

STATE BAR ASSOCIATION OF NORTH DAKOTA

ETHICS COMMITTEE

OPINION NO. 93-15

NOVEMBER 17, 1993

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STATE BAR ASSOCIATION
OF NORTH DAKOTA

The Ethics Committee has received a request from [REDACTED]

[REDACTED] for an opinion based on the following facts.

Attorney A was hired to represent a client who suffered injuries in an accident. At the inception of the representation, the client signed a contingent fee agreement wherein the client agreed to pay costs and expenses incurred and also one-third of any recovery. The client agreed to pay the costs of an investigator and an investigator was employed. Attorney A met the investigator, did preliminary work including the securing of all medical records, statements from potential witnesses, photographs of vehicles involved, statements of investigating officers, and discussions with medical personnel involved. Attorney A has also assisted the client in another matter stemming from the accident for which the attorney was retained. No lawsuit has been commenced at this time.

Attorney A has been contacted by Attorney B who indicated that Attorney A has been discharged as the attorney for the client and that Attorney A is not to contact the client except through Attorney B. For purposes of this opinion, the Committee has assumed that other than the contact from Attorney B, Attorney A has not received any verbal or written communication directly from his client notifying him of his discharge.

Based upon the foregoing facts, the Committee has been asked to address the following questions:

1. Can Attorney B forbid Attorney A from contacting the client where the client has not notified Attorney A that he has been discharged?

2. Does Attorney A have to turn over the file to Attorney B without compensation for the expenses and costs incurred and without a finalized contract on the compensation that Attorney A is entitled to consistent with the contingency contract?

3. What rights does Attorney A have with regard to retaining the file and filing an attorney's lien and where should the same be filed prior to the release of any documentation?

DISCUSSION

I. CONTACT WITH CLIENT

The first issue raised by the request for opinion concerns the issue of what limitations exist with respect to a discharged attorney's ability to contact the former client. Rule 4.2, North Dakota Rules of Professional Conduct, clearly prohibits contact with an individual represented by an attorney without the consent of the lawyer unless there is some other legal authority to make such contact. Accordingly, once Attorney A is discharged by his client, he should not make contact with the former client unless he has the consent of the client's new lawyer or there is some other legal authority authorizing such contact.

The committee is of the opinion that until Attorney A is discharged by his client, he is free to communicate with his client. Rule 1.16, North Dakota Rules of Professional Conduct, recognizes that a client has a right to discharge a lawyer at any

time, with or without cause. In the Committee's opinion, it is the client who must communicate the fact of discharge to his or her attorney. While the rules do not specify the form of notice of discharge, it is clear that the client could accomplish the same via verbal or written communication from the client to the attorney being discharged. As indicated in the facts presented in this request for opinion, the client has not communicated either verbally or through a written communication directly from the client that Attorney A has been discharged. It is incumbent upon the new attorney taking on a case which was previously handled by another attorney to make sure that the client has in fact terminated the former attorney. ABA Informal Decision 834 (April 26, 1965) [interpreting prior Code of Professional Responsibility].

In summary, until Attorney A has been notified by his client that he has been discharged, the Committee's opinion is that he may communicate with his client. Such communication is appropriate, at a minimum, to confirm the fact of discharge. Once the client has confirmed or communicated the fact that he has discharged Attorney A, there should be no further communication with the former client without the consent of the client's new lawyer.

II. RETAINING LIEN UPON FORMER CLIENTS PAPERS IN THE HANDS OF THE DISCHARGED ATTORNEY.

The second issue raised by the request for opinion concerns the right of a discharged attorney to retain the papers

belonging to the former client as security for costs, expenses and fees due the discharged attorney. Rule 1.16(e) provides as follows:

Upon termination of representation, lawyers 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 a client is entitled and refunding any advance payment of fees that have not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law.

(Emphasis added). The comments to Rule 1.16 indicate that the discharged attorney "must take all reasonable steps to mitigate the consequences to the client. The lawyer may retain papers as security for a fee only to the extent permitted by law."

North Dakota Century Code §§35-20-08 and 35-20-09, concern the rights of an attorney with respect to retention of client files and/or claims against recoveries in pending litigation. Accordingly, North Dakota law does recognize the right of an attorney to assert a lien on papers, money and against a judgment in favor of a former client. It is not the role of this Committee to render legal advice with respect to how an attorney perfects a lien under N.D. Cent. Code Chapter 35-20, but the statutory lien provision is cited herein for purposes of discussing the ethical issues that may arise when an attorney asserts the statutory lien rights recognized under North Dakota law.

