

Ethics Opinion

000210

FACTS: Attorney B successfully represented to conclusion a sophisticated client in a criminal matter, but was paid only a small portion of the substantial bill incurred. Following the successful resolution of the criminal matter, the client retained a malpractice attorney C to pursue an earlier attorney A whose advice, it is claimed, created unnecessary difficulties with the criminal charges. Copies of documents had been given to client as the criminal case proceeded, however attorney B retained the file on the criminal matter, aware of the potential malpractice action and awaiting payment from the proceeds of that action. To assure payment, attorney B requested from client and malpractice attorney a consensual lien on the proceeds from the malpractice action. Malpractice attorney C refused, insisting that Rule 1.16(d) of the Montana Rules of Professional Conduct mandated that attorney B convey the file of the completed criminal case and threatened attorney B with suit if he refused. Attorney B initially refused to release the file, claiming a retaining lien under Rule 1.8(j)(3). Attorney B did not prevent access to materials in the file, and instead agreed to produce items in the file necessary to protect the client's interest in the malpractice action when the malpractice attorney C made specific written requests. Retention of the file was not included as a possible repercussion for non-payment of the bill for legal services in the written fee agreement entered between client and attorney B.

QUESTIONS PRESENTED: May an attorney retain a client's legal file until the bill for services is paid (or secured by bond or other collateral) if the client has not paid for the attorney's services and the file is necessary evidence in another action?

SHORT ANSWER: The Montana Rules of Professional Conduct recognize retaining liens under limited circumstances and where the client has agreed to such liens in writing. They are, however, generally disfavored.

DISCUSSION: In 1993, the Montana Supreme Court amended Rule 1.8 (a) and (j) and 1.16(d) of the Montana Rules of Professional Conduct to provide clarification on the issue of retaining liens. The 1993 amendments are reflected below with the old language stricken, and new language underlined.

RULE 1.8 Conflict of Interest: Prohibited Transactions:

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;

(2) in matters in which a lawyer wishes to assert a retaining lien against client property, papers or materials in the lawyer's possession to secure payment for the lawyer's services

and costs advanced relating to such property, papers or materials, the agreement for such a lien shall expressly set forth the limitations contained in paragraph (j) (3);

(3) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and

~~(3)~~ (4) the client consents in writing thereto.

* * *

(j) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien granted by law to secure the lawyer's fee or expenses; and and assert a charging lien only against causes of action or counterclaims in litigation pursuant to and only to the extent specified in MCA 37-61-420(2); such a charging lien does not extend to other client property, papers or materials in the lawyer's possession, to any matter not in litigation, or to any matter otherwise not covered by the specific language of MCA 37-61-420(2);

(2) contract with a client for a reasonable contingent fee in a civil ~~ease~~ case; and

(3) may not acquire or assert a retaining lien to secure payment due for the lawyer's services against any client property, papers or materials other than those related to the matter for which payment has not been made and, upon termination of representation, shall deliver to the client any client property, papers or materials reasonably necessary to protect the client's interest in the matter to which the property, papers or materials relate as provided in Rule 1.16(d).

RULE 1.16 Declining or Terminating Representation

* * *

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering 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 other law.~~ A lawyer is entitled to retain and is not obliged to deliver to a client or former client papers or materials personal to the lawyer or created or intended for internal use by the lawyer except as required by the limitations on the retaining lien in Rule 1.8(j). Except for those client papers which a lawyer may properly retain under the preceding sentence, a lawyer shall deliver either the originals or copies of papers or materials requested or required by a client or former client and bear the copying costs involved.

The 1993 amendments render Montana's Rules of Professional Conduct uniquely different from the Model Rules of Professional Conduct. The critical changes for purposes of this opinion are to Rule 1.8(a)(2), (j)(3) and 1.16(d). Also critical is the continued inclusion of Rule 1.8(a)(4), the requirement that the client consents in writing to the retaining lien. The other changes relate to the issue of statutory charging liens, also known as judgment liens, which are not at issue here.

The context of the 1993 rule change is critical to our understanding of retaining liens. Submitted with the petition to amend the rules was a "Statement of Principles for Resolution of Issues Between Lawyers and Clients and Former Clients Regarding Possession and Control of Client Property and File Materials." While not adopted verbatim by the Supreme Court, these principles (set out in the footnote below) were incorporated in full in the amendments set out above. While some clarity may have been lost in the manipulated sentence structure, the principles were instituted in their entirety.

Given this context, it is apparent that the Montana Supreme Court intended to recognize the existence of common law retaining liens, and that they intended to modify the Rules of Professional Conduct to provide some limitations to their application.

Applying the facts presented to the rules as amended leads us to conclude that because retaining attorney B does not have the client's written consent to the lien pending payment, attorney B is obligated to release the file. Had that element been satisfied, the Rules would have permitted the retention of the file, as the other element for retaining liens had been met. Attorney B was not seeking to retain any client papers other than those relating to the matter for which payment had not been made. Further, attorney B's representation of client in the criminal matter was complete and the issues finally resolved. Malpractice attorney C wants a copy of the file of the completed criminal matter, for which client has not paid. Yet, in an unprofessional manner, malpractice attorney C refuses to provide collateral or any assurance of payment. Loath as we are to reward uncivil and unprofessional behavior, attorney B's lack of a written agreement providing for a retaining lien causes us to conclude that attorney B must release the file. We note that as a matter of professional courtesy (see Standards of Professional Courtesy), malpractice attorney C should have agreed to provide some form of assurance of payment. Attorney C's malpractice action against attorney A cannot be accomplished without proof of damages, proof available in abundance through attorney B and his firm's attorneys' fees.

