



NEW YORK STATE BAR ASSOCIATION

ONE ELK STREET ALBANY, NEW YORK 12207 TEL. (518) 463-3200

Committee on Professional Ethics

Opinion 591 - 5/3/88 (5-88)

Topic: Retaining lien; release of malpractice claims.

Digest: Proper for lawyer to negotiate a release of professional malpractice claims only if stated conditions satisfied. Improper to assert retaining lien on client's papers to enhance negotiation of release.

Code: DR 6-102(A), 2-110,
5-103(A)(1);
EC 2-23, 5-7.

QUESTIONS

1. When a client and a lawyer terminate their relationship as a result of a client's dissatisfaction with the lawyer's services or the amounts billed, may the lawyer negotiate for a release of malpractice claims by offering a compromise or release of the lawyer's outstanding bills?
2. May the lawyer assert a retaining lien on the client's papers pending the completion of such negotiations?

OPINION

A lawyer may ethically negotiate with a former client for the settlement or release of potential malpractice claims, but only after the lawyer takes specific steps to insure that the negotiations are fair. DR 6-102(A), precluding a lawyer from seeking exoneration on or a limitation of liability for personal malpractice, has been interpreted as applicable to future representation. It does not in all circumstances bar a lawyer from seeking a release or compromise of liability for past conduct. See, N.Y. State 275 (1972); A.B.A. Inf. 1010 (1967); Mass. Op. 82-1 (1982) indexed in ABA/BNA Lawyers' Manual on Professional Conduct 801:4604; Maine Op. 68 (1986), indexed in ABA/BNA Lawyers' Manual on Professional Conduct 901:4202; see also *Matter of Tallon*, 86 A.D.2d 897 (3d Dep't 1982).

An agreement limiting or releasing a lawyer's liability for malpractice is proper only if all of the following conditions have been met before negotiations for such agreement are undertaken:

1. A client has been fully apprised of the facts pertaining to the representation that may give rise to specific claims against the lawyer;
2. the lawyer has been discharged or has withdrawn from the representation in accordance with DR 2-110; and
3. the lawyer has advised the client to secure independent counsel in the negotiation and consummation of such an agreement.

Cf. A.B.A. Inf. 1010 (1967); N.Y. State 275 (1972).

The advice to secure independent counsel should normally be in writing. *See* Wisconsin Op. 85-12 (1986).

Turning to the second question, the Committee is of the opinion that a lawyer may not ethically assert a retaining lien on a client's papers to enhance the lawyer's ability to negotiate for a general release. Fair negotiations over a release are not possible while the lawyer retains a position of advantage by withholding the client's papers.

A lawyer's retaining lien is a possessory lien recognized in common law. *Robinson v. Rogers*, 237 N.Y. 464 (1924); *Matter of Heinsheimer*, 214 N.Y. 361, 364 (1915); *see* Note, Attorney's Retaining Lien Over Former Client's Papers, 65 Colum. L. Rev. 296, 301 (1965). This lien may, in proper circumstances, extend to papers and property delivered by a client, as well as to papers created by the lawyer or others during the course of the representation. Subject to the need to protect against immediate harm to the client, an unpaid lawyer may have the right to retain such papers or other property until the client pays the fees or provides adequate security. *Lebovic v. P. Ballantine & Sons, Inc.*, 12 A.D.2d 494 (2d Dep't 1960); *Taraborelli v. Vinciquerra*, 25 A.D.2d 544 (2d Dep't 1966); *Matter of Mongitore v. Murphy*, 42 A.D.2d 800 (3d Dep't 1973). As this Committee noted in N.Y. State 567 (1984), "the Code permits a lawyer to protect his right to collect a fee by asserting legally permissible liens. DR 5-103(A)(1) and EC 5-7."

A lawyer may assert a retaining lien pending resolution of a fee dispute, so long as the lawyer also acts in accord with EC 2-23 to resolve the fee dispute amicably. N.Y. State 567 (1984). The inconvenience and annoyance of a retaining lien, however, should not be inflicted lightly. The lawyer should first be satisfied that the fees billed are justly owed for services properly rendered.

In summary, if a lawyer wants to obtain a release as protection from malpractice claims, the lawyer should first return the client's files and satisfy each of the conditions listed above. The lawyer may not retain the client's files as a bargaining chip to secure a release. N.Y. State 339 (1974).

CONCLUSION

For the reasons stated, the first question is answered in the affirmative (subject to the conditions stated) and the second is answered in the negative.
