Ethics
Informational Packet

ATTORNEY LIENS

Courtesy of
The Florida Bar
Ethics Department

FLORIDA BAR ETHICS OPINION
OPINION 88-11 (Reconsideration)
March 23, 2021

Advisory ethics opinions are not binding

Under normal circumstances, a lawyer has an ethical obligation to comply with a client's or former client's reasonable request for copies of file material where that information would serve a useful purpose to the client. Among documents a lawyer is generally required to provide to clients are the client's own property, such as original documents with intrinsic value given to the lawyer by the client. The opinion also provides information on what documents the lawyer should consider providing copies of and what documents a lawyer generally is not required to provide. A lawyer may charge a reasonable amount for the cost of retrieving and delivering file materials to a client as well as reasonable copying charges. The cost of reproduction or other means of access should be reasonable and reflect the actual costs incurred. A law firm that is discharged by a client before the client's litigation is concluded may assert a retaining lien against the case file until costs advanced on behalf of the client are either reimbursed or guaranteed. However, if the law firm and client have agreed that the client's repayment of costs is contingent on the outcome of the matter, then the law firm may not ethically assert a retaining lien for outstanding costs prior to the occurrence of the contingency. Similarly, a law firm may not assert a retaining lien for fees owed in a contingent fee case until the contingency has occurred.

RPC: 4-1.4, 4-1.16(d)
Opinion: 71-37, 71-57, 88-11, 01-1, ABA 471, Michigan R-019, Oregon 2017-192, Wisconsin EF16-03
Cases: *Daniel Mones, P.A. v. Smith,* 486 So.2d 559 (Fla. 1986); *Dowda and Fields, P.A. v. Cobb,* 452 So.2d 1140 (Fla.5th DCA 1984); The Florida Bar v. Doe, 550 So.2d 1111 (Fla. 1989); *The Florida Bar v. Dorta,* 794 So.2d 606 (Fla. 2001); *The Florida Bar v. Varner,* 992 So.2d 224 (Fla. 2008); *Rosenberg v. Levin,* 409 So.2d 1016 (Fla. 1982)

In Opinion 88-11, the inquiring lawyer's firm represented a client, the plaintiff in a personal injury matter, for more than two years. The lawyer stated that his firm had been ready for trial for six months, but twice moved for a continuance at the client's direction.

The client then changed lawyers. The client's new lawyer previously handled a criminal matter for the client. The new lawyer contacted the inquiring lawyer's firm and requested the case file. The inquirer's firm had advanced costs of approximately $2,000 on the case.

The inquirer asked whether it would be ethically permissible to retain the case file until the outstanding costs were paid.

In Florida Ethics Opinion 88-11 (Reconsideration), the Committee revised its original opinion to clarify its views on when it is ethical for a lawyer in the inquirer's position to assert a retaining lien on a file for costs or fees. The committee is further revising this opinion to offer

guidance regarding providing a client with file material when no fees or costs are owed. This opinion withdraws prior 88-11 (Reconsideration) and replaces it.

Florida case law indicates that the file generated by a lawyer is the property of the lawyer rather than the client. *See*, *Dowda and Fields, P.A. v. Cobb*, 452 So.2d 1140, 1142 (Fla.5th DCA 1984). Therefore, other than original papers and documents given to the lawyer by the client or previously paid for by a client, a lawyer is not obligated to provide a client with the lawyer's original file. A lawyer, however, does have an ethical obligation to comply with a client's or former client's reasonable request for copies of file material where that information would serve a useful purpose to the client, although the lawyer does not have to bear the cost of reproduction. *See* Florida Ethics Opinion 71-37 [since withdrawn on other grounds] and Florida Opinion 88-11.

