

Labor and Employment Law Section

Annual Meeting 2011

Client, You're Fired!

Ethical Issues in Terminating a Client Lawyer Relationship

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I. Terminating the Client-Attorney Relationship

A. Mandatory Withdrawal

(1) The General Rule. An attorney is required to withdraw from representation in four situations: if continuing the representation will result in a violation of the law or rules, if the attorney is unable to represent the client due to a physical or mental impairment, the client fires the attorney, or if the client is bringing the lawsuit merely to harass or injure another person.

(a) New York Rules of Professional Conduct (“Rule(s)”)

Rule 1.16(b)¹: a lawyer shall withdraw from the representation of client when:

(1) the lawyer knows or should know that the representation will result in a violation of these Rules or of law;

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

(3) the lawyer is discharged; or

(4) the lawyer knows or reasonably should know that the client is bringing the legal action, conducting the defense, or asserting a position in the matter, or is otherwise having steps taken, merely for the purpose of harassing or maliciously injuring any person.

(b) Mandatory withdrawal is required under Rule 1.16(b)(1) when conflicts arise during the course of concurrent representation and the conflict either cannot be waived or one party will not agree to waive the conflict.

In Formal Opinion 2005-05, 2005 WL 6631005 (“NYCBA Opinion 2005-05”), the New York City Bar Association’s Committee on

¹ Rule 1.16 was formerly Code of Professional Responsibility Disciplinary Rule 2-110.

Professional and Judicial Ethics (the “NYCBA Ethics Committee”) discussed the latter situation: when unforeseeable, waivable conflicts arise between concurrent clients and one client is unwilling to waive the conflict.² As explained in Opinion 2005-05, “when two clients will not consent to a conflict of interest, and the conflict requires consent, the law firm must withdraw from representation of at least one of the clients.” 2005 WL 6631005 at *4.

As an initial matter, the NYCBA Ethics Committee determined that if continued representation of one client would require the use of material confidential information of the other client, then the attorney must withdraw from representing both clients, since the duty of confidentiality extends to former clients. *See* Rule 1.9. As the NYCBA Ethics Committee explained, “In particular, the confidences and secrets of the former client must be protected, and no attorney may continue an adverse representation . . . in which material confidences or secrets of either client (or former client) will be placed at risk.” 2005 WL 6631005 at *12.

Assuming material confidential information will not be placed at risk, the question then is how should the attorney decide which client to represent going forward? The NYCBA Ethics Committee identified several factors that should guide the decision. The most important factor is the prejudice the withdrawal or continued representation will cause the respective parties and

² All of these Opinions were issued under the prior Code of Professional Responsibility, not the current Rules of Professional Conduct. However, there is little substantive difference between the Code and the Rules as concerns these issues, unless specifically noted.

whether representing one client will give an unfair advantage to that client. Other factors to consider are:

- the origin of the conflict (which client's actions caused the conflict to arise);
- whether one client has manipulated the conflict to try to force a lawyer off the matter and is using the conflict as leverage;
- the costs and inconvenience to the party being required to obtain new counsel, including the complexity of the representation;
- whether the choice would diminish the lawyer's vigor of representation towards the remaining client;
- and, the lawyer's overall relationship to each client.

2005 WL 6631005 at *8.

(2) Securing the Tribunal's Permission

(a) Rules of Professional Conduct:

Rule 1.16(d): If permission for withdrawal from employment is required by rules of a tribunal, a lawyer shall not withdraw from employment in a matter before that tribunal without its permission. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the relationship.

(b) Compilation of Codes, Rules and Regulations of the State of New York:

22 NYCRR 604.1(6): Once a client has employed an attorney who has entered an appearance, the attorney shall not withdraw or abandon the case without (i) justifiable cause, (ii) reasonable notice to the client, and (iii) permission of the court.

(c) An attorney may not withdraw from representing a client, even if

withdrawal is mandatory under Rule 1.16(b), unless the attorney has secured the

necessary permission of the respective tribunal. Under 22 NYCRR 604.1(6), in order to withdraw from a case where an attorney has entered an appearance in New York state court, the attorney must show that the withdrawal is justified, must give reasonable notice to the client, and must receive the court's permission.

