



ISBA Professional Conduct Advisory Opinion

Opinion No. 12-11
May 2012

Subject: Discharged of lawyer; Division of Fees; Fees and Expenses

Digest: A discharged attorney may not share in a division of fees with his former client's successor attorney where the client does not agree in writing to the arrangement.

References: Illinois Rules of Professional Conduct, Rules 1.5(c)(e), 1.8(i), 1.16(d)

ISBA Advisory Opinion Nos. 92-22, 93-17, 94-14 and 02-02

ABA Informal Ethics Op. 1520 (1986)

ABA Annotated Model Rules of Professional Conduct (7th ed. 2011)

770 ILCS 5/1 Attorneys Lien Act

Friedman v. Malevitis, 304 Ill. App. 3d 979, 710 N.E.2d 843, 238 Ill.Dec. 46 (1st Dist. 1999)

Delapaz v. Selectbuild Construction, Inc., 394 Ill. App. 3d 969, 917 N.E.2d 93, 334 Ill.Dec. 496 (1st Dist. 2009)

Upgrade Corp. v. Michigan Carton Co., 87 Ill. App. 3d 662, 410 N.E.2d 159 (1st 1980)

Twin Sewer & Water, Inc. v. Midwest Bank & Trust Co., 308 Ill. App. 3d 662, 720 N.E.2d 636 (1st 1999)

In re Estate of Callahan, 144 Ill. 2d 32, 578 N.E.2d 985 (1991)

Stephanie Kanwit, *Attorneys' Liens: When Can You Retain Client's Files?*, 79 Ill. Bar J. 274 (1991)

Patrick Sean Ginty, *When Can You Retain Files for Failure to Pay Fees?*,
92 Ill. Bar J. 97 (2004)

FACTS

Client discharges Lawyer A in his personal injury case in favor of Lawyer B. Both lawyers then reach a written agreement on division of the contingent fee in exchange for Lawyer A tendering the client's file. Lawyer B subsequently advises A that the complexities of the case require that she engage additional counsel and that she was refusing to honor their agreement as it lacked the written consent of the Client.

QUESTIONS

1. Where Lawyer A has a proper attorney's lien for a contingent fee as well as a retaining lien on the client's file, and accepts Lawyer B's offer to share future fees, is client consent necessary for a division of fee agreement to be enforceable?
2. Must a client consent in writing to a division of fee agreement between her current attorney and her former discharged attorney?

OPINIONS

Division of Fees-Discharged Attorney

The instant questions are resolved by reference to Rule 1.5(e) of the Rules of Professional Conduct which states:

- (e) A division of a fee between lawyers who are not in the same firm may be made only if:
- (1) the division is in proportion to the services performed by each lawyer, or if the primary service performed by one lawyer is the referral of the client to another lawyer and each lawyer assumes joint financial responsibility for the representation;
 - (2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and
 - (3) the total fee is reasonable.

Thus, any arrangement for a division of fees between attorneys to which the client does not agree in writing violates the above Rule, regardless of whether the basis for the division is the proportionality of services performed by each lawyer or the referral of one attorney to another. See Rule 1.5, Comment [7] Division of Fee. In addition, this result is compelled by the Illinois Appellate Court's decision in *Friedman v. Malevitis*, 304 Ill.

App. 3d 979, 710 N.E.2d 843, 238 Ill.Dec. 46 (1st Dist. 1999). In that case, a discharged lawyer entered into an agreement with the successor lawyer, without the consent of the client, to divide on a percentage basis any fee earned from the resolution of the underlying case. When the case was settled the successor attorney refused to pay the agreed upon percentage and the discharged lawyer filed suit. The successor attorney claimed the agreement was void because it violated public policy and RPC 1.5. The Appellate Court agreed and noted: “it is clear that Illinois public policy prohibits a discharged lawyer from receiving a percentage-based fee where said fee was not related to the value of services rendered, the client does not consent to the fee arrangement, and the discharged attorney has no responsibility for the pending litigation.” *Friedman*, 304 Ill.App.3d at 987, citing *Leoris v. Dicks*, 150 Ill. App. 3d 350, 353, 501 N.E.2d 901, 903, 103 Ill.Dec. 584 (1st Dist. 1986).

Notwithstanding the impropriety of the fee division described above, it is clear that a discharged lawyer is entitled to some amount of fee on a quantum meruit basis. E.g. *Delapaz v. Selectbuild Construction, Inc.*, 394 Ill. App. 3d 969, 917 N.E.2d 93, 334 Ill.Dec. 496 (1st Dist. 2009). The discharged and successor lawyers are free to agree upon a fee to be paid the discharged lawyer, whether upon a percentage or quantum meruit basis, as long as the client consents in writing. In the absence of client consent confirmed in writing, however, the discharged lawyer’s remedy would be for the court to determine the appropriate quantum meruit amount using a number of well established factors. *Delapaz*, 394 Ill. App. 3d at 973 (“Several factors are considered in determining the quantum meruit amount for services rendered, which include ‘the time and labor required, the attorney’s skill and standing, the nature of the cause, the novelty and difficulty of the subject matter, the attorney’s degree of responsibility in managing the case, the usual and customary charge for that type of work in the community, and the benefits resulting to the client.’”).

