## ALASKA BAR ASSOCIATION ETHICS OPINION NO. 95-6

## Attorney's Right To Withhold A Client's File Unless The Client Pays For Copying Files

The Committee has been asked to give an opinion as to whether it is proper for an attorney to refuse to return a client's file unless the client pays the copying charges.

It is the opinion of the Committee that the client's files may not be withheld if prejudice would result to the client.

It is fundamental to the attorney-client relationship that the lawyer must disclose to the client the basis on which the client is to be billed for both professional time and any other charges, including photocopy expenses. This disclosure should be made at the outset of the representation. [Rule 1.5(b).] Unless the lawyer's fee agreement specifically sets forth the understanding of the parties regarding copy charges, the lawyer may not charge the client for copying the file.

The circumstance in which this question will arise is typically when the relationship between lawyer and client has ended. In that event, the interests of lawyer and client may be diverging. The client may be dissatisfied with the lawyer's work and may have discharged him or her, and be seeking new counsel. The lawyer who has been discharged, rightly or wrongly, may feel threatened and may not have been paid. Under these circumstances, the client's interests must be paramount.

Pursuant to Rule 1.15, the lawyer has an obligation to hold property of a client separately. Such property must be identified and appropriately safeguarded. Further, the client's property must be promptly returned upon request. It is the Committee's opinion that the client's original files are the property of the client. Accordingly, a lawyer must make available to his or her client all papers and property to which the client is entitled, and may not make receipt of them contingent upon payment for copying. See Pa. Ethics Op. 89-76 (1989) (files of client).

A lawyer may not charge the client for making a copy of the original documents for his or her own purposes. There are circumstances in which the lawyer who has been discharged may wish to retain copies of all or some part of the client's file. A lawyer may not charge for the duplication costs of a client's file if the duplication is to protect the attorney from a malpractice or related claim or to provide forms for a research bank. In those instances, the copies are made not for the client's benefit, but for the lawyer's. The Committee believes it is improper to charge the client for such costs. See Philadelphia Bar Ops. 80-32, 86-154 (111386) (1984) (ABA/BNA LAWYER'S MANUAL ON PROFESSIONAL CONDUCT § 901:7510 at 50 (1984)); Virginia Bar Op. 1171 (21389) (1989) (BNA MANUAL § 901:8749 at 25 (1989)).

Further, Rule 1.16(d) governs the lawyer's obligations to the client upon termination of the representation:

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect the client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled, and refunding any advance payment of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law.

Alaska R. Professional Conduct 1.16(d) (emphasis added).

The comment to the model rules provides insight as well:

## Assisting the Client Upon Withdrawal

Even if the lawyer has been unfairly discharged by the client, a lawyer 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.

Thus, a lawyer must surrender the client's papers and other property <u>unless</u> the lawyer is permitted by law to retain the papers as a matter of law.

Alaska law provides for a statutory attorney's lien. A.S. 34.35.430 provides:

**Attorney's Lien.** (a) An attorney has a lien for compensation, whether specifically agreed upon or implied, as provided in this section.

(1) First, upon the papers of the clients that have come into the possession of the attorney in the course of the professional employment;

. . . .

In <u>Miller v. Paul</u>, 615 P.2d 615 (Alaska 1980), the Alaska Supreme Court shed some light on the balancing required between the attorney's right to compensation and the client's need for the file. The facts were as follows. Attorney Miller was retained by Mary Paul to represent her in the probate of her husband's estate and in prosecuting a wrongful death action. A written fee agreement was executed providing for a contingent fee for services in the wrongful death claim. Apparently due to a possible conflict of interest on Miller's part, Mary Paul terminated Miller's services. Miller then submitted a billing for his services rendered. Miller filed a notice of attorney's lien covering both a retaining lien on papers in his possession and a charging lien on any recovery ultimately received by Paul. Paul substituted counsel, McMurtray, who moved for an order requiring Miller to turn over the files to him. The superior court granted the motion, indicating that Miller was adequately protected by the charging lien. 615 P.2d at 617.

Paul contends that Miller's statutory and contractual liens must give way to an attorney's ethical duty not to prejudice a client's case by withholding access to relevant materials in the attorney's possession. Attorneys must conform to

high ethical standards regardless of whether statutory rights permit contrary conduct. . . . [A] question is presented as to whether ethical considerations require that a lawyer return the client's files. Paul had the right under the contract to fire her attorney without cause. An attorney should have the right to some protection, assuring payment of reasonable fees earned. A balancing of those interests is required in determining what security should be required for relinquishment of the attorney's retaining lien.

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. Even where the client terminates the relationship without just cause, the court must consider the value of the files to the client's case in determining the adequacy of the security to be requested. . . . . Economic duress may not be utilized to prevent a client from exercising the right to terminate the relationship with the attorney.

## <u>Id.</u> at 619-20.

The Committee recognizes that an attorney's right to assert a lien to secure payment of his or her right to a professional fee is primarily a question of law. While the court in <u>Miller</u> was not specifically concerned with copying charges, the considerations appear to be the same. The lawyer who has not been paid for his or her services is entitled to assert a lien against the file. However, the lawyer's interest in getting paid must be subordinate to the rights of the client. A lawyer may not prejudice a client's rights by withholding property of the client which is essential to the client's case.

In summary, the question of whether it is proper for a lawyer to refuse to return a client's file unless the client pays for the copying charges is fraught with potential conflicts. The circumstances in which this question will arise are typically when the relationship between the lawyer and client has ended. In that event, the interests of lawyer and client may be diverging. Regardless of the reason for the lawyer's discharge, the client's interests must be paramount. If the lawyer's fee agreement expressly provides the client will pay copying charges, the Committee believes it is acceptable for the client to be charged for copying the file if it is to benefit the client's interests. However, the client should not be charged for photocopying the client's file if duplication is for the lawyer's benefit rather than the client's. Assuming the law permits a lawyer to assert a lien for fees, care must be taken to assure that imposition of the lien will not prejudice important rights or interests of the client. The client's interests must always be paramount.

Approved by the Alaska Bar Association Ethics Committee on September 7, 1995.

Adopted by the Board of Governors on October 20, 1995.

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