The decision to impose a retaining lien should not be made simply in the context of the Montana Rules of Professional Conduct, as there is a considerable body of common law outside of Montana on the topic. After a general statement discussing the availability of retaining liens, 69 ALR4th 974, entitled "Attorney's Assertion of Retaining Lien as Violation of Ethical Code or Rules Governing Professional Conduct," suggests retaining liens not be used without considerable attention to other considerations:

An attorney's assertion of a retaining lien in his client's property, however, may conflict with one or more of the attorney's ethical duties to his client and therefore constitute a violation of an ethical code or rules governing professional conduct. Courts have generally held that an attorney's assertion of a retaining lien in his client's property is not a per se violation of an ethical consideration or disciplinary rule. But in several

cases, the courts have ruled that it is unethical for an attorney to assert a retaining lien in his client's documents unless necessary to prevent fraud or gross imposition on the part of the client. In another case, the court concluded that it is unethical for an attorney to assert a retaining lien on otherwise unavailable documents or other tangible things without which his client cannot prosecute or defend his position or obtain his goal, for which the client would suffer serious disadvantages if the processes of the court were used to obtain the material. Finally, a court has held that when a client discharges her attorney, it is unethical for the attorney to assert a retaining lien in the client's files if the client is of limited resources and the files are of vital importance to processing the client's claim.

Id. at 979. The fraud and gross imposition standard mentioned in the ALR have its roots in the Ethical Considerations that were replaced by the Model Rules. That standard is parsed in two informal ABA Ethics Opinions, 1461 (decided in November 1980) and 86-1520 (decided in April 1986). In the 1980 Opinion, the ABA Ethics Committee explained:

The application of this [fraud and gross imposition] standard requires the lawyer to evaluate his or her interests against interests of the client and of others who would be substantially and adversely affected by assertion of the lien. The lawyer should take into account the financial situation of the client, the sophistication of the client in dealing with lawyers, whether the fee is reasonable, whether the client clearly understood and agreed to pay the amount now owing, whether imposition of the retaining lien would prejudice important rights or interests of the client or of other parties, whether failure to impose the lien would result in fraud or gross imposition by the client, and whether there are less stringent means by which the matter can be resolved or by which the amount owing can be secured. Even though a lawyer may be justified in declining to devote further time and expense on behalf of a non-paying client, it does not follow in all cases that he is ethically justified in exercising an attorney's lien.

ABA/BNA Lawyers' Manual on Professional Conduct at 801:306. In the 1986 Opinion, the Ethics Committee withdrew the 1980 decision explaining that the issue of retaining liens to secure a lawyer's fee is a question of law rather than of ethics. Despite the withdrawal, the standard as initially defined has taken root in many jurisdictions.

While our Montana Rules of Professional Conduct are unique on the issue of retaining liens, we caution any attorney contemplating the imposition of a retaining lien to take the fraud or gross imposition standard into consideration. Retaining liens should not be viewed as automatic remedy upon a client's failure to pay, even when an attorney has complied with the requirement of consent in writing of Rule 1.8(a)(4). There are no Montana Supreme Court decisions on the Montana Rules of Professional Conduct provisions concerning retaining liens as provided by the 1993 amendments. Attorneys should approach the remedy of retaining liens cautiously, taking into account other jurisdictions' additional considerations.

CONCLUSION: An attorney may retain a client's property, papers or materials in the attorney's possession to secure payment for the lawyer's services and costs advanced if the property, papers or materials relate to the lawyer's services and the client has agreed to imposition of such a lien

in writing. In the event an attorney wants to assure the option of a retaining lien, it would be wise to include in the written fee agreement retention of the file as a possible repercussion for non-payment of the bill for legal services. While we recognize the availability of retaining liens, we caution lawyers to use them sparingly and only after review of the legal standards that are continually evolving concerning their application.

THIS OPINION IS ADVISORY ONLY

END NOTES

1. Statement of Principles for Resolution of Issues Between Lawyers and Clients and Former Clients Regarding Possession and Control of Client Property and File Materials.

Section 1: A lawyer may assert a retaining lien, dependent upon possession, against client property, papers or materials in the lawyer's possession only to the extent permitted by this statement of principles.

Section 2: A lawyer may contract with a client for a retaining lien against client property, papers or materials in the lawyer's possession to secure payment for the lawyer's services related to such property, papers or materials except as limited by Sections 3 and 4.

Section 3: A client, upon termination of representation, is entitled under Rule 1.16(d) of the Rules of Professional Conduct, to delivery by the lawyer of client property, papers or materials reasonably necessary to protect the client's interests in the matter to which the property, papers or materials relate.

Section 4: A lawyer may not assert a retaining lien to secure payment due for lawyers' services against any client property, papers or materials other than those related to the matter for which payment has not been made.

Section 5: A lawyer may assert a charging lien under M.C.A. §37-61-420(2) only against causes of action or counterclaims in litigation and only to the extent specified in the statute. Such charging lien does not extend to other client property, papers or materials in the lawyer's possession; to any matter which is not in litigation; or any matter otherwise not covered by the specific language of M.C.A. §37-61-420(2).

Section 6: A lawyer is entitled to retain and is not obliged to deliver to a client or former client papers or materials personal to the lawyer or created or intended for internal use by the lawyer except as required by Section 3.

Section 7: Except as limited by Section 3, a lawyer shall have the option to deliver either the originals or copies of papers or materials requested or required by a client or former client. The cost of copying papers and materials delivered to the client or former client or retained by the lawyer shall be borne by the lawyer.