NOTICE TO THE BAR

COMMON LAW RETAINING LIEN – INVITATION TO COMMENT

The New Jersey Supreme Court invites comments on a Report and Recommendation of the Advisory Committee on Professional Ethics regarding the continued viability of the common law retaining lien as it relates to RPC 1.16(d). The recommendation of the Committee is to amend RPC 1.16 so as to specifically prohibit the use of a retaining lien. A copy of the Committee's Report and Recommendation is attached.

Any comments on the Committee Report and Recommendation should be sent by January 31, 2013 to the Secretary, Advisory Committee on Professional Ethics, Administrative Office of the Courts, Richard J. Hughes Justice Complex, P.O. Box 037, Trenton, New Jersey, 08625-0037. Comments may also be submitted via Internet e-mail to the following address: Comments.Mailbox@judiciary.state.nj.us.

The Committee will not consider comments submitted anonymously. Thus, those submitting comments by mail should include their name and address and those submitting comments by e-mail should include their name and e-mail address. Comments submitted may be subject to public disclosure after the Court has acted on the Committee recommendation.

Hon. Glenn A. Grant, J.A.D.
Acting Administrative Director of the Courts

Dated: November 14, 2012

ADVISORY COMMITTEE ON PROFESSIONAL ETHICS

Appointed by the Supreme Court of New Jersey

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Richard J. Hughes
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September 25, 2012

New Jersey Supreme Court
R. J. Hughes Justice Complex
Trenton, NJ 08625

Re: Supreme Court Referral
Common Law Retaining Lien

Dear Chief Justice and Associate Justices:

The New Jersey Supreme Court requested the Advisory Committee on Professional Ethics to "consider and report on the continued viability of the common law retaining lien as it relates to RPC 1.16(d) . . . ." The Court further requested that the Committee invite the New Jersey State Bar Association (NJSBA) to participate in the matter.

The common law retaining lien generally permits a lawyer to retain the client's property, such as a file, if the client has not paid the legal bill. It usually is asserted by a lawyer after he or she has withdrawn or been terminated in a case. If retention of the file will prejudice the interests of the client, then a court may order the former lawyer to turn over the papers. Some of the older cases require the client to post a bond in the amount of the outstanding legal bill prior to ordering a turnover of the file. See Steiner v. Stein, 141 N.J. Eq. 478 (Ch. 1948), rev'd on other grounds 2 N.J. 367 (1949); Brauer v. Hotel Associates, Inc., 40 N.J. 415 (1963), cert. den. sub nom In re Brauer, 387 U.S. 944 (1967); Frenkel v. Frenkel, 252 N.J. Super. 214 (App. Div. 1991). See also Michels, K., New Jersey Attorney Ethics Section 37:1-3, pages 893-97 (Gann 2012).

Rule of Professional Conduct 1.16(d) states:

> (d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a 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 or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

Committee Opinion 554, 115 N.J.L.J. 565 (May 16, 1985), titled "Retention of Client's File After Termination of Employment Relationship," addresses related issues. The first part of the Opinion concerns a personal injury plaintiff's lawyer who is discharged prior to conclusion of the case (and prior to accrual of a contingent fee). The substituting lawyer asked for a copy of the file. The Committee relied on In re Estate of Poli, 134 N.J. Super. 222 (Cty. Ct. 1975), for the proposition that "a client has the absolute right to discharge his attorney and terminate the relationship at any time with or without cause." The Committee further discussed RPC 1.15(b), that a lawyer "shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive." The Committee concluded: "We believe that the client or his new attorney is entitled to receive the file with everything which is or was essential for the completion of the litigation." Costs of copying are to be paid by the client and the new lawyer. But the lawyer's right to payment of a fee in a contingency fee case does not accrue until there is a recovery. A common law retaining lien could not be asserted until the contingency occurred and the right to payment accrued. Accordingly, the Opinion does not address the retaining lien.

The Committee considered retaining lien law in other jurisdictions. A minority of jurisdictions flatly prohibits assertion of a retaining lien;[1] others prohibit its assertion when it would prejudice the interests of the client.[2] A few jurisdictions permit exercise of the common law retaining lien without restriction.[3]

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[1] North Dakota Rule of Professional Conduct 1.19(a) provides that "a lawyer shall not assert a retaining lien against a client's files, papers, or property." Louisiana Rule of Professional Conduct 1.16(d) provides that "the lawyer may retain a copy of the file but shall not condition release over issues relating to the expense of copying the file or for any other reason." North Carolina Rule of Professional Conduct 1.16 Comment 10 provides that "the lawyer may never retain papers to secure a fee." Minnesota, by statute, removed authority for retaining liens. Minn. Stat. Ann. Section 481.13. Missouri case law states that the file belongs to the client and so a retaining lien may not be asserted, In re Cuuples, 952 S.W.2d 226 (Mo. en banc 1997).

