

The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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OPINION 92-8

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Withdrawn by Adv. Op. 2019-06

[CPR Opinion-provides advice under the Ohio Code of Professional Responsibility which is superseded by the Ohio Rules of Professional Conduct, eff. 2/1/2007.]

SYLLABUS: An attorney has an ethical duty to promptly deliver a former client's case files to the former client upon request. Materials acquired or prepared for the purposes of representing the client and other materials that might prove beneficial to the client should be returned. These materials include, but are not limited to, all significant correspondence, investigatory documents and reports the client has paid for, filed or unfiled but prepared pleadings and briefs, and all materials supplied by the client.

An attorney may retain a copy of the client's file since the information in the file may be needed in the event of a later dispute between the attorney and client. The attorney should not charge for the costs of copying the file because the client has no interest in the attorney retaining the copies.

In order to promote the aspirational goals within Ethical Consideration 2-22 of the Code, the Board discourages the assertion of a retaining lien in order to solve fee disputes. Such conduct could violate Disciplinary Rule 2-110 (A) (2) by causing foreseeable prejudice to the rights of a client. The Board encourages attorneys to resolve fee disputes through alternative methods such as fee dispute arbitration.

OPINION: The question presented is whether an attorney has an ethical duty to deliver case files to a former client upon request by the former client. The requester provides the following hypothetical facts: the attorney completed representation of the client over seven years ago; the attorney was fully compensated for the services rendered; and there is no dispute about the compensation.

A lawyer's ethical duty to deliver a client's papers and property is addressed in several disciplinary rules. Disciplinary Rule 2-110, governing withdrawal from employment, imposes on the lawyer an ethical duty as does Disciplinary Rule 9-102, a rule regarding preserving the identity of client funds and property. These rules are set forth below.

DR 2-110 Withdrawal from Employment

(A) In General.

(1) If permission for withdrawal from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a proceeding before that tribunal without its permission.

(2) 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.)

(3) A lawyer who withdraws from employment shall refund promptly any part of a fee paid in advance that has not been earned.

DR 9-102 Preserving Identity of Funds and Property of a Client

(B) A lawyer shall
[(1) through (3) omitted.]

(4) **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.** (Emphasis added.)

These rules set forth a broad duty to deliver to the client the papers and property to which the client is entitled. The rule does not define precisely what papers and property must be returned. Therefore, in fulfilling this ethical duty an attorney must make a determination as to what papers and property the "client is entitled."

The American Bar Association Committee on Ethics and Professional Responsibility, responding to an inquiry about a file in the possession of trademark counsel pertaining to trademark of a client, advised that counsel must return all of the material supplied by the client to the attorney. ABA, Informal Opinion 1376 (1977). The lawyer must also deliver the "end product"-the certificates or other evidence of registration of the trademark that he was employed to procure and for which the client has paid; but, the lawyer need not deliver internal notes and memos generated primarily for his or her own purposes in working on the client's problem. *Id.* The committee acknowledged that between these extremes are the items that create uncertainty; but stated that the ethical principles involved are simple--the client is entitled to receive what he or she has paid for and to the return of what he or she has delivered to the lawyer. *Id.*

In Massachusetts, Disciplinary Rule 2-110 (A) was amended, effective January 1, 1992, to provide specific guidance by rule as to what a client is entitled to receive. In other states, guidance is provided through ethics committees. A Michigan ethics committee has advised that a lawyer must surrender to the client or substitute counsel the attorney's work product for which the client is obligated to pay a fee; including, but not limited to, all file interview notes, research notes, and unfiled but prepared pleadings. State Bar of Michigan, Op. CI-926 (1983). In Georgia, the duty to release client files and papers includes work product created during billable time and excludes other documents such as time records. State Bar of Georgia, Op. 87-5 (1988).

The entitlement to papers and property is less clear when there is a dispute regarding fees. Some jurisdictions allow an attorney to assert a retaining lien in an effort to override a client's right to papers and property. In some states the lien is a statutory lien. In Ohio, the attorney retaining lien is a common-law lien. See Krueger v. Newcomb, 36 Ohio App. 469 (Ct. App. Warren County 1930), Foor v. Huntington Nat'l Bank, 27 Ohio App. 3d 76 (Ct. App. Franklin County 1986); Bogen v. Prudential Insurance Co., 68 Ohio App. 3d 92 (Ct. App. Warren County 1990). The Foor court described the retaining lien as a common law lien attaching to all property, papers, documents and monies of the client coming into the attorney's hands during the representation and giving the attorney the right to retain possession of such property, papers, documents and money as security for fees and expenses due the attorney in connection with the professional relationship. Foor v. Huntington Nat'l Bank, 27 Ohio App. 3d 76, 79 (Ct. App. Franklin County 1986). However, assertion of the lien may not always relieve an attorney from responding to a subpoena duces tecum requesting client papers. See Foor v. Huntington National Bank, 27 Ohio App. 3d 76 (Ct. App. Franklin County 1986); Bogen v. Prudential insurance Co., 68 Ohio App. 3d 85 (Ct. App. Warren County 1990).