It is the Committee's opinion that the assertion of a retaining lien under N.D. Cent. Code §35-20-08(1) and (2) against

the papers or money belonging to a former client which are in the attorney's possession is not "per se" unethical under the Rules of Professional Conduct. An attorney asserting a legal right to claim a retaining lien under the law, however, must weigh the attorney's legal rights with the ethical obligations imposed upon an attorney under the Rules of Professional Conduct. In other words, depending on the circumstances of each case, the attorney's ethical obligations under the Rules of Professional Conduct may indicate that the attorney should release the client's file so as to not prejudice the right of the client.

As indicated, Rule 1.16(e) requires an attorney to "take steps to the extent reasonably practicable to protect a client's interest. As noted in the comments, the attorney does have a duty to mitigate the consequences to the client even if the attorney feels that the discharge was unfair. The "[m]ere existence of a legal right does not entitle a lawyer to stand on that right if ethical considerations require that he forego it." ABA Informal Opinion 1461 (November 11, 1980) [Interpreting prior Code of Professional Responsibility].

While Informal Opinion 1461 interpreted the prior model Code of Professional Responsibility, the opinion contains statements which are relevant to the obligations imposed upon attorney's under the Model Rules of Professional Conduct as adopted in the State of North Dakota. On this issue, Informal Opinion 1461 states as follows:

The application of this standard requires the lawyer to evaluate his or her interest against

the interest of the client and of others who would be substantially and adversely affected by assertion of the lien. The lawyer should take into account the financial situation of a client, the sophistication of the client in dealing with lawyers, whether the fee is reasonable, or the client clearly understood and agreed to pay the amount now owing, whether imposition of the retaining lien would prejudice important rights or interest of the client or of other parties, or the failure to impose the lien would result in fraud or gross imposition by the client, and whether there are less stringent means by which the matter can be resolved or by which the amount owing can be secured. Even though a lawyer may be justified in declining to devote further time and expense in behalf of a non-paying client, it does not follow in all cases that he is ethically justified in exercising an attorney's lien.

If, for example, exercise of the retaining lien would prejudice the client's ability to defend against a criminal charge, or to assert or defend a similarly important personal liberty, the lawyer should ordinarily forego the lien. Similarly, if the court, or other parties, or the public interest would be adversely or seriously affected by the lien, the lawyer should be hesitant to invoke it. Financial inability of a client to pay the amount owing should also cause the lawyer to forego the lien because the failure to pay the fee is not deliberate and does not constitute fraud or gross imposition by the client. The lawyer should forego the lien if he knew of the client's financial inability at the beginning or if he failed to assure agreement as to the amount or method of calculating the fee.

Assertion of the lien would be ethically justified when the client is financially able but deliberately refuses to pay a fee that was clearly agreed upon and is due, since this conduct would constitute gross imposition by the client.

In Federal Land Bank of Jackson in Receivership v. Federal Intermediate Credit Bank of Jackson, 127 F.R.D. 473 (S.D.

Ms. 1989), aff'd in part rev'd in part, 128 F.R.D. 182 (S.D. Ms. 1989), the Court, recognizing the right of an attorney to assert a retaining lien under Mississippi law, noted that the "ethical issue which the lawyer must weigh in the balance with his legal rights is at what point will the enforcement of his legal right breach his ethical duty under 1.16(d) [Similar to Rule 1.16(e), N.D. Rules of Professional Conduct] to 'take steps to the extent reasonably practicable to protect a client's interest.'" Id. at 476. The Court went on to state that "generally, if retaining the client's file prevents the client from obtaining another lawyer or from proceeding with his case in a timely manner, then a lawyer may have breached the ethical duty owed to the client." Id.

It is the Committee's opinion that Rule 1.16(e), N.D. Rules of Professional Conduct, also requires attorneys to weigh the assertion of their legal right with the duty owed to their former clients under the Rules of Professional Conduct. Depending on the facts involved in each case, an attorney's ethical obligations may dictate the lawyer forego the assertion of the legal rights to claim a retaining lien on client papers or money in the attorney's possession.

In Pomerantz v. Chandler, 704 F.2d 681 (2nd Cir. 1983), the Court stated that "when the client has an urgent need for the papers to defend a criminal prosecution and will be seriously prejudiced by withholding of them but lacks of the means to pay the lawyer's fee and disbursements; in that event the court may in its discretion, after balancing conflicting interests require the

lawyer to release the papers under reasonable conditions." Id. at 683, citing, ABA Committee on Professional Ethics, Informal Opinion No. 1461 (1980). The Pomerantz Court went on to note "that such a release may be ordered, however, only upon a client's making a clear showing of the need for the papers, the prejudice that would result from denying him access to them, and his inability to pay the legal fees or post a reasonable bond." See also, Jenkins v. Weinshienk, 670 F.2d 915 (10th Cir. 1982).

