Advisory Opinion 1985-4

A. FACTS SET FORTH IN THE REQUEST FOR ADVISORY OPINION

1. The law firm which requests the advisory opinion accepted representation with regard to a group of condemnation cases, upon a contingent fee basis.

2. The contingent fee is in fact a shared contingent fee with a referring attorney, such that the fee agreed to by the law firm is two-thirds of the one-third contingent fee agreed to directly between the referring attorney and the multiple clients, and the underlying contingent fee is upon funds recovered in excess of the offer made by the condemnor prior to filing the condemnation actions.

3. An attorney associated with the law firm who has been primarily responsible for the representation of the clients for the law firm, and who has devoted approximately 52.3 hours to the files, is leaving the law firm.

4. The law firm is willing that the attorney leaving the firm continue to act as co-counsel for the clients, along with the original referring attorney.

5. The departing attorney is willing to continue to represent the clients.

6. Apparently the original referring attorney is willing to continue to represent the clients, as co-counsel with the departing attorney.

7. Apparently also the clients are willing that the original attorney and the departing attorney represent them and are willing that the law firm withdraw from representation, although this has not been specifically stated in the letter requesting this advisory opinion.

8. The original referring attorney has apparently received approximately $5,000 from the condemnor, an amount which we assume is in excess of some original offer by the condemnor and is therefore subject to distribution to the client, less applicable contingent fee to the attorneys. The requesting letter does not indicate whether this sum was received on behalf of one client or on behalf of more than one client.

9. There is or may be no written Contingent fee agreement between (a) the clients and the original referring attorney, or (b) the clients and the law firm; there is a letter from the law firm to the referring attorney setting forth the apparent understanding between the law firm and the referring attorney. it contains no provisions for compensation to the law firm in the event of withdrawal or discharge.

10. In the letter agreement between the law firm and the original referring attorney there is no provision relating to whether moneys received from the condemnor will be distributed immediately to clients, and before all moneys are received, and is likewise silent on when contingent fees will be actually distributed to any of the attorneys.

11. The law firm requesting the advisory opinion has offered, apparently to the departing attorney, to accept as full payment of any fees payable to the law firm, the sum of $3,339.50, being 52.3 hours times the departing attorney's hourly rate of $65.00 per hour, and upon receipt of such sum to forego any further contingent fees on further sums recovered for the clients, although further sums recovered may be substantial and thus would, theoretically, generate contingent fees to the law firm in excess of the sum of $3,339.50 (plus gross receipts tax) it is willing to accept. The law firm is willing to do this if the departing attorney will be responsible for and perform the necessary future services for the clients.

12. The law firm asks, however, whether it may retain its files, and not turn them over to the departing attorney, until the sum of $3,339.50, plus tax, is paid.

B. FACTS NOT SET FORTH IN REQUESTING LETTER

The section above states what is revealed by the letter requesting the advisory opinion. Set forth below is what the letter does not reveal:

1. What documents are contained in "the files" which the law firm seeks to continue to possess until it is paid the indicated sum.

2. To what extent, if any, the clients might be prejudiced in the pending litigation if they are deprived of the files in question, or whether the law firm has sought to ascertain the existence of any such prejudice.

3. Whether the clients are agreeable to the fee payment of the sum of $3,339.50, whether the clients have agreed that such sum be paid from the $5,000 presently in the possession of the referring attorney, or in some other manner, or whether the clients have in fact even been informed of the proposed payment.

4. Whether the departing attorney is in agreement with the sum or method of payment to the law firm which is proposed.

5. Whether the law firm is counsel of record in the condemnation cases.

6. Whether the law firm has filed a motion to withdraw as counsel of record in the condemnation cases.

C. ADVISORY OPINION REQUESTED

The specific request for an advisory opinion, sought by the law firm, is whether, under the circumstances stated, it offends any ethical prohibition by insisting upon retention of the "files" generated by the departing attorney until it is paid the sum it has requested.

D. OPINION

Under the stated circumstances, the law firm has not accomplished a number of preliminary steps to place it in position to assert a "retaining lien," and to assert such retaining lien in the absence of taking such steps would violate its ethical obligations to:

a) Notify its client of receipt of an intended distribution of funds recovered on behalf of the clients;

b) Obtain client consent to modifications of the attorney-client agreement;

c) Take appropriate steps to protect a client against possible prejudice resulting from the assertion of a retaining lien.

DISCUSSION:

The retention of possession of documents received from or received on behalf of, or generated as work product on behalf of a client is the assertion of general lien, or, more commonly, a retaining lien." *Prichard v. Fulmer,* 22 N.M. 134, 159 P. 39, 2 ALR 474 (1916); *Attorneys Retaining Lien Over Former Clients Papers*, 65 Colum. L. Rev. 296 (1965); *Attorneys versus Client: Lien Rights and Remedies in Tennessee,* 7 Mem. St. L. Rev. 435 (1977); 7 Am. Jur. 2d, Attorneys at Law, §§ 35-323, pp. 332-336. By implication from the dicta in *Prichard v. Fulmer, supra,* New Mexico would recognize the legal right of an attorney to assert such a lien. See also *In re Grand Jury Proceedings,* 727 F.2d 941 (10th Cir. 1984).