Courts considering whether to permit withdrawal look to the prejudicial effect the withdrawal would have on the client. See, e.g., Alter v. Oppenheimer & Co., Inc., 2008 WL 5050071 (N.Y. Sup. Ct. Nov. 20, 2008). In Alter, two law firms sought to withdraw from representing an individual defendant in a sexual harassment lawsuit after Oppenheimer (the corporate defendant who also was represented by the two law firms) reached a settlement with the plaintiff on the eve of trial. The law firms claimed that the settlement created a conflict between Oppenheimer and the individual defendant, necessitating withdrawal. Alternatively, the law firms claimed that the individual defendant had lost confidence in their ability, making it unreasonably difficult for them to carry out their employment effectively.

Ultimately, the court denied the request to withdraw the representation. The court first concluded that there was no conflict between the parties because Oppenheimer was no longer a defendant in the matter. Id. at *5. Next, the court found that neither law firm had demonstrated that the attorney-client relationship was "irrevocably broken." Id. at *6. Finally, the court concluded that permitting withdrawal would have a materially adverse effect on the defendant's ability to vigorously defend himself at trial, given that the motion

for withdrawal was made only four days before the trial was scheduled to commence. Id.

In Riley v. Segan, Nemerov & Singer, P.C., 2009 WL 5299224 (Bronx Sup. Ct. Dec. 14, 2009), a malpractice case, the court considered what constitutes reasonable notice under 22 NYCRR 604.1(6).

An attorney is required to provide reasonable notice to the client when withdrawing from representation, and no definition of reasonable notice would require a client to infer, from ambiguous action or inaction on the part of the attorneys, . . . that she is no longer represented. . . . [M]ore than equivocal behavior [is] required to sever the relationship.

Id. at *4 (quoting Gotay v. Breitbart, 58 AD3d 25 (1st Dept. 2008)). The Riley court concluded that notice of withdrawal must be communicated unambiguously; in that case, through an in-person oral communication, as opposed to a crafted letter. 2009 WL 5299224 at *5.

B. Permissive Withdrawal

(1) The General Rule. Unlike the Code of Professional Conduct, which contained only eight circumstances in which withdrawal was permitted, the Rules of Professional Responsibility include 13 different circumstances in which an attorney may withdraw from representing a client. Importantly, under the Rules, withdrawal is permitted for any reason if it can be accomplished without materially harming the interests of the client.

(a) Rules of Professional Conduct

Rule 1.16(c): a lawyer may withdraw from the representation of client when:

- (1) withdrawal can be accomplished without material adverse effect on the interests of the client;

- (2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
- (3) the client has used the lawyer's services to perpetrate a crime or fraud;
- (4) the client insists upon taking a course of action with which the lawyer has a fundamental disagreement;
- (5) the client deliberately disregards an agreement or obligation to the lawyer as to expenses or fees;
- (6) the client insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by go faith argument for an extension, modification, or reversal of existing law;
- (7) the client fails to cooperate in the representation or otherwise renders the representation unreasonably difficult for the lawyer to carry out employment effectively;
- (8) the lawyer's inability to work with co-counsel indicates that the best interest of the client likely will be served by withdrawal;
- (9) the lawyer's mental or physical condition renders it difficult for the lawyer to carry out the representation effectively;
- (10) the client knowingly and freely assents to termination of the employment;
- (11) withdrawal is permitted under Rule 1.13(c) or other law;
- (12) the lawyer believes in good faith, in a matter pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal; or
- (13) the client insists that the lawyer pursue a course of conduct which is illegal or prohibited under these Rules.

(b) If the tribunal requires permission to withdraw, the attorney must secure the tribunal's permission, even if withdrawal is otherwise permitted under the Rules. See Rule 1.16(d); Section I(A)(2), supra.

(2) Using Retainer Agreements to Facilitate Permissive Withdrawal.

Retainer agreements are a regularly-used vehicle for outlining the circumstances in which an attorney may withdraw as counsel. For instance, a retainer agreement may specify that an attorney may withdraw from representation if, after investigation or consultation with experts, the attorney is convinced that the defendant is not liable. See NYSBA Committee on Professional Ethics Formal Opinion (“NYSBA Formal Opinion”) 440 (1976). A retainer agreement may also set forth other grounds for terminating the client-attorney relationship, as long as they are consistent with the grounds set forth in Rule 1.16(c). See NYSBA Formal Opinion 719.

