

FORMAL OPINION NO 2005-90

Client Property: Attorney Liens

Facts:

Lawyer *A* represents Client *A* in litigation. Lawyer *B* represents Client *B* in litigation.

Lawyer *A* is fired by Client *A* shortly before trial and is granted leave to withdraw as counsel of record. Lawyer *B* seeks leave to withdraw for nonpayment of fees, and leave is granted. Both Client *A* and Client *B* hire other counsel to protect their interests, and their respective cases continue.

Both Lawyer *A* and Lawyer *B* are owed substantial fees by their clients and both have in their possession documents and information of critical importance to their clients' cases, which the clients cannot practically duplicate or replace.

Questions:

1. May Lawyer *A* retain client documents or information until all past-due fees are paid?
2. May Lawyer *B* retain client documents or information until all past-due fees are paid?

Conclusions:

1. Yes, qualified.
2. Yes, qualified.

Discussion:

Oregon RPC 1.16(a)(3) requires a lawyer to withdraw if the lawyer “is discharged.” Oregon RPC 1.16(b)(5) permits the lawyer to withdraw if

the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer’s services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled.

See also OSB Formal Ethics Op No 2005-1.

In either case, the terms and conditions of withdrawal are governed by Oregon RPC 1.16(c) and (d):

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(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 or expense that has not been earned or incurred. The lawyer may retain papers, personal property and money of the client to the extent permitted by other law.

See, e.g., In re Biggs, 318 Or 281, 864 P2d 1310 (1994) (lawyer ceased practicing law without taking steps necessary to avoid prejudice to existing clients); *In re Devers*, 317 Or 261, 855 P2d 617 (1993) (lawyer disciplined for failing to deliver to client all papers to which client was entitled); *In re McKnight*, 9 DB Rptr 17 (1995) (lawyer disciplined for failure to refund unearned portion of retainer promptly on withdrawal from employment); *In re Passannante*, 16 DB Rptr 310 (2002) (lawyer who ceased working on client’s legal matter without notice to client and without returning file to client effectively withdrew in violation of *former* DR 2-110(A)(2)); *In re Covert*, 16 DB Rptr 87 (2002) (lawyer violated *former* DR 7-110 by withdrawing from bankruptcy representation without obtaining bankruptcy court’s permission).

On the facts as presented, the requirements of Oregon RPC 1.16(c) have been met, and the portion of Oregon RPC 1.16(d) relating to refunding any unearned advance payments does not apply. Thus, it is only necessary to consider the application of the remaining portion of Oregon RPC 1.16(d) relating to return of client documents or property. *See also* Oregon RPC 1.15-1(d).¹

ORS 87.430 creates an attorney's possessory lien on client papers and property, and ORS 87.435 and ORS 87.440 provide a procedure by which a client may file a surety bond and obtain discharge of the lien.² If the lien is otherwise valid and if the client has sufficient resources to pay the lawyer what is due but chooses neither to make payment nor to file a bond, the lawyer may lawfully withhold the client's materials. If, however, the client does not have sufficient resources to pay the lawyer in full and if surrender of the materials is necessary to avoid foreseeable prejudice to the client, the attorney lien must yield to the fiduciary duty that the lawyer owes to the client on payment of whatever amount the client can afford to pay. *Compare* Thomas G. Fischer, Annotation, *Attorney's Assertion of Retaining Lien as Violation of Ethical Code or Rules Governing Professional Conduct*, 69 ALR4th 974 (1989) (supple-

¹ Oregon RPC 1.15-1(d) provides in pertinent part:

(d) . . . Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client . . . any funds or other property that the client . . . is entitled to receive and, upon request by the client . . . , shall promptly render a full accounting regarding such property.

² See also ORS 87.445 to 87.490, regarding liens on actions and judgments. With respect to the difference between "retaining" and "charging" liens, see *Lee v. Lee*, 5 Or App 74, 482 P2d 745 (1971). We do not believe that the existence of ORS 9.360 and ORS 9.370, which provide a procedure in which clients can obtain a court ruling requiring the return of their papers or property, compels the conclusion that it necessarily is ethical for lawyers to retain client papers or property until a court so orders. *Cf. In re Arbuckle*, 308 Or 135, 139, 775 P2d 832 (1989) (disciplining lawyer who had not "attempted to justify his failure to return the property by any claim of privilege or right"). Among other things, there will be clients whose very lack of resources or abilities will render this remedy unavailable.

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mented periodically), and sources cited; Washington Advisory Op No 181 (1987) (available at <www.wsba.org/resources-and-services/ethics/advisory-opinions>).

Approved by Board of Governors, August 2005.

COMMENT: For additional information on this general topic and other related subjects, see *The Ethical Oregon Lawyer* § 3.4-11 (addressing withdrawal or discharge in fee agreement), § 3.5-1(a) to § 3.5-1(b) (security for payment of fees), § 3.5-6(c) (payments upon discharge or withdrawal), § 4.1 to § 4-2-2(d) (withdrawal), § 4.3 (mandatory withdrawal), § 4.3-3 (discharge by the client), § 4.4 to § 4.4-3 (permissive withdrawal), § 12.3-7(b) (payment of attorney fees from lawyer's trust account), § 12.4-1 to § 12.4-2 (client property) (OSB Legal Pubs 2015); *Restatement (Third) of the Law Governing Lawyers* §§ 17, 31–33, 40, 43–46 (2000) (supplemented periodically); and ABA Model RPC 1.15–1.16.