The Attorney Professionalism Committee invites our readers to send in comments or alternate views to the responses printed below, as well as additional hypothetical fact patterns or scenarios to be considered for future columns. **Send your comments or questions to: NYSBA, One Elk Street, Albany, NY 12207, Attn: Attorney Professionalism Forum, or by email to journal@nysba.org.**

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DEAR FORUM:

I represented a client in a dispute including allegations that my client improperly took confidential proprietary data from the plaintiff. In the course of discovery, my firm obtained a copy of that data from our client, which we maintained on our computer network. After some initial discovery and motion practice in the case, we were replaced as counsel. At the time, I believed that we were not owed any additional fees by the now former client and I turned over the files requested by the incoming counsel, including a copy of the data. I kept digital copies of all of the files in the case, however, including the data. I later learned that our firm was owed significant fees by the client and, when advised of this, the former client started to complain about our work in the case and refused to pay our fees. Although I believe that the former client's complaints were not serious and were likely part of an attempt to negotiate a reduction in fees, we issued a retaining lien and declined to provide any further files requested by the new counsel until the payment issue was resolved.

I just received a call from the former client's new counsel who said that they settled the underlying matter with the plaintiff, but as part of the settlement all copies of the data needed to be destroyed within the next week, including any copies we have in our files. I reminded the new counsel that we had a lien on the file and we had not signed any agreement to destroy the data. The new counsel quickly said that we had no right to hold the client's data "hostage" and we had an obligation to destroy the client's data if the client directed it.

I don't believe that the new counsel is correct. I think that we have the right to retain copies of my former client's files (including discovery materials) in order to defend myself against any accusations of malpractice by the client. I don't want to prejudice the former client, but I think I have a legitimate reason to retain the data. Can I demand that my outstanding legal fees be paid and request a release from any wrongdoing from my former client as a condition of my destruction of the data?

Sincerely,
Lee Ninplace

DEAR LEE NINPLACE:

A dispute with a client about turning over files when there is an outstanding balance is an unpleasant fact of life that many attorneys will experience at some point in their careers. As much as the practice of law is a noble profession, it is also a business. Attorneys work on a fee-for-services basis and should be fairly compensated. The answer to your question requires a close analysis of various sections of the New York Rules of Professional Conduct (RPC).

RPC 1.15(c)(4) states that a lawyer shall, "promptly pay or deliver to the client or third person as requested by the client or third person the funds, securities, or other properties in the possession of the lawyer that the client or third person is entitled to receive." RPC 1.16(e) provides that upon the termination of an attorney's representation, the "lawyer shall take steps, to the extent reasonably practicable, to avoid foreseeable prejudice to the rights of the client, including … delivering to the client all papers and property to which the client is entitled." Even if the circumstances surrounding the end of the attorney-client relationship were unfair to the attorney, the lawyer is obligated to take reasonable steps to mitigate any prejudice the client may face by discharging their counsel. *See* RPC 1.16 Comment [9]. RPC 1.16 Comment 9, however, specifically notes that a "lawyer may retain papers as security for a fee only to the extent permitted by law." *Id.,* citing RPC 1.8(i)(1). We will address this point in greater detail below. In this context, "papers" refer to the client's file maintained by the attorney whether it is in electronic or paper form. *See* Roy Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 967 (2016 ed.).

In Formal Opinion 766, the New York State Bar Association (NYSBA) Committee on Professional Ethics

