

### The Retaining Lien - Does It Exist?

The answer is yes, but...

The retaining lien is a lien created by Colorado statute. It allows an attorney to keep any of a client's papers which came into the attorney's possession during his or her professional employment. These papers are relinquished to the client after payment of "a general balance of compensation." C.R.S. §12-5-120.

A review of cases construing this statutory provision leads one to conclude that the statute means exactly what it says and that attorneys possess a powerful tool to compel payment of fees actually earned up to the time the lien is asserted. The Colorado Supreme Court said so.

In *Jenkins v. District Court*, 676 P.2d 1201 (Colo. 1984), the Colorado Supreme Court stated:

There is little doubt that an attorney who withdraws from a case for justifiable reason, or is terminated by his client without cause, may recover compensation for his services. In such situations the attorney has the right to a retaining lien upon the books, papers, securities, and money of his client in his possession.

This should be the end of the inquiry, right? But, of course, things are never that simple. Imposed on the statutory lien are a host of ethical considerations which complicate the question.

To begin with, a formal opinion on this issue was adopted by the Ethics Committee of the Colorado Bar Association. (*Formal Opinion 82*, Adopted 1989, Addendum issued 1995.) This Opinion suggests that two Rules of Professional Conduct be considered, 1.8(j) and 1.16(d). Rule 1.8(j) states that "the lawyer may acquire a lien granted by law to secure the lawyer's fee or expenses." Rule 1.16(d) reads as follows:

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 law.

The first part of this section seems to take away any retaining lien but the last sentence gives it back. One isn't given a clear idea of what can or cannot be done. So...

#### **When are retaining liens *not* allowed?**

The drafters of *Formal Opinion 82* concluded that an attorney may **not** ethically assert a retaining lien if:

1. There is no legal basis for assertion of the lien.
2. The lawyer has been suspended or disbarred. (*MacFarlane v. Harthun*, 581 P.2d 718 (Colo. 1978).)
3. The attorney is guilty of "misconduct" in the particular matter; however, a lien may be asserted in other matters in which there has been no misconduct. (*MacFarlane v. Harthun*, *supra*.)
4. It is prior to the completion of the case in a contingency fee case. (This section does not address whether or not an attorney can assert a retaining lien for costs incurred up to the time the attorney is removed from the case. It would seem that a valid lien could be

- asserted for costs since the client has usually executed a contingency fee agreement contracting to pay the costs separate and apart from any recovery.)
5. A client who cannot pay the fees furnishes adequate security, or posts an adequate bond.
  6. The client's papers are essential to preserve an important personal liberty interest, i.e. criminal matters.
  7. The lawyer withdraws without just cause or reasonable notice.
  8. The lawyer is validly discharged for "professional misconduct," or conduct prohibited by the Rules of Professional Conduct.
  9. The client is financially unable to post a bond or pay, unless the client's inability to pay or post bond is a result of fraud or gross imposition by the client. (*Jenkins v. Weinshienk*, 760 F.2d 915 (10th Cir. 1992).)

The American Bar Association (ABA) has weighed in by stating that the attorney should forgo the lien if the client is financially unable to pay, especially if the attorney knew this from the outset and didn't make adequate provisions to avoid the problem. (Informal Opinion No. 1461.) Other jurisdictions consider the lien to be available only as a last resort on the basis that the professional rules direct that a lawyer must zealously avoid conflicts with clients over fees.

The American Law Institute (ALI) has been working on a "Restatement Of Law Governing Lawyers." The restatement's section on lawyer's liens states:

(1) Except as provided in Subsection (2) or by statute or rule, a lawyer *does not acquire a lien entitling the lawyer to retain the client's property* in the lawyer's possession in order to secure payment of the lawyer's fees and disbursements. A lawyer *may decline to deliver to a client or former client an original or copy of any document prepared by the lawyer or at the lawyer's expense* if the client or former client has not paid all fees and disbursements due for the lawyer's work in preparing the document and nondelivery would not unreasonably harm the client or former client. (Emphasis added.)

