FORMAL OPINION NO. 28

Inquiry has been made concerning the ethical propriety of a lawyer's assertion of a retaining lien to secure payment of his or her legal fees and expenses. A retaining lien (recognized in some but not all jurisdictions) is non-contractual, applies to a client's papers and other property coming into an attorney's hands professionally, and gives the attorney the right to retain them (but not "foreclose" against them) until the attorney has received payment of fees and expenses owed by the client to the attorney.

Three Disciplinary Rules are applicable.

HRPC 1.8(i)(1) states that an attorney may “acquire a lien authorized by law to secure the lawyer’s fee or expenses.”

HRPC 1.16(d), applicable to an attorney's termination of representation, requires an attorney “to take steps to the extent reasonably practicable to protect a client’s interests, such as . . . surrendering papers and property to which the client is entitled. . . .”

HRPC 1.15(d), which is not limited to withdrawal situations, says: “Except as stated in this Rule or otherwise permitted by law or by agreement with the client, 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 . . . .”

Questions of law are not to be determined by the Board. Those questions include, among others, the questions whether and under which circumstances retaining liens eventually may be recognized in Hawai‘i and which papers and other properties in any given case are those to which the client is entitled.

The Disciplinary Board’s mission is to maintain the integrity of the legal profession and protect the public from professional misconduct by attorneys.
The Board is, however, charged with the duty to adopt and publish advisory opinions interpreting the Hawai‘i Rules of Professional Conduct.

It is the Board's ruling that, until such time as retaining liens are explicitly recognized by Hawai‘i law, a lawyer's assertion of a retaining lien against papers and other properties of a client or former client would violate the spirit and intent of HRPC 1.16(d) in withdrawal cases and HRPC 1.15(d) in other cases and, hence, would constitute a breach of that lawyer's ethical obligations under our Hawai‘i Rules of Professional Conduct.

DATED: Honolulu, Hawai‘i, December 22, 1983

C. Frederick Schutte
Chairperson, Disciplinary Board

UPDATED: Honolulu, Hawai‘i, June 28, 2001

Carroll S. Taylor
Chairperson, Disciplinary Board

UPDATED: Honolulu, Hawai‘i, March 19, 2015

Hon. Clifford L. Nakea (Ret.)
Chairperson, Disciplinary Board