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October 17, 2007

Mr. Dwight Dinkla
Executive Director
Iowa State Bar Association
521 E. Locust
Des Moines, IA 50309

Re: Opinion 07-08 (Retaining Lien- Client Files)

Dear Mr. Dinkla:

We have been asked to opine on the apparent conflict between the use of the lawyer's retaining lien found in §602.10116(1)IOWA CODE(2007)and Iowa Rule of Professional Conduct 32:1.16(d).

OPINION

An Attorney may not assert a statutory retaining lien against a client's original documents if, by doing so the client would be otherwise prejudiced

ANALYSIS

Iowa Code §602.10116(1) (2007) provides:

> An attorney has a lien for a general balance of compensation upon:

> 1Any papers belonging to a client which have come into the attorney's hands in the course of professional employment.

In addition, Rule 32:1.16(d) provides:

> (d) Upon termination of representation, a lawyer shall . . . protect a client's interests, such as . . . surrendering papers and property to which the client is entitled . . . . The lawyer may retain papers relating to the client to the extent permitted by law.

The lien created by Iowa Code §602.116(1) is known as a "retaining lien" or a "general lien." Tri City Equipment Co. v. Modern Real Estate Investments, Ltd., 460 N.W. 2d 464, 466 (Iowa 1990); Feaker v. Bulicek, 538 N.W. 2d 662, 663 (Iowa App. 1995). This general or retaining lien "operates on any property, including client's documents . . . in the attorney's hands that belong to a client until such client pays the attorney for fees due." Tri City Equipment, 460 N.W. 2d at 466; Feaker, 538 N.W. 2d at 663. Such a retaining lien is "an exception to the rule of professional conduct that prohibits an attorney from acquiring a proprietary interest in the client's case." Iowa Supreme Court Board of Professional Ethics & Conduct v. McKittrick, 683 N.W. 2d 554, 561 (Iowa 2004). Consistent with the last sentence in Rule 32:1.16(d) (formerly DR 2-110), "this exception applies only to liens 'granted by law.'" McKittrick, 683 N.W. 2d at 561. Most recently, Justice Wiggins observed:

> While it is not unethical for a lawyer to engage in fee collection practices against a former client, the practice employed to enforce a collection should be carefully scrutinized. Illegal, aggressive, and improper collection practices can lead to disciplinary actions against attorneys, as can the use of attorney liens and confessions of judgment.

Iowa Supreme Court Attorney Disciplinary Board v. Powell, 726 N.W.2d 397, 404 (Iowa 2007). For example, in Iowa Supreme Court Attorney Disciplinary Board v. Earley, 729 N.W. 2d 437 (Iowa 2007), the client hired the respondent attorney, but the respondent attorney "took no action . . . despite [the client's] numerous attempts to contact him." Id. at 440. Later, the client and a new attorney requested that the respondent attorney provide him with a copy of the file. The respondent attorney did not respond, "nor did he make any arrangements to provide the file to either [the client] or her attorney." Id. The Court

found that such inaction violated DR 9-102(b)(3), which then required a lawyer to "promptly deliver to the client the properties in the possession of the lawyer that the client is entitled to receive." Id. at 442. Similarly, in Iowa Supreme Court Attorney Disciplinary Board v. Bjorklund, 725 N.W. 2d 1 (Iowa 2006), the respondent attorney received a flat fee of $1,500 to represent the client in an OWI charge. The client "appeared in court on two occasions for his sentencing, only to learn that the matter had been continued." Id. at 9. Respondent attorney's office was "aware of the continuance, but had not notified" the client. Id. The client then wrote the respondent attorney, asking the respondent attorney to withdraw from the case, "requesting a refund of any unearned funds, and asking that his file be mailed to him." Id. The respondent attorney informed the client that "he was not entitled to a refund," and "offered to send a copy of [the] file upon payment of $25 to cover copying and postage." Id. The Court found the respondent attorney's "failure to return his client's file was a violation of DR 2-110(A)(2)." Id. Last but not least, in Committee on Professional Ethics and Conduct v. Nadler, 445 N.W. 2d 358 (Iowa 1989), the Court cited with approval a "general rule" that "[p]roperty or funds delivered for a special purpose by a client to his attorney cannot constitute the subject matter of a retaining lien in favor of such attorney." Id. at 361 (citing 7A C.J.S. Attorney and Client §377). In Nadler, the respondent attorney negotiated successfully a settlement on the client's behalf, and the client then gave the respondent attorney $500 to be used to pay toward the settlement. The respondent attorney then "asked for payment on his fees as well." Id. The client "was not prepared to comply. So instead of advancing the $500 to [the client's] creditor, [the respondent attorney] retained the sum to secure his own fee, claiming an 'attorney's lien' under Iowa Code §602.10116." Id. The Court found such action violated then EC 9-6, because "by keeping his client's money instead of applying it to the purpose for which he received it, [the respondent attorney] clearly failed to seek the lawful objective of his client and prejudiced his client's cause in violation of DR 7-101(A)(1), and (2), and (3)." Id.