[2] Massachusetts Rule of Professional Conduct 1.16(e)(7) provides that "a lawyer may not refuse, on grounds of nonpayment, to make available materials in the client's file when retention would prejudice the client unfairly." Vermont Advisory Ethics Opinion 1999-07 provides that a lawyer must subordinate a retaining lien if assertion of lien would

The Restatement of the Law advocates in favor of the abrogation of the common law lien. The Restatement provides: "[A] lawyer does not acquire a lien entitling the lawyer to retain the client's property in the lawyer's possession in order to secure payment of the lawyer's fees and disbursements." Restatement of the Law (Third), The Law Governing Lawyers, Section 43(1), p. 305 (ALI 2000). The comment states:

> While a broad retaining lien might protect the lawyer's legitimate interest in receiving compensation, drawbacks outweigh that advantage. The lawyer obtains payment by keeping from the client papers and property that the client entrusted to the lawyer in order to gain help. The use of the client's papers against the client is in tension with the fiduciary responsibilities of lawyers. A broad retaining lien could impose pressure on a client disproportionate to the size or validity of the lawyer's fee claim. . . .

Other scholars have pointed out the potential dangers of overreaching and breach of fiduciary duty when lawyers assert retaining liens.

> Where the document or property in question is personal in nature, or is needed in an ongoing legal matter, the client is likely to view the lien as more akin to "hostage-taking" than security for payment of a just debt. For this reason, the retaining lien is subject to the qualification that it not be used if the client would be prejudiced. However, because that qualification will apply in most situations

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prejudice the client in pursuing case; available at www.vtbar.org. Iowa State Bar Association Committee on Ethics and Practice Guidelines Opinion 07-08 provides that a lawyer cannot assert the retaining lien if doing so would prejudice the interests of client. Virginia Legal Ethics Opinion 1690 provides that a lawyer cannot assert a retaining lien if doing so would harm the client. Georgia Formal Advisory Opinion 87-5 provides that a lawyer may not withhold a client's papers or files on withdrawal as security for unpaid fees; available at www.gabar.org/baarrules/handbookdetail.cfm?what=rule&id=508. Connecticut prohibits assertion of retaining lien when it would prejudice the client, Marsh, Day & Calhoun v. Solomon, 529 A.2d 702 (Ct. 1987). Washington Advisory Opinion 181 (1987) provides that a lawyer may not assert retaining lien when it would interfere with the client's subsequent representation; available at mcle.mywsba.org/IO/print.aspx?ID=1524.

[3] New York County Lawyers Opinion 678 (1990). Maryland, Attorney Grievance Commission of Maryland v. Sheridan, 741 A.2d 1143 (1999). Colorado Ethics Opinion 82 (1989), available at www.cobar.org/index.cfm/ID/386/subID/1803/CETG/Ethics-Opinion-82:-Assertion-of-Attorney's-Retaining-Lien-on-Client's-Papers,-04/15/89;-Addendum-Iss/. Rhode Island, Tyler v. Superior Court, 723 A. 467 (RI 1909). Alaska, Miller v. Paul, 615 P. 2d 615 (Alaska 1980). Nevada, Morse v. District Court, 195 P. 2d 199 (Nevada 1948).

> where the lawyer would want and need to apply pressure, in practice the retaining lien will not have great value as a collection device.
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> [Hazard, G., Hodes, W., Jarvis, P., The Law of Lawyering, Section 8.23, p. 8-57 (3d ed. 2000).]

The Committee requested participation by the NJSBA. The NJSBA Board of Trustees found that the lien should be retained, noting that "any legitimate avenue for pursuing payment should be maintained, as long as the rights of clients are protected." A copy of the Board's letter is attached.

The Supreme Court's referral requires the Committee to weigh the lawyers' interests in being paid for services rendered and the clients' interests in having a copy of the file, after the lawyer has withdrawn or been discharged, to continue pursuing a legal claim or defense. Assertion of the common law retaining lien clearly protects the lawyers' interests in being paid. Its declining use by lawyers in recent years arguably reflects our State's evolving public policy to protect the less powerful party, clients.

New Jersey cases on common law retaining liens reveal a shift in attitude on the balance of interests between clients and lawyers. In the olden days, this State's highest court referred to a charging lien as a device to protect lawyers from "the knavery of their clients." Norell v. Chasan, 125 N.J. Eq. 230, 236 (E&A 1939). While some clients may still act like knaves, the judicial language has softened over the years and a recognition of the disparate positions of lawyer and client in fee disputes has emerged. In Steiner, the court noted the superior position the lawyer has over a client: "The retaining lien is a judicial device for the protection of the attorney. An attorney should not be permitted to use it wantonly to injure his client." 141 N.J. Eq. 478, 480-81 (1948) (internal citation omitted). In Frenkel, the court ordered the turnover of the file in an attempt to prevent the lawyer from using a retaining lien to injure the client – and did not require the client to post a bond for the unpaid bill. 252 N.J. Super. 214, 219 (1991).

