

1979 WL 42881 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

March 23, 1979

*1 E. W. Laney, III
Chairman
Board of Commissioners on Grievances and Discipline
Post Office Box 11330
Columbia, South Carolina 29211

Dear Mr. Laney:

You have asked whether an attorney who, after being discharged by his client, refuses to release the client's file until he is paid is acting unethically. In Formal Opinion No. 209, the American Bar Association's Committee on Professional Ethics concluded that the question you present is one of law and does not ordinarily present an ethical issue. An exception was recognized in cases of flagrant overcharges. See, Formal Opinion No. 209, supra.

DR 5-103(A)(1) of the Code of Professional Responsibility (Rule 32, Rules of the Supreme Court of South Carolina, Code of Laws of South Carolina, 1976) recognizes the right of an attorney to acquire a lien granted by law to secure his fee or expenses. South Carolina does recognize the common law general or retaining lien. [Keels v. Powell](#), 207 S.C. 97, 34 S.E.2d 482 (1945); [Perry v. Atlantic Coast Life Insurance Company](#), 166 S.C. 270, 164 S.E. 753 (1932) (dictum). The lien is defined in 7 C.J.S. Attorney and Client § 210 (1937):

The general or retaining lien of an attorney is his right to retain possession of all documents, money, or other property of his client coming into his hands professionally until a general balance due him for professional services is paid.

The lien cannot be actively enforced. It is a passive right which allows the attorney to merely retain property of the client until he is paid. 7 Am.Jur.2d, Attorneys at Law § 280 (1963). In general, the lien is not lost or destroyed by the mere fact that the client discharges the attorney. However, it is recognized that the lien may be lost if the discharge is for good cause. 7 Am.Jur.2d, Attorneys at Law § 278 (1963). A determination of whether a particular discharge was or was not for cause is, of course, too dependent upon individual fact situations to attempt to discuss here. Please see the Annotation, '[Rights and Documents on which Attorney has Retaining Lien](#)', 3 A.L.R.2d 148, § 5 (1949) for a short discussion of this point. Furthermore, there is a line of decisions requiring an attorney to release the client's papers where a case of necessity is presented. Annotation, supra, § 3. See, e.g., Brauer v. Hotel Associates, Inc., 40 N.J. 415, 192 A.2d 831 (1963) for a general discussion of the retaining lien and a recognition that a court may require the client's papers to be released for cause.

In conclusion, the ABA's treatment of the attorney's retaining lien issue as being a legal rather than an ethical question and the absence of recent litigation in the South Carolina courts in regard to such liens, prevents a definitive answer in regard to the ethical question which you have posed. However, it is the opinion of this Office that an attorney may retain his client's file until his fee is paid, unless such retention would foreseeably prejudice the client's cause. Cf., DR 2-110(A)(2) of the Code of Professional Responsibility.

Very truly yours,

*2 Richard B. Kale, Jr.
Assistant Attorney General

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