MICROFILM DIVIDER

OMB/RECORDS MANAGEMENT DIVISION
SFN 2053 (2/85) 3M

ROLL NUMBER

DESCRIPTION

2396

2001 SENATE JUDICIARY

SB 2396

2001 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2396

Senate Judiciary Committee

☐ Conference Committee

Hearing Date February 5th, 2001

Tape Number	Side A	Side B	Meter #
1		x	49-end
2	x		0-15
3	x		10 - 24.0

Committee Clerk Signature Mike Hanley

Minutes: **Senator Traynor** opened the hearing on SB 2396: A BILL FOR AN ACT TO REPEAL SECTIONS 27-13-05, AND 27-13-07 OF THE NORTH DAKOTA CENTURY CODE, RELATING TO AN ATTORNEY'S REFUSAL TO DELIVER A CLIENT'S MONEY OR PROPERTY AND THE FURNISHING OF A BOND.

Christina Hogan, representing the State Bar Association of North Dakota, testifies in favor of SB 2396. (testimony attached)

Senator Traynor, that would be a refusal to deliver clients money and property. Are we repealling this law? What is the status of these rules?

Christina Hogan, we have rules that apply to the situation which makes these unethical. Disbarment could be the penalty.

Senator Traynor, are there appropriate criminal statutes that apply?

Christina Hogan, yes.

Senator Trenbeath, one horrible thought is that when we settle account, we cut checks from clients and ourselves. Now are we giving all the money to the client and hope that they pay us?

Christina Hogan, that isn't the issue. A lawyer is entitled to get paid.

Senator Traynor, public is still protected if we pass this bill?

Christina Hogan, better protected.

Senator Traynor, rules would be more extensive because this deals with disbarment. He then closed the hearing on SB 2396.

SENATOR WATNE MOTIONED TO DO PASS, SECONDED BY SENATOR DEVER. VOTE INDICATED 6 YEAS, 0 NAYS AND 0 ABSENT AND NOT VOTING. SENATOR WATNE VOLUNTEERED TO CARRY THE BILL.

Date: 2/6
Roll Call Vote #: 1

2001 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 2396

Senate Judiciary Committee

☐ Subcommittee on _____

or

☐ Conference Committee

Legislative Council Amendment Number _____

Action Taken Do Pass

Motion Made By Watne Seconded By Dever

Senators	Yes	No	Senators	Yes	No
Traynor, J. Chairman	X		Bercier, D.		
Watne, D. Vice Chairman	X		Nelson, C.	X	
Dever, D.	X				
Lyson, S.	X				
Trenbeath, T.	X				

Total (Yes) 6 No 0

Absent 1

Floor Assignment Watne

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE (410)
February 8, 2001 1:20 p.m.

Module No: SR-23-2732
Carrier: Watne
Insert LC: . Title: .

REPORT OF STANDING COMMITTEE

SB 2396: Judiciary Committee (Sen. Traynor, Chairman) recommends **DO PASS** (6 YEAS, 0 NAYS, 1 ABSENT AND NOT VOTING). SB 2396 was placed on the Eleventh order on the calendar.

2001 HOUSE JUDICIARY

SB 2396

2001 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2396

House Judiciary Committee

❑ Conference Committee

Hearing Date 03-12-01

Tape Number	Side A	Side B	Meter #
TAPE I		x	481 to 734
TAPE I		x	2529 to 2998

Committee Clerk Signature Dottie L Jones

Minutes: Chairman DeKrey opened the hearing on SB 2396. Relating to an attorney's refusal to deliver a client's money or property and the furnishing of a bond.

Christine Hogan: Executive Director of the State Bar Association of North Dakota, (see attached testimony).

Chairman DeKrey: Are there any questions, if none, thank you for appearing before the committee. Is there anyone else wishing to appear in support, opposition or neutral. Seeing none we will close the hearing on SB 2396.

COMMITTEE ACTION

Chairman DeKrey called the committee to order on SB 2396. What are the wishes of the committee. Vice Chr Kretschmar moved a DO PASS seconded by Rep Mahoney. The clerk will call the roll on SB 2396. The motion passes with 13 YES, 0 NO and 2 ABSENT. Vice Chr Kretschmar is the carrier.

Date: 03-12-01
Roll Call Vote #: 1

2001 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. SB-2396

House JUDICIARY Committee

☐ Subcommittee on _____
or
☐ Conference Committee

Legislative Council Amendment Number _____

Action Taken Do Pass

Motion Made By Vice Chr Kretschmar Seconded By Rep Mahoney

Representatives	Yes	No	Representatives	Yes	No
CHR - Duane DeKrey	✓				
VICE CHR --Wm E Kretschmar	✓				
Rep Curtis E Brekke					
Rep Lois Delmore	✓				
Rep Rachael Disrud	✓				
Rep Bruce Eckre	✓				
Rep April Fairfield					
Rep Bette Grande	✓				
Rep G. Jane Gunter	✓				
Rep Joyce Kingsbury	✓				
Rep Lawrence R. Klemin	✓				
Rep John Mahoney	✓				
Rep Andrew G Maragos	✓				
Rep Kenton Onstad	✓				
Rep Dwight Wrangham	✓				

Total (Yes) 13 No 0

Absent 2

Floor Assignment Vice Chr Kretschmar

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

SB 2396: Judiciary Committee (Rep. DeKrey, Chairman) recommends **DO PASS** (13 YEAS, 0 NAYS, 2 ABSENT AND NOT VOTING). SB 2396 was placed on the Fourteenth order on the calendar.

2001 TESTIMONY

SB 2396

Testimony before the Senate Judiciary Committee
Regarding Senate Bill 2396
February 5, 2001
By Christine Hogan
State Bar Association of North Dakota

Chairman Traynor and members of the Committee, my name is Christine Hogan. I am the Executive Director of the State Bar Association of North Dakota. I am here to speak in favor of Senate Bill 2396. Senator Holmberg introduced this bill at the request of the Board of Governors of the State Bar Association of North Dakota.

The Association is requesting that the statutes allowing attorneys to assert a lien on a client's files be repealed. Repeal of the statutes is necessary because it has been held unethical in this state for lawyers to withhold client files on the condition that copying charges be paid.

In the past, there have been complaints that lawyers did not return files to clients or that lawyers charged excessively for providing copies of a file after the lawyer's services were terminated by the client.

The Joint Attorney Standards Committee, which is made up of lawyers and lay people appointed by the Supreme Court and by the State Bar Association of North Dakota, studied the issue of client access to files. The Committee determined that it is not appropriate for a lawyer to assert a retaining lien against a client's files, papers, or property. The Committee developed a new draft rule of professional conduct to address the issue. The proposed rule change is currently pending consideration by the North Dakota Supreme Court. As an accompaniment to the rule change, the Committee

also recommended that the following current statutes, which do allow a retaining lien against a client's files, ought to be repealed:

1. 27-13-05 NDCC (Attorney's refusal to deliver client's money or property – Penalty)
2. 2713-06 NDCC (Attorney's withholding of client's money or property under alleged lien unlawful if bond furnished.)
3. 27-13-07 NDCC (Attorney's refusal to deliver client's money or property not unlawful if he furnishes a bond.)

It is necessary to repeal these three statutes because, if they remain on the books, the statutes could cause confusion for lawyers. These statutes purport to *allow* attorneys to assert retaining liens, but this very conduct has been held to be *unethical* by the Ethics Committee of the State Bar Association of North Dakota and the disciplinary counsel of the North Dakota Supreme Court.

