

LEGAL ETHICS OPINION 1544

TERMINATION OF REPRESENTATION
- FEES - FILES: RETENTION OF
CLIENT'S FILE WHEN COSTS HAVE
NOT BEEN PAID, AND NO FEE HAS
BEEN EARNED, IN A CONTINGENCY
CASE.

You have presented a hypothetical situation in which a client engages a law firm on a contingent fee basis in a claim based on perceived negligence of health care providers. No fee is paid by the client, and the client does not advance any funds for litigation costs advanced by the law firm. The claim is investigated, and suit is filed. Eventually, the lawsuit is dismissed by the court, and there is no recovery for the client.

You indicate that the client does not reimburse the law firm for any of the approximately \$8,000 of litigation costs advanced. The client then engages another lawyer to represent him as to any claim the client may have against the law firm with respect to the representation of the client in the lawsuit. The new lawyer, on behalf of the client, requests "a copy of their [law firm's] file, including, without limitation, all pleadings; discovery; correspondence; memoranda; drafts of documents; notes; computer discs containing information relating to this matter; telephone message slips; copies of cases, statutes or other research; medical records and bills; etc" The new lawyer also asks to pick up the file.

You have asked the committee to opine under the facts of the inquiry, (1) whether the client has any right to either copies of the file documents or the original file documents without first reimbursing the law firm for the litigation costs, (2) whether the law firm has a possessory lien on the file documents as security for reimbursement of the litigation costs, and (3) whether, if the client reimburses the law firm for the litigation costs, the client is entitled to either copies of or possession of the original file documents or any part of them since the client has never paid the law firm for its services on the lawsuit.

The appropriate and controlling Disciplinary Rule related to your inquiry is DR:2-108(D), which states that upon termination of representation, a lawyer shall take reasonable steps for the continued protection of a client's interests, including giving reasonable notice to the client, allowing time for employment of other counsel, delivering all papers and property to which the client is entitled, and refunding any advance payment of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by applicable law. Further guidance is available through DR:2-105(C) and EC:2-22 which describe the rationale and operation of contingent fee agreements.

The committee opines on the questions presented as follows:

1. Previously rendered Legal Ethics Opinions do not make a distinction between the payment of fees and costs under DR:2-108(D). The committee is of the opinion, however, that the real question is whether or not the retention of file documents

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October 20, 1993

would be prejudicial to the former client. If such retention would be prejudicial, the firm may not hold the documents for the reimbursement of costs. Although the facts presented are not sufficient to make a comprehensive determination of possible prejudice to the client, the committee believes that the continued protection of the client may require return of the file. Thus, the client would be entitled to either copies or originals of the file documents. The committee is of the further opinion that the client's file includes the stance of information stored in the lawyer's computer system, if any.

2. The committee has consistently opined that the client, and not the lawyer or law firm, owns the file, except to the extent that a lien to protect attorney fees is permitted by law. Even where a lien is appropriate, the file must be made available to avoid prejudice to the client. See LE Op. 1171, LE Op. 1176, LE Op. 1366, LE Op. 1403.

Whether or not the firm has a valid possessory lien on the file documents raises a legal issue the determination of which is beyond the purview of the committee. The committee opines, however, that even if the law firm has a possessory lien on the file for reimbursement of the litigation costs, the file still must be made available for the client's review to avoid prejudice to the client. See LE Op. 1357.

3. The committee believes that the fact that the client never paid the law firm for services rendered is immaterial to the conclusions reached in issue #1 above. The committee is of the view that the very nature of a contingent fee agreement dictates that, in cases where the client does not prevail, no fee will be received by the lawyer or law firm.

Thus, the committee opines that the paramount concern still remains the avoidance of prejudice to the client and, therefore, regardless of whether the client reimburses the law firm for litigation costs or pays the firm for its services, the client is entitled to copies of or possession of the original file documents if withholding such documents would prove prejudicial to the client.

The committee also reminds the inquirer that the Disciplinary Rules do not ethically prohibit a lawyer or law firm from bringing an action against a client for attorney's fees or, by implication, for costs advanced. See LE Op. 995.