

You advised that an attorney has been contacted by a former client who has requested her file from the attorney's office; however, the client is indebted to the attorney's office for legal fees incurred during the representation.

L E Op. No. 871 states that an attorney may retain papers relating to the file to the extent permitted by "applicable law". You wish to know what the term "applicable law" means and what materials must be returned to the client.

Disciplinary Rule 2-108(D) states that "Upon termination of representation, a lawyer shall take reasonable steps for the continued protection of the client's interest, including giving reasonable notice to the client, allowing time for employment of another counsel, delivering all papers and property to which the client is entitled, and refunding any advance payment of fees that have not been earned. The lawyer may retain papers related to the client to the extent permitted by applicable law." It is the opinion of the Committee that the applicable law to which DR:2-108(D) presently refers is that which relates to any attorney's lien for legal fees owed by the client. (See LE Op. 1171) In other words, the retaining lien or the common law possessory lien allows an attorney to retain a client's documents or property (except for trust funds) currently in the attorney's possession until the fee for professional services is paid. Therefore, if there is no dispute about fees and the client has the ability to meet the financial obligation, the lawyer may assert a retaining lien on the client's files as security for unpaid legal fees, unless the withholding of the files would prejudice or damage the client. ABA Informal Opinion 1461, adopted on November 11, 1980, articulates several circumstances under which the assertion of an attorney's lien for fees by retention of the client's file would prejudice the client, and several criteria which need to be considered in determining whether to impose the lien.

While allowing an attorney to "retain papers relating to the client," the general provision of DR:2-108(D) requires that upon termination of representation, the lawyer must take reasonable steps for the continued protection of the client's interests (emphasis added). Thus, an attorney must consider the welfare of the client and whether the retention of the client's files will materially interfere with the client's subsequent legal representation, and whether the client would be prejudiced as a result. Therefore, the Committee is of the opinion that in certain circumstances the lawyer may be required to permit the client to have access to the file while the attorney retains possession of the actual file in order to preserve the lien without prejudicing the client.

With regard to which materials constitute the client's property, the Committee is of the view that in addition to the obvious fact that items in the file which were originally

provided to the lawyer by the client continue to be the property of the client, items in the client's file which constitute attorney's work-product are purchased by the client by the payment of legal fees. Thus, where there are no legal fees owed, the client owns the attorney work-product, whether in tangible, documentary form or in the intangible provision of the attorney's expertise in having applied the law to the client's fact situation during the course of the representation. *Scroggins v. Powell, Goldstein, Frazier and Murphy*, 15 B.R. 232, 240-241 (Bankr. N.D. Ga. 1981), rev'd on other grounds, 25 B.R. 729 (N.D. 1982).

The Committee opines that an attorney may assert a retaining lien on the client's property or case file currently in his possession if the client is unwilling or has refused to pay the attorney's fees and the withholding of the file would not damage or prejudice the client, or if the retaining lien is necessary to prevent fraud or gross imposition by the client. Even where a lien has been appropriately asserted, however, the lawyer may need to make the file available for the client's review if totally withholding the file would prejudice the client. A lawyer should be zealous in his efforts to avoid controversies over fees with clients and should attempt to resolve amicably any differences on the subject. The lawyer should consider whether there are less stringent means by which the matter can be resolved or by which the amount owed can be secured. (See EC:2-25.)

Committee Opinion
September 29, 1989

Legal Ethics Committee Notes. – Rule 1.16(e) governs a lawyer's duty to provide files to a former client.