branch  
3 may amend a statute that it believes the courts have misconstrued.  
4 Rivers, 511 U.S. at 313. Therefore, it is appropriate to apply  
5 judicial interpretations of existing law retrospectively. Rivers,  
6 511 U.S. at 312 (citing Harper v. Va. Dep’t of Taxation, 509 U.S.  
7 86, 97 (1993) and Kuhn v. Fairmont Coal Co., 215 U.S. 349, 372  
8 (1910)). See also McClung v. Employment Dev. Dep’t, 34 Cal.4th  
9 467, 474 (2004) (following Rivers, and stating that judicial  
10 construction of a statute expresses what the statute meant both  
11 before and after the decision, and may therefore be applied  
12 retroactively).

13 Nor is the holding in Fletcher limited in any material  
14 fashion to the facts in that case. The court’s holding contained  
15 no restrictive language; its reasoning was applied in the context  
16 of a civil action wherein an attorney sought to enforce an oral  
17 contract. Fairly read, Fletcher’s construction of the California  
18 statutes concerning attorney fee contracts requires that a lawyer  
19 comply with Rule 3-300 in any case where the attorney seeks to  
20 enforce a charging lien under an hourly fee agreement.

21 So, too, does the remedy for noncompliance adopted by the  
22 court apply here: the lien will be rendered unenforceable.

23 Fletcher invoked that remedy despite prior applications of Rule 3-  
24 300 only in the context of disciplinary proceedings. See Hawk v.  
25 State Bar, 45 Cal. 3d 589 (1988) (disciplining an attorney for  
26 failure to comply with Rule 3-300); Ames v. State Bar, 8 Cal. 3d  
27 910 (1973) (applying Rule 4, the predecessor to Rule 3-300, to  
28 discipline an attorney who acquired an adverse interest in his

1 client's property).<sup>4</sup> See also Cetenko v. United Cal. Bank, 30  
2 Cal. 3d 528, 531-33 (1982) (enforcing an attorney's charging lien  
3 taken to secure hourly fees as against a third party, but not  
4 discussing rule 3-300); BGJ Assocs., LLC v. Wilson, 7 Cal. Rptr.  
5 3d at 147 (commenting that a violation of the Rules of  
6 Professional Conduct subjects an attorney to disciplinary  
7 proceedings, "but does not in itself provide a basis for civil  
8 liability").

9 We therefore hold that the bankruptcy court did not err in  
10 its application of Fletcher to invalidate the Firm's charging lien  
11 in the Alter settlement funds asserted to secure its hourly fees.  
12 Even though the parties executed a written fee contract, Alter was  
13 not advised by the Firm in writing that she could seek the advice  
14 of an independent lawyer. The Firm's arguments that Alter's  
15 agreements with Coleman, signed at or near the same time, had such  
16 cautionary language are unavailing. Fletcher requires the  
17 attorney contracting with the client to comply with the Rule and  
18 to include such a provision in its written fee agreement,  
19 regardless of other facts. See also BGJ Assoc., LLC, 7 Cal. Rptr.  
20 3d at 147 (finding a violation of Rule 3-300 even though the  
21 client actually sought the advice of independent counsel, and  
22 applying the rule literally); Interstate Brands Corp., 121 Cal.  
23 Rptr. 2d at 535 ("When the client enters into a retainer agreement  
24 with one particular attorney, a lien in favor of another, albeit  
25

---

26  
27 <sup>4</sup> The California State Bar has opined, however, that  
28 Fletcher does not require compliance with Rule 3-300 when the  
attorney enters into a written contingent fee agreement. Cal.  
State Bar Form. Opn. No. 2006-170.

1 associated attorney is neither express nor implied and does not  
2 exist.”).

