

ADVISORY ETHICS OPINION 1999-07

SYNOPSIS:

A lawyer must deliver to a client or former client, upon request, all property that the lawyer has in his/her possession which the client is entitled to receive. Further, a lawyer may only assert a lien for attorney's fees and costs if to do so would not prejudice the client in pursuing his/her case.

FACTS:

Lawyer represented Client in a personal injury matter. After Client failed to accept or follow Lawyer's legal advice, Lawyer withdrew from further representation of Client.

Client owes Lawyer monies for costs expended on Client's behalf. Lawyer also claims an entitlement to a *quantum meruit* recovery of attorney's fees based upon the work that was performed for Client. Certain documents in Client's file have been created solely by Lawyer. Other documents, including medical records, have been paid for by Lawyer, but not reimbursed by Client despite Lawyer's requests. Client agreed in writing to pay such costs.

Lawyer claims an entitlement to place any subsequent attorney on notice of a lien for fees and costs. Lawyer advised Client in writing that Lawyer would make Client's file available to any new counsel whom Client selects. Lawyer also has concerns that Client's file contains information concerning Client, similar to a doctor's file, which may not be in Client's best interest to have revealed without the assistance of counsel to help interpret it.

QUESTION:

- (A) What materials must be released directly to the Client under these circumstances?
- (B) May Lawyer assert a lien for attorney's fees and costs incurred during Lawyer's representation of Client?

DISCUSSION:

The applicable provisions of Rule 1.16 of the Vermont Rules of Professional Conduct are relevant to the inquiry presented herein. Rule 1.16, entitled **Declining Or Terminating Representation**, provides in pertinent part as follows:

* * *

- (d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect the client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee as not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law.

Rule 1.16(d), Vermont Rules of Professional Conduct.

In the past, the Committee has addressed the issues presented herein in opinions decided under the then applicable Code of Professional Responsibility.¹ Our analysis and result does not change under the Vermont Rules of Professional Conduct, effective September 1, 1999.

In *Opinion 91-3*, the Committee recognized that a lawyer must turn over to a client or former client, upon request, all property which the lawyer has in his/her possession which the client is entitled to receive.² In relying upon *Informal Opinion 1376* of the American Bar Association, the Committee noted that the materials that a lawyer must return in such circumstances are as follows: (1) all of the property delivered to the lawyer by the lawyer's client; (2) the "end product" of the lawyer's work; and (3) all other material which is useful to the client in fully benefiting from the services of the lawyer.³ Notwithstanding the foregoing, a lawyer need not deliver his/her internal notes and memos which have been generated for the lawyer's own purposes in working on the client's problem.⁴

¹ See, e.g., *Opinion 91-3* and *Opinion 82-9*.

² *Opinion 91-3*.

³ See *Opinion 91-3*, citing *ABA Informal Opinion 1376*

⁴ *Id.*

In the present case before the Committee, it is plain that the medical records of the Client, an integral part of any personal injury claim, clearly would be useful to the Client in fully benefiting from the services of the Lawyer. Consequently, the Lawyer is ethically bound to deliver to the Client the medical records that Lawyer has obtained on behalf of Client. If the Lawyer has concerns about the sensitive nature of the information, the Lawyer may so advise the Client and suggest that it may be in the Client's best interest for Client's new counsel to assist in the interpretation of the information. Nevertheless, if the Client insists upon the file being turned over to Client directly, Lawyer is ethically obligated to do so.

The next question posed by Lawyer is whether Lawyer may assert a lien for attorney's fees and costs incurred during Lawyer's representation of Client. The question regarding the existence of an attorney's lien in these circumstances is a question of contract law and not strictly a question of ethical conduct.⁵ While the common law of Vermont recognizes the existence of an attorney's lien on the "money and papers of the client in the hands of the attorney," there are ethical considerations which may affect the claim of or enforcement of the attorney's lien.⁶

Therefore, Lawyer must balance Lawyer's obligation to avoid prejudice to the Client against Lawyer's right to a reasonable fee.⁷ It is axiomatic that the fee must be in fact reasonable pursuant to Rule 1.5 in order to form the basis for any claimed lien.⁸ Moreover, Lawyer may have to subordinate his/her lien and deliver the papers to which the Client is entitled, if retaining the papers would prejudice the Client in pursuing his/her case.⁹

In construing the applicable provisions of the Model Code of Professional Conduct, the American Bar Association Committee also recognized the existence of the attorney's lien but has noted that the "[m]ere existence of a legal right (to assert the lien) does not entitle the attorney to stand on the lien if ethical considerations require that he/she forego it."¹⁰

CONCLUSION:

In summary, Lawyer is ethically obligated to deliver to the Client all documents and materials in Lawyer's possession which the Client is entitled to receive as aforesaid. Caution must be taken by Lawyer before asserting a lien for attorney's fees and costs incurred during Lawyer's representation of the Client so as to avoid prejudice to the Client.

⁵ See *Opinion 91-3*.

⁶ See generally *In re: Buckham*, 160 Vt. 355, 365, n.* (1993); *Valley Disposal, Inc. et al. v. Central Vermont Solid Waste Management District*, 113 F.3d 357, 362-363 (2d Cir. 1997) (applying Vermont law which recognizes two types of liens: attorney's charging lien and attorney's equitable lien); *Walker v. Sargeant*, 14 Vt. 247, 253 (1842); *Estate of Button v. Anderson*, 112 Vt. 531, 536-538 (1942); and *Hutchinson v. Howard*, 15 Vt. 544 (1843); see also *Opinion 82-9*, *Opinion 85-4*, *Opinion 91-3* and *Opinion 97-10* and Annotation, *Attorney's Assertion of Retaining Lien as Violation of Ethical Code or Rules Governing Professional Conduct*, 69 A.L.R. 4th 974 (1989) (as cited in *In re: Buckham, supra*, compiling cases addressing circumstances under which retaining lien is appropriate).

⁷ See *Opinion 82-9*.

⁸ See Rule 1.5, Vermont Rules of Professional Conduct.

⁹ *Id.*; see also *Opinion 91-3*.

¹⁰ *ABA Informal Opinion 1461*.