Several ethics rules address a lawyer's obligation to provide a client with file information. Rule 4-1.4, Rules Regulating The Florida Bar, requires a lawyer to keep a client reasonably informed about the status of their matter and to promptly comply with a client's reasonable request for information. Rule 4-1.16(d) requires a lawyer to protect a client's interests when terminating a relationship by providing papers and property to which the client is entitled. *The Florida Bar v. Varner*, 992 So.2d 224 (Fla. 2008). (Failure to provide successor counsel with a copy of client's file violated Rule 4-1.16(d).) In Florida Ethics Opinion 02-3, citing Rule 4-1.16, the committee reiterated that a lawyer must take steps to protect a client when withdrawing from representation, including providing copies of necessary documents.

While a lawyer has a duty to provide necessary documents and useful information to a client, not all file information must be provided. Although no Florida ethics opinion or rule specifies what particular information must be provided to a client, the ABA and ethics committees of other jurisdictions have considered what particular information must be supplied or need not be provided. *See* ABA Formal Opinion 471, Wisconsin Opinion EF16-03, Oregon Formal Opinion No. 2017-192.

A lawyer generally must provide the client's own property, such as original documents with intrinsic value given to the lawyer by the client.

In general, a lawyer should consider providing information such as:

- documents filed with a tribunal;
- executed instruments prepared for the client's use;
- correspondence relating to the matter that is found by the lawyer necessary to protect the client's interests;
- electronic data such as documents, records, and information in the specific client matter that the lawyer determines is necessary to protect the client's interests;
- discovery paid for by the client;
- legal opinions issued at the request of the client; and
- billing statements.

A client or former client is generally not entitled to:

- confidential information concerning another client;

- internal administrative materials such as conflicts checks, work assignments, personal notes and assessments or impressions of clients;
- drafts of documents and legal instruments;
- unexecuted documents;
- consultations regarding malpractice or ethics; or
- internal legal memoranda and research materials.

The above are representative but non-exclusive lists, because, depending on the underlying facts in a particular matter, the overarching duty under Rule 4-1.16 to take steps "reasonably practicable to protect the client's interests" and prevent harm might necessitate providing the client with some types of materials that would ordinarily not be required. For example, under certain circumstances, a lawyer may have to provide unexecuted documents or the draft of a document. ABA Formal Opinion 471.

Although a lawyer does not have to bear the expense of copying the file, the cost of reproduction or other means of access should be reasonable and reflect the actual costs incurred. Florida Ethics Opinion 06-1 (files stored electronically should be easily reproducible and a lawyer may charge reasonable copy charges for reproducing copies of documents). *See e.g.*, *The Florida Bar v. Dorta*, 794 So.2d 606 (Fla. 2001) (Table) (Consent judgment for 30 day suspension for a lawyer who charged improper $250 administrative fee for opening file, and charged client arbitrary set fees for faxing, long distance, and courier charges without any relationship to costs actually incurred).

Additionally, a lawyer may charge a reasonable amount for the cost of retrieving and delivering file materials to a client. Michigan Ethics Opinion R-019 (2000). It is advisable that these costs and the method used to determine these costs be included in the original written representation agreement with the client.

In appropriate situations, however, a lawyer is entitled to refuse to provide copies of material in the file and instead may assert an attorney's lien. Such situations include a client's refusal to reimburse a discharged lawyer for the lawyer's incurred costs or to provide a reasonable guarantee to the lawyer that the costs will be repaid at the conclusion of the case. *See* Florida Ethics Opinion 71-57. While in such a situation it may be ethically permissible for a lawyer to assert a lien with respect to materials in a case file, the validity and extent of the lien is a question of law to be decided by the courts.

Florida common law recognizes two types of attorney's liens: the charging lien and the retaining lien. The charging lien may be asserted when a client owes the lawyer for fees or costs in connection with a specific matter in which a suit has been filed. To impose a charging lien, the lawyer must show: (1) a contract between lawyer and client; (2) an understanding for payment of attorney's fees out of the recovery; (3) either an avoidance of payment or a dispute regarding the amount of fees; and (4) timely notice. *Daniel Mones, P.A. v. Smith*, 486 So.2d 559, 561 (Fla. 1986). The lawyer should give timely notice of the asserted charging lien by either filing a notice of lien or otherwise pursuing the lien in the underlying suit. The latter approach is preferred.

