

Legal Ethics Opinion No. 1690

SURRENDER OF FILES TO FORMER CLIENT  
WHO HAS FAILED TO PAY LAWYER'S FEE  
AND REIMBURSE COSTS ADVANCED.

INQUIRY: The large number of prior LEOs, as well as an occasional lack of uniformity of expression, warrants the issuance of a compendium opinion which addresses a recurring question: Is it ethically permissible for a lawyer to retain a former client's files because the former client has failed or refused to pay the fees and costs owed the lawyer? This compendium opinion overrules prior LEOs with respect to their inconsistency with the opinion expressed herein.

The question arises in various factual contexts. The lawyer withdraws from representation of the client. The client fires the lawyer, with or without cause. The former client's new lawyer wants the files in order to complete the subject of the original lawyer's representation. The files are germane to a new matter for which the former client has engaged new counsel. The former client's new lawyer wants the files to investigate a legal malpractice claim against the original lawyer. The common thread is that the original lawyer is owed money for fees or costs, or both, which the former client has failed or refused to pay.

APPLICABLE DISCIPLINARY RULES: The controlling Disciplinary Rules are as follows:

DR 2-108(D): 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.

DR 9-102(B)(4) A lawyer shall: Promptly pay or deliver to the client or another as requested by such person the funds, securities, or other properties in the possession of the lawyer which such person is entitled to receive.

PRIOR RELEVANT LEOs: 352, 374, 431, 871, 996, 1101, 1124, 1157, 1171, 1176, 1305, 1307, 1322, 1332, 1339, 1357, 1366, 1403, 1418, 1485, 1518, and 1544.

OTHER AUTHORITIES: Annot., *Attorney's Assertion of Retaining Lien as Violation of Ethical Code or Rules Governing Professional Conduct*, 69 A.L.R. 4th 974 (1989); 7A C.J.S., *Attorney & Client* ' ' 357 *et seq.* (1980); 7 Am. Jur. 2d, *Attorneys at Law* ' ' 315 *et seq.* (1980); ABA/BNA *Lawyers= Manual on Professional Conduct* at 41:2101-41:2120 (1992); *A Lawyer=s Right to Retain Files* *CA Ethics Analysis*, 21 VBA Journal 7 (No. 1 1995); *Client Access to a Lawyer=s Files*, 8 ALAS Loss Prevention Journal 8 (No. 1 1997).

OPINION: Two distinct lawyers= liens were recognized at common law: (1) the retaining lien, which permitted lawyers to retain possession of a client=s file until fees and costs were paid, and (2) the charging lien, which permitted lawyers to give notice of lien against and be paid from a judgment or settlement recovered through their legal services.<sup>1</sup> The lawyers= charging lien has been codified in Virginia to embrace tort-based and contract-based causes of action.<sup>2</sup> The lawyers= retaining lien has not been codified, however. Its existence in Virginia common law is based on Stevens v. Sparks, 205 Va. 128, 135 S.E.2d 140 (1964), and Bolling v. Bowen, 118 F.2d 59 (4th Cir. 1941). Interestingly, the evidence presented in those cases did not support the retaining lien asserted.

#### Assertion of Retaining Lien

The lawyers= retaining lien is a wholly passive lien; it is not a cause of action. Nor is there any common law procedure to enforce or foreclose a retaining lien. It only permits a lawyer to retain possession of the former client=s property until the former client pays or secures payment of fees and costs due and unpaid.<sup>3</sup> It is settled that a former client=s file is his property. Although the lawyer=s retaining lien is recognized at common law, its assertion is ethically circumscribed by DR 2-108(D).

Upon termination of representation, a lawyer shall take reasonable steps for the continued protection of a client=s interests, including . . . delivering all papers and property to which the client is entitled . . . . *The lawyer may retain papers relating to the client to the extent permitted by applicable law.*

(emphasis added.)

The foregoing italicized language clearly authorizes lawyers to invoke the common law retaining lien. It does so, however, in the context of the preceding language obligating a lawyer to take reasonable steps for the continued protection of his former client=s interests, to include Adelivering all papers and property to which the client is entitled.@ The boundaries of law and ethics are blurred by language which bows to the retaining lien permitted by law but simultaneously imposes an ethical restraint on its use.

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<sup>1</sup> ABA/BNA Lawyers= Manual on Professional Conduct at 41:2101.

<sup>2</sup> Code of Virginia ' 54.1-3932.

<sup>3</sup> ABA/BNA, supra, at 41:2106; 7A C.J.S., supra, ' 390.