The existence of a retainer agreement specifying certain grounds for terminating the client-attorney relationship does not relieve an attorney of his obligation to seek the court's permission, if necessary. See NYSBA Formal Opinion 440. Nor may a retainer agreement “mislead the client with regard to the attorney's obligations, including the obligation to continue as counsel in the absence of a permissible ground for withdrawing from the representation.” NYSBA Formal Opinion 719.

II. Protecting the Former Client

A. Avoiding Prejudice.

A withdrawing attorney has an obligation to protect the former client's interest by avoiding foreseeable prejudice to the rights of the client.

(1) Rules of Professional Conduct

Rule 1.16(e): Even when withdrawal is otherwise permitted or required, upon termination of representation, a lawyer shall take steps, to the extent reasonably practicable, to avoid foreseeable prejudice to the rights of the client, including giving reasonable notice to the client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, promptly refunding any part of a fee paid in advance that has not been earned and complying with applicable laws and rules.

(2) What constitutes reasonable notice is discussed in Section I(A)(2)(c), supra. An attorney's obligations related to producing the client's file are discussed in Section III, infra, and obligations where an attorney's fee is disputed are discussed in Section V, infra.

B. Post-Withdrawal Obligations.

Even after an attorney has withdrawn from representing a client, the attorney continues to have certain obligations to the now-former client, including an obligation to avoid conflicts of interest and a duty of confidentiality.

(1) Conflicts of Interest

(a) General Rule: Absent the former client's written informed consent, an attorney may not represent another in the same or a substantially related matter in which the new client and former client's are materially adverse.

(b) Rules of Professional Conduct

Rule 1.9:

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) Unless the former client gives informed consent, confirmed in writing, a lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which

the lawyer formerly was associated had previously represented a client: (1) whose interests are materially adverse to that person; and (2) about whom the lawyer had acquired information protected by Rules 1.6 or paragraph (c) of this Rule that is material to the matter.

(c) Substantial Relationship Test

In the Second Circuit, matters are substantially related if the relationship between the issues in the present and former representations is “patently clear” or those issues are “identical” or “essentially the same.” Government of India v. Cook Indus., Inc., 569 F.2d 737 (2d Cir. 1978); Loomis v. Consolidated Stores Corporation, 2000 U.S. Dist. LEXIS 12391 (S.D.N.Y. 2000); Rosewood Apartments Corp. v. Perpignano, 2000 U.S. Dist. LEXIS 1255 (S.D.N.Y. 2000); Witorsch v. Notaris, 1997 U.S. Dist. LEXIS 12805 (S.D.N.Y. 1997). Neither the fact that the two representations share a common area of the law nor just any factual connection will suffice; the matters must be sufficiently related that information disclosed in the earlier representation will be useful in the latter case. Silva Run Worldwide Limited v. Gaming Lottery Corp., 1999 U.S. Dist. LEXIS 9150 (S.D.N.Y. 1999); see also Cleverly Minded Limited v. Anthony Sicari Apparel Group Industries, Inc., 2003 U.S. Dist. LEXIS 855 (S.D.N.Y. 2003) (general knowledge about former client, his business practices and his assets not sufficient to disqualify attorney unless those matters are in issue in later case); Regal Marketing Inc. v. Sonny & Son Produce Corp., 2002 U.S. Dist. LEXIS 14069 (S.D.N.Y. 2002) (“A substantial relationship will be established between the two representations if facts pertinent to the problems for which the original legal services were sought are relevant to the subsequent

litigation.”); Rosewood Apartments v. Perpignano, 2000 U.S. Dist. LEXIS 1255 (principal focus must be on degree of overlap between factual and legal issues, to shed light on likelihood that former client disclosed confidential information to attorney that may be useful in representing new client); NYSBA Formal Opinion 723 (1999) (factors tending to show a substantial relationship include an identity of issues between the two matters, a significant overlap in contested facts between the two matters, or where the issue in controversy in the second matter arose out of a transaction in which the lawyer represented the former client); see also Sanders v. Woods, 2004 Wash. App. LEXIS 939 (Wash. App. 2004) (lawyer whose partner had previously advised an employer with respect to its non-compete clause precluded from representing former employee in action brought by that employer to enforce the non-compete clause; prior representation of employer substantially related to current adverse representation of former employee).