Based on the language of Rule 32:1.16(d) and the Iowa Supreme Court opinions discussed supra, we are of the view that while it is generally proper for Attorney to assert a retaining lien against a client's original documents, it would be improper to do so if the retention of such documents will prejudice the rights of the client.

The secondary, related issue is what constitutes "prejudice" such that Attorney might counsel against assertion of a retaining

lien. In that context, the Annotated Model Rules of Professional Conduct (5th Ed.), published by the American Bar Association (2003), at p. 275, provides the following discussion:

> State jurisdictions interpreting Rule 1.16(d) and the corresponding rule under the Mode Code generally have held that a lawyer's legal right to execute a lien granted by law to secure a fee or expense is subordinate to ethical obligations owed to the client. See, e.g., Defendant A v. Idaho State Bar, 2 P.3d 147 (Idaho 2000) (no violation in retaining client's file to insure payment of outstanding fees when lawyer made file available to new counsel to copy and no imminent prejudice to client); Ferguson v. State, 773 N.E.2d 877 (Ind. Ct. App. 2002) (trial court erred by denying inmate's motion to compel delivery of papers and unearned fee; hearing should have been held to determine whether lawyer possessed any documents not previously provided and amount of unearned fees, if any); Campbell v. Bozeman Investors of Duluth, 964 P.2d 41 (Mont. 1998) (discharged lawyers claiming possessory lien failed to protect client's interests by retaining file when claim still pending); Averill v. Cox, 761 A.2d 1083 (N.H. 2000) (lawyer required to bear cost of retaining copy of client's file; client's file belongs to client and, upon request, lawyer must provide it to client); In re Tillman, 462 S.E.2d 283 (S.C. 1995) (lien inappropriate; lawyer failed to establish that client deliberately failed to pay clearly agreed-upon fee); Ky. Ethics Op. E-395 (1997) (upon termination of representation, lawyer must give file to client and may not retain file due to fee dispute); Miss. Ethics Op. 144 (1988) (if retention of file will prevent client from obtaining another lawyer or proceeding with case in timely matter, lawyer has breached ethical duty owed to client under Rule 1.16); N.Y. State Ethics Op. 591 (1988) (lawyer may not ethically assert retaining lien on client's papers to enhance ability to negotiate general release from liability); Pa. Ethics Op. 96-157 (1996) (revised) (lawyer must give file to former client if failure to do so would substantially prejudice client's interests, even though lawyer has valid retaining lien on file for outstanding costs).

Perhaps the appellate court in Oklahoma best summarizes the consideration as follows:

> The rule imposes a mandatory obligation on an attorney

> to mitigate the consequences of the severed attorney-client relationship, and requires the attorney to "surrender" the client's papers. The rule also permits an attorney to retain the client's papers to secure payment of earned and unpaid fees, but only as allowed by law. The contrast between the mandatory obligation to surrender the client's papers, and the permissive retention right, suggests to us that, all other things being equal, the right of the client to possession of his or her books and papers prevails over the attorney's retaining lien rights in the case of conflict between the two. This must be so because the assertion of a retaining lien that causes prejudice to a client is inconsistent with the lawyer's continuing duty to his client, particularly since other legal methods are available to collect the fee. So, in a conflict between an attorney's retained possession and prejudice to the client, a balancing of the competing rights must be undertaken.

Britton and Gray, P.C. v. Shelton, 69 P. 3d 1210, 1214-15 (Okla. App. 2003) (emphasis is original).

In conclusion, the Committee suggests that while it may be proper for an attorney to assert a retaining lien and keep the client's files until the lien and underlying unpaid fee have been satisfied and paid, assertion of the lien should only be made only if retention of the file clearly does not prejudice the client. If there is any hint or potential for prejudice, the attorney should err on the side of releasing the files and not asserting the retaining lien. The current language of Rule 32:1.16(d) and interpretive case law from the Iowa Supreme Court and from other jurisdictions mandate this conclusion.

For the Committee,

Nick Critelli

Nick Critelli, Chair