("Committee") stated that the question of whether certain documents belong to the client is a question of law and not ethics. The New York Court of Appeals has held that a client has "presumptive access to the attorney's entire file on the represented matter, subject to narrow exceptions." *Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn L.L.P.,* 91 N.Y.2d 30, 37 (1997). *See also* Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 968. These exceptions include documents subject to a duty of non-disclosure to a third party or documents intended for internal law firm office review and use. *See id.* The Court of Appeals in *Sage Realty* explained that clients are not necessarily entitled to law firm documents intended for internal law firm use and held that lawyers have a need "to be able to set down their thoughts privately in order to assure effective and appropriate representation…. This might include, for example, documents containing a firm attorney's general or other assessment of the client, or tentative preliminary impressions of the legal or factual issues presented in the representation, recorded primarily for the purpose of giving internal direction to facilitate performance of the legal services entailed in that representation." 91 N.Y.2d 30, 37-39 (1997). The Court also noted that these types of documents are not likely to be helpful to the client or new counsel, which also militates in favor of allowing an attorney to retain these types of documents. *See id.* at 38.

Clients often expect the following items to be included in their files: documents the attorney obtained from third parties through discovery, subpoenas or requests, court papers and pleadings, transactional documents (closing documents and contracts), correspondence with the client, third parties or opposing counsel, research and work product (such as draft memoranda or internal e-mails addressing legal issues). *See* Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 969.

But, as noted above, a lawyer can – under certain circumstances – hold a client's file as security for payment of legal fees. *See* NYSBA Comm. on Prof'l Ethics, Op. 1164 (2019), citing NYSBA Comm. on Prof'l Ethics, Op. 780 (2004). In addition, RPC 1.6(b)(5) specifically permits a lawyer to reveal a client's confidential information in order to establish or collect fees due and owing or to defend against accusations of misconduct. *See* Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 972. In this regard, the Committee has opined that a lawyer may properly insist on a release from a former client as a condition of the lawyer forgoing his interest in maintaining a copy of the file. *See* NYSBA Comm.

on Prof'l Ethics, Op. 1164 (2019), citing NYSBA Comm. on Prof'l Ethics, Op. 780 (2004). There are certain "extraordinary circumstances," however, that would override a lawyer's interest in retaining a client file. *See* NYSBA Comm. on Prof'l Ethics, Op. 1164 (2019). For example, "where the client has a legal right to prevent others from copying its documents and wishes for legitimate reasons to ensure that no copies of a particular document be available under any circumstance." *Id.*, citing NYSBA Comm. on Prof'l Ethics, Op. 780 (2004). The circumstances, however, will require a fact-intensive analysis to balance the interests of the client and lawyer in any situation where the interests of the lawyer and client differ with respect to the file retention by the lawyer. The Committee opined that "[t]his balance determines the extent to which the lawyer may condition compliance with a client's demand for destruction of a file on protections for the lawyer's benefit." *Id.* The Committee offered some helpful factors and common considerations when balancing the interests of clients and lawyers. Lawyers should consider: (1) the strength of the client's ownership claim; (2) the sensitivity of the materials; (3) the centrality of the sensitivity of the materials to the object of the representation; (4) the legitimacy of the client's request for destruction; (5) the extent to which the documents comprise the client file (one document versus the entire file); (6) difficulty with the destruction of the documents; (7) risk of liability for the attorney; and (8) availability of methods to protect the lawyer's interest. *Id.*

The situation presented in NYSBA Comm. on Prof'l Ethics, Op. 1164 (2019) is very similar to your inquiry. In that opinion, the inquirer also had an interest in maintaining a former client's file from a litigation representation due to concern over potential suits by the former client and the adverse party in the case. *Id.* The former client requested deletion of certain files as part of a settlement agreement with the adverse party. *Id.* In that instance, the Committee answered that it was appropriate for the lawyer to condition the destruction of the client's files upon the execution of a simple hold-harmless agreement. *Id.* The Committee noted, however, that there is some ambiguity with respect to whether the lawyer could *insist* that the former client pay advance legal fees and expenses in the event of a subsequent claim arising out of the files before complying with the client's request to destroy its file. *Id.*

