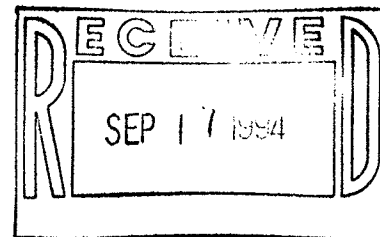


NEW HAMPSHIRE BAR ASSOCIATION

Attorney Liens

Ethics Committee Formal Opinion  
2/17/82



Reviewed by Board of Governors 3/25/82

I. QUESTION: Does an attorney have the right to a lien for his services against assets or the file of the client, or against a settlement or other funds to be received by the client for his services and expenses?

A. Specific areas of concern:

1. What constitutes a "lien."
2. A lien against the material in the file when the file is requested by a client when an attorney is discharged.
3. A lien against the proceeds or expectancies to be received by a client when an attorney is discharged by a client.
4. A judicially approved lien against assets of a client by an attorney for unpaid bills with respect to services and costs.

II. Definition of a "Lien"

- A. Within the context of this Opinion a "lien" should be considered any attempt by an attorney to encumber any property of the client, including an expectancy, without the benefits of the judicial process. An attempt to encumber shall include all correspondence, notices or communication designed to restrict, limit or hinder a client's assets or his right, title and interest in an expectancy settlement or property in his possession or control of a third party.

III. Does the attorney have a lien against the material in the file when the attorney no longer represents the client and the client requests the file?

- A. This question is of equal import irrespective of whether the withdrawal is by the choice of the attorney or by mandate of the client.

DR 2-110 (A) (2) states that a lawyer shall not withdraw from employment "...until he has taken reasonable steps to avoid foreseeable prejudice to the rights of his client, including ... allowing time for employment of other counsel, delivering to the client all papers and property

to which the client is entitled and complying with applicable laws and rules." Opinions of other Bar Associations have applied this DR also to situations in which a client terminates his attorney's services.

It would appear from this Rule that, because an attorney has an obligation to take care that he not prejudice the rights of his client in the case, in no event is an attorney justified in withholding papers and property which are essential to try the case, perfect the appeal, settle the claim or otherwise assist in effecting a favorable outcome. Therefore, an attorney is not entitled to withhold the file of the client when the file is requested by the client; No "lien" on the file is permitted; the attorney may retain copies of all materials in the file.

IV. Is an attorney entitled to a "lien" against the proceeds, expectancy settlement amount or other property to be received by the client when an attorney is discharged by the client?

A. With respect to the case in which the attorney was formerly involved, an attorney may not assert any lien either for costs, expenses, disbursements, or for services rendered if the assertion of the lien will foreseeably prejudice the rights of the client. (See DR 2-110(A)(2)). However, Canon 5 (EC 5-7) permits the attorney to assert a legally permissible lien and DR 5-103 states that an attorney may "acquire a lien granted by law to secure his fee or expenses." The Committee can render no opinion on New Hampshire law concerning the nature of legally permissible attorneys lien but refers to RSA 311:13 and Peterson v. Reiley 105 NH 340 (1964) for the existence of such liens. An attorney may assert such liens to the extent they are legally permissible and do not foreseeably prejudice the client's rights in the case.

V. May an attorney utilize the judicial process to assert a lien against assets of a client for unpaid attorneys fees?

A. Attorneys may utilize the judicial process to collect unpaid fees including court ordered liens under aforesaid DR 5-103, but the ethical considerations of Canon 2 (EC 2-23) state that an attorney should not sue a client for a fee unless "necessary to prevent fraud or gross imposition by the client."