Unlike a charging lien, a retaining lien may be asserted with respect to amounts owed by a client for all legal work done on the client's behalf regardless of whether the materials upon which the retaining lien is asserted are related to the matter in which the outstanding charges were incurred. A retaining lien may be asserted on file materials as well as client funds or property in the lawyer's possession, and may be asserted whether or not a suit has been filed. *Mones*, 486 So.2d at 561.

A lawyer's right to assert a lien may be limited, however, by the ethical obligation to avoid foreseeable prejudice to the client's interests. What papers or documents must be furnished to a client in a particular case in order to avoid prejudicing the client's interest therein will necessarily depend on the specific facts and circumstances involved.

A related issue often arising when a lawyer is discharged is the amount of fee to which the discharged lawyer is entitled. In *Rosenberg v. Levin*, 409 So.2d 1016 (Fla. 1982), the Florida Supreme Court held that a lawyer employed under a valid contract who is discharged without cause before conclusion of the matter can recover only the reasonable value of the lawyer's services, limited by the maximum contract fee. In contingency fee cases, this quantum meruit action arises only upon successful occurrence of the contingency. Therefore, a lawyer may not ethically assert a retaining lien for fees allegedly owed in a contingent fee case unless and until the contingency has occurred. *See The Florida Bar v. Doe*, 550 So.2d 1111 (Fla. 1989). Similarly, if lawyer and client have agreed that the client's repayment of advanced costs and expenses is to be contingent on the outcome of the matter, then the lawyer may not ethically assert a retaining lien for outstanding costs prior to the occurrence of the contingency.

FLORIDA BAR ETHICS OPINION
OPINION 88-11
August 1, 1988

Advisory ethics opinions are not binding.

A law firm that is discharged by a client before the client's litigation is concluded may assert a retaining lien against the case file until costs advanced on behalf of the client are either reimbursed or guaranteed.

Opinions: 71-37, 71-57
Cases: *Daniel Mones, P.A. v. Smith*, 486 So.2d 559 (Fla. 1986); *Dowda and Fields, P.A. v. Cobb*, 452 So.2d 1140 (Fla. 5th DCA 1984); *Rosenberg v. Levin*, 409 So.2d 1016 (Fla. 1982)

The inquiring attorney's firm represented a client, the plaintiff in a personal injury matter, for more than two years. The attorney states that his firm has been ready for trial for the past six months, but has twice moved for a continuance at the client's direction.

The client recently changed attorneys. Her new attorney previously handled a criminal matter for the client. The new attorney contacted the inquiring attorney's firm and requested the case file. The inquirer's firm had advanced costs of approximately $2,000 on the case.

The inquirer would like to retain the case file until the outstanding costs are paid. He asks whether this is ethically permitted.

Many attorneys are unaware that in Florida a case file is considered to be the property of the attorney rather than the client. *Dowda and Fields, P.A. v. Cobb,* 452 So.2d 1140, 1142 (Fla. 5th DCA 1984); Florida Ethics Opinion 71-37 [since withdrawn]. Under normal circumstances, an attorney should make a available to the client, at the client's expense, copies of information in the file where such information would serve a useful purpose to the client. Opinion 71-37 [since withdrawn].

In appropriate situations, however, an attorney is entitled to refuse to provide copies of material in his file and instead may assert an attorney's lien. Such situations include a client's refusal to reimburse a discharged attorney for his incurred costs or to guarantee payment of those costs at the conclusion of the case. Florida Ethics Opinion 71-57. While in such a situation it may be ethically permissible for an attorney to assert a lien with respect to materials in a case file, the validity and extent of the lien is a question of law to be decided by the courts.