The right to exercise such a "lien" in any given set of circumstances is normally a question of law with which an ethics advisory opinion cannot be concerned. Opinion CI-628, (Michigan 1981) (ABA/BNA Lawyers Manual on Professional Conduct S 801:4821); Opinion CI-949 (Michigan 1983) (ABA/BNA Lawyers Manual § 801:484) (Michigan 1983); Opinion (8); New Hampshire 1982 (BNA/ABA Lawyers Manual..... § 801:5702); Opinion E-80-8 (Wisconsin 1980) (BNA/ABA Lawyers Manual..... § 801:9102).
The ethical rule addressing the retaining lien directly is DR 5-103, which states:

> "DR5-103 Avoiding Acquisition of Interest in Litigation
>
> A. A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation he is conducting for a client, except that he may:

(1) Acquire a lien granted by law to secure his fee or expenses." (Emphasis supplied).

Although an ethics advisory opinion may not advise whether a retaining lien is afforded by law in any given circumstances, nevertheless numerous ethical considerations are implicated by the request at hand. Specifically:

a) An attorney may not alter the terms of a fee arrangement unless the client is informed and consents. See ABA/BNA Lawyers manual .... 41:601.

b) In withholding a client's files, the lawyer must consider possible prejudice to the client. ABA/BNA Lawyers Manual ... 41:2104.

c) The existence or possibility of prejudice cannot be determined until inquiry is made into the nature of the documents and the details of a case. *National Sales & Service Co. v. Superior Court,* 667 P.2d 738 (Ariz. 1983).

d) The lawyer exercising a retaining lien cannot hold items in excess of that needed to satisfy a claim. *Adams, George, Lee, Schultz & Ward, P.A. v. Westinghouse Electric Corp.,* 597 F.2d 570 (5th Cir. 1979); *White v. Zelf,* 309 N.W.2d 650 (Mich. 1981).

Assuming, without purporting to decide, that an attorney might exercise a retaining lien upon withdrawing or being discharged in a contingent fee case where funds have not yet been received on behalf of the client and fees are thus not yet payable, (See Note, *Attorney versus Client; Lien Rights and Remedies in Tennessee,* 7 Memp. St. U.L. Rev. 435, at pp. 442, 443), and recognizing that the code of ethics does not prohibit separation agreements between a law firm and a withdrawing attorney, DR-2-107, the appropriate procedure to be followed would appear to be as follows:

1. Assuming that there was no contrary employment agreement between the law firm and the departing attorney, the law firm should first attempt to work out a separation agreement between it and the departing attorney, and not involving the client and the referring attorney (see *Cordes v. Purcell, Fritz & Ingrao,* 453 N.Y.S.2d 237 (1982) . . . " ***The outgoing attorneys lien should be computed on the basis of *quantum meruit.**** The issue is primarily or exclusively between the attorneys and not as between the client and attorney."), unless the law firm, as a matter of practicality, must reasonably look to funds in the hands of the referring attorney in order to be compensated.

a) Such an agreement should be in recognition by the departing attorney that a law firm is not required to relinquish its total compensation or fees merely because the departing attorney is going to be responsible to complete the contingent fee cases, and that the law firm is entitled to *quantum meruit* or a fee on a contingent basis based upon *quantum meruit.* See *Cordes v. Purcell, Fritz & Ingrao,* N.Y.S.2d 237 (1982).

b) Such an agreement should further be negotiated in recognition by the law firm that the departing attorney may not be in financial position to personally pay the *quantum meruit* fee prior to receiving his fee from the client, and that in fact the departing attorney, in the absence of some contractual duty not referred to in the request letter, is not personally legally obligated to pay the fee at all.

(i) on the other hand, the departing attorney should approach the attempt to work out the separation agreement with his former law firm with the understanding that he is *ethically* obligated to protect the fee of a discharged or withdrawing counsel. See Informal Opinion 81-2, Connecticut 1980 (ABA/BNA Lawyer'sManual 801:2051).

