Disciplinary Board Policy

Charges imposed by an attorney for copying a client's file.

Introduction

The office of disciplinary counsel has experienced an influx of complaints wherein the attorney will not release a client's file upon termination unless the client pays copying fees. This concern is often compounded when the attorney has a valid retaining lien.

In New Mexico there is no statute which directly addresses the problem. The common law in New Mexico does, however, recognize both "retaining liens" and "charging liens." A retaining lien,

> [G]ives the attorney the right to retain papers or other property that comes into his possession, or money that he has collected in the course of his professional employment, until all his costs and charges against his client have been paid. *Thompson v. Montgomery & Andrews, P.A.*, 112 N.M. 463, 465, 816 P.2d 532 (Ct. App. 1991), *cert. denied* 1991. (citing *Prichard v. Fulmer*, 22 N.M. 134, 159 P. 39 (1916).)

The second type of lien is a "charging lien," which,

> [R]ecognizes the right of an attorney to recover his fees and costs on behalf of his client from a fund recovered as the result of his efforts, and also the right to have the court interfere to prevent payment by the judgment debtor to the creditor in fraud of that right, and also to prevent or set aside assignments or settlements made in fraud of that right. *Id.*

As has been noted by the ABA Committee on Ethics and Professional Responsibility, however, the "[m]ere existence of a legal right does not entitle a lawyer to stand on that right if ethical considerations require that he forego it." *See*, ABA Committee on Ethics and Professional Responsibility, November 11, 1980 Informal Opinion 1461 p. 3. In an attempt to minimize problems in such cases, the Disciplinary Board adopts the following policy:

Policy

A. WITH VALID RETAINING LIEN:

When the attorney has a valid retaining lien[1], but the client requests his or her file:

1. It is the policy of the Disciplinary Board that each matter must be decided based upon the particular facts surrounding the controversy, giving deference to the Rules of Professional Conduct and the general guidelines set forth below. Attorneys are encouraged to copy files for clients whenever feasible without charging for copies.

2. The attorney who has possession of the file should permit another attorney, who is considering taking the client's case, to view the file without making and paying for copies or paying the retaining lien if the new attorney guarantees that the former attorney's lien will be paid if he or she accepts the case.

3. The attorney must release the client's file despite having a valid retaining lien in any one of the following cases:

   a. If there is an important personal liberty interest of the client at stake.
   b. If the lawyer is guilty of professional misconduct such as withdrawing without just cause or without reasonable notice to client.
   c. If the client can demonstrate that he or she is financially unable to pay the attorney's fees and costs, and the client's ability to obtain other counsel is significantly hindered.
   d. If the lawyer has an irreplaceable original document provided to him or her by the client and the client will lose substantive rights.

4. The attorney may, in all cases, charge the reasonable costs incurred in copying the file. The term "reasonable costs" is defined in paragraph (B)(7) below.

5. If the client pays the retaining lien, or makes an arrangement to do so, the policy for charging clients for copying his or her file when there is no retaining lien will apply.

B. WITH NO VALID RETAINING LIEN.

When there is no valid retaining lien, and the client requests his or her file:

1. It is the policy of the Disciplinary Board that each matter must be decided based upon the particular facts surrounding the controversy, giving deference to the Rules of Professional Conduct and the general guidelines set forth below. Attorneys are encouraged to copy files for clients whenever feasible without charging for copies.

2. The attorney should be responsible for paying for copies of all "client property" that the attorney wishes to retain, including:

[1] When there is a dispute as to the amount or validity of a retaining lien, if the client is willing to place the amount of money the attorney alleges to owed in escrow, the matter will be treated as if there is no retaining lien. See section B above.

(continued on page 8)

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a. documents brought to the attorney by the client or client's agents;
b. depositions, discovery documents, and pleadings which were prepared but not yet filed;
c. attorney research and all other documents which are pertinent to the case for which client was billed and has paid for; and,
d. such other documents as are necessary to understand and interpret documents highlighted above.

3. The client should be responsible for paying for:

a. additional copies of documents which were previously provided to the client by the attorney; and,
b. all other documents in the file which is not "client property."

4. The attorney does not have to release attorney work-product to the client, unless the client was charged and paid for the attorney's time in producing this work-product. Attorney work-product is defined as, "matters relating to the lawyer's mental processes developed explicitly for litigation." If the attorney chooses to release his or her work-product, the attorney may ask the client to pay the cost of copying.

5. The attorney should accept reasonable suggestions to lower the cost of copying the file, such as, allowing the file to be copied by a less expensive copying service or allowing the client to copy his or her own file at the lawyer's office to save overhead expenses.

6. The attorney may not charge the client for any portion of the client's file if the client can demonstrate that he or she is financially unable to pay the cost of copies and the attorney was aware of the client's inability to pay when representation began.

7. If the attorney charges the client for copies, he or she may only charge the "reasonable costs" of such copying which are defined as the actual cost of copying, including staff time, paper and copy machine costs. The attorney may not profit from charges made to the client.

The Judiciary

Court of Appeals of New Mexico Applicants for Judicial Vacancy

Twenty-one (21) applications have been received in the judicial selection office as of 5 p.m., November 1, for the Court of Appeals of New Mexico judicial vacancy due to the resignation of Judge William W. Bivins.

The Appellate Judicial Nominating Commission is scheduled to meet Thursday, November 17, and Friday, November 18, 1994, in the Courtroom of the Supreme Court, Supreme Court Building, 237 Don Gaspar Avenue, Santa Fe, NM 87503, beginning at 8:30 a.m., to evaluate the applicants for the position.

The names of the applicants in alphabetical order are as follows:

Michael D. Bustamante
Carl J. Butkus
Pete Dinelli
Anthony Joseph Ferrara
Paul G. Fyfe
Gregory Griego
Michael P. Gross
Bruce Herr
Frank D. Katz
Roderick T. Kennedy
Victor S. Lopez
Peggy J. Nelson
Luis Quintana
Warren F. Reynolds
Edward Ricco
Bruce R. Rogoff
Stephen G. Ryan
Alfonso G. Sanchez
Jonathan B. Sutin
Norman S. Thayer, Jr.
James J. Wechsler

New Mexico Supreme Court Applicants for Judicial Vacancy

Nine (9) applications have been received in the judicial selection office as of 5 p.m., November 1, for the New Mexico Supreme Court judicial vacancy due to the resignation of Justice Seth D. Montgomery.

The Appellate Judicial Nominating Commission is scheduled to meet Wednesday, November 16, 1994, in the Courtroom of the Supreme Court, Supreme Court Building, 237 Don Gaspar Avenue, Santa Fe, NM 87503, beginning at 8:30 a.m., to evaluate the applicants for the position.

The names of the applicants in alphabetical order are as follows:

Frank H. Allen, Jr.
Sarah E. Bennett
Petra Jimenez Maes
Pamela B. Minzner
Ruben Rodriguez
Stephen G. Ryan
Alfonso G. Sanchez
Norman S. Thayer, Jr.
Steven L. Tucker

NM Bar Foundation

The New Mexico Bar Foundation has relocated to the Simms Tower, 400 Gold SW, Suite 680, in Albuquerque. The new mailing address is P. O. Box 2184, Albuquerque, NM 87103-2184.

The Bar Foundation is a nonprofit corporation established in 1962 to encourage and implement the legal profession's commitment to law-related public service. Programs administered by the Bar Foundation include the Bill Kitts Mentor Program, the Domestic Violence Legal Hotline, Interest on Lawyer Trust Accounts (IOLTA) and the New Mexico Law-Related Education project.