

ADVISORY ETHICS OPINION 82-09

SYNOPSIS:

An attorney's lien on a client's file must not impair or prejudice the client's interests in the subject matter of the file.

OPINION:

Our opinion is requested regarding the ethics of an attorney's withholding a client's file pending payment by the client of monies due and owing for legal services. The letter does not reveal whether the client's legal matter has been completed or remains pending, with the client wishing to place the open file in the hands of another lawyer. Because of the importance of the basic question and the frequency with which it arises in practice, we will address both fact situations.

The Code of Professional Responsibility specifically acknowledges and condones the attorney's lien, as it may exist by statute or at common law. Ethical Consideration 5-7 reads:

“. . . [I]t is not improper for a lawyer to protect his right to collect a fee for his services by the assertion of legally permissible liens, even though by doing so he may acquire an interest in the outcome of litigation.”

Disciplinary Rule 5-103(A)(1) correspondingly provides:

“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 acquire a lien granted by law to secure his fee or expenses.”

Vermont decisional law recognizes and sanctions the attorney's lien and holds it applicable to the client's papers as well as funds.¹

Despite its references to the attorney's lien, which appear in the context of an attorney acquiring an interest in the outcome of litigation, the Code does not specifically address the propriety of a lawyer withholding either a closed or active file to secure payment of fees. Disciplinary Rule 9-102(B)(4), however, mandates that “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.” To the extent a client's file is his property, it certainly must be delivered to him upon request; but a valid attorney's lien will, under the common law, disentitle the client to possession of the property until the lien has been discharged.

Ethical Consideration 2-30 foresees that clients will change lawyers while a matter is pending, and Disciplinary Rule 2-110(A)(2) requires the withdrawing lawyer to take

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.)

Again, however, the issue of entitlement arises, if the client owes the withdrawing lawyer for services, under the attorney's lien law the client is not entitled to receive his file until the lien has been discharged by payment.

Faced with the Code's general but out of context endorsement of the attorney's lien concept, on one hand, and what we perceive to be obvious hardship to a client unable to turn over an active file likely involving a pressing matter to counsel of his choice, on the other hand, we think certain fundamental tenets must govern our decision.

When explicit ethical guidance does not exist, a lawyer should determine his conduct by acting in a manner that promotes public confidence in the integrity and efficiency of the legal system and the legal profession.²

We believe it axiomatic that the public should have ready access to the independent professional services of a lawyer of integrity and competence³, and that the most intrinsic corollary to the lawyer's duty to represent his client zealously is the

¹ See e.g., Button's Estate v. Anderson, 112 Vt. 531 (1942); Nason v. Addison County Trust Co., 104 Vt. 183 (1932); Hurlbert v. Brigham, 56 Vt. 368 (1883); Hutchinson v. Howard, 15 Vt. 544 (1843); Walker v. Sargeant, 14 Vt. 247 (1842).

² EC 9-2.

³ EC 1-1.

responsibility to avoid prejudice to the rights of his client.⁴ In return for his services, of course, a lawyer is entitled to a reasonable fee⁵, and upon proper advice a client should never misunderstand that.⁶ The ethical propriety of withholding a client's file to secure payment of a fee, therefore, depends on whether the retention is likely to prejudice the client's rights in the action, proceeding or matter which is the subject of the file. That is true, in our judgment, notwithstanding the clear legality under decisional law of withholding a file in asserting an attorney's lien.

Where the lawyer's work on a matter is finished, the file is closed, or for other reasons it is not foreseeable that the client's rights in the subject matter of the file may be prejudiced or impaired by the client being deprived of access to his file, it is ethical for the lawyer to withhold the client's file or other property pursuant to an attorney's lien. Where the subject matter of the client's file remains active and the client wishes to change lawyers, the withdrawing lawyer must assess the consequences of retaining the file. If it reasonably appears that withholding the client's file may impair or prejudice the client's interests in the subject matter of the file, or adversely affect the speedy and efficient administration of justice, then the withdrawing lawyer must subordinate his lien and promptly deliver the file to the client.

It may be argued the attorney's lien will become a fee collection device of no practical use or purpose, since ordinarily no client will need or much less want a closed file, and further since access to an active file ordinarily would be a prerequisite to competent representation by a lawyer new to the case.

So be it. Fee arrangements should be settled in advance, at the lawyer's initiative⁷, and the client practicing fraud or gross imposition is always subject to a suit for fees.⁸ Moreover, while a matter is pending, a client may decide in complete good faith to change lawyers out of dissatisfaction with the quality of services received or with the cost of those services. In those cases, it would be untenable to require the client to concede disputed contract or fee issues to the discharged attorney, by paying him in full, as a prerequisite to being able to turn over the pending file to different counsel.

⁴ See, e.g., DR 2-110(A)(2).

⁵ See EC 2-16, 2-17.

⁶ EC 2-19.

⁷ EC 2-19.

⁸ EC 2-23.