The Jenkins Court recognized that an attorney should ethically consider foregoing the retaining lien when an important personal liberty interest of the client is at stake; when the papers are essential to the defense of a criminal charge; when the issue involves personal misconduct by the lawyer, as when he has withdrawn without just cause or reasonable notice; or, in situations where the client is financially unable to post a bond or pay, in which case the client's failure not to pay is not deliberate and requiring the client to pay may hinder the client's ability to secure other representation. Id. 919-920. See also, Lucky - Goldstar International (America), Inc., v. International Manufacturing Sales Company, Inc., 636 F.Supp. 1059 (N.D. Ill. 1986), and, Attorney's Assertion of Retaining Lien as Violation of Ethical Code or Rules Governing Professional Conduct, 69 ALR 4th. 974.

In summary, it is the Committee's opinion that an attorney's assertion of a retaining lien under N.D. Cent. Code §35-20-08(1) and (2) is not a "per se" violation of the Rules of

Professional Conduct, however, the Rules would require an attorney to forego enforcement of a retaining lien when the former client lacks the means to pay the lawyer's fee or post a bond and has an urgent need for the papers to defend a criminal prosecution or to assert or defend a similarly important personal liberty. Where the former client is financially able to pay the fees and cash advances claimed by the former attorney or to post the security contemplated by N.D. Cent. Code §35-20-09, the Committee is of the opinion that there is no ethical obligation on the part of the lawyer to forego the retaining lien.

The Committee cautions, however, that each case must be determined on its own facts. The attorney involved must assess the case based on the facts presented and determine whether the assertion of the attorney's statutory lien rights in the particular case are outweighed by the attorney's ethical obligations to mitigate the consequences of the attorney's discharge/withdrawal to the client. If so, the ethical obligations would dictate that the attorney forego the enforcement of the retaining lien.

The request for opinion raises a related issue with respect to what portions of the file are to be released to the client upon the payment of the claim or the posting of security for payment of the claim. When the retaining lien is satisfied, all documents in the firm's files which are the property of the client must be made available to the former client. It is the Committee's opinion that documents which are "owned" by the firm, do not need to be produced to the client or made available to the former

client. While such documents may be subject to discovery under the Rules of Civil Procedure, Courts have recognized that a law firm cannot be compelled to produce documents which are "it's property and which are privileged or which are not relevant to the subject matter involved in " the matter. Federal Land Bank of Jackson in Receivership, 127 F.R.D. at 478.

In the Committee's opinion the portion of a file which must be turned over to a client upon the payment of the fee or other adequate provision for amounts owed to the attorney are made, would consist of "the papers and property delivered by him to the lawyer, the pleadings or other end product developed by the lawyer, the correspondence engaged in by the lawyer for the benefit of the client, and the investigative reports which have been paid for by the client." Id. "The Ethics Committee does not consider an attorney's work product to be property of the client and the attorney has no ethical obligation to deliver his work product." Id. at 479. See also, Jenkins, 670 F.2d at 920. In ABA Informal Opinion 1376, (February 18, 1977), it was stated that an attorney must return all the materials supplied by the client to the attorney, and also any "end product", but internal notes and memos which have been generated primarily for the attorney's purposes in working on the client's problem need not be turned over to the client.

The Court in Federal Land Bank of Jackson in Receivership, citing an opinion by the San Diego Bar Association

noted the following with respect to the documents which belong to the client and those which belong to the attorney:

[t]he documents in a typical client's file, which are owned by the client, are: (a) pleadings and other papers which are filed with the court, and which become part of the public record in the case, and (b) correspondence to the client, to the opposition and witnesses, and correspondence which the attorney receives from the same. The San Diego opinion characterizes these documents as the attorney's finished product, or responses to his finished product. The opinion states that such documents have been voluntarily and strategically exposed to public light by the attorney to further his client's interest. These are documents for which the client has paid, for which the client can anticipate paying, and they are the type of document which both the attorney and the client expect to become the property of the client. San Diego Bar Association, 25 Dicta, May 1978 at 19 (Opinion 1977-3 n.d.), reprinted in The Digest of Bar Association Ethics Opinions, No. 10651, at 91, (Supp. 1980).

The San Diego Opinion states that the documents in a typical client's file which are owned by the lawyer include 'notes written by the attorney to himself preparatory to drafting other documents or as preparation for disposition or trial, or notes of interviews - - all these typically characterized by their informality, candor, and containing mental impressions, conclusions, opinions, or legal theories." Id. With respect to these documents, the opinion states:

such personal notes as are described above ... are not the property of the client. This is so because a typical attorney-client relationship presupposes that the rough, blemished opinions of the attorney, whether or not reduced to writing, are the tools of his trade (like into the tools of a carpenter) without which the attorney cannot construct the appropriate legal

representation for which the client has retained him and which the client has every right to expect. Therefore these ... documents are ones to which the client has no entitlement."

Id. at 478-479.

