

# Ethics Opinion

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**QUESTION PRESENTED:** May an attorney retain a client's legal file if the client has not paid for the attorney's services, in view of the complex nature of some cases and possible close proximity of trial dates?

**ANSWER:** Yes.

**ANALYSIS:** The Rules of Professional Conduct adopted by the Montana Supreme Court themselves do not answer this question directly, leaving the answer to the appropriate controlling law. Rule 1.16(d) of the Rules of Professional Conduct is entitled "Declining or Terminating Representation" and the cited sub-section of the rule is quoted here in its entirety:

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonable 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 the fee that has not been earned. *The lawyer may retain papers relating to the client to the extent permitted by other law.* (Emphasis added.)

Under the premise that the Rules of Professional Conduct defer the question of whether or not an attorney can ethically retain a client's file in return for payment up to the controlling law, this question was researched.

Initially, two different classes of attorney liens are recognized by courts:

1. retaining or possessing liens; and
2. charging liens. The former is generally a common law lien, and is passive, not being actively enforceable in a court. It attaches to all books, papers and documents that come into the hands of the attorney. 7 Am Jur2d Attorneys at Law Section 315-322. The continuance of the attorney's retaining lien depends upon if the attorney keeps the documents; once they are voluntarily delivered, the lien may be lost.

The special or charging lien, set up by statute in Montana Section 37-61- 420 is given to the attorney in situations where he or she has performed services for a client resulting in an actual judgment or award being rendered in favor of the client. This charging lien may be directly and actively enforced.

When an attorney retains the file, rather than charges a lien, the general rule is that where the attorney did not terminate the relationship with the former client, the client cannot force the former attorney to deliver the documents which are the subject of the retaining lien unless the client pays the attorney fees or furnishes adequate security for the payment of what is due, or may be subsequently be found to be due. 3 A.L.R. 2d 148.

Since retaining liens are passive in nature, and they are not directly enforceable by court order, the question concerning their validity arises in cases where clients or former clients have filed some action seeking delivery of their papers in the face of a claimed lien. Cf. Morse v. Eighth Judicial District Court, 195 P.2d 199, 3 A.L.R. 2d 136 (1948, NV). In such situations, courts have generally refused to require the attorney to surrender the papers without the client's first paying the sum due or providing suitable security for it.

While the foregoing rule itself is well-established, the question becomes under what, if any, extenuating circumstances a court would require an attorney to produce the papers notwithstanding the existence of a retaining lien and the clients nonpayment or failure to furnish adequate security. The rule reflected in 3 A.L.R. 2d supra at p. 152 is as follows:

When, however, there is presented a case of necessity for possession of papers held by the attorney, as where they are necessary to the conduct of litigation in which the client is represented by another attorney, the court will usually, upon the condition that the client furnish adequate security for satisfaction of disputed claims of the replaced attorney, order the papers delivered over to the client.

Thus, even in cases of claimed necessity, courts still require the furnishing of security. The only American case listed as an exception to this rule involved a criminal case where the Defendant needed the papers in order to prepare an adequate defense.

It thus appears that the attorney may ethically retain the documents until the client makes payment for fees due or provides suitable security for the payment. Since the retaining lien is a passive one, the attorney would not be successful in attempting to enforce it in the court. The issue would be raised when and if client files some action seeking delivery of the papers, which client would be expected to do.

**THIS OPINION IS ADVISORY**