3 The Firm’s arguments that its use of the model form  
4 recommended at the time by the California State Bar for such fee  
5 agreements also lacks merit under Rivers. The lien language  
6 contained in the Firm’s hourly fee agreement was identical to the  
7 form language in the available sample bar forms. However, the  
8 sample fee agreement forms are simply that: samples. The forms  
9 published by the bar contain an express disclaimer cautioning  
10 attorneys that the forms are intended to satisfy the “basic  
11 requirements” of Cal. Bus. & Prof. Code § 6148. While use of the  
12 sample forms may absolve an attorney from civil liability, they do  
13 not insulate counsel in this context, where the California Supreme  
14 Court has incorporated the terms of the Rule into the substantive  
15 law applicable to the enforceability of attorney-client contracts.  
16 That ethical considerations could be applied in the civil context  
17 to render a lien unenforceable is but one of the consequences of  
18 judicial decision-making: “it is often difficult to predict the  
19 precise application of a general rule until it has been distilled  
20 in the crucible of litigation.” Rivers, 511 U.S. at 312.

21  
22 **B. Possessory lien.**

23 Although not elaborating on its ruling concerning the Firm’s  
24 claim of a possessory lien, we hold the bankruptcy court correctly  
25 determined the Firm could not assert an enforceable possessory  
26 lien in the settlement proceeds under these facts.

27 As an initial matter, we question whether California would  
28 recognize the type of common-law possessory lien the Firm alleges

1 it held. See Acad. of Cal. Optometrists v. Super. Ct., 124 Cal.  
2 Rptr. 668, 670 (Cal. Ct. App. 1975) (noting that no statutory or  
3 judicial authority exists for a retaining lien in California);  
4 Spencer v. Taylor, 252 Cal. Rptr. 747, 753 (Cal. Ct. App. 1967)  
5 (noting that no reported California cases existed recognizing  
6 possessory, or retaining, liens, calling into doubt whether or not  
7 such liens actually could be asserted). Instead, Fletcher  
8 explains that, unlike in "most jurisdictions" where a lien may be  
9 imposed by operation of law, "in California, . . . an attorney's  
10 lien is created only by contract . . . ." Fletcher v. Davis, 33  
11 Cal. 4th at 1219. See also Severdia v. Alaimo, 116 Cal. Rptr.  
12 405, 411 (Cal. Ct. App. 1974) (calling into question whether a  
13 common law retaining lien exists in California, and noting that an  
14 attorney has no lien absent a contract containing an agreement for  
15 a lien). Indeed, Rule 3-300 expressly applies to contracts  
16 between an attorney and client to create a possessory interest in  
17 property adverse to the client, and retainer agreements asserting  
18 a lien in a future recovery to secure payment of hourly fees are  
19 considered to fall within the ambit of adverse interests.

20       Consequently, the Firm's argument that it held a possessory  
21 lien in any funds recovered in the Alter litigation to secure  
22 payment of its fees suffers from the same lack of compliance with  
23 Rule 3-300 discussed above. Failure to comply with Rule 3-300  
24 renders the contractual lien provision in its retainer agreement  
25 unenforceable. Absent an enforceable written contractual lien  
26 agreement, the Firm's claim of a possessory lien fails.

27       Even if a non-consensual possessory lien is available to an  
28 attorney in California, the Firm could not acquire such a lien

1 under the facts of this case. A possessory lien may arise only  
2 when the attorney has a prior lien agreement with the client,  
3 successfully achieves a settlement for the client, and receives  
4 payment of the settlement funds "into the attorney's trust  
5 account." Bendon v. Andrade & Assocs. (In re Colt Eng'g, Inc.),  
6 288 B.R. 861, 873 (Bankr. C.D. Cal. 2003). Recognition of such a  
7 retaining lien may be limited, however, to funds that come into an  
8 attorney's possession by way of a fee award, payment of a judgment  
9 in which the attorney asserts a lien pursuant to a contingent fee  
10 contract, a deposit on account of fees and costs, or similar  
11 situations. In re Winnett, 97 B.R. 7, 11 (Bankr. E.D. Cal. 1989).  
12 See also Bendon, 288 B.R. at 876 (finding the debtor's attorney  
13 held an enforceable possessory lien in settlement funds directly  
14 paid to the firm in express satisfaction of its attorney fees).  
15 Not only is a written contractual agreement crucial to create such  
16 a lien, but the attorney must also have actual possession of the  
17 funds in the attorney's client trust account when the client files  
18 bankruptcy. Bendon, 288 B.R. at 873, 876; In re Winnett, 97 B.R.  
19 at 10 ("Since the retaining lien is possessory, it is essential  
20 that the lienor have possession of the property.").

