

ADVISORY COMMITTEE
MISSOURI BAR ADMINISTRATION

FORMAL OPINION #115, as amended

ATTORNEY MAY NOT WITHHOLD PROPERTY BELONGING TO HIS CLIENT TO ENFORCE PAYMENT OF FEES OR EXPENSES.

Question: May a Missouri Attorney ethically withhold from his client papers, books, documents or other personal property which belong to the client and came to the attorney in the course of his professional employment to enforce payment of fees or expenses owed to the attorney by the client?

Answer: It is the opinion of the Advisory Committee that under the Rules of Professional Conduct, such action by an attorney is improper. The Advisory Committee is of the opinion that the file belongs to the client, from cover to cover, except for those items contained within the file for which the attorney has borne out-of-pocket expenses such as, but not limited to, transcripts. The attorney may retain those items until such time as he is reimbursed for the out-of-pocket expense and then they must be immediately delivered to the client. Those items which have commonly been denominated as "work product" of the attorney actually belong to the client because those are the result of services for which the client contracted.

The basis given for such action by attorneys in Missouri has been the so-called Attorney's Common Law Retaining Lien, said lien having existed in the English Common Law and being recognized in a number of states of which Missouri is not one. It is strictly a passive lien inasmuch as the attorney has no power to enforce payment other than to embarrass, inconvenience or to cause worry to the client by the withholding of his papers. The legal question of whether or not the Attorney's Common Law Retaining Lien exists has not been affirmatively answered by the Missouri Courts.

The Advisory Committee recognizes the Statutory Attorney's Lien created in Missouri by the act of 1901 and it, in no way, is affected by this Opinion. This Lien is embodied in Sections 484.130 and 484.140 of the Missouri Revised Statutes 1986. It has been held to give the attorney a lien on the fund or funds produced for the client by his action where he filed a petition or counterclaim and/or where he has given sufficient notice to the defendant of the existence and nature of his contract with the plaintiff.

Even if the Attorney's Common Law Retaining Lien were deemed to be in existence, the question of the ethical propriety of its exercise must still be answered with reference to the Rules of Professional Conduct. The situations under which this question normally arise will be where the attorney has withdrawn from the representation of his client or where the client has discharged the attorney because the representation has been

completed or prior to the time of the completion of the representation. For purposes of this discussion, however, the aforementioned situations do not differ inasmuch as Rule 1.15(b) of Missouri Supreme Court Rule 4 states "Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. 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 or third person any funds or other property that the client or third person is entitled to receive and, upon request of the client or third person, shall promptly render a full accounting regarding such property." Furthermore, Rule 1.16(d) of Rule 4 of the Missouri Supreme Court Rules states that "Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interest, 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 other law." (Emphasis added) If a lawyer wishes to keep a copy of the file for his own use or protection, then the lawyer must bear the costs of copying the file.

The above quoted disciplinary rules require the lawyer to turn over such property to which the client is "entitled". It could be argued that the disciplinary rules constitute an exception which would include the property over which the lawyer has a recognized lien. However, in the opinion of the Advisory Committee, for a lawyer to force payment of his fees or expenses by resorting to a lien which can only be effective by causing embarrassment, inconvenience or worry to his client is for the lawyer to act in a manner totally inconsistent with the above-cited disciplinary rules and, further, is inconsistent with the spirit of his professional responsibility. This is particularly true since other methods are available for use by an attorney for the collection of those fees and expenses to which he may be legally entitled.

Adopted March 4, 1988