The common law right to assert a retaining lien is embodied within Disciplinary Rule 5-103 (A) of the Code of Professional Responsibility. The Model Rules contain an identical provision in Rule 1.8 (j). DR 5-103

- (A) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation he [she] is conducting for a client, **except he [she] may:**
- (1) **Acquire a lien granted by law to secure his [her] fee or expenses.** (Emphasis added.)

However, in many circumstances the assertion of an attorney's retaining lien can cause foreseeable prejudice to the rights of a client. Such conduct is not in accordance with the aspirations of Ethical Consideration 2-22 that "[a] lawyer should be zealous in his [her] efforts to avoid controversies over fees with clients and should attempt to resolve amicably any differences on the subject. He should not sue a client for a fee unless necessary to prevent fraud or gross imposition by the client."

The American Bar Association Committee on Professional Ethics and Grievances has advised that whether or not the attorney's lien attaches to the client's papers or property to secure the lawyer's fee is a question of law rather than ethics and not within the jurisdiction of the committee. See Informal Opinion 1376 (1977), Formal Opinion 209 (1940); and Formal Opinion 63 (1932). However, the American Bar Association Committee on Ethics and Professional Responsibility in Informal Opinion 1461 (1980) concluded that assertion of the lien would be ethically justified when the client is financially able but deliberately refuses to pay a fee clearly agreed upon and due, since this conduct would constitute gross imposition by the client. More recently, in Informal Opinion 86-1520 the committee withdrew Informal Opinion 1461, citing Formal Opinion 209 and Informal Opinion 1376 (1977), and advising that "[a] lawyer's right to assert an attorney's lien is subject to the obligation of diligent representation before withdrawal. Whether, upon withdrawal, the lawyer may withhold documents necessary to the client in the prosecution or defense of the client's position is a question of the law governing attorneys' liens in that jurisdiction."

Some state ethics committees have advised against the use of an attorney retaining lien. For example, the Pennsylvania Bar Association advised that a lawyer who is owed unpaid legal fees should return the client's file and thereafter sue the client for the fee, rather than assert a retaining lien. Op. 87-61 (1987). In West Virginia, a lawyer may not retain a client's papers as security for a fee and must return all original documents with the exception of fee statements and firm records. West Virginia State Bar, Op. 89-2 (undated). In New Hampshire, a lawyer may not attach a lien for fees on the file.

New Hampshire Bar Ass'n, Op. (8) (1982). In comparison, the ethics committee of the Columbus Bar Association has advised that prior to exercising a retaining lien on a client's papers, a lawyer must evaluate the situation to ensure that the exercise of the legal right does not violate ethical limitations. Columbus Bar Ass'n, Op. 4 (undated).

As to the facts presented, there are no circumstances that warrant withholding the requested papers and property. The attorney-client relationship was ended approximately seven years ago and there is no dispute regarding fees.

In conclusion, it is the Board's opinion that an attorney has an ethical duty to promptly deliver a former client's case files to the former client upon request. Materials acquired or prepared for the purposes of representing the client and other materials that might prove beneficial to the client should be returned. These materials include but are not limited to all significant correspondence, investigatory documents and reports the client has paid for, filed or unfiled but prepared pleadings and briefs, and all materials supplied by the client. However, if the attorney has not been fully compensated for his or her work, the attorney may be entitled to hold the files as a matter of law. Whenever an attorney asserts a legal right to an attorney's retaining lien, the attorney must make sure that assertion of the right does not result in causing foreseeable prejudice to the rights of the client.

An attorney may retain a copy of the client's file since the information in the file may be needed in the event of a later dispute between the attorney and client. The attorney should not charge for the costs of copying the file because the client has no interest in the attorney retaining the copies.

In order to promote the aspirational goals within Ethical Consideration 2-22 of the Code, the Board discourages the assertion of a retaining lien in order to solve fee disputes. Such conduct could violate Disciplinary Rule 2-110 (A) (2) by causing foreseeable prejudice to the rights of a client. The Board encourages attorneys to resolve fee disputes through alternative methods such as fee dispute arbitration.

Advisory Opinions of the Board of Commissioners on Grievances and Discipline are informal, nonbinding opinions in response to prospective or hypothetical questions regarding the application of the Supreme Court Rules for the Government of the Bar of Ohio, the Supreme Court Rules for the Government of the Judiciary, the Code of Professional Responsibility, the Code of Judicial Conduct, and the Attorney's Oath of Office.