

Attorney Retaining Liens

Rule 1.16(d) of the Rules of Professional Conduct set forth an attorney's obligations towards a client upon termination of representation whether by the attorney withdrawing or the client discharging the attorney. A question frequently arises concerning the right of an attorney to refuse to turn over the file to the client or the new attorney until the client pays the attorney's fee or expenses incurred.

Rule 1.16(d) states that "[t]he lawyer may retain papers relating to the client to the extent permitted by law." There exists in West Virginia a common law retaining lien available to attorneys "to retain possession of a client's documents, money, or other property which comes into the hands of the attorney professionally, until a general balance due him for professional services is paid." Capehart v. Church, 69 S.E.2d 127, 129 (W. Va. 1952); Fuller v. Stonewall Casualty Co. of W. Va., 304 S.E.2d 347, 349 n.1 (1983).

An element of coercion may exist when an attorney retains a file in the middle of litigation inconsistent with a lawyer's duties towards the client, particularly when the client disputes the amount of fees owing. When an attorney's retention of the file would interfere with a client's ability to pursue ongoing litigation, the attorney's right to a retaining lien under Rule 1.16(d) must give way to the lawyer's duty to take steps to protect the client's interest. The client is entitled to the attorney's

file, whether the client discharged the attorney or the attorney withdrew.¹

The file which must be turned over consists of all material provided by the client; all correspondence; all pleadings, motions, other material filed and discovery, including depositions; all documents which have evidentiary value and are discoverable under the Rules of Civil Procedure, such as depositions and business records. The above-described material must be released regardless of any outstanding fees or costs.

If the client has not paid attorney fees and expenses which are clearly owed, the attorney may withhold work product covered by Rule 26(b)(3) of the West Virginia Rules of Civil Procedure. Rule 26(b)(3) extends protection against general discovery to documents prepared for litigation by or for the attorney. See In re Markle, 174 W. Va. 550, 328 S.E.2d 157, 161-63 (1985). If the client does not owe the attorney money, the attorney must turn over all work product, too, since he or she has been compensated for such work.

Some jurisdictions, such as Minnesota, Georgia and Washington State apply more stringent standards, permitting the attorney to withhold only opinion work product. Others permit the retention of the file regardless of the prejudice to the client, such as Maryland, Alabama, New York, Utah and Virginia. This Committee has tried to steer a middle course to balance the rights of a client to

¹ In L.E.I. 89-02, the Committee stated that an attorney may retain a copy of the file at his or her own expense unless the representation agreement allocated this specific type of copying to the client.

seek new counsel in the middle of litigation with the interests of a lawyer to be compensated for his or her work.

Some jurisdictions permits an attorney to assert a retaining lien when the client owes money if certain conditions exist. Whether these conditions exist could be a subject of great dispute between the lawyer and the client. For example, Tennessee allows a retaining lien only to prevent fraud or gross imposition by the client. Colorado prohibits a retaining lien if the papers are essential to a liberty interest, the lawyer is rightfully discharged or if a contingent fee is not yet concluded. In New York County, New York, a lawyer must relinquish the lien if the client has a compelling need, such as defending against a murder charge.

The Committee prefers to establish a bright line not subject to much interpretation to provide clear guidance to attorneys seeking to comply with their ethical obligations.

This matter being adopted by the full Committee on Legal Ethics on February 7, 1992.



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