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## Professionalism Committee

David W. Long, Chair

### Hostage Files

Imagine a client discharges you on the eve of settlement, only to close the deal on his own. Suppose you spend countless hours on a contingent fee case, only to be discharged prior to judgment. Under these circumstances, lawyers have little, if any, recourse for collecting their legal fee short of suing their clients.

Now, the same client who has refused to pay your fee demands his file. Is it ever appropriate to withhold a client's file to secure a fee?

The answer is a resounding no. North Carolina courts have not recognized the use of a "retaining lien," — a lien on the documents or files in the attorney's possession to secure payment of a legal fee. The Revised Rules of Professional Conduct (hereafter "Revised Rules") and several ethics opinions exploring this issue also consistently have rejected such an assertion.

Revised Rule 1.16 obligates an attorney whose employment is terminated to surrender to the former client "all papers . . . to which the client is entitled . . ." With the exception of an attorney's own notes and incomplete work product, the client is entitled to originals or copies of anything in

the file that would be helpful to a successor attorney. Revised Rule 1.16, Comment [11]; CPR 3, RPCs 169 and 178. Moreover, the attorney must foot the bill if the attorney wants to keep a copy of the client's file for his or her own records.

What if the client requests copies of original documents, such as deeds or wills, that the attorney has already delivered to the client during the course of representation? Pursuant to RPC 178, the attorney has fulfilled his or her obligation to the client with respect to those original documents. If the attorney only kept *copies* of the original documents provided to the client, the attorney may charge the client for any additional copies requested. *See* RPCs 169 and 178. The attorney also may charge a client for the actual cost of retrieving a closed client file from storage. *See* 98 F.E.O. 9. The attorney, however, may not condition the delivery of such copies upon payment of legal services or copying expenses. *Id.*

Suppose the attorney has copied the client on documents, such as correspondence and pleadings, during the course of representation. The true originals may be in the hands of third parties or a court. The Rules and

ethics opinions suggest that a discharged attorney is still obligated to produce these duplicate documents to the client. For example, Comment 11 to Revised Rule 1.16 appears to require the copied documents be provided to the client because they would assist a successor attorney in the client's representation. Besides, the client, assuming the attorney was keeping all documents in the law firm's file, may have discarded the copies of correspondence or pleadings provided in piecemeal fashion by the attorney. Again, a discharged attorney may reproduce these copied documents for his own use, but may not charge the client.

While this result may appear unfair to the discharged attorney, the rule places a higher value on the policy of client choice in legal representation. Any other result would be extortionate, would likely deprive the client of subsequent effective legal assistance, and would chill the client's right to terminate a representation in favor of a different lawyer.

*Submitted by Deanna S. Broucker, assistant ethics counsel for the North Carolina State Bar, and Douglas J. Broucker, deputy counsel for the North Carolina State Bar.*