

# Liens



## Can a lawyer hold my file?

This fact sheet provides information for complainants about whether a lawyer can hold a client's file.

### What is a lien?

*Alien* is a lawyer's right to keep a client's property until the client has paid the lawyer's fees and disbursements. Unless the client and the lawyer have come to some other agreement, a lien can be exercised at any time if the lawyer's bill has not been paid.

### What things can a lawyer hold under a lien?

If a client owes a lawyer money, the lawyer can hold a lien over all papers, files, documents and deeds that belong to the client and that the lawyer received while representing the client; *Legal Profession (Solicitors' Conduct) Rules 2020*, Rule 18 and 19.<sup>1</sup> This can include files and documents relating to other matters which have been completed and which the client has already paid for.

Where documents relate to the defence or prosecution of current proceedings a lawyer must make those documents available if reasonable security is provided for the unpaid costs or a second solicitor agrees to pay or obtain costs on completion of the relevant proceedings.

A lawyer can also hold a lien over money that the lawyer is holding on behalf of a client. For example, after a legal case a lawyer might receive a cheque

for the client. The cheque will generally be banked into the lawyer's trust account.

The lawyer will then prepare a bill to the client and ask for the client's authority to pay the bill with money from the trust account.

If the client refuses to authorise payment or objects to payment, the lawyer can hold in the trust account enough money to pay the bill – but not more – section 252 *Legal Profession Act 2007*.

This does not prevent the client from having the costs assessed by a court appointed assessor.

### Are there things that cannot be held under a lien?

A lawyer cannot hold a lien over the title deeds of a property which has passed to another owner. Other documents which cannot be the subject of a lien include wills. Wills cannot be held under a lien because a lawyer holds a will for a client as a custodian, and after the client's death the will must be produced to show entitlement to property.

### What happens if I change lawyers?

Liens become an issue most often when either the client or the lawyer has terminated the lawyer's retainer and the client wishes to retain a new lawyer.

If the client terminated the retainer, the lawyer is entitled to a 'general retaining lien' over the client's documents until the client has paid the lawyer's bill in full.

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<sup>1</sup> Commenced 1 October 2020

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If the lawyer terminated the retainer, he or she only has a 'qualified lien' and should make the client's documents available upon payment or satisfactory security so that another lawyer can continue the client's current court proceedings.

The client might have to provide some kind of promise or security for the lawyer's costs, and the documents would have to be returned to the lawyer at the conclusion of the court proceedings if the costs remained unpaid.

In many cases, a client's file might be released after the former lawyer, the new lawyer and the client have signed a 'three party agreement' which covers the payment of the former lawyer's costs. This usually involves the new lawyer agreeing to ensure that the former lawyer is paid or gets the file back at the end of the legal matter.

In other personal injury matters, costs are usually paid out of settlement or court-awarded money at the conclusion of the case. If the client transfers the case to a new lawyer, the former lawyer might release the file to the new lawyer if the new lawyer agrees to pay the former lawyer's costs as agreed or assessed. Usually the client has to give the new lawyer an irrevocable authority to pay the former lawyer's assessed or agreed costs out of any settlement or verdict monies, and to return the file to the former lawyer if the new lawyer's retainer is terminated.

### What if the lawyer won't release my file?

There are a number of ways to have your file released from a lien.

First, pay the costs.

Alternatively, enter into an arrangement with your lawyer about the costs.

If you dispute the costs, take steps to resolve the dispute.

Secondly, you may have a right to apply to the Supreme Court for an order to have the documents produced where necessary to do justice in your particular case.

Finally, if the Legal Profession Board or Disciplinary Tribunal has made a finding that a complaint is substantiated it may make a determination that the lawyer waive any lien in respect to a particular document or class of documents.

*The information contained in this fact sheet does not constitute legal advice.*

*The information contained in this fact sheet has been adapted with permission from the NSW Office of the Legal Services Commissioner, 'Liens' Fact Sheet 10.*

### Further information

If you have any questions or require further information, please contact the Legal Profession Board of Tasmania.

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