Based upon the Committee's analysis, we agree that you may condition the deletion of your former client's files on the signing of a hold-harmless agreement. *Id.* It does not seem you have a basis to deny that the client owns the documents or that destruction of the file would place an undue burden on you. The files at issue, and their potentially proprietary information, also appear to be the central aspect of the litigation for which you were engaged. *Id.* The destruction in exchange for a hold-harmless agreement balances the interests of your former client with your interest in being protected against future claims. We believe that you are also permitted to maintain an inventory list of the documents destroyed (including the file names, sizes and dates for data supplied by the former client) as an additional level of protection from future claims. *Id.*

With respect to your retaining lien, when clients fail to pay, New York lawyers ordinarily have the right to assert a retaining lien over the client's file. RPC 1.8(i)(1); *see* Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 969. However, there is a catch. As noted in RPC 1.16 Comment 9, a "lawyer may retain papers as security for a fee *only to the extent permitted by law*." *Id.* (emphasis added), citing RPC 1.8(i)(1). While retaining liens are permissible in New York, other jurisdictions take a different tack. For example, New Jersey Rule of Professional Conduct 1.16(d) prohibits lawyers from asserting common law retaining liens. *Id.* New Jersey's highest court based its decision to abolish common law retaining liens on a report from the New Jersey Supreme Court's Advisory Committee on Professional Ethics that found that "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." *Id.*

In New York, courts have generally held that attorneys cannot be required to turn over files to a client or successor counsel unless the fee dispute is resolved or some security is put in place for the attorney's fees where a valid retaining lien is in place. *See* Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 594 citing *American Stevedoring, Inc. v. Red Hook Container Term., LLC*, 2015 WL 7725445 (1st Dept. Dec. 1, 2015). *American Stevedoring* noted a potential exception in cases of "exigent circumstances." *See id.*

From the details you have given us, it appears that you have a valid basis to refuse to destroy the files until your retaining lien has been resolved. We strongly suggest, however, that you investigate whether your retaining lien is completely valid and reasonable before conditioning destruction of the files on its resolution. For example, if you were removed as counsel for cause, the amount of your legal fees and retaining lien were unreasonable, or there is some other deficiency in your retaining lien, it may not be enforceable and you could expose yourself to liability if your refusal to comply with the former client's direction derails the settlement. *See* Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 594. While your former client should have involved you in the settlement agreement, and the 10-day request may be unreasonable considering the outstanding retaining

lien, there is some risk in taking an aggressive approach if there is any question as to the validity of your lien. If you want to mitigate that risk, an alternative option is to condition the destruction of the files on your former client placing the amount of the retaining lien in an escrow account subject to the resolution of the fee dispute. This will ensure that the lien is secured and the former client is not prejudiced in complying with its settlement agreement obligations.

Sincerely,
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QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

My partner and I have a two-person firm that we have operated out of a small shared office for many years. With the advances in technology over the last two decades, such as e-filing, video conferencing, file transfer programs, high speed internet, and email, we decided that we don't really need our office space as much as we did only 20 years ago. And it isn't just our office technology that has reduced the need for our office space. Our clients prefer to conduct most of their communications with us electronically and they aren't interested in spending time traveling to our office if they can avoid it. We meet with clients periodically in the office for certain matters, like the signing of wills and deposition preparation, but when we don't have client meetings scheduled, we usually just work from home to avoid our commutes. Our office lease is about to expire and we are seriously considering alternatives to our traditional office space.

One option I have read about is a "virtual office." As I understand the virtual office business model, we could pay a fee to have access to a meeting space as we need it. My preliminary research suggests that it would be a significant reduction of our overhead costs and I don't think it will impact our business significantly as long as we have a reliable location where we can meet with clients when we need to schedule a face-to- face meeting.

I know that there are restrictions on how attorneys maintain their offices and I don't want to run afoul of my ethical obligations. I think it will also be beneficial to our clients since many of the virtual offices are centrally located and it will be easier for many of our clients to travel to our "virtual" office space when we do meet in person. What issues do I need to consider if we decide to transfer to a virtual office? For instance, what address can we put on our letterhead and our website?

Sincerely,
Neo