Ethics committees have wrestled with the dilemma presented by the conflict between a common law lien and a delimiting ethical mandate. Some ethics committees have declined to issue opinions on retaining liens on the grounds that they present questions of law. Others have issued opinions that it is always unethical to assert a retaining lien because there is invariably prejudice to the former client=s interests.<sup>4</sup> Still other ethics committees have proceeded case-to-case: the retaining lien should not be asserted if it would prejudice the former client=s rights.<sup>5</sup> The obvious point of the retaining lien is to pressure the former client to pay his bill by depriving him of something he needs, or at least wants to have. Hence some amorphous Aprejudice@ to the former client is a virtual certainty. Some ethics committees have defined the Aprejudice@ to the former client which defeats a retaining lien on his file as prosecution for a serious criminal charge or litigation involving an important personal liberty.<sup>6</sup> In Virginia some LEOs have exhibited confusion about whether the retaining lien is subordinate to the ethical mandate of continued protection of a former client=s interests and about the client=s interests that warrant protection.<sup>7</sup> It is fair to say that over the years the avoidance of harm to the client=s interests has become a controlling imperative, and that the client=s interests warranting continued protection have been expanded.

A focused analysis of the lawyer=s right to withhold his former client=s papers began with LEO No. 1176, dated December 19, 1988:

Even if applicable law permits the attorney to retain papers relating to the client, the Committee opines that to do so, under certain circumstances, may be unreasonable, and thereby violate the first sentence of DR 2-108(D). That is, under certain circumstances retention of papers relating to the client may be inconsistent with taking Areasonable steps for the continued protection of a client=s interests. . . .@ Determination of whether or not retention of papers is unreasonable, even when permitted by applicable law, can only be made on a case-by-case basis considering such things as the ability of the client to pay the fee, whether the fee is in dispute and the harm to the client if papers are retained.

A like theme was sounded in LEO No. 1124, dated September 27, 1989, but qualified by an emphasis on Acontinued protection of the client=s interests.@

[I]f there is no dispute about the fees and the client has had 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. . . .

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<sup>4</sup> ABA/BNA, *supra*, at 41:2109.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 41:2110.

<sup>7</sup> Thomas E. Spahn ably presents the historical evolution in his helpful article. *See* 21 VBA Journal 7.

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, thereby creating a prejudice to the client.

See also LEO No. 1101, dated September 29, 1989.

The ethical restraint on the lawyer's retaining lien was emphasized further in LEO No. 1322, dated February 27, 1990.

Foremost, upon termination of representation, the Disciplinary Rule requires a lawyer to take reasonable steps for the continued protection of a client's interest, . . . [E]ven if applicable law permits the attorney to retain papers relating to the client, such withholding may be inconsistent with taking reasonable steps for the continued protection of a client's interest.

(emphasis added.)

This compendium opinion expresses the sense of the Committee that the lawyer's retaining lien, though recognized at common law, is not ethically permissible whenever its assertion would prejudice or imperil the continued protection of a client's interests. The client's interests warranting continued protection cannot be stated in an all-encompassing fashion. LEO No. 1124 provides helpful insight: the lawyer contemplating a retaining lien on his former client's files must weigh whether it will materially interfere with the client's subsequent legal representation. *Id.* If so, assertion of the retaining lien would not be ethically permissible. Subsequent legal representation is not the only client-interest warranting protection, however. For example, if a former client needs his file in order to prepare tax returns, assertion of the retaining lien would not be ethically permissible.

LEO No. 1544, dated October 20, 1993, illustrates the breadth of the standard of avoidance of prejudice to the former client. There the former client hired a new lawyer to represent him as to any claim he might have against his original law firm. The new lawyer requested a copy of the law firm's file. The law firm had advanced several thousand dollars in litigation costs. The law firm wished to retain the former client's files until its litigation costs were paid. The Committee opined the following:

[I]f such retention [of the former client's files] would be prejudicial [to the former client], 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. . . .

[T]he 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.

It is fair to say, therefore, that the ethical mandate virtually displaces the common law retaining lien. The ethical mandate is just that C a mandate. It is contained in DR 2-108(D); the Disciplinary Rules are promulgated by the Virginia Supreme Court with the force of law.<sup>8</sup> There is ample justification for the elevation of the ethical mandate over the retaining lien. In the first place, the lawyer sets the fee and the payment terms, deposit, and security arrangement at the outset of representation, and he may decline the representation absent the client=s agreement to the fee and the terms. Having undertaken representation, the lawyer may withdraw if the client does not perform his payment obligations. See DR 2-108(B) and (C). Secondly, the lawyer is a fiduciary who owes undiluted loyalty to his client. Holding a former client=s files hostage does not comport with a lawyer=s post-representation duty to take reasonable steps for the continued protection of the client=s interests.<sup>9</sup> Finally, the lawyers= retaining lien could well chill a client=s interest in giving important documents to his lawyer and, in turn, impede the lawyer=s effective representation. Neither the profession nor the client is well-served under those circumstances.

