

# Ethics Opinion

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**QUESTION PRESENTED:** What are the rights of clients and attorneys relative to client files when representation ends?

**ANSWER:** They belong to the client.

**ANALYSIS:** Model Rule 1.16, Declining or Terminating Representation, provides:

(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 provided by law.

**OFFICIAL COMMENTS:**

(4) A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

(9) Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. The lawyer may retain papers as security for a fee only to the extent provided by law. Regardless of how a representation ends, a lawyer must take all appropriate measures to protect the client upon termination. If representation is ongoing and the lawyer is discharged, that lawyer must still protect the client's interests. The client's papers and property must be promptly surrendered to successor counsel.

Regardless of the possibility of asserting a lien (lien statutes are invariably narrowly construed because of the singular nature of the lawyer-client relationship), it is prudent to refrain from this course of action. Discharged lawyers have been disciplined when client's interests are abandoned to the client's detriment.

A client may terminate the lawyer-client relationship for any reason. A lawyer is required to protect the client's interests following termination. The lawyer must cooperate with substitute counsel to protect the client. A discharged lawyer cannot recover on the employment contract; the recovery, if any, is thereafter limited to quantum meruit. (This includes contingent fee contracts.) The reason for this rule is to protect the client's right to discharge; likewise a retainer agreement should not penalize the client.

When fee disputes are at issue the likelihood of acrimony is significant. It is not uncommon for clients to file malpractice suits to "get even".

The Model Rules do not define lawyer liens, but leave the inquiry to state law. Nevertheless, a lawyer who asserts a lien not clearly within the statute may be subject to civil liability. (See General Principle No. 3--lien statute strictly construed-- perhaps mishandling of property.) To hold otherwise would chill the client's right to discharge.

Retaining liens are discouraged and have been abolished in at least one state. (This lien attaches to the client's property, but does not necessarily apply to all property in the discharged lawyer's possession; it does not permit retention until payment for copying the file, which is the lawyer's own expense.) One court has held that a lawyer cannot refuse to turn over a client's file that had no substantive value to the lawyer. (See, *Academy of California Optometrists, Inc. v. Superior Court*, 51 Cal.App. 3d 999, 124 Cal.Rptr. 668 (1975).)

A charging lien is narrowly construed. (See Section 37-61<sup>4</sup>20, MCA.) This lien is generally a litigation or judgment lien; it does not apply to office practice matters. It is limited to fees incurred in the cause that results in the judgment and does not encompass different matters.

Retention of client files when they have been requested is seldom justified. The former attorney can withhold former client's files for duplication, but may not withhold the files any longer than necessary for this purpose; in any event, they must be surrendered in ample time to permit protection of the client's interests by a successor attorney.

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