Thus, in order to bring the Century Code into compliance with current ethical decisions and with the proposed new rules of the professional conduct. The State Bar Association of North Dakota is recommending that Senate Bill 2396 be passed.

Thank you.

State Bar Association of North Dakota

P.O. Box 2136 BISMARCK, ND 58502 (701) 255-1404
In-State WATS 1-800-472-2685 FAX (701) 224-1621

February 5, 2001

Senator Jack Traynor
Chairman, Judiciary Committee
North Dakota Senate

Dear Senator Traynor:

At your request, I am providing the following background materials for the Senate Judiciary Committee's consideration of Senate Bill 2396 regarding the repeal of the attorney retaining lien statutes:

1. Copies of §§ 27-13-05 through 27-13-07 N.D.C.C.;

2. N.D. Supreme Court opinion in *Disciplinary Board v. Anseth*, 562 N.W.2d 385 (N.D. 1997);

3. Excerpts from the Joint Attorney Standards Committee's report to the Supreme Court on the issues relating to client access to files and circumstances under which a lawyer may charge a client for providing copies of a file to the client;

4. The Attorney Standards Committee's proposed new *Rule 1.19* of the Rules of Professional Conduct.;

5. Conforming amendments to the *comment* to current *Rule 1.6* of the Rules of Professional Conduct to reflect the lawyer's ability to make copies of a client file for the lawyer's own purposes, subject to limitations imposed under new *Rule 1.19*;

6. Conforming amendments to the *comment* and to *paragraph (e) of Rule 1.16*. This proposed amendment to paragraph (e) replaces the general references to "other law" with a reference to new *Rule 1.19* in describing the authorization for lawyer retention of client papers. The *comment* is amended to delete language regarding retention of a file as security for a fee, which is no longer applicable in light of the new *Rule 1.19*;

WP\1pglettr

7. Memorandum from Vivian Berg addressing the lawyer's ethical duty to turn over files as requested by a client when the representation is terminated; and

8. Ethical opinions from other states.

Thank you for the opportunity to assist the committee. Please let me know if you have any further questions.

Very truly yours,

Christine Hogan
Executive Director

cc: Jim Ganje, Court Administrator's Office
North Dakota Supreme Court

WP\1pgltr

ATTACHMENT

1

27-13-05. Attorney's refusal to deliver client's money or property — Penalty. An attorney, except as otherwise provided in sections 27-13-06 and 27-13-07, who receives money or property of his client in the course of his professional business and who refuses to pay or deliver the same to the person entitled thereto within a reasonable time after a demand therefor has been made upon him, is guilty of a class A misdemeanor.

Source: Pol. C. 1877, ch. 18, § 17; R.C. 1895, § 438; R.C. 1899, § 438; R.C. 1905, § 511; C.L. 1913, § 805; R.C. 1943, § 27-1305; S.L. 1975, ch. 106, § 312.

Revocation of License.

The license of an attorney to practice in the courts of the state was revoked and canceled where the attorney was guilty of converting his client's money. In re Garrity (1931) 60 ND 454, 235 NW 343.

27-13-06. Attorney's withholding of client's money or property under alleged lien unlawful if bond furnished. When an attorney claims a lien upon money or property of his client in his possession, he is not subject to the penalty of section 27-13-05 unless he neglects or refuses to pay or deliver such money or property to the person entitled thereto upon his giving a bond with sufficient surety to be approved by the clerk of the district court conditioned for the payment of the amount of such attorney's claim when legally established.

Source: Pol. C. 1877, ch. 18, § 18; R.C. 1895, § 439; R.C. 1899, § 439; R.C. 1905, § 512; C.L. 1913, § 806; R.C. 1943, § 27-1306.

Collateral References.
Attorney's assertion of retaining lien as violation of ethical code or rules governing professional conduct, 69 ALR 4th 974.

27-13-07. Attorney's refusal to deliver client's money or property not unlawful if he furnishes a bond. An attorney is not liable as provided in section 27-13-05 if he gives a sufficient bond conditioned that he will pay or deliver the whole or any portion of such money or property to the claimant in the event that such claimant finally establishes his right thereto.

Source: Pol. C. 1877, ch. 18, § 19; R.C. 1895, § 440; R.C. 1899, § 440; R.C. 1905, § 513; C.L. 1913, § 807; R.C. 1943, § 27-1307.

Collateral References.
Attorney's assertion of retaining lien as violation of ethical code or rules governing professional conduct, 69 ALR 4th 974.

27-13-05. Attorney's refusal to deliver client's money or property - Penalty. An attorney, except as otherwise provided in sections 27-13-06 and 27-13-07, who receives money or property of his client in the course of his professional business and who refuses to pay or deliver the same to the person entitled thereto within a reasonable time after a demand therefor has been made upon him, is guilty of a class A misdemeanor.

27-13-06. Attorney's withholding of client's money or property under alleged lien unlawful if bond furnished. When an attorney claims a lien upon money or property of his client in his possession, he is not subject to the penalty of section 27-13-05 unless he neglects or refuses to pay or deliver such money or property to the person entitled thereto upon his giving a bond with sufficient surety to be approved by the clerk of the district court conditioned for the payment of the amount of such attorney's claim when legally established.

27-13-07. Attorney's refusal to deliver client's money or property not unlawful if he furnishes a bond. An attorney is not liable as provided in section 27-13-05 if he gives a sufficient bond conditioned that he will pay or deliver the whole or any portion of such money or property to the claimant in the event that such claimant finally establishes his right thereto.

ATTACHMENT

2

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

1997 ND 66

In the Matter of the Application for Disciplinary Action Against Leroy P. Anseth
a Member of the Bar of the State of North Dakota

Civil No. 960297

Application for disciplinary action.
PUBLIC REPRIMAND ORDERED.
Per Curiam.
Vivian E. Berg (argued), Disciplinary Counsel, P.O. Box 2297, Bismarck, ND 58502-2297.
Anseth Johnson Law Firm, 417-1st Avenue East, P.O. Box 2536, Williston, ND 58802-2536, for respondent; argued by LaRay Anseth Johnson. Appearance by LeRoy P. Anseth.

Matter of Application for Disciplinary Action Against LeRoy P. Anseth

Civil No. 960297

Per Curiam.

[¶1] Disciplinary Counsel objects to the Disciplinary Board's dismissal of a formal disciplinary case against LeRoy P. Anseth. We exercise our inherent power to discipline, and we publicly reprimand Anseth.

I. Background

[¶2] Together, Anseth and Janet Zander practiced law in Williston. They contracted with the Williston Regional Child Support Enforcement Unit (RCSEU) to review, sign and file documents prepared by RCSEU staff, and to prepare and file more complicated documents for child-support enforcement. Zander did most of this work for the firm.

[¶3] On March 28, 1994, Zander, who was only an employee, told Anseth she was quitting. On April 4, RCSEU notified Anseth it would terminate his contract effective May 4, and would award a new contract to Zander. RCSEU later extended Anseth's contract

to July 31, 1994, so he could complete his files, but it did not assign any new cases to him.

[¶4] Anseth continued work for RCSEU through July 31. Soon after that, he put nearly twenty-five full boxes of former RCSEU files into off-site storage. However, six files, lettered cases A through F for identification, became the subject of this disciplinary complaint.

[¶5] Before September 1, Elaine Peterson, an RCSEU secretary, called Anseth about case A, and asked him to file original documents. Anseth wrote back: "On July 28, 1994 I received a letter from Michon Sax which directed me to cease legal services on July 31, 1994. I would like to inform you that the letter specifically stated I was to cease doing anything on the case." Anseth never returned or filed the originals, and RCSEU had to file photocopies with the clerk of court after getting permission from the court. The same thing happened with case C, only RCSEU could not file photocopies and had to start over by serving the summons and complaint a second time.

