

State Bar of South Dakota

Ethics Opinion 95-16

December 26, 1995

- *Rules: 1.5, 1.16*
- *Subject: Discharge by client; Unpaid fees; Attorney's lien on client files after discharge*
- *Summary: Attorney must provide copies of file to replacement counsel, but can keep original files for purpose of attorney's liens.*

FACTS

You were hired to assist with the investigation and possible assertion of a bad faith claim against your clients' homeowners insurer. The course of this work involved defending your clients in a small claims action brought on by a contractor, as well as an action to extinguish a mechanic's lien established by that same contractor. Your clients were billed for this work on an hourly basis, although you discussed with your clients a contingent fee agreement in the event that a bad faith claim could be asserted.

Your investigations indicated that the bad faith claim would not be resolved without extensive, costly discovery. The insurer had made a small offer which you communicated to your clients. After communicating the offer and explaining the risks and costs to your clients, you advised them that they should feel free to ask any other attorney of their choosing for a second opinion. A portion of your bill has been paid but an outstanding balance was owed.

You thereafter received a letter from another lawyer indicating that he wanted all files related to your clients. You have enclosed with your request to this Committee copies of the correspondence between yourself and the other lawyer and no attempt will be made here to recite in detail this correspondence. This lawyer has requested copies of any and all papers in your former clients' files together with an itemized bill for your services rendered which apparently has never been sent to your client.

Based upon these facts you have asked whether or not the Rules of Professional Conduct require you to provide copies of your former clients' files upon which you have asserted an attorney lien pursuant to SDCL 16-18-21(1).

OPINION

It is the opinion of this Committee that under these facts you are required to provide to the other lawyer a copy of your former clients' files. Rule 1.16(d) provides:

Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interest, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned. The lawyer may retain papers and property relating to the client to the extent permitted by other law.

The “other law” referred to in Rule 1.16(d) certainly refers to, among other things, the attorney lien statutes. This reference, however, does not mean that an attorney may ethically ignore his or her client’s rights in an effort to preserve his or her right to payment for services rendered. In other words, there must be a balance between SDCL 16-18-21 and Rule 1.16(d). Without this balance, an attorney asserting a lien could effectively deprive his client of the right of the client to terminate the services of the attorney thus holding the client hostage and the claim in abeyance. In light of this balance, it is the opinion of this Committee that you must turn over to the other attorney copies of your former clients’ files.

This Committee perceives an issue presented by your factual scenario regarding whether or not you should forward to your former client and their new lawyer an itemized bill for the services that you had rendered. This Committee believes that under Rule 1.5 an itemized bill is required to demonstrate that your fee is “reasonable”.

Michael S. McKnight
Chair, Ethics Committee
State Bar of South Dakota