

Attorney's Liens -what are they and when are they permissible?

Under the New Hampshire Rules of Professional Conduct, the default rule is that a “[a] lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client...” NH RPC R. 1.8(i). There are two exceptions to this prohibition: (1) a lawyer may “acquire a lien authorized by law to secure the lawyer’s fee or expenses,” NH RPC R. 1.8(i)(1), and (2) a “contract with a client for a reasonable contingent fee in a civil case.” NH RPC R. 1.8(i)(2).

The New Hampshire Bar Ethics Committee has not examined attorney’s liens recently. In an old informational piece, the committee observed that, historically, there have been two types of liens which a lawyer was entitled to impose on a client’s property. INQUIRY #1984-5/15. The first is a “charging lien” authorized by RSA 311:13. *Id.* The second type of lien was known as a “retaining lien.” *Id.* This enabled a lawyer to retain a client’s property and/or file pending payment of the lawyer’s fees or the posting of sufficient security for payment. *Id.*

Charging Liens

Under NH RSA 311:13, an “attorney who appears for a client in a [action, bill in equity or other proceeding in any court, the filing of a counterclaim or plea in set-off or recoupment, or appearance in any proceeding before any state or federal department, board, or commission] shall have a lien for reasonable fees and expenses upon the client’s cause of action, upon the judgment decree or other order in the client’s favor entered or made in such proceeding, and upon the proceeds derived therefrom.” Such a lien “cannot be affected by any settlement between the parties before or after the judgment decree or other order.” RSA 311:13.

Upon request of the client or the attorney, “the court in which the proceeding is pending, or, if the proceeding is not pending in a court, the superior court, may determine and enforce the

lien...” *Id.* But, “this section shall not apply to matters arising under RSA 282-A¹ and any case where the method of determination of attorneys’ fees is otherwise expressly provided by statute.”

Id.

Given the language of NH RPC R. 1.8 and RSA 311:3, charging liens are permissible. But, the lawyer should be mindful of their other obligations to the client including those under NH RPC R. 1.16.

Retaining Liens

A prudent lawyer should avoid using a “retaining lien” on a client’s file or property. Historically, “retaining liens” allowed a lawyer to retain a client’s property and/or file pending payment, but retaining a client’s file is no longer permissible. NH RPC R. 1.16 states that “[a]s a condition to termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client’s interests, such as.... surrendering papers and property to which the client is entitled...” A comment to NH RPC R. 1.16 states that “[e]ven if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. The lawyer may retain papers as security for a fee only to the extent permitted by law.” 2004 ABA Model Rule Comm. 9 to NH RPC R. 1.16.

There is precedent that a lawyer must return a client’s file upon the client’s request.² *Averill v. Cox*, 145 N.H. 328, 339 (2000) (stating “a client’s file belongs to the client, and upon request, an attorney must provide the client with the file”). So a prudent lawyer would not retain a client’s file as a means of securing payment from the client.

¹ RSA 282-A is the chapter dealing with unemployment compensation.

² The lawyer may make a copy of the client’s file for the lawyer’s own use before returning it to the client. But, “absent a written agreement requiring the client to pay reasonable costs of copying his or her file, if an attorney wishes to retain a copy of the client’s file, the attorney must pay the associated costs.” *Averill*, 145 N.H. at 339.

As to other client property, ABA Model Rule Comm. 9 to NH RPC R. 1.16 only states that the “lawyer may retain papers as security for a fee only to the extent permitted by law.” Absent a statute which expressly allows a lawyer to retain a client’s property to secure payment for the lawyer’s work, a prudent lawyer would not retain a client’s property as a means of securing payment from the client.

Conclusion

Attorney’s liens are permissible under the New Hampshire Rules of Professional Conduct and New Hampshire law. But, an attorney’s lien is likely limited to “charging liens.” A prudent lawyer would not attempt to impose a “retaining lien” on a client’s file given the New Hampshire Supreme Court’s guidance in *Averill*. Further, a prudent lawyer would not attempt to impose a “retaining lien” on a client’s property absent clear statutory authorization.