[¶6] Peterson also contacted Anseth about case B, again asking him to file original documents thought to be in his office. On August 24, Charles Neff, the opposing attorney in case B, wrote Anseth notifying him original pleadings needed to be filed or he would move to dismiss. Replying to Neff on August 30, Anseth wrote that he checked the clerk's file for the originals and they had been filed. Anseth copied this letter to Zander. However, Anseth did not tell Peterson the originals had been filed, but merely repeated that he no longer worked for RCSEU.

[¶7] RCSEU believed case D also lacked original documents, but it did not contact Anseth about that case. Administrator Barbara Johnson said RCSEU did not do so because a "pattern had been set and it appeared the documents were not being filed and we were trying to get these files completed with whatever means that we could." Later, RCSEU obtained an order permitting them to file photocopies with the clerk of court. Still later, it discovered the original pleadings had been filed already.

[¶8] Administrator Johnson contacted the State's Attorney about Anseth, and he advised her RCSEU's options were to file a complaint with the Disciplinary Board, get a court order, or just try to finish the cases. The governing board for RCSEU met to discuss the situation, and decided to try to work with Anseth instead of filing a disciplinary complaint. Michon Sax, Social Services Director for Williams and McKenzie County, testified the board wanted to maintain a relationship with Anseth because they still planned to work with him as a guardian ad litem and attorney for indigent clients. Sax hoped all along the Anseth situation was a "nightmare that would go away."

[¶9] On September 12, before cases A,B,C, and D were

completed, Sax wrote Anseth requesting the "original court documents." Anseth replied by letter on September 15:

> I thank you for your letter of September 12, 1994. I would like you to look at your letter to me of July 28, 1994 when you indicated you had terminated the contract to provide legal services for the Williston Regional Child Support Enforcement Unit effective July 31, 1994 and in that letter you went on to specifically add that it was no longer my obligation to provide legal services and that those services would cease July 31, 1994. Those are your words and not mine. Attached to that letter of July 28, 1994 were specific lists of cases I was to ceasehaving any further obligations to.
>
> In your letter of September 12, 1994 you refer to Williams County, a former client. You are now requesting some documents. I am enclosing for you a copy of a plaque which many lawyers have hanging in their office and a quote by Abe Lincoln that says, "A lawyer's time and advice are his stock in trade". I am assuming by your reference that you are a former client and that you have no intention of paying for my time to locate things in my file which are now in storage. If you wish to hire me at my regular billing rate as there is no longer a contract in force I would be most happy to work for you.

Sax did not respond to Anseth's letter because RCSEU was not willing to pay again for work he had been paid to do.

[¶10] For case E, Anseth had prepared an order and filed it with the court, but the court clerk had returned it for corrections. Anseth never filed a corrected order, and RCSEU had to buy a trial transcript to enable Zander to do it. Anseth admits this order "may have fallen through the cracks."

[¶11] Case F had been heard on July 25, 1994, four working days before Anseth's contract ended. Anseth failed to prepare the necessary order for it. RCSEU bought a transcript to enable Zander to prepare it. Johnson testified that Anseth was to have prepared the order. Anseth testified that the order was to have been prepared by RCSEU staff, so the staff would have sent the order to Zander if it was completed after July 31. He also testified that four days was not a typical turnaround to prepare an order. The fact that Zander, and not RCSEU staff, eventually prepared the order supports Johnson's testimony. We find Anseth took the notes at the July 25 hearing on case F to prepare an order, had time to complete the order, and failed to do so without notifying his client.

[¶12] John Cecil, a party to case F, frequently asked Craig Burke,

the RCSEU investigator, about the status of his case. Burke told Cecil he did not know what was happening on it, and he suggested Cecil call Anseth. Cecil called Anseth, and Anseth made a conference call with Cecil to Burke. When Burke found out Anseth was not representing either RCSEU or Cecil, he hung up on them. Anseth then contacted Burke's superior to inquire further. The superior told Anseth that RCSEU would get back to Cecil about the status of the case. The hearing body found on this incident: "The inquiry Anseth made with various Social Services employees and administrative personnel was professional and courteous." Disciplinary Counsel does not contest this finding. We conclude Anseth's inquiries about case F did not violate the Rules of Professional Conduct.

[¶13] Burke, the RCSEU investigator for some of these cases, eventually filed the complaint against Anseth with the Disciplinary Board. An inquiry committee recommended a formal disciplinary petition. The hearing body found Anseth's conduct "did not violate any Rules of Professional Conduct or any other professional rules, requiring discipline," and recommended dismissal. Without oral arguments or briefs, the Disciplinary Board adopted the findings and recommendations of the hearing body and dismissed the disciplinary action. Disciplinary Counsel filed objections to that order of dismissal with this court.

II. Objections

[¶14] This is the first time Disciplinary Counsel has objected to a Disciplinary Board's dismissal. We must decide whether her objection calls for our review.

[¶15] Disciplinary Counsel argues she is entitled to object under NDRLD 3.1(G). Alternatively, under our reserved powers in NDRLD 3.1(H), she contends we should exercise our inherent authority to discipline.

[¶16] Generally, the parties to a disciplinary action can object to a Disciplinary Board decision:

> Review by the Court. The board shall promptly submit to the court a report containing its findings and recommendations on each matter heard other than those resulting in remand, dismissal without appeal, consent probation without appeal, or reprimand without appeal. . . . A copy of the report submitted to the court must be served upon counsel, complainant, and the lawyer. Within 20 days of service of the report, the lawyer and counsel may file objections to the report.

NDRLD 3.1(G). Here, the Disciplinary Board dismissed the action against Anseth and did not file a report with this Court. Disciplinary Counsel, however, argues that this disposition can be

appealed when she objects. Thus, she argues, "an appeal was made and this matter is appropriately before the Court under Rule 3.1 (G)." Because we choose to use our inherent disciplinary power in this case, we do not decide whether Disciplinary Counsel properly appealed this dismissal.

[¶17] Even if NDRLD 3.1(G) may not apply, Disciplinary Counsel urges this court to review the actions of the Disciplinary Board under our inherent authority to discipline lawyers reserved in NDRLD 3.1(H). Disciplinary Counsel submits this case is serious enough for use of that inherent power. We agree.

[¶18] This Court has a duty to maintain the integrity of the legal profession by disciplining lawyers. Matter of Lovell, 292 N.W.2d 76, 82 (N.D. 1980). To that end, we have reserved the power to discipline lawyers on our own initiative: "Nothing in these rules prevents the court from instituting disability or disciplinary proceedings on its own initiative." NDRLD 3.1(H). As this Court explained long ago:

> The power to discipline attorneys, who are officers of the court, is an inherent and incidental power in courts of record, and one which is essential to an orderly discharge of judicial functions.

In re Simpson, 83 N.W. 541, 553 (N.D. 1900). We conclude this case calls for us to exercise our "inherent and incidental power."

III. Misconduct

[¶19] Disciplinary Counsel objects to the hearing body's decision that Anseth did not breach the Rules of Professional Conduct. She argues RCSEU did not have to hire Anseth again to retrieve its own documents from his files, and did not have to pay to get Anseth to comply with ethical standards. She asserts that Anseth failed to respond helpfully or meaningfully to RCSEU's requests, and contends he was obligated to minimize any harm that ending his representation would cause his client. Disciplinary Counsel asserts RCSEU had a "vital" right to discharge an attorney without having to pay two attorneys for the same services. Disciplinary Counsel submits that Anseth's actions did not reasonably protect RCSEU's interests and that his conduct reflects badly on the legal profession.

