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## ASSERTION OF ATTORNEY'S RETAINING LIEN ON CLIENT'S PAPERS

Adopted April 15, 1989.

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### *Introduction and Scope*

#### *Assertion of Attorney's Retaining Lien on Client's Papers*

The Ethics Committee of the Colorado Bar Association has been requested to provide guidance to many Colorado attorneys regarding ethical considerations in asserting a retaining lien on clients' papers in their possession under C.R.S. § 12-5-120 (1973). This opinion discusses situations in which it may *not* be ethically permissible to assert such a lien.

### *Syllabus*

A lawyer may ethically assert a retaining lien on a client's papers, thereby keeping the papers, when the client is financially able to pay outstanding fees, but fails or refuses to do so. If, however, one or more of the following circumstances is present, then a lien may *not* be asserted: (1) there is no legal basis for the assertion of the lien; (2) the lawyer has been suspended or disbarred; (3) the lawyer is guilty of misconduct in the particular matter; (4) the representation is in a contingency fee case prior to completion of the case; (5) the client furnishes adequate security; (6) the client's papers are essential to the preservation of an important personal liberty interest; (7) the lawyer has withdrawn without just cause or reasonable notice; (8) the lawyer is validly discharged for professional misconduct or conduct prohibited by the Code of Professional Responsibility; and (9) the client is financially unable to post a bond or pay the fees, unless the client's inability to pay or post bond is a result of fraud or gross imposition by the client.

### *General Discussion*

#### A. *C.R.S. § 12-5-120: The Retaining Lien on Client's Papers*

C.R.S. § 12-5-120 (1973) states in pertinent part that:

An attorney has a lien for a general balance of compensation upon any papers of his client which have come into his possession in the course of his professional employment . . . from the time of giving notice of the lien to that party.<sup>1</sup> Attorneys are permitted to acquire interests in causes of action or the subject matters of litigation they are conducting for clients in order to protect their rights to collect fees by the assertion of legally permissible liens. DR 5-103(A)(1); EC 5-7.

#### B. *General Legal Limitations on the Assertion of Retaining Liens on Clients' Documents*

A lawyer's right to assert a retaining lien is not absolute. The right may be limited by legal and ethical considerations.<sup>2</sup> In Colorado, there is no common law attorney's lien, and no lien exists except under the statute. *Donaldson v. Gaudio*, 260 F.2d 333 (10th Cir. 1958). In order for an attorney to assert a retaining lien, the client must owe the attorney a general balance of compensation. *People v. Garnett*, 725 P.2d 1149, 1154 (Colo. 1986) (*en banc*); *People ex rel. Goldberg v. Gordon*, 199 Colo. 296, 609 P.2d 995, 997 (1980) (*en banc*). The retaining lien, as a passive possessory lien, may be lost if the lawyer voluntarily relinquishes possession of the items to which the lien has attached. *See, In re Southwest Restaurant Systems, Inc.*, 607 F.2d 1243 (9th Cir.), *cert. denied*, 444 U.S. 1080 (1979); *Attorney Grievance Commission v. McIntire*, 286 Md. 87, 405 A.2d 273 (1979); 7 Am.Jur.2d Attorneys at Law §§ 315 and 322. Moreover, if a lawyer sues a client to recover fees and expenses, the lawyer forfeits the right to exclusive possession of the client's papers relevant to the fee dispute, and the lawyer can be required to produce

them for inspection pursuant to C.R.C.P. Rule 26(b)(1). *Jenkins v. District Court*, 676 P.2d 1201, 1204-05 (Colo. 1984). See, *Intaglio Service Corp. v. J.L. Williams & Co.*, 112 Ill. App.3d 824, 445 N.E.2d 1200, 1201-1204 (1st Dist. 1983); “Attorney’s Retaining Lien as Affected by Action to Collect Legal Fees,” 45 A.L.R. 4th 199; Klein and Todd, “The Treatment of Attorney’s Liens in Colorado,” 16 *The Colorado Lawyer* 623, 624 (April 1987).

Finally, an attorney who has asserted a lien may be compelled to produce documents to the client’s adversary, since it would be inequitable to deny a litigant access to relevant and perhaps essential proof, merely because the opposing party had failed to pay attorney’s fees. *Lucky-Goldstar International (America), Inc. v. International Mfg. Sales Co.*, 636 F.Supp. 1059, 1064-65 (N.D.Ill. 1986); *Tri-Ex Enterprises v. Marzon Guar. Trust Co.*, 583 F.Supp. 1116, 1118 (S.D.N.Y. 1984).