In New York State courts, prior to the adoption of the Rules, the emphasis was more on access to confidential information than on the existence of common issues. See Claramont v. Kessler, 2000 N.Y. App. Div. LEXIS 1058 (1st Dep’t 2000) (acquisition of confidential information in prior representation of adverse party which is likely to be an issue in subsequent case provides basis for disqualification). Comment 3 to Rule 1.9 now provides that “[m]atters are ‘substantially related’ . . . if they involve the same transaction or legal dispute or if, under the circumstances, a reasonable lawyer would conclude that there is a substantial risk that confidential factual information that would normally have

been obtained in the prior representation would materially advance the client's position in the subsequent matter.”

In the Second Circuit, the fact that matters are substantially related creates a presumption of shared confidences which supports the disqualification of the attorney in the latter, adverse case. This presumption is rebuttable. See, Silver Chrysler Plymouth v. Chrysler Motors Corp., 518 F.2d 751 (2d Cir. 1975); Rocchigian v. World Boxing Council, 2000 U.S. Dist. LEXIS 755 (S.D.N.Y. 2000); Schwed v. Gen. Elec. Co., 990 F. Supp. 113 (N.D.N.Y. 1998). In very limited circumstances, state courts in New York have also indicated the presumption may be rebutted. See Solow v. W.R. Grace & Co., 83 N.Y. 2d 303 (1994); but see Trustco Bank N.Y. v. Melino, 164 Misc.2d 999 (Sup. Ct. 1995) (indicating an irrebutable presumption).

(d) Defining “Former” Client

(i) Representation For a Distinct Matter. Because of the significant difference in the standard applicable to representation of concurrent and former clients with adverse interests, establishing that an attorney-client relationship has previously terminated can be critical.

Where employment of a lawyer is for a specific matter, and substantive services related to the matter have come to an end, the client may be characterized as a former client. See G.D. Searle & Co. v. Nutrapharm, Inc., 1999 U.S. Dist. LEXIS 5963 (S.D.N.Y. 1999).

(ii) Continuous Relationships. However, where the attorney and the client's relationship is continuous and longstanding, the fact that

there is no particular matter currently being handled by the lawyer is not enough to make the client a “former” client. See Credit Index, LLC v. RiskWise, LLC, 192 Misc.2d 755, 746 N.Y.S.2d 885 (New York Co., 2002)(finding that client was a current client where firm represented client on various matters over the course of four years, including a month before undertaking a case adverse to the client, and the firm never sent a letter terminating its relationship with the client); Credit Index L.L.C. v. Risk Wise Intl. L.L.C., 192 Misc. 2d 755 (N.Y. Cty.) aff’d in part, 296 A.D. 2d 318 (1st Dep’t 2002) (fact that firm had no open matters on date in question does not make client who has used firm’s services on an intermittent, as needed basis, a former client).

(e) Creating a Former Client: The Hot Potato Rule

A lawyer generally may not drop an existing client in the midst of an active representation, like a “hot potato,” when a conflict arises and thereby avoid the “current client” standard and rely on the less rigorous “substantial relationship” test applicable to former clients. See MERCK EPROVA AG v. Prothera, Inc., 08 CW 0035 (S.D.N.Y. 2009) reported in NYLJ (October 19, 2009). Anderson v. Nassau County Department of Corrections, 376 F. Supp. 2d 294 (E.D.N.Y. 2005); Ehrich v. Binghamton City School Dist., 210 F.R.D. 17 (N.D.N.Y. 2002); Strategem Dev. Corp. v. Herons Int’l, N.V., 756 F. Supp. 789. (S.D.N.Y. 1991). See also discussion in New York City Opinion 2005-02. However, even when the “hot potato” rule is applicable, disqualification is not automatic. E.g. Universal City Studios, Inc. v. Reimerdes, 98 F. Supp.2d 449

(S.D.N.Y. 2000) (no disqualification without significant risk of trial taint); see also University of Rochester v. G. D. Searle & Co., Inc., 2000 U.S. Dist. LEXIS 19030 (W.D.N.Y. 2000) (generally under per se rule of disqualification involving current clients, disqualification still requires showing of trial taint).

(f) Conflicts Created by the Lateral Movement of Lawyers: Screening Devices and Disclosure Obligations

The lateral movement of lawyers between firms can frequently give rise to conflict issues and the possibility of lawyer and firm wide disqualification. The appropriate outcome is very fact specific and can depend on many variables, including whether the disqualification is directed at the firm from which the tainted lawyer has departed or the firm to which the tainted lawyer has moved.