Florida common law recognizes two types of attorney's liens: the charging lien and the retaining lien. The charging lien may be asserted when a client owes the attorney for fees or costs in connection with a specific matter in which a suit has been filed. To impose a charging lien, the attorney must show: (1) a contract between attorney and client; (2) an understanding for payment of attorney's fees out of the recovery; (3) either an avoidance of payment or a dispute regarding the amount of fees; and (4) timely notice. *Daniel Mones, P.A. v. Smith,* 486 So.2d 559, 561 (Fla. 1986). The attorney should give timely notice of the asserted charging lien by either filing a

notice of lien or otherwise pursuing the lien in the underlying suit. The latter approach is preferred. Unlike a charging lien, a retaining lien may be asserted with respect to amounts owed by a client for all legal work done on his behalf regardless of whether the materials upon which the retaining lien is asserted are related to the matter in which the outstanding charges were incurred. A retaining lien may be asserted on file materials as well as client funds or property in the attorney's possession, and may be asserted whether or not a suit has been filed. *Mones,* 486 So.2d at 561.

An attorney's right to assert a lien may be limited, however, by his ethical obligation to avoid foreseeable prejudice to the client's interests. What papers or documents must be furnished to a client in a particular case in order to avoid prejudicing his interest therein will necessarily depend on the specific facts and circumstances involved.

A related issue often arising when an attorney is discharged is the amount of fee to which he is entitled. In *Rosenberg v. Levin*, 409 So.2d 1016 (Fla. 1982), the Florida Supreme Court held that an attorney employed under a valid contract who is discharged without cause before conclusion of the matter can recover only the reasonable value of his services, limited by the maximum contract fee. In contingency fee cases, this quantum meruit action arises only upon successful occurrence of the contingency.

In summary, it would not be ethically improper for the inquiring attorney's firm to assert a retaining lien on the case file until the outstanding costs are paid or guaranteed. Alternatively, a charging lien can be filed.

FLORIDA BAR ETHICS OPINION
OPINION 87-12
November 1, 1987

Advisory ethics opinions are not binding.

An attorney may not assert a retaining lien against any portion of funds entrusted to him by a client for a specific purpose, even if some portion of the funds proves to be not needed to fulfill that specific purpose.

Note: Rule 4-1.15 was significantly amended by the Supreme Court in April 2002. The substance of the rule is now incorporated into Rule 5-1.1.

RPC:	4-1.15(b)
Integration Rule:	Art. XI, 11.02(4)
Cases:	*Daniel Mones, P.A. v. Smith*, 486 So.2d 559 (Fla. 1986); *The Florida Bar v. Bratton*, 413 So.2d 754 (Fla. 1982); *Wilkerson v. Olcott*, 212 So.2d 119 (Fla. 1968)

The inquiring attorney represented two clients in matters concerning the validity of title to a sailing vessel and a "preferred ship's mortgage" given by the clients to a lender as collateral for a loan on the vessel. The lender had declared the loan in default due to an alleged problem with the title. The inquiring attorney negotiated with the lender's attorney and reached an agreement whereby the inquirer was to have his clients place in his trust account a certificate of deposit in the amount of $50,000. The certificate was to be held in the trust account as collateral for the loan.

Subsequently, the clients retained another attorney to represent them and discharged the inquirer. The clients owe the inquiring attorney approximately $21,000 in unpaid legal fees.

Apparently, the inquirer's former clients have now decided to satisfy their loan obligation through liquidation of the certificate of deposit. They have directed the inquiring attorney to deliver the certificate to the lender immediately. The attorney states that the remaining balance due on the loan is less than the amount of the certificate, and he desires to claim a retaining lien on that "equity."

The attorney asks whether he ethically may assert a retaining lien on that portion of the certificate of deposit proceeds not needed to satisfy the loan.

In many circumstances, a Florida attorney may assert a retaining lien on funds of a client that are held in the attorney's trust account. *Daniel Mones, P.A. v. Smith*, 486 So.2d 559 (Fla. 1986). However, there are situations in which an attorney is not entitled to assert a retaining lien.

Rule 4-1.15(b) of the Rules Regulating The Florida Bar provides:

> 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 by the client or third person, shall promptly render a full accounting regarding such property.