[¶20] We review disciplinary actions against attorneys anew under a clear and convincing standard of proof. Disciplinary Bd. of Supreme Court v. McKennett, 349 N.W.2d 29, 31 (N.D. 1984). Although we give due weight to the findings, conclusions and recommendations of the Disciplinary Board, we do not automatically accept those findings; we decide each case on its own facts. Disciplinary Bd. v. Gray, 544 N.W.2d 168, 171 (N.D. 1996); Disciplinary Action Against Britton, 484 N.W.2d 110, 111 (N.D. 1992). Here, we conclude Anseth clearly violated duties to

RCSEU upon termination of his services.

[¶21] Anseth's ethical duties to RCSEU, as a governmental entity, were the same as to an individual client. See NDRPC 1.18 cmt. Anseth's obligations were clear:

> 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. The lawyer may retain papers relating to the client to the extent permitted by other law.

NDRPC 1.16(e) (emphasis supplied). Anseth was obligated to surrender the original documents for cases A, B, C, and D. Anseth was obligated to take "steps to the extent reasonably practicable to protect [RCSEU's] interests" on cases E and F by, at least, completing work undertaken within the allotted time or informing his client clearly about their incomplete status.

[¶22] We are not concerned with cases B and D because Anseth no longer had those originals. Although Anseth should have been more informative in his replies to RCSEU's inquiries, he was not obligated to return documents he no longer had.

[¶23] For cases A and C, though, Anseth had a clear duty to turn the originals over to RCSEU. "The lawyer who has withdrawn or has been discharged by the client has a duty to surrender promptly all papers and other property to which the client is entitled." Annotated Model Rules of Professional Conduct Rule 1.16(d) annot. at 256 (3d ed. 1996); see also Matter of Lyles, 477 S.E.2d 105, 106-07 (Ga. 1996)(suspending attorney in part for failure to return requested client documents); In re McCarty, 665 A.2d 885, 887 (Vt. 1995)(publicly reprimanding attorney for failing to return client property after termination of representation). While Anseth did not have to bear the cost of returning the documents, he should have made them readily available for RCSEU personnel to pick up. See Illinois State Bar Ass'n, Comm. on Prof'l Ethics, Op. 94-14 (1995)("All original papers delivered to the lawyer by the client must be returned to the client."); Maine State Bar Ass'n, Prof'l Ethics Comm'n, Op. 120 (1991)(requiring attorney to make papers available to client, but not requiring attorney to bear delivery costs). Anseth should have done more to return RCSEU's documents.

[¶24] Unfortunately, both the Disciplinary Board and the hearing body ignored case E and did not make any findings about it. Anseth's inaction on case E is not acceptable; that it "may have fallen through the cracks" is not a valid excuse. His inattention was negligent, at least.

[¶25] We do not believe Anseth actually had to prepare the case E order after July 31. SeeNDRPC 1.16(c) cmt. ("Whether or not a lawyer for an organization may under certain unusual circumstances have a legal obligation to the organization after withdrawing or being discharged . . . is beyond the scope of these Rules.") However, before the end of his representation, he should have adequately informed RCSEU about the incomplete status of that case. See NDRPC 1.4 (requiring attorneys to keep clients reasonably informed about status of matter); In re Ambrose, 442 N.E.2d 900, 902 (Ill. 1982)(reprimanding attorney in part for failure to inform client about incomplete status of case upon withdrawal of representation); Disciplinary Bd. v. Robb, 506 N.W.2d 714 (N.D. 1993)(publicly reprimanding attorney for failure to keep client reasonably informed about status of bankruptcy matter).

[¶26] We reach the same conclusion for case F. As we explained in Disciplinary Bd. v. Amundson, 297 N.W.2d 433, 443-44 (N.D. 1980): "Public trust in the legal profession is a necessity and as a consequence lawyers traditionally have been held to a higher standard." By failing to protect RCSEU's interests on cases E and F, Anseth breached his obligation to "take steps to the extent reasonably practicable to protect a client's interests."

[¶27] Anseth blames RCSEU for a lack of communication on these six cases. Anseth says he promptly responded to RCSEU's requests for documents, but RCSEU did not contact him again. On the prepared documents, he points out that RCSEU did not follow its usual practice of checking an order's status. We are not persuaded because RCSEU tried several times to communicate its needs to Anseth, but was met each time with his stubborn and uninformative refusal to cooperate in any way without being paid. Anseth, not RCSEU, had the affirmative duty to "take steps to the extent reasonably practicable to protect a client's interests."

IV. Sanction

[¶28] Disciplinary Counsel urges the most appropriate sanction for Anseth's misconduct is a short period of suspension followed by probation. She contends that "Anseth knowingly engaged in conduct that violated his duty to the client upon termination of his employment, with serious or potentially serious injury to the client, the public, and the legal system." She suggests disbarment might even be appropriate, if we found Anseth intended to enrich himself by seeking payment for simply returning the client's own documents. Disciplinary Counsel urges more than a reprimand is needed because Anseth's misconduct was affirmative and deliberate, not merely negligent.

[¶29] To formulate a suitable sanction for a lawyer's misconduct, we consider: (1) the ethical duty violated by the lawyer; (2) the lawyer's mental state; (3) the extent of actual or potential injury

caused by the lawyer's misconduct; and (4) the existence of aggravating or mitigating factors. Disciplinary Action Against LaQua, 548 N.W.2d 372, 374 (N.D. 1996); NDSILS 3.0. The range of sanctions for Anseth's misconduct is suggested in North Dakota Standard for Imposing Lawyer Sanctions 7.0:

> Violations of Duties Owed to the Profession
>
> Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving . . . improper withdrawal from representation . . . .
>
> 7.1 Disbarment is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed to the profession with the intent to obtain a benefit for the lawyer or another, and causes serious or potentially serious injury to a client, the public, or the legal system.
>
> 7.2 Suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed to the profession and causes injury or potential injury to a client, the public, or the legal system.
>
> 7.3 Reprimand is generally appropriate when a lawyer negligently engages in conduct that is a violation of a duty owed to the profession and causes injury or potential injury to a client, the public, or the legal system.
>
> 7.4 Admonition is generally appropriate when a lawyer engages in an isolated instance of negligence in determining whether the lawyer's conduct violates a duty owed to the profession, and causes little or no actual or potential injury to a client, the public, or the legal system.

Generally, disbarment and suspension are the appropriate sanctions for knowing misconduct, and reprimand and admonition are appropriate for negligent misconduct.

[¶30] Here, suspension would ordinarily be appropriate for Anseth's knowing failure to fulfill his obligations to RCSEU. However, we find his misconduct is mitigated by his cooperation with the Disciplinary Board and the absence of any prior disciplinary record. SeeNDSILS 9.32(a) and (e). Disciplinary Counsel argues that Anseth's failure to admit the seriousness of his conduct is an aggravating factor that warrants a stiffer sanction. Yet, Anseth grudgingly conceded one file had "fallen through the cracks." On the whole, we conclude that Anseth's failure to

understand the seriousness of his misconduct is also largely balanced by the mitigating factors, and that the most appropriate sanction for Anseth is a public reprimand.

[¶31] We direct that LeRoy P. Anseth be publicly reprimanded for his misconduct, and that Anseth pay the costs of this disciplinary proceeding to be determined by the Disciplinary Board.

