

Advisory Opinion 1984-4

The question presented to the Advisory opinions Committee is whether an attorney may retain documents and papers of a former client when the documents and papers are needed in other litigation by that client, but the client has not paid his account with the attorney.

Counsel should first consider whether he has a valid lien on the client's papers. This is primarily a question of contract to be determined by state law. ABA Formal Opinion 209 (1940). In some circumstances, New Mexico recognizes the common law right of an attorney to claim a retaining lien for outstanding unpaid fees on the papers and documents which come into the lawyer's possession as a result of his professional representation of the client. See *Prichard v. Fulmer*, 22 N.M. 134, 159 P. 39 (1916); Restatement of Securities 5 62B (1941). In analyzing whether the lien is valid, counsel should consider whether possession of the documents and papers was obtained in his professional capacity (e.g. papers given expressly to the attorney by the client in connection with the professional services being rendered for the client and for which professional services were actually rendered), or through other means such as an unauthorized request, another person's unauthorized act, accident, mistake or in an unrelated matter. The Committee does not view its role as determining the validity of the lien. It would disapprove, though, of any attempt to enforce an invalid lien.

A second consideration concerns the scope of the lien and the rights of the attorney and client thereunder. A situation similar to the one presented here arose in *Pomerantz v. Schandler*, 704 F.2d 681 (2d Cir. 1983) and *Jenkins v. Weinsheink*, 670 F.2d 915 (10th Cir. 1982). In *Pomerantz* an attorney withdrew from representation of a litigant and claimed a lien on the litigant's documents for payment of his fees. The litigant requested release of the documents, but the attorney refused unless his account was paid or adequate security for payment was posted. Although the attorney had no absolute right to assert his lien, the court held under the facts of the case that the attorney may withhold the papers until the fee was paid or adequate security for payment was posted. The court, however, recognized an exception to withholding when the client can show: (1) an urgent need for the papers; (2) prejudice if access is denied; and (3) an inability to pay the fee.

The purpose of the retaining lien is to cause the client to pay his bill. The effectiveness of the lien depends on the client's inability to gain access to the papers. It therefore follows that the lawyer may withhold the papers even if needed in other litigation until the client pays the bill or is able to convince a judge that the *Pomerantz* exception applies. Although in *Pomerantz* the other litigation involved a criminal prosecution, the rule may also be applicable in certain civil litigations where important personal liberties and rights are at stake. See *Jenkins v. Weinsheink, supra*. Counsel should note that the opposing party in the other lawsuit probably can gain access to the papers through discovery if the papers are not protected by work product notwithstanding the retaining lien. *Jenkins v. Weinsheink, supra*.

The ethical propriety of asserting a retaining lien is not absolute either under the Model Code. Counsel is strongly urged to review ABA Informal opinion 1461 (1980) carefully; see Model Rules of Professional Conduct 1.16 (1983). A proper sense of the regard for the nature of the profession should lead a lawyer to evaluate his financial interests in light of the interests of the client when making his decision to invoke an attorney's lien to which he may be entitled under law. Informal opinion 1461 points out that the mere existence of a legal right to a retaining lien does not entitle a lawyer to stand on that right if ethical considerations require that he forego it. See DR 2-110(A)(2); EC 2-23; EC 2-32. In relevant part Opinion 1461 states that the attorney must

evaluate his or her interests against interests 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 the client, the sophistication of the client in dealing with lawyers, whether the fee is reasonable, whether the client clearly understood and agreed to pay the amount now owing, whether imposition of the retaining lien would prejudice important rights or interests of the client or of other parties, whether 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 and seriously affected by the lien, the lawyer should be hesitant to invoke it. Financial inability of the 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 thus does not

constitute fraud or gross imposition by the client. The lawyer should forego the lien if he knew 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.

The attorney has not provided the Committee with enough facts to permit a clear cut answer. It would be helpful to know if the client asserts that the attorney's efforts were improper, inadequate or contrary to instructions; that the fee billings were excessive or contrary to agreement; whether the client claims a present inability to pay; and whether the client discharged the attorney or the attorney withdrew without just cause or reasonable notice. See *Jenkins v. Weinsheink*, *supra*; Informal Opinion 1461.

The Committee concludes that the attorney may assert a retaining lien and withhold the papers and documents notwithstanding other litigation if: (1) a valid lien exists; (2) the client does not fall within the exceptions set out in *Pomerantz* and *Jenkins*; and (3) the ethical considerations raised in ABA Informal opinion 1461, the cites therein and Model Rule 1.16 are not breached.