2 . If satisfactory assurance of payment cannot be worked out solely between the law firm and the departing attorney, and the law firm reasonably concludes it must look to the originally referring attorney for payment or assurance of payment of the fee from settlement funds obtained by the referring attorney, then the referring attorney must be brought into, the negotiations and the best practice would be for the law firm, the departing attorney and the originally referring attorney to agree to a payment, in writing, of either a fixed sum certain or a formula by which the sum may be rendered certain. Because the client would not be required to pay a fee in excess of the original fee agreed upon, and because there would not at this stage of the matter be any retaining lien" contemplated or anything which would otherwise implicate the rights of the client (other than the fact that the law firm is withdrawing), there would appear to be no need to involve the client in the fee negotiations. The client should, of course, be advised of the withdrawal of the law firm, with the resultant lack of responsibility for the handling of the matter, and should, in writing, consent to such withdrawal. See Rule 89 N.M.R.C.P.;

DR 2-110(A)(1). The consent should specifically recite that satisfactory arrangements have been made for the payment of all fees of the law firm out of the contingent fees to be received by the referring attorney or the departing attorney, and, for the protection of the client should also be signed on behalf of the law firm.

a) The agreement should also recite that all files, documents, papers, etc. have been delivered to the departing attorney and/or the original referring attorney and such should be acknowledged by the attorney receiving such papers, by signing of the three-party agreement.

b) That stated in a), above, should not be construed as indicating that the withdrawing law firm may not copy such documents as it feels necessary to protect its interests, such as the interest of the possibility of any future malpractice claim. This copying should be at the expense of the law firm unless there was a specific provision in the original agreement under which the client (or some other party) agreed to pay such expense. See ABA/BNA Lawyers Manual at 801:1310; 801:1851; and 801:4866 and 801:7505.

3. If for some reason the law firm and departing attorney or the law firm, the departing attorney and the referring attorney cannot arrive at an agreed solution, as above, and it would appear either that

a) the law firm is insisting upon a retaining lien or a charging lien or some other assurance *by the clients,* that its fees be paid, then, and only then, must the client be brought into the negotiations. Such advice should comport with the provisions of Model Rule1 1.4, and Model Rule 1.8, that is the client must be fully and clearly informed of the status of the inability of the lawyers to agree among themselves and this may include advising the client that he is free to, and may want to, obtain independent counsel to advise the client in the matter.

i) At this stage the withdrawing law firm would have to confront the issue of prejudice, if any, to the client, which might result from failure to turn over all files and papers, as a matter of ethics, and consider whether under the circumstances it may, as a matter of law, assert a retaining lien. It would be at this point that normally ethical considerations might arise, and any attorney confronting the issue of possible prejudice would be well advised to consult the seven (7) point checklist at p. 307 of the Columbia Law Review article referred to earlier in this brief. The checklist, although referring to what a court would require if it were to determine the issue, as a matter of law, would be useful in ethical considerations as well.

Because the attorneys may have reached an impasse but have not involved the client, and have not detailed any facts necessary to evaluate any specific prejudice to the client, it is impossible for these authors to make the further evaluation of whether prejudice to the client would outweigh assertion of a retaining lien.

The authors conclude, therefore, that the law firm may not use a retaining lien or the threat of a retaining lien to effect a separation agreement between the law firm and the departing attorney, because unless and until the client is afforded notice and opportunity to protect itself, a legal remedy which would affect the client cannot be used to compel an agreement with the departing attorney.

As a matter of practical application to the facts recited at the inception of this opinion, it would appear that the referring attorney has received approximately $5,000, which, as above, we assume may be funds received in excess of the condemnor's offer and thus subject to the contingent fees of the attorneys. We again note that the requesting letter does not indicate whether this $5,000 was received on behalf of just one client or on behalf of more than one client. In any event, assuming that it is presently subject to distribution to the clients and to the attorneys, then the law firm would, prior to departure of its former attorney, be entitled to receive two-thirds of one-third of $5,000 $1,111.10. The law firm is presently demanding, with tax, the sum of $3,556.73. The requesting letter does not indicate whether it is insisting that such sum be paid out of the $5,000, and, therefore, in part out of the pocket of the clients. If it is contemplated that it came out of the pocket of any client, then it should be shared by the client on some pro rata basis. if it is contemplated that it came out of the pocket of the departing attorney or the referring attorney, then it is inappropriate to threaten the client's files with a lien to secure the payment from
the attorneys.

Finally, as to the reasonableness of the figure which the law firm indicates is acceptable to it, in conjunction with its foregoing participation in any future contingent fees, or as to the formula employed to arrive at such figure, we express no opinion. As to the reasonableness of the fees generally, we merely direct the law firm to DR2-106, to Model Rule 1.5 and

to 41:10 to 41:2003 of the ABA/BNA Lawyers Manual on Professional Conduct.

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1 The authors are cognizant of the fact that the Model Rules of Professional Conduct adopted by the ABA in 1983, have not yet been adopted in New Mexico and that New Mexico still operates under the Model Code of Professional Conduct. The Model Rules, however, are being quoted with approval by courts in states which have not yet adopted them. See *Securities Investor Protection Corporation v. Vigman*, FS (U.S.D.C. Calif. 1984). See, also, *State v. Martinez,* 106-N.M. 532 (Ct. App. 1983).