The comment section acknowledges that the "decisional law" of most jurisdictions recognizes retaining liens and that ALI is adopting a minority position. The drafters indicate that a lien, while designed to protect the lawyer's legitimate interest in receiving compensation, has so many drawbacks that it proves to be without any advantage. The drafters also indicate that the retention of client papers creates at least a potential conflict with the lawyer's fiduciary duty. In addition, a broad-based retaining lien could impose pressure on a client greatly disproportionate to the validity or size of the fee claim. The restatement then specifically states that retaining liens are not recognized under the restatement except as authorized by statute or under certain exceptions discussed in this section.

In the end, *does* a retaining lien exist in Colorado? The statute and the cases construing the statute lead one to conclude that indeed the lien is available. But consideration of the ethics opinions and the position taken by the American Law Institute may make one think otherwise. It is clear that before an attorney asserts such a lien, a careful analysis must be made to avoid disciplinary exposure. Each particular situation should be evaluated on the existing facts. It is advisable to seek an opinion from someone disinterested in the fee and whose wisdom you respect before invoking a retaining lien.

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Article by Michael Ludwig of Wood, Ris & Hames, P.C.

### **Malpractice Prevention Tips on Billing**

1. Review your case thoroughly before you sue for fees. The Colorado Bar Association's legal malpractice program shows that when an attorney sues for fees, 48% of the clients counter sue for legal malpractice.
2. Bill your clients frequently with clear, concise statements. If a receivable falls into arrears, call your client to determine the issues at hand. If the client's payment situation becomes a problem, have an attorney other than the billing partner become the primary contact person to resolve the issue. This attorney may be more objective to assist the situation.
3. Revise your client intake procedures. Many fee problems can be avoided by consistent use of good client intake procedures.
4. Never let your clients billing questions go unanswered. Anticipate and answer questions before they are even asked. In 18% of the CBA-endorsed Lawyer Professional Liability Program claims, billing is an issue. There may not be an actual overbilling — only a perception of one. But if the client is always well-informed, a malpractice case may be less likely.

### **Claim of the Quarter**

#### **I. FACTS**

Mike and his partners had a medium-sized law firm that specialized in commercial litigation and tax law. Although Mike's firm had a strong client base, he had recently noticed that several clients over the past year had changed firms because of the increasingly competitive hourly rates for attorneys in the Denver area. At their last meeting, Mike and his partners had brainstormed about ways to keep their current clients at the same hourly rate while continuing to grow their business. Mike suggested that the firm should offer to provide annual prepaid legal services, which would provide the firm's clients with competitive rates based upon the amount of legal work required over an annual period, while providing the firm with a solid income stream at the beginning of each year. Consequently, Mike's firm signed up several clients to annual flat-fee contracts.

Over the ensuing year, "Widgets 'R' Us," one of the clients that had taken the flat-fee agreement, sent several contractual disputes to the firm for Mike to handle. In two of the disputes that Widget had sent over, Mike discovered that the firm had a conflict of interest in light of relationships with the parties adverse to Widget. To resolve this problem, Mike contacted Ed, a transactional lawyer who was a former law school classmate of his and who had recently formed a firm in Denver. Mike offered to pay Ed a flat fee to handle the two Widget cases, and Ed agreed. After lengthy negotiation and hand-holding, Widget also agreed to allow Ed to handle their cases, based upon assurances from Mike that Ed was a competent transactional lawyer (although not quite as good as Mike).

Unfortunately, Ed turned out to be less than a competent litigator. Ed failed to keep Widget informed of several offers to settle the contractual dispute and failed to timely name experts in one of the Widget cases. Widget eventually lost both of the contractual disputes based clearly upon Ed's errors. Consequently, in addition to pulling their business from Mike's firm, Widget filed suit against both Ed and Mike for legal malpractice.

#### **II. WHAT MIGHT HAVE BEEN DONE DIFFERENTLY**

Although flat fees can be an attractive compensation structure for both law firms and clients, extraordinary care must be taken in referring cases that a firm cannot or will not handle under the flat-fee agreement. Attorneys should clearly explain why they are unable to handle certain work and either allow the client to choose alternative counsel, or give clients several options as to alternative counsel based upon a clearly documented, objective basis. Attorneys then must

undertake the difficult process of either refunding money to clients for cases that are not being handled under the flat-fee agreement or hammering out a deal with the new firm as to compensation.

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The claim of the quarter is a composite description based upon claims both inside and outside Colorado. Substantive laws or principles may be unique to the jurisdictions in which the claim arose and not necessarily applicable in Colorado.