

NEBRASKA ETHICS ADVISORY OPINION FOR LAWYERS NO 12-09

Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, including surrendering papers and property to which the client is entitled, although the lawyer may retain papers relating to the client to the extent permitted by other law.

QUESTION PRESENTED

What are the lawyer's ethical duties to release the client's file when the law firm has a written express consent for the firm to acquire a lien on the file to secure the lawyer's fees or expenses?

FACTS

The client signs a retainer agreement with the law firm providing express consent for the law firm to acquire a lien on the file to secure the lawyer's fees or expenses. The attorney/client relationship is then terminated, and there is a balance owing on the client's account. The client requests that the law firm release her file to her so that she can provide it to her new attorney. The law firm refuses to release the client's file, because they claim a balance due and owing on the client's account.

RULES OF PROFESSIONAL CONDUCT

Section 3-501.16(7)(d): "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 the employment of other

counsel, surrendering papers and property to which the client is entitled, and refunding any advance payment of fees 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...

Assisting the Client Upon Withdrawal

[9] Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequence to the client. The lawyer may retain papers as a security for a fee only to the extent permitted by law. (See Rule 1.15.)

Section 3-501.15(d): “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.

DISCUSSION

Nebraska Ethics Advisory Opinion for Lawyers No. 01-3 provided: AN ATTORNEY HAS AN ETHICAL OBLIGATION, UPON DEMAND, TO PROMPTLY PROVIDE A CLIENT WITH THE CONTENTS OF THE FILE BELONGING TO THE CLIENT. WHAT THE CLIENT MAY BE ENTITLED TO RECEIVE

DEPENDS ON THE NATURE OF THE WORK, THE AGREEMENT BETWEEN THE ATTORNEY AND CLIENT, AND THE PARTICULAR CIRCUMSTANCES OF THE CASE. AS A GENERAL RULE, HOWEVER, A CLIENT IS ENTITLED TO: 1) ALL DOCUMENTS PROVIDED TO THE ATTORNEY; 2) ALL DOCUMENTS OR RESPONSES ACQUIRED BY COUNSEL THROUGH THE DISCOVERY PROCESS; 3) ALL CORRESPONDENCE IN PURSUIT OF THE CLIENT'S INTERESTS; 4) ALL NOTES, MEMORANDA, BRIEFS, MEMOS, AND OTHER MATTERS GENERATED BY COUNSEL BEARING ON THE CLIENT'S BUSINESS AND RESULTING FROM THE EMPLOYMENT OF THE COUNSEL. THE COUNSEL MAY RETAIN COPIES OF THE FILE, ABSENT AN AGREEMENT FROM THE CLIENT. SUCH COPIES MUST BE MADE AT COUNSEL'S EXPENSES.

Nebraska has since adopted the Rules of Professional Conduct. Therefore, the applicability of the above has been questioned, as the prior opinion was decided under the Code of Professional Responsibility. *Neb.Rev.Stat. § 7-108* states, "An attorney has a lien for a general balance of compensation upon any papers of his client which have come into his possession in the course of his professional employment; and upon money in his hands belonging to his client; and in the hands of the adverse party in an action or proceeding in which the attorney was employed from the time of giving notice of the lien to that party."

The **ABA-BNA Lawyers' Manual on Professional Conduct, Practice Guide, Section on Duties at the End of Representation** (45:1201), provides as

follows:

State Rules:

Many of the jurisdictions that have substantially modified their ethics rules since the ABA adopted the Model Rules have embraced [Model Rule 1.16](#) with little significant change, although some states have made slight modifications regarding the scope and existence of a lawyer's right to retain the client's file in the event the Client refuses to pay the lawyer's fees.

Arizona adds that a lawyer must upon request surrender “all of the client's documents, and all documents reflecting work performed for the client.” The lawyer may retain documents reflecting work performed for the client to the extent permitted by other law, the rule adds, but “only if retaining them would not prejudice the client's rights.”

Connecticut requires that the attorney confirm the termination in writing within a “reasonable time.”

The District of Columbia provides that the continuing duty to protect the client applies in connection with “any” termination of representation, not just those terminations based on withdrawal. The rule also reminds lawyers that the right to impose a retaining lien is governed by Rule 1.8(i), which allows retaining liens to be applied only to an attorney's work product and, in any event, prohibits a lawyer from retaining property when the client is unable to pay or where there is a

significant risk of harm if the property is retained.

Georgia omits completely the model rule language that allows a lawyer to retain papers. It also specifies that the “maximum penalty” for violating the rule is a public reprimand.

