

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

ASHLEY WALTHER,
Plaintiff,

vs.

CHASE WALTHER,
Defendant.

: No. 17-21,138
:
:
:
: CIVIL ACTION - LAW
: CUSTODY
:
: *Motion to Release File*

ORDER

AND NOW, on May 28, 2020 Defendant Chase Walther (“Defendant”) filed a Motion to Release File, seeking to have his former counsel, Attorney Matt Zeigler, Esquire, release Defendant’s file to his present counsel, Joseph F. Orso, III.

Defendant had formerly retained Attorney Zeigler of the Zeigler Law Firm to represent him in the foregoing custody matter. In March of 2020, Defendant terminated his attorney-client relationship with the Zeigler Law Firm and engaged the legal services of Attorney Orso of Rudinski, Orso & Lynch, P.C. Since March of 2020, Attorney Zeigler and the Zeigler Law Firm have refused to provide their complete case file to Attorney Orso and Rudinski, Orso & Lynch, P.C. Attorney Zeigler asserts that pursuant to the parties’ Representation and Fee Agreement, the Zeigler Law Firm has a retaining lien on the file pending payment of all outstanding costs and fees.

Pennsylvania recognizes a common law retaining lien, which is the power of an attorney “to retain possession of such documents, money, or other property of his client coming into his hands by virtue of the professional relationship, until he has been paid for his services, or until he voluntarily surrenders possession of the property, with or without payment.”¹ A retaining lien is “an equitable, passive lien, without the power of enforcement or sale and valuable only to the extent that the attorney's retention of a client's files will embarrass the client.”² As an equitable lien, the retaining lien may give way in light of stronger public policy interests. “Courts have recognized an exception when an important personal liberty interest of the client is at stake, as when the papers are essential to defense of a criminal charge.... Another recognized exception is

¹ *Smyth v. Fid. & Deposit Co. of Maryland*, 602, 190 A. 398, 401 (Pa. Super. 1937), *aff'd*, 192 A. 640 (Pa. 1937).

personal misconduct by the lawyer, as when he has withdrawn without just cause or reasonable notice[,]”³ or when an attorney has been justifiably discharged.⁴

Attorney Orso asserts that the Zeigler Law Firm has extinguished the retaining lien by providing portions of Defendant’s file to Rudinski, Orso & Lynch, P.C. Attorney Zeigler does not deny that the Zeigler Law Firm has returned portions of the file.⁵

The Pennsylvania courts have held that a retaining lien is dependent on possession, and will thus be extinguished if the attorney asserting the lien voluntarily surrenders the former client’s files.⁶ The case law does not address whether an attorney who returns a portion of the file maintains a lien on the files still within their possession. However, this Court interprets the language used by the Pennsylvania Supreme Court in characterizing a retaining lien – “[s]uch a lien is dependent upon *possession* by the attorney and binds only money, papers or other property in *his hands*”⁷ – as indicating a retaining lien applies to any documents over which an attorney has maintained exclusive possession. The Court therefore does not find that Attorney Zeigler and the Zeigler Law Firm waived their retaining lien over the documents still within their exclusive possession by turning over other portions of the file.

Attorney Orso further asserts that in retaining Defendant’s files, Attorney Zeigler has violated the Pennsylvania Rules of Professional Conduct Rule 1.15(d)⁸ and Rule 1.16(d).⁹ The question of whether Attorney Zeigler’s refusal to surrender documents

² *Maleski by Chronister v. Corp. Life Ins. Co.*, 641 A.2d 7, 9 (Pa. Commw. 1994).

³ *In re Garcia*, 69 B.R. 522, 525 (Bankr. E.D. Pa. 1987), *aff’d*, 76 B.R. 68 (E.D. Pa. 1987) (quoting *Jenkins v. Weinshienk*, 670 F.2d 915, 919–20 (10th Cir.1982)).

⁴ *Berger Realty Grp., Inc. v. Pullman*, No. CIV.A. 84-2075, 1986 WL 7418, at *1 (E.D. Pa. June 25, 1986).

⁵ The Zeigler Law Firm has provided Rudinski, Orso & Lynch, P.C. with court documents, but retains hand-written notes regarding custody issues, a video, and text messages. Attorney Orso avers that he requires access to these retained documents to adequately represent his client.

⁶ See *Maleski*, 52, 641 A.2d at 8 n.2 (holding that because former counsel had involuntarily relinquished client’s files in accordance with a court order, it had not waived its retaining lien).

⁷ *Silverstein v. Hirst*, 103 A.2d 734, 737 (Pa. 1954) (quoting *Appeal of Harris*, 186 A. 92, 94 (Pa. 1936)) (emphasis added)

⁸ Rule 1.15(d) provides: “Upon receiving Rule 1.15 Funds or property which are not Fiduciary Funds or property, a lawyer shall promptly notify the client or third person, consistent with the requirements of applicable law. Notification of receipt of Fiduciary Funds or property to clients or other persons with a beneficial interest in such Fiduciary Funds or property shall continue to be governed by the law, procedure and rules governing the requirements of confidentiality and notice applicable to the Fiduciary entrustment.”

⁹ Rule 1.16(d) provides: “Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client’s interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is

violates the Rules of Professional Conduct is a question for the Pennsylvania Disciplinary Board and not for this Court.¹⁰ While a violation of the Rules of Professional Conduct may in some instances be enforced indirectly when the relevant Rule effectively codifies the common law,¹¹ Rules 1.15(d) and 1.16(d) conflict with the common law retaining lien still recognized in Pennsylvania.

The Court otherwise finds that Attorney Orso has failed to demonstrate that an exception to the retaining lien would be applicable. There is no indication that Defendant terminated Attorney Zeilger for just cause, and there are no allegations that Attorney Zeigler is seeking exorbitant fees. The parties' Representation and Fee Agreement explicitly provided that were Attorney Zeilger discharged, the Zeigler Law Firm would place a retaining lien on Defendant's file pending full payment of all costs and fees. Defendant was therefore not subject to undue surprise by the application of the retaining lien. While the Court has reservations about the ethical implications of the Zeigler Law Firm's retention of materials that could be potentially significant to Defendant's upcoming custody trial, the Court also recognizes the validity of the retaining lien under the common law. Defendant's remedy in this instance will be to reach a payment agreement with the Zeigler Law Firm. Consequently, Attorney Orso's Motion to Release File is DENIED.

IT IS SO ORDERED this 9th day of July 2020.

BY THE COURT,

Eric R. Linhardt, Judge

entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law."

¹⁰ See *In re Estate of Pedrick*, 482 A.2d 215, 221–22 (Pa. 1984) ("The fact that a Rule [of Professional Conduct] is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Accordingly, nothing in the Rules should be deemed to argument any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such duty.") (citation omitted).

¹¹ See e.g., *Maritrans GP Inc. v. Pepper, Hamilton & Scheetz*, 602 A.2d 1277, 1284-85 (Pa. 1992) (holding that before the Code of Professional Responsibility was adopted, the common law recognized that a lawyer could not undertake a representation adverse to a former client in a matter substantially related that

ERL/cp

cc: Joseph F. Orso, III, Esquire

Matt Zeigler, Esquire

Gary Weber, Esquire / Lycoming Reporter

in which the lawyer had previously served the client, and thus holding that the Court could sanction such behavior under the common law).