It should be noted, too, that the ramifications of a common law retaining lien may not have been addressed fully in the literature. For example, since the lawyer controls the client=s production of documents to him in the representation, does the retaining lien constitute a financial, business or personal interest on the lawyer=s part under DR 5-101(A) requiring the client=s consent? If so, and the client has not consented after full and adequate disclosure, does the assertion of a retaining lien violate DR 5-101(A)?

The retaining lien provides security for payment of fees and costs. Apparently it is inchoate when representation is accepted and is perfected when asserted. It is, in any event, one of the terms of the fee arrangement with the client. Does DR 2-105(A) require that the retaining lien be Aadequately explained@ to the client?

The upshot is that assertion of the lawyer=s common law retaining lien almost invariably will cause (and is designed to cause) prejudice to the former client=s interests in violation of DR 2-108(D). Assertion of the lien is not ethically permissible, therefore, whenever doing so will materially prejudice the former client=s interests.

#### Expense of Copying Clients= Files

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<sup>8</sup> Code of Virginia ' 54.1-3909; DR 1-102(A).

<sup>9</sup> Following the conclusion of representation, a lawyer has distinct duties under DR 5-105(D) and DR 4-101(B) derivative of the fiduciary relationship theretofore existing.

A client's file belongs to the client. If the client requests his file from his former lawyer, the lawyer may at his own expense make a copy of the file for his office records. The former client may not be charged the copying expense even if, with his consent, his former lawyer keeps the original of the file and gives a copy thereof to him. See LEO No. 1171, dated February 13, 1989, and LEO No. 1418, dated May 14, 1991.

During the course of representation a lawyer ordinarily sends copies of pleadings, discovery, and correspondence to his client. Doing so addresses the lawyer's obligation under DR 6-101(C) to keep his client reasonably informed. Upon termination of the representation, DR 2-108(D) triggers a distinct duty to deliver all papers and property to which the client is entitled. Hence, the former client is entitled to receive and may not be charged for copying documents requested that had been sent to him during the representation where he no longer has those documents. See LEO No. 1366, dated July 24, 1990.

After a lawyer has surrendered so much of the file as the former client requests, the lawyer has no ethical duty to duplicate a second copy of the documents without charge. In that circumstance the former client may be required to bear the copying expense for a duplication of documents previously surrendered without charge to the former client.

Copying costs can be avoided, of course, if the lawyer chooses to surrender the original documents without keeping a copy. The lawyer may choose to surrender the original documents or copies of the original documents, except that if withholding the original documents would entail prejudice to the former client's interests, the original documents must be surrendered.

#### Documents to which Client is Entitled

DR 2-108(D) provides that upon termination of representation, a lawyer is obligated to take reasonable steps for the continued protection of his former client's interests, including delivering all papers and property to which the client is entitled. The authorities are split over the scope of what the client is entitled to receive from his former lawyer's file even where all fees and costs have been paid.

One position taken is that the client is entitled to receive the entire contents of his former lawyer's file without exception.<sup>10</sup> The entire contents position means just that every piece of paper in the file, as well as electronically stored material such as e-mail messages, whatever the author, the source, the purpose, or the message.<sup>11</sup> The entire contents position was taken in LEO No. 1366, dated July 24, 1990, where all fees had been paid. See also LEO No. 1418, dated May 14, 1991. Another position taken is that a former client is generally entitled to receive only the lawyer's finished product in addition to the return of papers which the former client

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<sup>10</sup> 8 ALAS Loss Prevention Journal, supra., at 8 and 12.

<sup>11</sup> Id.

furnished.<sup>12</sup> Hence, the former client is not entitled to receive (i) the lawyer=s so-called workproduct, *i.e.*, recorded mental impressions, research notes, unfiled pleadings, working drafts, and internal memoranda, and (ii) administrative materials, *i.e.*, time and expense records, conflicts of interest memoranda, and client creditworthiness data.<sup>13</sup> Documents such as the lawyer=s personal research, drafts, and notes of interviews Areflect the candid, rough and blemished private thoughts of the lawyer [and] are the tools of the lawyer=s trade to which the client has no entitlement.@<sup>14</sup> The ABA Committee on Ethics and Professional Responsibility articulated a like view in ABA Informal Op. 1376, dated February 18, 1977:

[T]he lawyer need not deliver his internal notes and memos which have been generated primarily for his own purposes in working on the client=s problem.