With respect to whether a client or third person is "entitled to receive" certain trust funds, the Comment to Rule 4-1.15 advises:

> *Money or other property entrusted to a lawyer for a specific purpose*, including advances for costs and expenses, *is held in trust and must be applied only to that purpose*. Money and other property of clients coming into the hands of a lawyer are not subject to counterclaim or setoff for attorney's fees, and a refusal to account for and deliver over such property upon demand shall be a conversion. This is not to preclude the retention of money or other property upon which a lawyer has a valid lien for services or to preclude the payment of agreed fees from the proceeds of transactions or collections. [Emphasis added.]

(This language was contained in the former Integration Rule of The Florida Bar, Article XI, Rule 11.02(4).)

The Florida Supreme Court has held that an attorney cannot impose a retaining lien on client funds entrusted to the attorney for a *specific purpose* where the parties have not agreed that attorney's fees should be paid out of the entrusted funds. *The Florida Bar v. Bratton*, 413 S.2d 754, 755 (Fla. 1982); *Wilkerson v. Olcott*, 212 So.2d 119, 121 (Fla. 1968); See also *Daniel Mones, P.A. v. Smith*, 486 So.2d at 561–62. In the situation presented, the certificate of deposit was entrusted to the inquiring attorney for a specific purpose — to be held as collateral for the loan.

As noted, the inquiring attorney states that he wishes to assert a retaining lien only on the "equity" in the certificate. In this respect, *Bratton* is instructive. In that case, the client entrusted the attorney with $10,000 to be posted as a bond in a mortgage foreclosure proceeding. The attorney argued that when the funds were released from the bond at the conclusion of the proceeding, he had the right to a retaining lien on the funds. The Supreme Court disagreed, stating that the funds were delivered to the attorney for a specific purpose and that there was no agreement for attorney's fees to be paid from the funds; consequently, the funds were not subject to a retaining lien. 413 So.2d at 755.

In view of the above, it appears that the inquiring attorney is not permitted to assert a retaining lien on any portion of the certificate of deposit.

FLORIDA BAR ETHICS OPINION
OPINION 82-2
February 15, 1982

Advisory ethics opinions are not binding.

Funds received and held in trust by an attorney for some different purpose may not, over the client's or former client's objections, ethically be applied to the satisfaction of an attorney's claim, or claimed lien, for costs and fees without prior approval of the application by a court of competent jurisdiction. Further, if the property held in trust is money or other readily divisible property, the retention under claim of lien of an amount or portion in excess of that necessary to satisfy the obligation to the attorney is improper.

CPR: DR 9-102(B)
Integration Rule: 11.02(4)
Opinions: 68-21, 71-67

Chairman Ervin stated the opinion of the committee:

A Florida attorney holds in his trust account funds he had received from administration of an estate, which funds were owed by the estate to the attorney's former client. Upon receipt of the funds, the attorney requested authorization from his former client to apply a portion of said funds to unpaid attorney's fees and costs from the attorney's earlier, unrelated representation and advised the former client of his intent to place a "retaining lien" against the funds.

The former client refused authorization to so apply the funds and the attorney thereafter (apparently without reference to or assertion of a lien of any sort) sought and secured a default money judgment in small claims court against the former client for a specified amount of costs and attorney's fees.

The attorney inquires whether he may now ethically apply a portion of the sum he holds in trust to satisfaction of his judgment against his former client and remit the balance or, alternatively, whether he may direct the sheriff to levy on the funds he holds in his trust account.

Section 11.02(4) of the Integration Rule provides as follows, in pertinent part:

> (4) Trust funds and fees. Money or other property entrusted to an attorney for a specific purpose, including advances for costs and expenses, is held in trust and must be applied only to that purpose. Money and other property of clients coming into the hands of an attorney are not subject to counterclaim or setoff for attorney fees, and a refusal to account for and deliver over such property and money upon demand shall be deemed a conversion. This is not to preclude the *retention of money or other property upon which the lawyer has a valid lien* for his services or to preclude the payment of agreed fees from the proceeds of transactions or collections. (Emphasis supplied.)

It is noted that the above-quoted section treats separately the instances where "retention" and "payment" are authorized, and uses the more restrictive term "retention" with reference to a "valid" claim.

