

## Utah Ethics Opinions

1989.

### 91. USB EAOB Opinion No. 91

Utah State Bar

Ethics Advisory Opinion Committee

Opinion No. 91

Effective Date May 17, 1989

**Issue:** Is it ethically proper for an attorney to retain a client's file and other papers and documents belonging to the client, because the client has refused to pay the attorney's fees?

**Opinion:** The Utah Rules of Professional Conduct permit attorneys to exercise a common-law retaining lien to papers and documents belonging to the client, because the client has not paid the attorneys' fees, when either the attorney has been wrongfully discharged by the client or has withdrawn from the representation for good cause. Attorneys are cautioned, however, that withdrawal must be accomplished in a manner that is consistent with the other requirements of Rule 1.14.

**Analysis:** Utah Rule of Professional Conduct 1.14(d) provides that an attorney withdrawing from representation may retain papers relating to the client to the extent permitted by other law. Because several Utah cases do recognize a common-law attorneys' retaining lien, use of the lien cannot be regarded as per se improper under Rule 1.14.

In the specific case for which this opinion is requested, the firm has a regular practice of invoking a common-law retaining lien to secure unpaid attorneys' fees and unreimbursed expenses when the attorney either has been wrongfully discharged by the client or has withdrawn for good cause. In April 1986, the attorneys undertook to represent clients in a real estate matter; suit was filed in May 1986. In July 1987, the attorneys withdrew from the representation, allegedly because the clients unreasonably failed to follow their advice, failed to pay agreed-upon fees, and failed to reimburse costs and expenses as agreed. Both at the time of the withdrawal, and in November 1987, the clients demanded return of their file and documents. The attorneys denied the request until the clients paid their bill. The lawsuit is pending. The clients complained to the Bar about the attorneys' refusal to release their file and about another matter. On January 15, 1988, Bar Counsel instructed the attorneys that they should release the clients'

file immediately because the lawsuit was pending. The attorneys have requested this advisory opinion from the Bar about the propriety of their policy of invoking the retaining lien.

Under the Utah Code of Professional Responsibility, Bar Counsel has taken the position that even in cases of proper withdrawal or wrongful discharge, the attorney is required to return the client's file and papers within a reasonable time, no matter what other circumstances exist. DR 2110(A)(2) provides that in all cases of withdrawal the lawyer must take "reasonable steps to avoid foreseeable prejudice to the rights of his client, including . . . delivering to the client all papers and property to which the client is entitled . . . ." In addition, DR 7101(A)(3) prohibits the lawyer from intentionally prejudicing or damaging the client and DR 9102(B)(4) requires the lawyer to deliver promptly to the client any "properties in the possession of the lawyer which the client is entitled to receive."

Under the Utah Rules of Professional Conduct 1.14(d), effective January 1, 1988, when representation is terminated, "a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as . . . surrendering papers and property to which the client is entitled . . . ." In addition, "[t]he lawyer may retain papers relating to the client to the extent permitted by other law." ABA Informal Opinion 861520 likewise concludes that whether attorneys may assert retaining liens is a matter to be determined under state law. ABA Informal Opinion 861520 also cautions, however, that while representation continues, the lawyer must act with reasonable diligence (*see* Utah Rule of Professional Conduct 1.3); withdrawal must be otherwise proper; and the lawyer upon withdrawal must take appropriate steps to protect the client's interests generally.

Several earlier Utah cases recognize the attorney's common-law retaining lien on files, records, and client's papers, even in the course of ongoing litigation. (fn1) These cases caution, however, that the retaining lien may be invoked only when the lawyer is wrongfully discharged or withdraws for good cause. (fn2) During the representation, the attorney is at all times required to act with reasonable diligence in representing the client under Utah Rules of Professional Conduct 1.3.

The attorneys' practice of invoking the retaining lien, therefore, is ethically proper only when the attorneys are wrongfully discharged by the client or withdraw for good cause under Utah Rules of Professional Conduct 1.14.

In adopting this opinion, the Board has also recommended that a Petition for Amendment of Rule 1.14 be filed with the

Utah Supreme Court to clarify the attorney's duty to the client in returned documents and papers upon termination of representation.

**Footnotes**

1. *Flake v. Frandsen*, 578 P.2d 516 (Utah 1978); *Midvale Motors v. Saunders*, 442 P.2d 938 (Utah 1968).

2. *Midvale Motors*, 442 P.2d at 940.

**Rule Cited:**

**1.14**