[¶32] Gerald W. VandeWalle, C.J.
Herbert L. Meschke
Dale V. Sandstrom
William A. Neumann
Mary Muehlen Maring

ATTACHMENT

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Client Files, Papers, and Property - Access and Copying

At the request of disciplinary counsel, the Joint Committee reviewed issues concerning client access to files held by a lawyer and the circumstances under which a lawyer may charge a client for

providing copies of a file to the client. In the past, disciplinary counsel had received complaints regarding lawyers not returning files to clients or charging excessively for providing copies of a file The Joint Committee discussed current practices concerning client access to files, the manner in which copies of file documents are generally provided to clients, and under what circumstances charging a client the cost of making copies may or may not be appropriate. The Joint Committee reviewed a proposal submitted by disciplinary counsel and approaches in other jurisdictions to this issue. The Joint Committee also discussed whether it is appropriate for a lawyer to assert a retaining lien against a client's files, papers, or property. After discussion at several meetings, the Joint Committee developed a proposed new rule and conforming amendments to two existing rules to address lawyer retention of files and copying of files. ***See Attachment B***.

The Joint Committee recommends *new Rule 1.19* to the Rules of Professional Conduct. Paragraph (a) of the new rule would disallow the assertion of a retaining lien against a client's files, papers, or property. (It was also recommended that the SBAND Board of Governors pursue legislation repealing the retaining lien statute). Paragraph (b) defines what constitutes client files, papers, and property, while paragraph (e) defines what does not. Paragraph (c) establishes the general limitation that a lawyer may not condition the return of client files, papers, or property on the payment of copying charges. Paragraph (d) addresses situations in which the lawyer has withdrawn from representation or has been discharged. In those instances, unless copies have been provided earlier to the client, the lawyer may only charge the cost of copying if the client, before termination of the lawyer's services, has agreed in writing to reimburse the lawyer for copying costs. Paragraph (f) permits a lawyer to make copies of a file for retention by the lawyer in connection with return of the file to the client. This is intended to afford a lawyer the opportunity to retain a copy of the file for essentially self-protective reasons, in the event of a future malpractice action. The lawyer cannot charge a client for making such copies.

The Joint Committee recommends *conforming amendments* to the *Comment to Rule 1.6* of the Rules of Professional Conduct to reflect the lawyer's ability to make copies of a client file for the lawyer's own purposes, subject to the limitations imposed under new Rule 1.19.

The Joint Committee recommends *conforming amendments* to the *Comment* and *paragraph (e) of Rule 1.16*. The proposed amendment to paragraph (e) replaces the general reference to "other law" with a reference to new Rule 1.19 in describing the authorization for lawyer retention of client papers. The Comment is amended in the section pertaining to "Assisting the Client Upon Withdrawal" do delete language regarding retention of a file as security for a fee. The language is regarded as no longer applicable in light of the limitations imposed under new Rule 1.19.

Amendments to the *Table of Rules* are included as ***Attachment C*** to reflect the proposed changes and additions.

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ATTACHMENT B

Proposed New Rule 1.19, Rules of Professional Conduct

RULE 1.19 FILES, PAPERS, AND PROPERTY RELATED TO A REPRESENTATION

(a) A lawyer shall not assert a retaining lien against a client's files, papers, or property.

(b) The following constitute a client's files, papers (including items only electronically stored), or property:

1. All papers and property provided by the client to the lawyer other than as payment.

2. All pleadings, motions, discovery, memoranda, and other litigation materials which have been executed and served or filed regardless whether the client has paid the lawyer for drafting and serving and/or filing the document(s).

3. All correspondence regardless of whether the client has paid the lawyer for drafting or sending the correspondence.

4. All items of potential evidentiary value regardless of whether the client has reimbursed the lawyer for any costs or expenses which the lawyer has advanced, including depositions, expert opinions and statements, business records, and witness statements.

(c) A lawyer may not condition the return of client files, papers, or property on payment of copying costs. Nor may the lawyer condition return of the client files, papers, or property upon payment of the lawyer's fee.

(d) Unless copies have earlier been provided to the client by the lawyer, a lawyer who has withdrawn from a representation or has been discharged from a representation may only charge the former client the cost of copying for the client, or electronically retrieving for the client, the client's files, papers, and property when the client has, prior to termination of the lawyer's services, agreed in writing to reimburse the lawyer for copying and retrieval expense. Any such charge must be reasonable in amount.

(e) The following, regardless of form, are not client files, papers, or property:

1. Pleadings, discovery, motion papers, memoranda, and correspondence which have been drafted but not filed, sent, or served, unless the client has already paid for the drafting or creating of the item(s).

2. Drafted but unexecuted or undelivered estate plans, title opinions, contracts, documents regarding the formation, operation, dissociation, dissolution, or termination of business or other associations or governing the relationship of those involved in them, or any other unexecuted or undelivered document, unless the client has already paid for the drafting and preparation of the item(s).

3. Any lawyer work product not expressly defined as client files, papers, or property by paragraph (b).

(f) In connection with the return of any file or paper, including client files or papers, a lawyer may make copies for retention by the lawyer. The client may not be charged for these copies.

Comment

Rule 1.15 governing turning over papers during the representation, and Rule 1.16 governing turning over papers when declining or terminating representation, impose an obligation to deliver or surrender items to which the client or prospective client is entitled. This Rule provides guidance regarding the items to which the client's entitlement extends, and speaks also to other questions associated with common lawyer/client issues regarding files and papers. This Rule also makes it improper for a lawyer to assert a retaining lien of any kind (common law, statutory, or contractual) against the client's files, papers, or property.

The obligations of Rule 1.6 of these Rules persist as to any files or papers retained by the lawyer, as to any copies made by the lawyer in conjunction with returning files or papers under paragraph (f) of this Rule, and as to any information relating to the representation contained in any file or paper. With respect to copying documents and charging a client, paragraph (d) pertains to copies made for or at the request of the client and paragraph (c) pertains to copies made and retained by the lawyer.

Reference: Minutes of the Joint Committee on Attorney Standards on 6/8/99, 9/16/99, 11/19/99, 3/23/00, 6/13/00, 9/15/00, and 11/17/00.

Proposed Amendments to Rule 1.6 (Comment), Rules of Professional Conduct

RULE 1.6 CONFIDENTIALITY OF INFORMATION

A lawyer shall not reveal, or use to the disadvantage of a client, information relating to the representation of the client unless required or permitted to do so by this rule. When such information is authorized by this rule to be revealed or used, the revelation or use shall be no greater than the lawyer reasonably believes necessary to the purpose. Such revelation or use is:

(a) required to the extent the lawyer believes necessary to prevent the client from committing an act that the lawyer believes is likely to result in imminent death or imminent substantial bodily harm;

(b) permitted when the client consents after consultation;

(c) permitted when impliedly authorized in order to carry out the representation;

(d) permitted to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal or fraudulent act that the lawyer reasonably believes is likely to result in non-imminent death, non-imminent substantial bodily harm, or substantial injury or harm to the financial interests or property of another;

(e) permitted to the extent the lawyer reasonably believes necessary to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(f) permitted, except as limited by Rule 3.3(c), to prevent or to rectify the consequences of a client's criminal or fraudulent act in the furtherance of which the lawyer's services had been used without the lawyer's knowledge;

(g) permitted to comply with law or court order; and

(h) permitted when information has become generally known.

COMMENT

The observance of the ethical obligation of a lawyer to hold inviolate confidential information of the client not only facilitates the full development of facts essential to proper representation of the client but also encourages people to seek early legal assistance. Almost without exception, clients come to lawyers in order to determine what their rights are and what is, in the maze of laws and

regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld. In order to foster the continued willingness of clients to seek early counsel, to reveal freely to counsel all facts, and thus to assure that most conduct will be lawful, the law recognizes that the client's confidences must be protected from disclosure or improper use.