In addition, DR 9-102(B) of the Florida Code of Professional Responsibility provides as follows, in pertinent part:

> (B) A lawyer shall:
>
> (1) Promptly notify a client of the receipt of his funds, securities, or other properties.
>
> *** * ***
>
> (4) Promptly pay or deliver to the client as requested by a client the funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive.

In prior Advisory Opinions 68-21 and 71-67 this Committee expressed its opinion that the question of whether the attorney had a *valid* lien against a client's property coming into the attorney's hands was a question of law for the courts, not one of ethics subject to opinion by this Committee, which question is not fully resolved by the securing of an earlier money judgment against the client.

The Committee adheres to its prior opinions and the view stated therein. The proper procedure would be for the attorney to promptly file an action seeking establishment of a retaining lien or other entitlement as to the funds, or a portion thereof, or otherwise pay the sums to the former client as demanded. The Committee is of the opinion that funds received and held in trust by an attorney for some different purpose may not, over the client's or former client's objections, ethically be applied to satisfaction of an attorney's claim, or claimed lien, for costs and fees without prior approval *of the application* by a court of competent jurisdiction.

The Committee is of the further opinion that where the property held in trust is money or other readily divisible property, the retention under claim of lien of an amount or portion in excess of that necessary to satisfy the obligations to the attorney is not ethically proper.

FLORIDA BAR ETHICS OPINION
OPINION 71-57
December 8, 1971

Advisory ethics opinions are not binding.

A law firm representing a plaintiff in a wrongful death action for a contingent fee may retain its own extensive investigation file when the file is discharged without cause and the new lawyer for the former client declines to reimburse the firm for its incurred costs or to guarantee payment at the conclusion of the case.

Note: See Florida Ethics Opinion 88-11 (Rec.) for advice on retaining liens.

CPR: EC 5-8; DR 5-103(B) [Note: superseded by 4-1.8(e)]
Opinions: 62-71, 65-10

Chairman Clarkson stated the opinion of the committee:

A law firm was retained by the appropriate parties to bring actions for wrongful death. Terms of employment were set forth in a contingent fee contract containing the customary clients' agreement to reimburse the law firm for necessary costs. Thereafter, the firm made a thorough investigation of the facts of the case at substantial expense.

Several months after employing the firm, the parties discharged it without cause and advised that another lawyer would call to obtain the file. The newly retained lawyer subsequently requested that all papers, documents and other items of investigation obtained or developed by the firm be delivered to him for his use in going forward with the case. However, the new lawyer has, upon request, declined to reimburse the firm for its incurred costs or to guarantee payment of them at the time the case is concluded. Under these circumstances the firm is reluctant to relinquish possession of the materials in its possession. As a separate but related matter, the firm has filed a claim of lien in the pending court actions based upon the contingent fee contract.

A member of the firm inquires whether he may properly retain the investigation file until reimbursed for the costs advanced prior to discharge.

A majority of the Committee answers this question in the affirmative. Some do so on the basis that it is not unethical for an attorney to exercise a retaining lien or other attorney's lien authorized by law, assuming such a valid lien can be established in this instance. See Florida Opinion 62-71 and 65-10. Others reach the same result under the theory that the requested materials are work product of the firm and may reasonably be withheld until the cost of producing them has been paid by or in behalf of the clients. Indeed, other ethical considerations preclude a lawyer from advancing costs of this nature unless his client retains the ultimate liability for them. EC 5-8, DR 5-103(B), CPR.

Two members of the Committee, observing that a claim of lien for compensation has been filed in the court having jurisdiction, believe the more appropriate procedure would be to let the court determine all questions, including that raised by this inquiry. They suggest that the right

to reimbursement for costs, involving as it may issues of work product and retaining lien, is so intertwined with the claim submitted to the court that all such matters should be determined by that tribunal.

We note in passing that the continued withholding of the firm's work product would likely be weighed by the court in assessing the amount of compensation to be awarded the firm pursuant to its claim of lien.