In the Ethics Committee's opinion, when an attorney decides to forego the attorney's right to assert a retaining lien under North Dakota law in light of the attorney's other ethical obligations under the Rules of Professional Conduct, the attorney has no ethical obligation to turn over to the client portions of the file which belong to the lawyer or his firm such as attorney work product.

III. PERFECTION OF LIEN

The third issue raised in the request for opinion concerns what procedures must be taken by an attorney to perfect a retaining lien against paper and money in an attorney's possession or a charging lien against money due the former client in the hands of another or which may become due as a result of the action. It is beyond the role of the Ethics Committee to render legal advice with respect to the procedures necessary to perfect either a retaining or charging lien under applicable North Dakota law. The above discussion sets forth the Committee's opinion with respect to the ethical considerations of a lawyer when enforcing a retaining lien against papers or money in the lawyer's possession. As indicated, the lawyers responsibility under the Rules of

Professional Conduct may, in the appropriate case, dictate the lawyer forego a retaining lien.

CONCLUSION

As indicated above, the Ethics Committee is of the opinion that an attorney may contact a client until such time as the attorney has been notified by the client that the lawyer has been discharged. The Committee considers such contact appropriate at a minimum, to confirm the fact that the lawyer has been discharged. Once notified, the discharged attorney should have no contact with the former client without the new lawyer's consent.

Furthermore, the discharged attorney's assertion of a retaining lien under applicable North Dakota law is not a "per se" violation of the Rules of Professional Conduct, however, the circumstances of each case must be assessed by the attorney to determine whether the ethical obligations of the attorney to protect the former client's interest would require the attorney to forego the assertion of the retaining lien. The Ethics Committee is of the opinion that the lawyer should forego the right to enforce a retaining lien on the client's papers when the former client lacks the means to pay the lawyer's fee or to provide adequate security therefore, has an urgent need for the papers to defend a criminal prosecution or to assert or defend a similarly important personal liberty.

This opinion was drafted by Paul F. Richard. It was
unanimously approved by the Ethics Committee on November 17, 1993.


Michael Maus, Chairman

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Mr. Michael J. Mans
Attorney at Law
P.O. Box 370
Dickinson, ND 58602-0370

Re: Request for Ethics Opinion

Dear Mr. Mans:

This letter is a request for an opinion from the Ethics Committee with regard to a file of mine. I was hired to represent a client for injuries suffered in a motorcycle accident on March 5, 1993. He came to my office in early April of 1993 and I obtained from him a signed contingent fee agreement wherein he agreed to pay my costs incurred and expenses and 33 1/3% of all recovery. I asked him if he would be willing to pay the costs of an investigator and he concurred. I employed an investigator and met with the investigator on numerous occasions requesting information from him as we began investigating this matter. I met with the investigator, outlined his duties, reviewed his work and requested additional information. In the meantime, I kept my client advised and showed him all of the work that we had done. We have obtained all of the medical records, obtained statements from all of the potential witnesses, secured photographs of all vehicles, obtained statements from the investigating officer, and have personally met with the medical personnel on duty. In addition, we have obtained all medical records and have discussed future care with the attending physician.

My client had some problems with the military as a result of this accident and we assisted the Air Force area defense counsel as he represented our client by providing information to him. We have talked with and provided information to his senator from the State of Iowa and are assisting that senator who is doing a congressional investigation into the actions taken by the United States Air Force against our client as a result of this motorcycle accident. Subsequent to the accident our client was involved in, he had another accident which was not his fault but which caused additional injury to his already injured limbs. I was not retained to represent him in the second accident.

We believe that communication has been excellent with the client and that his requests have been responded to as timely as conditions permitted given other files and clients' demands. Never has the client ever indicated a dissatisfaction with our representation.

[REDACTED]

The injuries of my client have not settled down and he may need additional medical treatment in addition to evaluation by doctors in the field of neurology to obtain a permanency rating. Following that, either settlement or lawsuit could be initiated. We have been informed by a local attorney in town that we have been relieved as attorneys for the client and that we are not to contact the client except through the newly hired attorney. I have some questions with regard to my file and would appreciate some direction with regard to the rules of professional responsibility and ethics in such matters.

1. Can another attorney forbid me from contacting my own client with whom I have a contingency contract and who also owes me for expenses advanced on his behalf?
2. Do I have to turn over my file to this attorney without compensation for the expenses and costs I have incurred and without a finalized contract on the compensation that I am entitled consistent with the contingency contract?
3. What rights do I have with regard to retaining the file and filing an attorney's lien and where should the same be filed prior to the release of any documentation?

Please respond as soon as possible as the attorney is now threatening me with legal action if I do not give him the entire file by Monday, November 8, 1993. This letter is being sent by fax to you for your attention.

Very truly yours,
[REDACTED]