This shift in public policy culminates in a 1981 Supreme Court case, brought by a New Jersey lawyer and the NJSBA, challenging the constitutionality (and "desirability") of the mandatory attorney fee arbitration system. In re Application of Philip J. LiVolsi, 85 N.J. 576, 581 (1981). The Court noted that the goal of mandatory fee arbitration is to "maintain[] public confidence in the judicial system." Id. at 585. The Court stated:

> The intended direct beneficiary of that [judicial] system is the litigant, the client, who can realistically gain access to it only through his relationship with a lawyer. The value of the judicial product depends upon the effectiveness of this access, the effectiveness of this relationship. If lawyers refuse to represent, the judicial system is almost worthless; if the terms and conditions of representation are unfair, the judicial system is impaired to that extent. This dependency of the public's confidence in the judicial

> system on its satisfaction with lawyer-client relationships is not theoretical: those dissatisfied with the system include a fair proportion dissatisfied with their lawyer. The most common cause of that dissatisfaction concerns fees . . . .
>
> [Ibid.]

The NJSBA Board of Trustees recommended that the retaining lien be maintained to permit lawyers to obtain payment from clients, provided client's rights are protected. As noted above, however, the lien is most effective when it causes prejudice to clients. A qualification that the lien should not be asserted when it causes prejudice to clients renders the lien ineffective as a method to obtain payment.

In the Committee's experience, it is rare for a lawyer with any sense of professionalism to assert a common law retaining lien when a client's interest in return of the file is acute. Assertion of the lien at a time when it is effective – when the inconvenience to the client in being denied access to his or her property is most intense – is unduly destructive of the lawyer-client relationship and impairs public confidence in the Bar and in the judicial system. The Committee recommends that the practice be prohibited. The Committee, of course, recognizes that lawyers are free to avail themselves of other legal avenues to pursue payment for unpaid fees for services rendered and reimbursement for costs advanced.

New Jersey's common law retaining lien can be abrogated only by the Court and not by a Committee opinion. Hence, the Committee recommends an amendment to Rule of Professional Conduct 1.16(d) to prohibit lawyers from asserting a retaining lien, adding this sentence to the end of paragraph (d): "No lawyer shall assert a common law retaining lien."

Respectfully submitted,

ADVISORY COMMITTEE ON PROFESSIONAL ETHICS

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August 9, 2012

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AUG 13 2012

Re: Retaining Lien and RPC 1.16

Dear Ms. Johnston:

Thank you again for including the New Jersey State Bar Association in the efforts of the Advisory Committee on Professional Ethics to reconcile the existence of the common law retaining lien with the requirements of RPC 1.16. I understand you and committee member Robert Koob attended a meeting of the NJSBA's Professional Responsibility and Unlawful Practice Committee. Your assistance to our committee in this regard is very much appreciated.

The NJSBA's Board of Trustees met recently and discussed this matter. The trustees had the background materials from Matter of Ambrano that you forwarded to us, in addition to a recommendation from the NJSBA Professional Responsibility and Unlawful Practice Committee. The committee recommended to the trustees that the NJSBA support the abandonment of the common law retaining lien, believing that RPC 1.16, along with other currently available methods of protecting attorney's fees, properly balances the rights of attorneys, clients and third parties.

The Board of Trustees, however, concluded that the retaining lien provides practitioners, at least in certain circumstances, with an option to use in securing payment for services rendered. Although case law over the past decades has diminished the impact of the retaining lien, we conclude that it is still viable and should be maintained by the Supreme Court. See Steiner v. Stein, 141 N.J. Eq. 478 (Ch. 1948); Brauer v. Hotel Associates, Inc., 40 N.J. 415 (1963); Frenkel v. Frenkel, 252 N.J. Super. 214 (App. Div. 1991). Particularly in some practice areas attorneys often have a difficult time getting paid, and the NJSBA believes any legitimate avenue for pursuing payment should be maintained, so long as the

rights of clients are protected. The use of a retaining lien may also help to avoid litigation against a client, a result that may save a professional relationship and also prevent an attorney from jeopardizing liability insurance coverage. Some carriers are known to frown on lawsuits against clients, and policies have been cancelled in some instances.

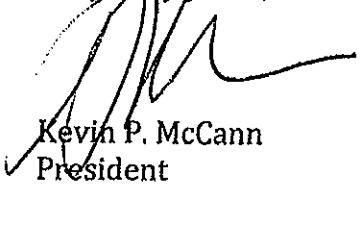
The NJSBA therefore requests that the ACPE consider an amendment to RPC 1.16 that clarifies the use of the retaining lien and eliminates any conflict between the two, as follows (proposed amendment underscored):

RPC 1.16 Declining or Terminating Representation

(a) .....no change
(b) .....no change
(c) .....no change
(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a 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 or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law <u>including the common law retaining lien, as a means of securing payment for legal services rendered.</u>

I thank the committee for considering our recommendations. If you have any questions, or need further information about our position please do not hesitate to contact me.

Very truly yours,



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