Louisiana requires a lawyer, upon written request from the client, to promptly release to the client, or the client's new lawyer the entire file relating to the matter. The lawyer may keep a copy of the file “but shall not condition release over issues relating to the expense of copying the file or for any other reason,” the rule states. Who is ultimately responsible for the cost of the copying “shall be determined in an appropriate proceeding.”

Massachusetts adds a list, in paragraph (e), of items that the lawyer must deliver to a former client, after the client requests his or her file.

Michigan’s rule calls on lawyers to take “reasonable” steps to protect the client's interests when terminating the representation.

Minnesota omits the model rule language that allows a lawyer to retain papers. It incorporates a list, in paragraph (e), of items that the lawyer must deliver to a former client, after the client requests his or her file.

Montana sets out a work product exception to the duty to return client property, stating that a lawyer need not surrender “papers or materials personal to the lawyer or created or intended for internal use by the

lawyer.” Papers that don't fall within that definition must be delivered to the client; if copies are kept, the rule adds, the lawyer bears the copying costs.

New Hampshire states that the steps to protect a client's interests are a “condition to termination of representation.”

New Mexico allows a lawyer to retain property to the extent permitted by law “or the Rules of Professional Conduct.”

North Dakota, in Rule 1.19, states that a lawyer shall not assert a retaining lien against a client's files, papers, or property, defines what constitutes a client's papers or property, and makes clear that copying costs may be assessed against the client only when the client agreed to the arrangement up front.

Ohio adds a clause defining client papers and property as including “correspondence, pleadings, deposition transcripts, exhibits, physical evidence, expert reports, and other items reasonably necessary to the client's representation.”

Oregon adds “papers” and “personal property” to the list of things that may be retained consistent with other law.

Rhode Island omits completely the model rule language that allows a lawyer to retain papers. A separate rule states that whenever a lawyer cannot locate a client the lawyer must petition the court for

instructions.

South Carolina adds a sentence expressly allowing a lawyer to “retain a reasonable nonrefundable retainer.”

Tennessee includes in the property that must be returned “work product” prepared for the client, and for which the lawyer has been compensated. The rule allows a lawyer to retain work product to the extent permitted by other law “but only if the retention of the work product will not have a materially adverse effect on the client with respect to the subject matter of the representation.”

Texas permits a lawyer to retain papers “only if such retention will not prejudice the client in the subject matter of the representation.”

Utah allows lawyers to retain papers to the extent permitted by other law but adds that the lawyer must provide, “upon request, the client's file to the client.” It also provides that the lawyer “may reproduce and retain copies of the client file at the lawyer's expense.”

Virginia sets out in paragraph (e) a detailed list of the types of documents that must be returned to the client, and specifies the procedure for copying papers the lawyer wishes to retain.

Also, the **ABA-BNA Lawyers' Manual on Professional Conduct, Practice Guide, Section on Duties at the End of Representation (45:1205)**, provides as follows:

Attorneys' Liens.

Many states allow lawyers to assert liens on client property as a means of guaranteeing that the attorneys' fees will be paid. See generally Restatement (Second) of Agency §464(b) (1958); Restatement of Security §62(b) (1941); 7 Am. Jur.2d Attorneys at Law §313 (1980); 7 C.J.S. Attorney & Client, §358 (1980). Indeed, [Model Rule 1.16\(d\)](#) specifically acknowledges that a lawyer may retain papers “to the extent permitted by law.”

Although the ethics rules neither endorse nor condemn attorneys' retaining liens, the majority of states have concluded that such liens are not unethical *per se*.

See Nat'l Sales & Serv. Co. v. Superior Court, 667 P.2d 738 (Ariz. 1983); Marsh, Day & Calhoun v. Solomon, 529 A.2d 702 (Conn. 1987); Maryland Attorney Grievance Comm'n v. McIntire, 405 A.2d 273 (Md. 1979); Levitas v. Levitas, 410 N.Y.S.2d 41 (Sup. Ct. N.Y. Cnty. 1978); Silverstein v. Hornick, 103 A.2d 734 (Pa. 1954); In re Anonymous, 335 S.E.2d 803 (S.C. 1985).

