

WHAT IS A CLIENT ENTITLED TO RECEIVE UPON CONCLUSION OF THE REPRESENTATION?

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A number of recent disciplinary matters and advisory opinion requests have raised the issue of which “papers” a client is entitled to receive upon request.

The Code of Professional Responsibility addresses this question. Disciplinary Rule 9-102(B)(4) provides:

A lawyer shall promptly pay or deliver to the client as requested by a client the funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive.

Disciplinary Rule 2-110(A)(2) provides:

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

These two disciplinary rules provide little explicit guidance on exactly which “papers” the client is entitled to receive.

ATTORNEY LIENS

This issue is complicated by the historic right of attorneys to assert liens against their clients’ property and papers to secure payment for legal services. Two types of attorney liens are recognized in many jurisdictions. First is the general retaining (possessory) lien on papers or personal property of the client coming into the attorney’s possession. There is also the specific charging (non-possessory) lien which allows an attorney to satisfy his or her expenses and fees out of the judgment recovered.

The Code addresses the issue of attorney liens in DR 5-103(A)(1) which provides:

(A) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation he is conducting for a client, except that he may:

- (1) Acquire a lien granted by law to secure his fee or expenses.

This disciplinary rule identifies local law as the standard by which to judge the propriety of attorney liens.

In Minnesota the general retaining lien on a client's papers and personal property no longer exists. Prior to 1976, MINN. STAT. §481.13 provided that an attorney had a lien for his or her compensation, whether the agreement therefore was expressed or implied, upon "the papers of his client coming into his possession in the course of his employment." As a result of complaints that attorneys were improperly withholding client files after discharge, the legislature eliminated this portion of the attorney lien statute. MINN. STAT. §481.13 (1982). Cf. MINN. STAT. §481.14 (1982) providing a legislatively created remedy for an attorney's refusal to surrender property to a client.

Even other jurisdictions which continue to recognize the general retaining lien have placed judicial limits on its use. See, e.g., *In re Kaufman*, 567 P.2d 957, 960 (Nev. 1977) (attorney has right to retain clients' papers, documents, and files as a passive lien for the payment of fees owing as of withdrawal. Public reprimand issued, however, for retaining discovery file as a means of inducing client to agree to a division of a contingent fee with the successor attorney in violation of DR 2-110(A)(2)).

Another leading case held that where the subject matter of an attorney's retaining lien is of no economic value to him or her, but is used only to extort *disputed fees* from the client, the lien is void as against public policy, and violates an attorney's ethical duties. *Academy of California Optometrist, Inc. v. Superior Court*, 51 Cal. App. 3d 999, 124 Cal. Rptr. 668 (1975). In *Academy of California Optometrists, Inc.*, the written fee agreement provided:

Counsel shall have a retaining lien on all files, papers, and documents in its possession to secure payment of all sums owed to it hereunder, and shall not be obligated to release the same to Client or to substitute Counsel unless and until all such fees and costs have been paid.

Id. At 1004. 124 Cal. Rptr. at 671. The court found the issue to be whether there was some rule of law, equity, or public policy which rendered this consensually-created possessory lien invalid and unenforceable. The attorney asserted the lien over a file which included lengthy pleadings, points and authorities, interrogatories and answers thereto, 38 depositions, extensive notes, other similar papers, memoranda, and communications collected during five years of representation. The court found that the sole benefit to the attorney in retaining these items was the coercive effect they had upon the client in paying the *disputed* fee claimed by the attorney. On the other hand, the court noted that the items were of inestimable value in the preparation and trial of the client's case. The court found further that such coercive behavior by the attorney prevented the client from honestly litigating the fee dispute. The court stated:

To enforce the lien in question here would be to condone a violation of the foregoing ethical duties owed by a lawyer to his client, contrary to the public policy of this state. Contracts which violate the canons of professional ethics of an attorney may for that reason be void.

Id. at 1007, 12 Ca. Rptr. at 672. Finally, the court stated in a footnote that even in jurisdictions recognizing retaining liens, lawyers run the risk of disbarment if their assertion of such a lien is deemed in bad faith. See, e.g., *People v. Radinsky*, 512 P.2d 627, 628 (Colo. 1973).