### C. Ethical Limitations on the Assertion of Retaining Liens

In *Jenkins v. District Court*, 676 P.2d at 1204, the Colorado Supreme Court stated:

There is little doubt that an attorney who withdraws from a case for justifiable reason, or is terminated by his client without cause, may recover compensation for his services. In such situations the attorney has the right to a retaining lien upon the books, papers, securities, and money of his client in his possession.

Nonetheless, the ethical propriety of asserting a retaining lien is not absolute under the Code of Professional Responsibility. An attorney must be guided by high ethical standards. *MacFarlane v. Harthun*, 195 Colo. 38, 581 P.2d 718 (Colo. 1978) (*en banc*). See, *Miller v. Paul*, 615 P.2d 615, 619 (Alaska 1980); *Saucier v. Hayes Dairy Products, Inc.*, 373 So.2d 102, 116-117 (La. 1979) (*on reh’g*). An attorney must also refrain from “conduct that is prejudicial to the administration of justice.” DR 1-102(A)(5).

Further, DR 7-101(A)(2) requires that a lawyer shall not intentionally fail to carry out a contract of employment entered into with a client, although a lawyer may withdraw as permitted under DR 2-110, DR 5-102, and 5-105. When a client “deliberately disregards an agreement or obligation to the lawyer as to expenses or fees,” the lawyer may cease representing the client. DR 2-110(C)(1)(f). The lawyer must nonetheless take “reasonable steps to avoid foreseeable prejudice to the rights of his client, including . . . delivering to the client all papers and property to which the client is entitled. . . .” DR 2-110(A)(2). Ethical Consideration 2-32 also states in part:

A lawyer should not withdraw without considering carefully and endeavoring to minimize the possible adverse effect on the rights of his client and the possibility of prejudice to his client as a result of his withdrawal. Even when he justifiably withdraws, a lawyer should protect the welfare of his client by giving due notice of his withdrawal, suggesting employment of other counsel, delivering to the client all papers and property to which the client is entitled, cooperating with counsel subsequently employed, and otherwise endeavoring to minimize the possibility of harm.

Various court decisions and bar association ethics opinions have stated that an attorney may not ethically assert a retaining lien in the circumstances described below:

1. There is no legal basis for the assertion of the lien. See, *Garnett*, 725 P.2d at 1154-55 (Colo. 1986) (*en banc*) (client did not yet owe any fees); *People v. Razatos*, 636 P.2d 666, 669-671 (Colo. 1981) (*en banc*) (attorney had “uncertain claim to the fee on which the purported lien was founded”).
2. A lawyer has been suspended or disbarred. In this situation, the lawyer may not assert a retaining lien with respect to any matter. This result is because “[t]he foundation of our profession is based upon honor, trust and the highest standards of integrity . . .” *MacFarlane v. Harthun*, *supra*, 581 P.2d at 718-19.
3. A lawyer is guilty of misconduct in the particular matter. Even if the lawyer is not suspended or disbarred, the lawyer may not assert the lien in that matter, but may assert the lien in other matters in which there has been no misconduct. *MacFarlane v. Harthun*, *supra*, 581 P.2d at 718.
4. In a contingency fee case, prior to the completion of the case. *People v. Radinsky*, 182 Colo. 259, 512 P.2d 627 (1973) (*en banc*).

5. A client who can not pay the fees furnishes adequate security, or posts an adequate bond. *See, e.g., Jenkins v. District Court, supra; Morse v. Eighth Judicial Court*, 65 Nev. 275, 195 P.2d 199 (1949); *Steiner v. Stein*, 141 N.J. Eq. 478, 58 A.2d 102 (1948); District of Columbia Bar Association Opinion No. 191 (4/19/88) (a lawyer may not withhold a client's file during a fee dispute if the client has offered adequate security, such as a bond or a letter of credit).

6. The client's papers are essential to preserve an important personal liberty interest, or defense of a criminal charge. *See, e.g. Jenkins v. District Court, supra*, 676 P.2d at 1204, n. 3; *Jenkins v. Weinshienk*, 670 F.2d 915, 919-20 (10th Cir. 1982); *Hauptmann v. Fawcett*, 243 A.D. 613, 276 N.Y.S. 523, modified, 243 A.D. 616, 277 N.Y.S. 631 (App. Div. 1935); ABA Informal Opinion No. 1461.