See also Alabama Ethics Op. 86-2 (1988), Alabama Ethics [Op. 89-25](#), and Alabama Ethics [Op. 89-58](#) (1989); Arizona Ethics [Op. 86-12](#) (1986); District of Columbia Ethics [Op. 250](#) (1994); Florida Ethics [Op. 88-11](#) (1993); Indianapolis Ethics Op. 2 of 1990; Maryland Ethics [Op. 87-36](#) (1987) and Maryland Ethics [Op. 89-11](#) (1988); New Mexico Ethics [Op. 1986-7](#); New York State Ethics Op. 567 (1984); Nassau County (N.Y.) Ethics [Op. 91-5](#) (1991); New York City Ethics Op. 82-74; Columbus Ethics Op. 2 (1987); Oregon Ethics [Op. 2005-90](#) (2005); Philadelphia Ethics Op. 87-1; South Carolina Ethics Op. 88-7; Utah Ethics [Kp. 91](#) (1989); Virginia Ethics [Op. 871](#) (1987) and Virginia Ethics [Op. 996](#) (1988).

See generally Annotation, Attorney's Assertion of Retaining Lien as Violation of Ethical Code or Rules Governing Professional Conduct, 69 A.L.R.4th 974 (1989); Thompson, Attorneys' Fees and Liens, 85 Comm. L.J. 136 (1980); Comment, Attorney's Liens: A Practical Overview, 6 U. Bridgeport L. Rev. 77 (1985).

Thus, although the ethics rules neither endorse nor condemn an attorneys' retaining lien, the majority of states have concluded that such liens are not unethical *per se*, as

set out above.

Approaching this problem, Colorado Opinion 104 (4/17/99), provides as follows:

Files of client; Withdrawal from representation; Photocopies.

At the termination of the representation of a client a lawyer must surrender papers and property to which the client is entitled. The fact that the lawyer may have previously provided copies of documents to the client does not relieve the lawyer of this responsibility. A lawyer has the right to withhold documents related to the representation of other clients that the lawyer used as a model for drafting the client's documents, but the product drafted for the client may not be withheld. Similarly, drafts of pleadings left in the file and not destroyed in the normal course of the representation should be surrendered. In addition, a lawyer may withhold personal attorney work product, including internal memorandums regarding the client's file, conflicts checks, personnel assignments, and a lawyer's notes containing personal impressions and comments that relate to the business of representing the client. If a lawyer's notes contain both factual information and personal impressions, the notes may be redacted or summarized to protect the interests of both the lawyer and the client. Lawyer work product does not include documents belonging to the client or those that are the lawyer's "end product," such as pleadings filed in the case, correspondence with clients, opposing counsel and witnesses, and final versions of contracts, wills, corporate records, and similar documents prepared for the client's use. Preliminary drafts, legal research, and legal research memorandums must also be surrendered. Specific documents that would fall into the category of work product are to be identified on a case by case basis, but the lawyer's duty to protect the interests of the client favors production. In the event of a dispute, a judicial in camera inspection may be necessary. A lawyer who chooses to retain copies of documents surrendered to a client may not charge the client for the duplication costs. But if a lawyer voluntarily surrenders work product to the client, the duplication costs may be charged to the client. In the absence of a valid agreement to the contrary, a lawyer may not refuse to provide papers and property to the client until the client pays duplication costs. Opinion 82; Rule 1.16(d).

CONCLUSION

Regardless of the change from the Code of Professional Responsibility to the Rules of Professional Conduct, “an attorney has an ethical obligation, upon demand, to promptly provide a client with the contents of the file belonging to the client. What the client may be entitled to receive depends upon the nature of the work, the agreement between the attorney and client, and the particular circumstances in the case. **In circumstances where the clients continued representation would be in jeopardy, the lawyer's ethical obligation to the client overrides any lien rights the lawyer may have otherwise obtained by statute or agreement.**

As a general rule, however, a client is still entitled to:

1) ALL DOCUMENTS PROVIDED TO THE ATTORNEY; 2) ALL DOCUMENTS OR RESPONSES ACQUIRED BY COUNSEL THROUGH THE DISCOVERY PROCESS; 3) ALL CORRESPONDENCE IN PURSUIT OF THE CLIENT’S INTERESTS; 4) ALL NOTES, MEMORANDA, BRIEFS, MEMOS, AND OTHER MATTERS GENERATED BY COUNSEL BEARING ON THE CLIENT’S BUSINESS AND RESULTING FROM THE EMPLOYMENT OF COUNSEL. THE COUNSEL MAY RETAIN COPIES OF THE FILE, ABSENT AN AGREEMENT FROM THE CLIENT. SUCH COPIES MUST BE MADE AT COUNSEL’S EXPENSE.” Production to the client may consist of scanned or hard copy.