Liens - Retaining and Statutory

Although the above is dispositive of the questions presented, the questions posed above note that Lawyer A did have a ‘proper attorneys’ lien for a contingent fee as well as a retaining lien on the client’s file.’ How these liens affect the ability of the attorney to collect her fees and expenses requires further explanation.

Rule 1.8(i) of the Rules of Professional Conduct, based upon the American Bar Association Model Rules of Professional Conduct, contains the following statements in Comment [16] pertaining to the general rule that lawyers are prohibited from acquiring a proprietary interest in litigation:

“In addition, paragraph (i) sets forth exceptions for liens authorized by law to secure the lawyers’ fees or expenses and contracts for reasonable contingent fees. The law of each jurisdiction determines which liens are authorized by law. These may include liens granted by statute, liens originating in common law and liens acquired by contract with the client.”

Reference to the Annotated Model Rules of Professional Conduct (7th ed. 2011) may not be helpful to the Illinois practitioner as the ABA has conceded this issue to the law of each jurisdiction. *See* ABA Informal Ethics Op. 1520 (1986) (whether upon withdrawal, lawyer may withhold documents necessary for prosecution or defense of client's case is matter of state law governing attorney's liens).

A "retaining lien" is defined in Illinois as a common law possessory lien which entitles an attorney to retain any funds, property and papers which come into her possession as part of her professional relationship with a client until amounts due her for services rendered have been paid. *See Upgrade Corp. v. Michigan Carton Co.*, 87 Ill. App.3d 662, 410 N.E.2d 159 (1st 1980); ISBA Opinions 93-17, 02-02; Stephanie Kanwit, *Attorneys' Liens: When Can You Retain Client's Files?*, 79 Ill. Bar J. 274 (1991). A retaining lien, however, is extinguished by giving the property back to the client. Once the attorney surrenders the property, the retaining lien is lost. *Upgrade Corp. v. Michigan Carton Co.*, 87 Ill. App. 3d 662, 665, 410 N.E.2d 159, 161. In addition, a retaining lien is a passive lien and cannot be judicially enforced. Only when the attorney is brought into court by the client to force her to turn over his money or his papers can the lien then be raised as a defense. *Twin Sewer & Water, Inc. v. Midwest Bank & Trust Co.*, 308 Ill. App. 3d 662, 720 N.E.2d 636 (1st 1999). Obviously, in a personal injury case taken on a contingent fee basis, there are no funds or rarely any property of the client involved and, thus, only the client's file or other papers could be retained.

Despite the common law 'retaining lien' to enforce payment of her bill, Rule 1.16(d) of the Rules of Professional Conduct requires a discharged attorney to "take steps to the extent reasonably practicable to protect a client's interest, such as...surrendering papers and property to which the client is entitled." *See* ISBA Advisory Opinion 94-14. Even though the Rule allows a lawyer to retain papers relating to the client "to the extent permitted by other law," the difficult question is whether the client, or the successor attorney, may arguably need the client's file or his papers to protect the client's interest. *See* Patrick Sean Ginty, *When Can You Retain Files for Failure to Pay Fees?*, 92 Ill. Bar J. 97 (2004) for an extended discussion of the competing principles between the attorney's right to her fee and the client's right to his property and files. The author concludes with the admonition, with which this Committee agrees, that just because a retaining lien may be available to encourage clients to pay their fees doesn't mean you should use it in any given case.

In personal injury cases where attorneys customarily advance the expenses of the litigation pursuant to Rule 1.5(c) of the Rules of Professional Conduct, the discharged lawyer may have incurred out of pocket expenses in obtaining police reports, ambulance reports, medical records and the like which would be of benefit to the successor attorney if surrendered. Most successor attorneys would be willing to reimburse such costs at the time the documents are surrendered if not at the conclusion of the case. However, withholding such records and reports would require the successor attorney to obligate the client to incur the duplicate expense of acquiring the same records and thus extinguish the client's need to bring the discharged lawyer to court and, ergo, obviate the retaining lien.

The “proper attorney’s lien” mentioned in the first question most likely refers to one perfected under the Attorneys Lien Act, 770 ILCS 5/1. However, the practitioner should remain aware that it is well established in Illinois that a client has the implied right, with or without cause, to discharge his attorney. An attorney discharged without cause is entitled to be paid on a quantum meruit basis for services rendered prior to discharge as the contingent fee contract no longer governs their relationship. *In re Estate of Callahan*, 144 Ill. 2d 32, 578 N.E.2d. 985 (1991); ISBA Advisory Opinion 92-22.

Professional Conduct Advisory Opinions are provided by the ISBA as an educational service to the public and the legal profession and are not intended as legal advice. The opinions are not binding on the courts or disciplinary agencies, but they are often considered by them in assessing lawyer conduct.

© Copyright 2012 Illinois State Bar Association