7. The lawyer has withdrawn without just cause or reasonable notice. *Jenkins v. Weinshienk, supra*, 670 F.2d at 920.

8. The lawyer is validly discharged for professional misconduct, or conduct prohibited by the Code of Professional Responsibility. *See*, Note, "Attorney's Retaining Lien Over Former Client's Papers," 65 *Colum. L. Rev.* 296 (1965); *Miller v. Paul*, 615 P.2d at 620 (Alaska 1980).

9. "[W]hen the client is financially unable to post a bond or pay, unless the client's inability to pay or post bond is a result of fraud or gross imposition by the client." *Jenkins v. Weinshienk, supra*, 670 F.2d at 920.

ABA Informal Opinion No.1461 states:<sup>3</sup>

. . . Financial inability of the client to pay the amount owing should also cause the lawyer to forego the lien because the failure to pay the fee is not deliberate and thus does not constitute fraud or gross imposition by the client. The lawyer should forgo the lien if he knew of the client's financial inability at the beginning or if he failed to assure agreement as to the amount or method of calculating the fee.

In sum, absent the exceptions stated above, a lawyer may ethically assert a retaining lien on a client's papers when the client is financially able to pay fees, but fails or refuses to do so.

### **1995 Addendum**

The Colorado Rules of Professional Conduct became effective on January 1, 1993, replacing the Code of Professional Responsibility. While the language of the Rules is somewhat different from the Code, the Ethics Committee considers this Opinion to continue to provide guidance to attorneys in this area. Attorneys are cautioned to review Tables A & B: Related Sections in the Colorado Rules of Professional Conduct and The Colorado Code of Professional Responsibility (found in the *Colorado Ethics Handbook*), to update the research contained in this Opinion and to conduct any independent research necessary.

Relevant provisions of the Colorado Rules of Professional Conduct, which should be examined together with this Opinion, are Rule 1.8(j) (providing the same exception to the prohibition against a lawyer acquiring a proprietary interest in a client's cause of action or subject matter of litigation that was provided in DR 5-103(A)(1)) and Rule 1.16(d) (requiring lawyers to take, upon termination of representation, {take} steps to the extent reasonably practicable to protect a client's interests such as surrendering papers and property to which the client is entitled).

## NOTES

1. This opinion does not deal with retaining liens asserted on funds under C.R.S. § 12-5-120, or with charging liens asserted under C.R.S. § 12-5-119 (1973).

2. This opinion does not discuss the effect of bankruptcy on attorneys' liens. *See* Klein and Todd, "The Treatment of Attorney's Liens in Colorado," 16 *The Colorado Lawyer* 623, 624 (April 1987). *See also, In re Oiltech, Inc.*, 38 Bankr. 484 (Bankr. D. Nev. 1984); *In re Life Imaging Corp.*, 31 Bankr. 101 (Bankr. D. Colo.

1983); *In re Ranes*, 31 Bankr. 70 (Bankr. D. Colo. 1983). This opinion also does not discuss potential constitutional considerations which might affect the assertion of retaining liens. For instance, one commentator has opined that: “The retaining lien should not be an absolute right that can be asserted in an *ex parte* manner. Otherwise, an attorney asserting a questionable fee claim could deny a client his/her property without due process of law . . .” Dubin, “The Retaining Lien: An Ethical Trap for the Unwary Lawyer,” 63 *Michigan Bar Journal* 257, 258 (March 1984).

3. Ethical Consideration 2-23 requires a lawyer to “be zealous in his efforts to avoid controversies over fees with clients,” and not to “sue a client for a fee unless necessary to prevent fraud or gross imposition by the client.” The same standard should be applied in determining whether to exercise a retaining lien. American Bar Association Informal Opinion No. 1461 (11/11/80); Tennessee Ethics Opinion No. 86-F-106 (9/26/86) (a retaining lien should be asserted only when necessary to prevent fraud or gross imposition by the client); Pennsylvania Bar Association Ethics Opinion No. 81-7 (undated) (a lawyer should assert a lien on client property only as a matter of last resort when necessary to prevent fraud by the client, and when other reasonable methods have failed).