A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.

This principle of confidentiality is also given effect in the attorney-client privilege and the work product doctrine. The attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose or use to the disadvantage of a client such information except as required or permitted by these Rules or other law. See also Scope.

Authorized Disclosure

A lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. For example, a lawyer may disclose information in litigation by admitting a fact that cannot properly be disputed or in negotiation by making a disclosure that facilitates a satisfactory conclusion. Specific instructions from the client or special circumstances may limit the lawyer's implied authority to make disclosures.

Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

Disclosure Adverse to Client

To the extent a client is aware that there are circumstances in which a lawyer is required or permitted to disclose the client's intentions, the client will be inhibited from revealing facts which would enable the lawyer to counsel against, and perhaps therefore effectively prevent, a course of action which would violate the rights of others. The public is thus better protected if full and open communication by the client is encouraged than if it is inhibited. The general rule of confidentiality is accepted because it provides that encouragement. In some circumstances, however, important as

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the principle of confidentiality is, it must give way to other interests; there are situations in which a lawyer must reveal information relating to representation of the client, and other situations in which a lawyer must be free to reveal such information.

A lawyer is required to reveal information the lawyer believes necessary to prevent the client from committing an act the lawyer believes is likely to result in imminent death or imminent substantial bodily harm. This requirement exists even though the lawyer can never be certain of the client's intentions.

A lawyer must have discretion to reveal information the lawyer reasonably believes necessary to prevent the client from committing criminal or fraudulent acts the lawyer reasonably believes are likely eventually to lead to the loss of another's life or to substantial bodily harm to another, or are likely to harm substantially the financial interests or property of another. Similarly there must be freedom to comply with law or an order of a court, to establish a claim or defense on the lawyer's behalf in disputes between the lawyer and the client, to establish a defense to allegations against the lawyer based on conduct involving the client, to permit the lawyer to respond in any proceeding concerning the lawyer's representation of the client, or to prevent or to rectify the consequences of a client's criminal or fraudulent act which the lawyer's services had furthered without the lawyer's knowledge.

The lawyer must always seek to persuade the client to adopt a lawful course of action. When this attempt is not successful, and the lawyer is either required to reveal information relating to the representation of the client or permitted to reveal such information and determined to do so, the disclosure should be no greater than is required under the circumstances and tailored—both as to the quantity of information revealed and the manner of the revelation—to minimize to the extent practicable the adverse effect upon the client. A lawyer required to decide the manner in which to reveal information relating to the representation should consider the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction, and factors that may extenuate the conduct in question.

Withdrawal

If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule 1.16(a)(1).

After withdrawal the lawyer is required to refrain from making disclosure of the clients' confidences, except as otherwise provided in this Rule. This Rule, Rule 1.8(b), and Rule 1.16(c) do not prevent the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like.

Where the client is an organization, the lawyer may be in doubt whether contemplated conduct will actually be carried out by the organization. Where necessary to guide conduct in connection with this Rule, the lawyer may make inquiry within the organization (See Comment to Rule 1.13).

Dispute Concerning Lawyer's Conduct

Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (e) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend, of course, applies where a proceeding has been commenced. Where practicable and not prejudicial to the lawyer's ability to establish the defense, the lawyer should advise the client of the third party's assertion and request that the client respond appropriately. In any event, disclosure should be no greater than the lawyer reasonably believes is necessary to vindicate innocence, the disclosure should be made in a manner which limits access to the information to the tribunal or other persons having a need to know it, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

If the lawyer is charged with wrongdoing in which the client's conduct is implicated, the rule of confidentiality should not prevent the lawyer from defending against the charge. Such a charge can arise in a civil, criminal or professional disciplinary proceeding, and can be based on a wrong allegedly committed by the lawyer against the client, or on a wrong alleged by a third person, such as when a person claims to have been defrauded by the lawyer and client acting together. A lawyer entitled to a fee is permitted by paragraph (e) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary. As stated above, the lawyer must make every effort practicable to avoid unnecessary disclosure of information relating to a representation, to limit disclosure to those having the need to know it, and to obtain protective orders or make other arrangements minimizing the risk of disclosure.

Lawyer Copying of Items Related to Representation

For the lawyer's own purposes, including facilitation of any revelation that might be permitted by paragraph (e), a lawyer is permitted to make copies of items in a file. The lawyer may charge the client for this copying only if allowed by Rule 1.19. The protection of this Rule, and the circumstances in which revelation is required or permitted, are applicable to the lawyer's copy or copies.

Disclosures Otherwise Required or Authorized

This Rule and other provisions in these Rules (see Rules 2.2, 2.3, and 3.3), in some circumstances permit and in others require a lawyer to disclose information relating to the representation. In these instances, the obligation not to reveal is not breached by disclosure.

Provisions in other law may seem to permit or require a lawyer to disclose information relating to a representation. Such a provision raises the legal issue of which directive takes precedence—the general rule of non-revelation found in this Rule or the provision in other law authorizing disclosure. It is the lawyer's obligation to disclose only when the precedence of the law authorizing disclosure is clear; an order of a court requiring or permitting disclosure is to be taken as a determination of that precedence.

The attorney-client privilege is a protector of some matters related to the representation of a client, and, as to a part of the information possessed by a lawyer about a client, operates as an obligation of the lawyer not to reveal. However, the law of attorney-client privilege differs among the jurisdictions. If a lawyer is called as a witness to give testimony concerning a client, and the client has not consented to the disclosure or the disclosure is neither permitted nor required by these Rules, the lawyer must invoke the privilege to resist disclosure whenever the privilege is applicable. The failure to invoke the client's privilege in such circumstances is a violation of the obligation recognized in this Rule. If invocation of the privilege results in a ruling issued by a court or other tribunal of competent jurisdiction requiring the lawyer to disclose the information, the lawyer may comply; that compliance is not a violation of the obligation of confidence recognized in this Rule.

Former Client

The duty of confidentiality continues after the client-lawyer relationship has terminated

Use of Confidential Information to the Disadvantage of Client

Use by the lawyer of confidential information to the disadvantage of a client is equivalent to revelation. This Rule and comment permits neither revelation nor use to the disadvantage of a client except as required or permitted by the Rule.

Reference: Minutes of the Professional Conduct Subcommittee of the Attorney Standards Committee on 03/16/84, 05/23/84, 06/27/84, 08/17/84, 09/13/84, 10/19/84, 12/14/84, 02/08/85, 03/11/85, 04/26/85, 08/23/85 and 03/15/86; Minutes of the Joint Committee on Attorney Standards on 6/8/99, 9/16/99, 11/19/99, 3/23/00, 6/13/00, 9/15/00, and 11/17/00.

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Proposed Amendments to Rule 1.16 [paragraph (e) and Comment], Rules of Professional Conduct

RULE 1.16 DECLINING OR TERMINATING REPRESENTATION

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall seek to withdraw from the representation of a client if:

(1) The lawyer reasonably believes that the representation will result in violation of the rules of professional conduct or other law;

(2) The lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client;

(3) The lawyer has offered material evidence in the testimony of the client and has come to know of its falsity and the client has refused to consent to disclosure of its false character to the tribunal; or

(4) The lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or:

(1) The client persists in a course of action involving the lawyer's services that the lawyer believes is criminal or fraudulent;

(2) The client has used the lawyer's services to perpetrate a crime or fraud;

(3) A client insists upon pursuing objectives or means that the lawyer considers repugnant or imprudent;

(4) The client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(5) The representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(6) Other good cause for withdrawal exists.