One commentator has advised attorneys as follows concerning holding a client's file hostage to the payment of fees:

Therefore, in spite of some older cases that counsel may retain the client's papers and materials needed in litigation until his fees are paid, it involves considerable risks to counsel if

he harms his client by refusing papers and materials needed in litigation and the client loses. In such case, counsel risks that newer case law outlined above will be followed and he may be found liable for breach of his trust to his client of turning over to the client who has discharged him such materials.

Thompson, *Attorneys' Fees and Liens*, Commercial Law Journal, April, 1981, at 136, 140.

OPINION NO. 11

In the late 1970's, at about the same time the legislature eliminated the Minnesota retaining lien, the Director's office also received numerous complaints about attorneys holding client files hostage to the payment of legal fees, thus preventing a new lawyer from properly representing the client. Some lawyers also withheld the client's file where it contained evidence of neglect or incompetent representation. In response to these concerns, the Board promulgated Opinion 11 based upon the disciplinary rules cited above and upon the change in the attorney lien statute.

Opinion No. 11 of the Lawyers Professional Responsibility Board provides:

It is professional misconduct for an attorney to assert a retaining lien on the files and papers of a client. This prohibition applies to all retaining liens, whether they be statutory, common law, contractual, or otherwise.

See also, the Director's December, 1979, and March, 1981, *Bench & Bar* articles addressing the issues raised under Opinion No. 11.

Given the historic retaining lien has been eliminated in Minnesota, the issue then becomes what constitutes client papers and property under DR 2-110(A)(2) and DR 9-102(B)(4). The resolution of this issue must be made on a case-by-case basis. There are no definitive rules which can cover every conceivable situation. It is the Director's position, however, that the client is entitled to the following upon request:

1. All original papers given to the attorney by the client.
2. All papers necessary for the client to continue his pending or contemplated litigation with another attorney. These papers cannot be defined with precision. However, as the foregoing cases indicate, when in doubt, a lawyer should deliver the requested papers in order to avoid any "foreseeable prejudice" to his client. DR 2-110(A)(2).
3. A frequent controversy arises whether a transcript paid for in advance by the attorney must be released upon request, but before reimbursement, by the client. This is not "client property" since the client has not paid for it. The risk of prejudice to the client is often minimal in most instances, since the transcripts are available directly from the court reporter. Nevertheless, if there is insufficient time for the client to obtain the transcript without suffering prejudice, the client may be entitled to it under DR 2-110(A).
4. Another frequent issue is whether a summons and complaint have been drafted, but neither served nor paid for by the client, constitute "client property." Where there are no statute of limitation considerations, *e.g.*, a dissolution action. I would resolve this question against the client. There would be little, if any, foreseeable prejudice to a client under

DR 2-110(A)(2) if the attorney were to refuse to provide the pleadings for which he has not been paid. However, where there are statute of limitations considerations, such as in personal injury actions, “foreseeable prejudice” to the client in refusing to provide the pleadings *may* compel the attorney to relinquish the documents.

5. In situations where an attorney has drafted an estate plan, a title opinion, articles of incorporation, a partnership agreement or other similar work product and the attorney is discharged before payment *and* before the documents are either executed or otherwise have legal effect, the lawyer need not surrender this work product upon request. In these and other non-litigation settings, the attorney has a legitimate right to be paid for his work before providing the product to his client. Where, however, such documents have been executed or otherwise have legal effect, the “foreseeable prejudice” dictate of DR 2-110(A)(2) mandates release.

MALPRACTICE CONSIDERATIONS

The Director’s office has consistently taken the position that an attorney may, at his or her own expense, make a copy of a surrendered file for his or her own malpractice protection. The attorney may also bill the client for these copies if there is a clear agreement allowing this to be done and so long as the original file is not held hostage to the payment of the copying fees. The Director’s office has not attempted, however, to define what type of file the attorney should maintain for his or her malpractice protection. This question must be resolved by reference to legal malpractice law.