21 In this case, at the time Alter filed her bankruptcy petition  
22 on August 13, 2004, the Firm held no settlement proceeds. Those  
23 funds were held in Coleman's trust account and later turned over  
24 to Trustee. The Firm never had possession of the funds in  
25 question, and so under these facts, a possessory lien could not  
26 arise even if such a lien exists. Absent clear, adverse  
27 possession of the client's funds, we decline to recognize any  
28 possessory lien.

1           The Firm argues that Coleman held the proceeds on its behalf.  
2 However, Coleman's possession of the litigation proceeds under  
3 these facts is, at best, equivocal: Coleman also held the funds on  
4 Alter's behalf in its trust account, as trustee. "If a possessory  
5 lien or a common law retaining lien does exist in California it  
6 does not attach to property coming into an attorney's hands as  
7 trustee." Severdia v. Alaimo, 116 Cal. Rptr. at 412 (declining to  
8 find that an attorney, who deposited proceeds from the sale of his  
9 client's house during a divorce action into his trust account,  
10 held a possessory lien in the funds for payment of his claimed  
11 fees).

### 12 13           **C. Equitable Lien.**

14           In its briefs on appeal, the Firm argued the bankruptcy court  
15 should have imposed an equitable lien on the settlement funds to  
16 protect the Firm's claim for fees. At oral argument, the Firm  
17 insisted that Coleman raised the issue of an equitable lien in its  
18 briefs filed with the bankruptcy court, in which argument the Firm  
19 joined. Our review of the record has located no reference to any  
20 argument, written or otherwise, presented to the bankruptcy court  
21 that the Firm or Coleman asserted an equitable lien in the  
22 settlement funds. Because this argument was not raised before the  
23 bankruptcy court, we need not consider it on appeal. In re  
24 Roberts, 331 B.R. 876, 881 (9th Cir. BAP 2005) ("We normally  
25 decline to consider on appeal an argument that is not raised in  
26 the bankruptcy court" and citing Kontrick v. Ryan, 540 U.S. 443,  
27 446 (2004)).

1           However, even if the Firm had timely asserted its equitable  
2 lien theory, it would fail in this context. An equitable lien is  
3 not created by contract, express or implied, but is rather a  
4 judicial remedy imposed by the court for equitable reasons.  
5 County of Los Angeles v. Constr. Laborers Trust Funds for S. Cal.,  
6 39 Cal. Rptr. 3d 917, 921-22 (Cal. Ct. App. 2006). Again, we  
7 question whether this equitable remedy is available in light of  
8 the California case law and ethical rules. See Wilkins v. Oken,  
9 321 P.2d 876, 879 (Cal. Ct. App. 1958) (holding that in the  
10 absence of a contract creating a lien against money collected by  
11 an attorney, the attorney was not entitled to an equitable lien on  
12 any specific funds). But even if it is available as a remedy, an  
13 equitable lien will not be judicially recognized until a judgment  
14 is rendered declaring its existence. New v. New, 306 P.2d 987,  
15 994 (Cal. Ct. App. 1957) (citing Hise v. Super. Ct., 21 Cal.2d  
16 614, 627 (1943)). Upon recognition via a judgment, the lien will  
17 relate back to the time it was created. Hise, 21 Cal.2d at 627-  
18 28.

19           In this case, no judgment imposing an equitable lien had been  
20 rendered in favor of the Firm that the bankruptcy court could  
21 enforce. Although the Firm argued that the state court had issued  
22 an order arguably recognizing the lien, the state court's order  
23 simply stated that the parties "acknowledged" Alter's attorneys  
24 claimed a lien. The order lacked the imprimatur of judicial  
25 recognition in the form of specific findings and conclusions by  
26 the court. On this record, the bankruptcy court did not err in  
27 declining to recognize any equitable lien. Tr. of Hearing at 10-  
28