(c) When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Where the lawyer has sought to withdraw in accordance with paragraph (a)(3) and withdrawal is not permitted, the lawyer may continue the representation without disclosure of the client's false testimony; such continuation alone is not a violation of these rules.

(e) 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. The lawyer may retain papers relating to the client only to the extent permitted by ~~other law~~ Rule 1.19.

COMMENT

A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion.

Mandatory Withdrawal

A lawyer ordinarily must decline or seek to withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.

Rule 3.3 and this rule require a lawyer to seek to withdraw from representation of a client upon learning that the client offered false evidence if the lawyer is unable to persuade the client to disclose its false character immediately to the tribunal.

When a lawyer has appeared on behalf of a client, withdrawal ordinarily requires approval of the tribunal. See also Rule 6.2. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may wish an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statements that professional considerations require termination of the representation ordinarily should be accepted as sufficient.

Discharge

A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

Whether a client can discharge appointed counsel may depend on applicable law. A client seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring the client to represent himself.

If the client is mentally incompetent, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interest. The lawyer should make special effort to help the client consider the consequences and, in an extreme case, may initiate proceedings for a conservatorship or similar protection of the client. See Rule 1.14.

Optional Withdrawal

A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer also may withdraw where the client insists on a repugnant or imprudent objective.

A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

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.~~

Whether or not a lawyer for an organization may under certain unusual circumstances have a legal obligation to the organization after withdrawing or being discharged by the organization's highest authority is beyond the scope of these Rules.

Reference: Minutes of the Professional Conduct Subcommittee of the Attorney Standards Committee on 04/26/85, 08/23/85, 09/20/85, and 01/10/86; Minutes of the Joint Committee on Attorney Standards on 6/8/99, 9/16/99, 11/19/99, 3/23/00, 6/13/00, 9/15/00, and 11/17/00.

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State of North Dakota
DISCIPLINARY BOARD OF THE SUPREME COURT
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TO: Robert J. Udland, Chair, Inquiry Committee West
Michael M. Thomas, Chair, Inquiry Committee East
Members, Inquiry Committee East and Inquiry Committee West

FROM: Vivian E. Berg

DATE: May 22, 1998

RE: Lawyers' duty to return client files upon termination of representation

Each of the inquiry committees has pending before it a complaint regarding return of files when representation has terminated. One involves a $[redacted] charge; the other involves asking the successor attorney to protect somewhat over $[redacted] expended in costs. Some variation of these complaints is often presented to the Committees, and this memo addresses the recurring question of a lawyer's ethical duties to turn over files as requested by a client when representation has terminated.

North Dakota's Rule 1.16(e), RPC, follows the ABA Model Rule, as follows:

> 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 been earned. The lawyer may retain papers relating to the client to the extent permitted by other law.

The "other law" for North Dakota is probably NDCC 27-13-05, which provides: "An attorney, except as otherwise provided in sections 27-13-06 and 27-13-07, who receives money or property of his client in the course of his professional business and who refuses to pay or deliver the same to the person entitled thereto within a reasonable time after a demand therefor has been made upon him, is guilty of a Class A misdemeanor." NDCC 27-13-06 and -07 provide for delivery upon payment of a bond.

The above, of course, is a criminal provision though contained within the statutes on "Conduct of Attorneys." It is generally understood to authorize a retaining lien, but this lien may conflict with a lawyer's other duties, primarily the duty of continuing protection to the client's interests.

The North Dakota Supreme Court issued a public reprimand to a lawyer who did not return original client documents when the client hired new counsel. There was no issue of any remaining fees or costs owed, but the lawyer refused to meet the former client's requests unless the client

was willing to rehire the lawyer at his "regular billing rate." In the Matter of the Disciplinary Action Against Anseth, 1997 ND 66, 562 NW2d 385. (The court wrote that suspension would ordinarily be appropriate for the conduct, but mitigating factors were considered in issuing the public reprimand.) A copy of the opinion is attached and clearly stands for the proposition that a lawyer has the affirmative duty to take steps to the extent reasonably practicable to protect a client's interests when representation ceases.

North Dakota Ethics Committee Opinion 93-15 is that a retaining lien is not a per se violation of the Rules of Professional Conduct. However, the circumstances of each case must be assessed by the attorney to determine whether the ethical obligations of the attorney to protect the former client's interests would require the attorney to forego the assertion of the retaining lien. An attorney should forego the right to enforce a retaining lien on a client's papers when the former client lacks the means to pay the lawyer's fees or to provide adequate security and has an urgent need for the papers to defend a criminal prosecution or to assert or defend a similar important personal liberty.

Other states have interpreted rules similar or identical to North Dakota's, with numerous ethics opinions upholding the general concept of an attorney's lien. A cross-section of these opinions follows:

Kentucky Opinion E-395 (3/97) - A lawyer may not retain a client's file because of a fee dispute. Upon termination of the representation, the lawyer must turn over the file to the client or the client's new attorney except for work product. Documents and other relevant items that may be required as evidence at trial must be surrendered in original form. A lawyer may charge a reasonable fee for duplication of documents in the file but does not have a statutory lien for the costs of duplication and should surrender the file even if reimbursement for copying is not forthcoming.

Virginia Opinion 1690 (6/5/97) - A lawyer may not assert a retaining lien if doing so would prejudice the client's interests; assertion of a retaining lien almost invariably will have such an effect. Since the file belongs to the client, he may not be charged with copying expenses even if the lawyer keeps the original, with the client's permission, and gives a copy to the client, but the client may be charged for documents previously surrendered without charge. A lawyer's work product should be relinquished if withholding it would materially prejudice the client's interests. More is required to establish prejudice with respect to lawyer work product than with client-provided papers. The fact that the new lawyer may have to do research, drafting, or witness interviews previously performed by the lawyer would not constitute such prejudice. A lawyer may ask a former client to sign a receipt for the documents, but may not refuse to surrender the file if the client fails to comply. A "rule of reason" will determine what constitutes delivery - it may involve giving access in the lawyer's office or sending the file by mail, messenger, or other means.

Pennsylvania 87-61 (10/87) - A lawyer who is owed unpaid legal fees should return the client's files and thereafter sue the client for the fee, rather than asserting a retaining lien.

South Dakota 96-7 (10/2/96) - A law firm should return to a former client those things the client delivered to the firm, items the client paid for, and any item which could reasonably be deemed useful to the client. A lawyer need not, however, deliver his or her internal notes and memos produced primarily for his or her own use in working for the client. Whether the firm may charge for photocopies or for time searching for the relevant material depends on the firm's customary practices or the specific agreement with the client. The distinction between property of the client versus property of the lawyer is a matter of substantive law.

Kansas Opinion 92-F (7/30/92) - A lawyer may charge actual costs only for photocopying file documents which are not considered client property that are requested by a former client whose fees and costs are paid. "Client property" includes (1) documents provided to the lawyer by the client or client's agents; (2) deposition or other discovery documents regarding the case, for which the client is billed and has paid, such as expert witness opinions; and (3) pleadings and other court papers and such documents as are necessary to understand and interpret the above-listed documents. The lawyer must forward file documents which are the former client's property to the client without additional copying costs.