A third position taken is that a lawyer may withhold his workproduct from his former client if the lawyer has not been paid, even though he must surrender the rest of the file regardless of payment. In LEO No. 1171, dated February 13, 1989, LEO No. 1101, dated September 29, 1989, and LEO No. 1339, dated May 8, 1990, the Committee observed that the client *purchases* his lawyer=s work product by the payment of legal fees. The implication from those opinions is that if the fees are unpaid, the client has not purchased and thus has no right to receive his former lawyer=s workproduct.

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<sup>12</sup> *Id.*

<sup>13</sup> *Id.*; ABA/BNA, *supra.*, at 41:2104-05. See generally Illinois State Bar Assoc. Op. 94-13 (Jan. 1995).

<sup>14</sup> *Federal Land Bank of Jackson v. Federal Intermediate Credit Bank*, 127 F.R.D. 473, 479 (S.D. Miss. 1989), *aff=d.*, 128 F.R.D. 182.

A no pay, no play rule has a simplistic appeal. However, DR 2-108(D)'s ethical duty to take steps for the continued protection of the client's interests does not distinguish between delivering workproduct and non-workproduct documents to a former client upon request. A[T]he paramount concern, at this Committee premised in LEO No. 1544, is the avoidance of prejudice to the client irrespective of payment of legal fees and costs advanced. With that premise as the polestar, workproduct in every form should be surrendered if withholding it would materially prejudice the former client's interests.<sup>15</sup> A determination of material prejudice is a fact-intensive inquiry. It is fair to say, however, that more is required to establish prejudice with respect to lawyer workproduct than to client-provided papers. The sense of the Committee is that, absent exigent circumstances, material prejudice does not occur simply because the successor lawyer has to create the workproduct, i.e., research, drafting, memoranda, witness interviews, etc., contained in the original lawyer's files. Doing so may be an inconvenience and an expense to the client, yet it does not rise to the level of material prejudice to the client's interests in the subsequent representation.

#### Protocol of File Surrender

A lawyer is permitted to ask a former client to sign a receipt that describes the documents delivered to the former client from his file. However, it is not ethically permissible for a lawyer to refuse to surrender documents until his former client signs a receipt. See LEO No. 1485, dated February 9, 1993. Nothing in DR 2-108(D) makes a receipt a condition of a former client's right to receive his file. If a lawyer has a concern about surrendering the file to his former client, the lawyer may make a copy thereof at his own expense or, if the file is voluminous, may code the documents surrendered with a sequential Bates stamp numbering in order to guard against alterations or substitutions after the documents are surrendered.

A lawyer is not a permanent storage facility for clients' closed or retired files, of course. Lawyers routinely age files and destroy them after the expiration of the aged retention period. Before client files are destroyed the lawyer should follow certain cautionary guidelines: screen the files to ascertain if they contain original documents of the client and if so, write to the client, offer to return the documents in the file, and, if necessary, explain the significance of documents the client may later need. See LEO No. 1305 dated November 21, 1989. As a practical matter, a former client's whereabouts may be unknown after the lapse of an aging period. Hence, the procedure outlined in LEO No. 1305 will be more effective if implemented at the conclusion of representation before the file is closed/retired to storage and later destruction. The manner of destruction should be consistent with the lawyer's on-going duty of confidentiality under DR 4-101(B).

DR 2-108(B) speaks to a lawyer delivering the former client's documents. Depending

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<sup>15</sup> See Minnesota Lawyers Professional Responsibility Board Op. No. 13, dated June 13, 1989; Bar Assoc. of San Francisco Formal Op. 1990-1. But lawyer probably not required to turn over uncommunicated workproduct where former client considering legal malpractice case. Bar Assoc. of San Francisco Formal Op. 1996-1.

upon the former client=s request, Adelivering@ may consist of giving him access to the documents at the lawyer=s office for his review and selection, making the documents available for pick-up at the lawyer=s office, or sending the documents to the former client by mail, messenger, UPS, etc. Adelivering@ is, in short, a rule of reason under the particular circumstances.

This compendium opinion is advisory only; it is not binding on any court or tribunal.

LEO Withdrawn  
Committee Opinion  
June 5, 1997

WITHDRAWN