Ethics Opinion No. 83-2

May an Attorney Hold a Client's Papers Pursuant to the Attorney Lien Statute when the Papers Would Be Helpful to the Client in Pending Litigation?

The Committee has been asked whether Ethics Opinions 77-2 (relating to holding a client's papers pursuant to the attorney's lien statute, AS 34.35.430(a)) and 78-1 (relating to the prohibition of attorneys recording telephone conversations) are still valid.

Formal Ethics Opinions of the Alaska Bar Association are adopted by the Board of Governors, and continue in full force and effect until subsequently modified or repealed by the Board of Governors, or until affected by a decision of the Alaska Supreme Court. Any request for the consideration of the repeal or modification of any Formal Ethics Opinion should be directed to the Alaska Bar Association Ethics Committee, which will then present the matter to the Board of Governors along with its recommendation.

Ethics Opinion 78-1, adopted by the Board of Governors on October 28, 1978, adopts American Bar Association Opinion No. 337. The rule stated in those opinions is:

No lawyer should record any conversation, whether by tapes or other electronic devices, without the consent and prior knowledge of all parties to the conversation.

Since that opinion was issued, there has been no contrary action by the Board of Governors or action by the Alaska Supreme Court on this point. Accordingly, this opinion continues in full force and effect.

Ethics Opinion 77-2 deals with whether an attorney may hold a client's papers pursuant to the attorney's lien statute, AS 34.35.420(a), when the papers would be helpful to the client in pending litigation. The opinion holds that the question of whether an attorney can hold the client's papers pursuant to a lien is a question of law rather than ethics and that an attorney does not violate DR 2-110(A)(2) by exercising the lien in a legally proper manner after justifiably terminating the representation of the client.

Ethics Opinion 77-2 has been substantially affected by *Miller v. Paul*, 615 P.2d 615 (Alaska 1980), which presently represents the law of Alaska with respect to attorney's liens. *Miller v. Paul*, in summary, provides:

(1) EC 2-32 does not mandate the return of a client's files when the client terminates the attorney/client relationship.

- (2) If the client does not initiate the withdrawal, or if there is just cause for the client to discharge the attorney, ethical considerations mandate return of the files.
- (3) Taking certain listed factors into account, the court may require certain security to be posted for the release of files.
- (4) If the discharge is due to a conflict of interest or other type of conduct prohibited by the Code of Professional Responsibility, the court may order that the files be transferred without any security.

The Supreme Court points out that economic duress may not be utilized to prevent a client from exercising the right to terminate the relationship with the attorney. On the other hand, where the client is well able to post a bond or give other security without the imposition of substantial hardship, there is no impediment to the court imposing such a requirement.

Ethics Opinion 77-2 deals with a situation where the attorney justifiably terminated the attorney/client relationship, and recognizes the attorney's lien in that situation. *Miller v. Paul*, on the other hand, states that if the client does not initiate the withdrawal, ethical considerations mandate return of the files (EC 2-32). This being the case, *Miller v. Paul*, 615 P.2d 615 (Alaska 1980) governs the release of the client's files when the attorney/client relationship is terminated by the attorney. Ethics Opinion 77-2 has no further force or effect.

Approved by the Board of Governors on June 8, 1983.