

WHAT HAPPENS WHEN IT GOES REALLY BAD—

WHOSE FILE IS IT ANYWAY?

The Nevada Rules of Professional Conduct provide that, upon terminating representation of a client, “[a] lawyer may retain papers relating to the client to the extent permitted by other law.” NRPC 1.16(d). In accord herewith, it is well settled in Nevada that “an attorney has the right to retain clients’ papers, documents, and files as a passive lien for the payment of fees owing.” *In re Kaufman*, 93 Nev. 452, 457, 567 P.2d 957, 960 (1977). In other words, as explicitly set forth by the Nevada Supreme Court in *Figliuzzi v. Eighth Judicial District Court*, 111 Nev. 338, 890 P.2d 798 (1995),

to ensure that clients pay their attorney’s fees, . . . [an attorney may hold] a general or retaining lien that entitles an attorney, if discharged by the client, to retain the client’s papers, property or money until a court, at the request of the client, requires the attorney to deliver the retained items upon the client’s furnishing of payment or security for the attorney’s fees.

Id. at 342, 890 P.2d at 801 (citing *Morse v. Eighth Judicial District Court*, 65 Nev. 275, 281, 286, 195 P.2d 199, 202, 204 (1948)).

In *Morse*, the Nevada Supreme Court undertook the opportunity to resolve the confusion as between a *common law* general or retaining lien and a *statutory* special or charging lien. 65 Nev. at 281-83, 195 P.2d at 202-03. With regard to the former, the Court held as follows: (1) a retaining lien attaches “without any special contract regarding it;” (2) “depends upon possession;” and (3) “applies to a general balance for all professional services performed whether in [one action] or in prior actions or for general legal services.” *Id.* at 282, 195 P.2d at 202. However, the Court also held that a general or retaining lien is only “passive,” and as such, is “not enforceable by proceedings to foreclose, except as may be accomplished through some incidental proceeding.” *Id.*, 195 P.2d at 202. In effect, as set forth by the Court, “the only advantage gained by the attorney through such [a] lien is the possibility of forcing the client to settle because of the embarrassment, inconvenience or worry caused the client by the attorney’s retention of the papers.” *Id.* at 284, 195 P.2d at 203.

Although a court may ascertain and determine the amount and extent of the lien, and enforce the underlying terms thereof, “only the client may request the court to compel an attorney, who is holding papers under a retaining lien, to relinquish the papers.” *Figliuzzi*, 111 Nev. at 343, 890 P.2d at 801 (citing *Morse*, 65 Nev. at 286, 195 P.2d at 204). Specifically, the client must be willing and able to offer and provide substitute security in order for a court to direct the attorney to return the client’s papers, property and moneys and otherwise discharge and destroy the lien. *Id.*, 890 P.2d at 801-02; *e.g. Morse*, 65 Nev. at 289-91, 195 P.2d at 205-07.

Clients should be aware that if they do not pay their bills for services and the lawyer ceases representation that lawyer can lawfully retain all of a client’s files, regardless of

the matter(s) involved or at issue in a dispute, until the client either makes full payment for all outstanding debts due and owing for services rendered, or alternatively, until the client offers sufficient substitute security to satisfy said indebtedness.

A retaining lien is a strong armed, *albeit*, lawful way for an attorney to pursue an errant client. The necessity of such a lien is most often abated by open communication between counsel and client and a realistic expectation control on the part of each.