The **Kansas Supreme Court** recently censured a lawyer who failed to turn over files to a client who had discharged him; the lawyer was also required to pay restitution for the extra attorney fees incurred due to withholding the files. The lawyer claimed an attorney's lien and no harm to the client as the client had "most of" the documents needed for discovery. The hearing panel wrote that the lawyer's conduct reflected poorly on the profession and noted among aggravating circumstances the lawyer's acrimony to his former associate (the client decided to take the case to a former associate who was leaving the firm), the reliance on the attorney's lien as justification, and the complainant's vulnerability. In re Palmer, Kan., No. 80,112, 4/17/98; ABA/BNA Lawyers' Manual on Professional Conduct, Vol. 14, No. 8, May 13, 1998.

Massachusetts Opinion 92-4 (11/17/92) - A law firm must turn over to its client on demand original documents supplied by the client, and any investigatory or discovery documents for which the client has paid out-of-pocket expenses. The firm may keep copies at its own expense. Pleadings, court filings and documents served by or upon a party must also be given to the client but the client may be required to pay photocopying charges if the client has not already paid for the materials; this is a matter of substantive contract law. Work product for which the client has paid must also be turned over; in a case that does not involve a contingent fee, whether or not the client has paid for work product is a matter of contract law. Because rule provisions are not clear on copying charges, lawyers are well advised to contract explicitly with their clients with respect to payment for copies of pleadings, filings, papers served by or upon any party, work product and

correspondence.

Minnesota's Rule 1.16 (e) follows the model rule except that it omits completely the language allowing a lawyer to retain papers. Minnesota also has Opinion 13, Copying Costs of Client Files, Papers and Property, which provides a detailed listing of papers involved and also provides for reasonable copying charges, but also that a lawyer may not condition the return of client files, papers, and property on payment of copying costs or the lawyer's fee. Documents "not constituting client files, papers and property" may be withheld, but not if the client's interest will be substantially prejudiced without the documents. Such circumstances include, but are not necessarily limited to, expiration of a statute of limitations or some other litigation-imposed deadline.

CONCLUSIONS

The client of a North Dakota attorney has a right to the file, but it is unclear as to whether that means literally all of the file. The client may be responsible for reasonable costs of copying, maybe even time spent on doing so. The lawyer whose services have been terminated may assert an attorney's lien, which gives way if the client has need for the documents. The lawyer has an affirmative obligation to protect the client.

VEB:if
Enclosure

pc: Dwight F. Kalash, Chair, Disciplinary Board

ATTACHMENT

8

LAWYERS PROFESSIONAL RESPONSIBILITY BOARD
300 RDO CONTINENT BUILDING
375 JACKSON STREET
ST. PAUL, MINNESOTA 55102

LAWYERS PROFESSIONAL RESPONSIBILITY BOARD
444 LAFAYETTE ROAD
4th FLOOR
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STAFF ATTORNEY
612 - 296-3952

OPINION NO. 11

Attorneys' Liens

It is professional misconduct for an attorney to assert a retaining lien on the files and papers of a client. This prohibition applies to all retaining liens, whether they be statutory, common law, contractual, or otherwise.

Adopted October 26, 1979.

Chairman

Administrative Director

LAWYERS PROFESSIONAL RESPONSIBILITY BOARD
930 LAFAYETTE ROAD
FIRST FLOOR
ST. PAUL, MINNESOTA 55155-4196
612-296-3952

OPINION NO. 13

COPYING COSTS OF CLIENT FILES, PAPERS AND PROPERTY

Client files, papers and property, whether printed or electronically stored, shall include:

1. All papers and property provided by the client to the lawyer.

2. All pleadings, motions, discovery, memorandums, and other litigation materials which have been executed and served or filed regardless of whether the client has paid the lawyer for drafting and serving and/or filing the document(s).

3. All correspondence regardless of whether the client has paid the lawyer for drafting or sending the correspondence.

4. All items for which the lawyer has advanced costs and expenses regardless of whether the client has reimbursed the lawyer for the costs and expenses including depositions, expert opinions and statements, business records, witness statements, and other materials which may have evidentiary value.

Client files, papers and property, whether printed or electronically stored, shall not include:

1. Pleadings, discovery, motion papers, memoranda and correspondence which have been drafted, but not sent or served if the client has not paid for legal services in drafting or creating the documents.

2. In non-litigation settings, client files, papers and property shall not include drafted but unexecuted estate plans, title opinions, articles of incorporation, contracts, partnership agreements, or any other unexecuted document which does not otherwise have legal effect, where the client has not paid the lawyer for the services in drafting the document(s).

A lawyer who has withdrawn from representation or has been discharged from representation, may charge a former client for the costs of copying or electronically retrieving the client's files, papers and property only if the client has, prior to termination of the lawyer's services, agreed in writing to such a charge. Such copying charges must be reasonable. Copying charges which substantially exceed the charges of a commercial copy service are normally unreasonable.

A lawyer may not condition the return of client files, papers and property on payment of copying costs. Nor may the lawyer condition return of client files, papers or property upon payment of the lawyer's fee. See Opinion No. 11 of the Lawyers Professional Responsibility Board.

A lawyer may withhold documents not constituting client files, papers and property until the outstanding fee is paid unless the client's interests will be substantially prejudiced without the documents. Such circumstances shall include, but not necessarily be limited to, expiration of a statute of limitations or some other litigation imposed deadline. A lawyer who withholds documents not constituting client files, papers or property for nonpayment of fees may not assert a claim against the client for the fees incurred in preparing or creating the withheld document(s).

Adopted: June 15, 1989.

Charles R. Kennedy, Chairman
Lawyers Professional
Responsibility Board

William J. Wernz, Director
Office of Lawyers Professional
Responsibility

Testimony before the House Judiciary Committee
Regarding Senate Bill 2396
March 12, 2001
By Christine Hogan
State Bar Association of North Dakota

Chairman DeKrey and members of the Committee, my name is Christine Hogan. I am the Executive Director of the State Bar Association of North Dakota. I am here to speak in favor of Senate Bill 2396. Senator Holmberg introduced this bill at the request of the Board of Governors of the State Bar Association of North Dakota.

The Association is requesting that the statutes allowing attorneys to assert a lien on a client's files be repealed. Repeal of the statutes is necessary because it has been held unethical in this state for lawyers to withhold client files on the condition that copying charges be paid.

In the past, there have been recurring complaints that lawyers did not return files to clients or that lawyers charged excessively for providing copies of a file after the lawyer's services were terminated by the client.

The Joint Attorney Standards Committee, which is made up of lawyers and lay people appointed by the Supreme Court and by the State Bar Association of North Dakota, studied the issue of client access to files. The Committee determined that it is not appropriate for a lawyer to assert a retaining lien against a client's files, papers, or property. The Committee developed a new draft rule of professional conduct to address the issue. The proposed rule change is currently pending consideration by the North Dakota Supreme Court. As an accompaniment to the rule change, the Committee

also recommended that the following current statutes, which do allow a retaining lien against a client's files, ought to be repealed:

1. 27-13-05 NDCC (Attorney's refusal to deliver client's money or property - Penalty)
2. 2713-06 NDCC (Attorney's withholding of client's money or property under alleged lien unlawful if bond furnished.)
3. 27-13-07 NDCC (Attorney's refusal to deliver client's money or property not unlawful if he furnishes a bond.)

It is necessary to repeal these three statutes because, if they remain on the books, the statutes could cause confusion for lawyers. These statutes purport to *allow* attorneys to assert retaining liens, but this very conduct has been held to be *unethical* by the Ethics Committee of the State Bar Association of North Dakota and the disciplinary counsel of the North Dakota Supreme Court.

Thus, in order to bring the Century Code into compliance with current ethical decisions and with the proposed new rules of the professional conduct. The State Bar Association of North Dakota is recommending that Senate Bill 2396 be passed.

Thank you.