(i) New York: Departing Lawyers

Generally there is a presumption that client confidential information learned by one firm attorney is shared with all other firm attorneys. Historically in New York, because of this presumption, the departure of the particular lawyer who had received a client confidence did not remove the conflict possibility for the remainder of the firm when it sought to undertake representation adverse to a former client of the departing lawyer. In Solow v. W.R. Grace, 83 N.Y.2d 303 (1994), the Court recognized that in limited circumstances the presumption of shared confidences is subject to rebuttal. There the presumption was rebutted because the attorney who actually possessed any former client confidences had left the firm, there was no evidence that she in fact shared any of those

confidences with any lawyer still at the firm, and the firm was a large, departmentalized firm which, in itself, lessened the basis for simply “presuming” confidences were shared. Consequently, the firm in Solow was not disqualified from representing a new client in a matter adverse to the former client who had been previously represented by the departed attorney.

Modification in 1999 to New York’s DR 5-108, subpart (C) (now reflected in New York Rule 1.10(b)), codifies much of the Solow holding. This provision now prohibits a firm from undertaking representation of a client adverse to the interests of a former client who was represented by a departed attorney only if the firm (including accessible files of the firm), or any remaining lawyer in the firm, actually possesses confidential information which is material to the new representation. See New York Rule 1.10, cmt 5[A]. Model Rule 1.10(b) is similar. Even if such confidences do still reside in the firm, representation of the new client is permissible with the consent, after full disclosure, of the former client.

(ii) New York: Incoming Lawyers

Under New York’s Rules (and prior DR 5-108), a lawyer entering a firm is generally considered to bring her conflicts with her, thereby giving rise to at least the potential for the disqualification of both that lawyer and her new firm in pending matters. There has been conflicting authority as to whether this rule applies where the client

confidences the new lawyer brings with her are not *actually* known to her, but were only those imputed to her through her prior association with the lawyers in her former firm. Compare *Young v. Central Square Central School Dist.*, 2002 U.S. Dist. LEXIS 13480 (N.D.N.Y. 2002) (small firm); *Cardinale v. Golinello*, 43 N.Y.2d 288 (1977) (small firm marked by informality supports presumption of shared confidences resulting in disqualification of lawyer and new firm); *Schwed v. General Electric Co.*, 990 F. Supp. 113 (N.D.N.Y. 1998); *Hernandez v. Paoli*, 255 A.D.2d 130 (1st Dep't 1998), with NYSBA Formal Opinion 638 (1992) (DR 5-108 (A) only applicable where new lawyer brings actual knowledge, not imputed knowledge, to new firm); Nassau County Opinion 96-16 (1996) (same). New York Rule 1.10(c), in language similar to its predecessor DR 5-108, seemingly incorporates the actual knowledge standard with respect to the incoming lawyer herself, by providing that that lawyer is prohibited from representing a client with interests adverse to a client of her former firm in a matter substantially related to that prior representation unless the lawyer “did not acquire” any confidential information.

NYSBA Formal Opinion 723 (1999), issued after DR 5-108 was first amended to reflect this rule (and before adoption of New York's Rules), adopts this knowledge standard, although it recognizes that there is a presumption of shared confidences among lawyers in a firm which follows the lawyer to her new firm. Nonetheless, the presumption can be rebutted by showing inter alia that the attorney's prior firm was a

large, departmentalized firm in which client confidences were not routinely shared across the firm. This “confidential information” standard is now codified in the Rules at Rule 1.9(b).

If a lawyer *personally represented* a client at her former firm, she may not represent a client at her new firm in the same or a substantially related matter, if the interests of the new and former clients are materially adverse. The following principles are noteworthy:

- It is possible to do work for a client without representing that client (e.g., research on a discrete legal issue which involved no access to client confidences or secrets).
- If a lawyer obtained or had access to confidential information, however, she may be deemed to have represented that client.
- If a lawyer is precluded from representing her new client under this rule, generally so is her new firm.

If the moving lawyer *did not personally represent* the first client (only her former firm did so), she will be prohibited from representing the client of her new firm only if (1) the interests of the two clients are materially adverse and (2) she actually acquired confidential information of the first client which are material to the representation.

- If the lawyer moved from a small firm “whose activities were characterized by an understandable formality” she

will be irrebutably presumed to have received confidential information.

- If, on the other hand, she came from a large, departmentalized firm, she may be able to demonstrate that she did not in fact gain much information.
- If the lawyer is disqualified from representing the second client, generally so is her new firm.

(3) Duty of Confidentiality

(a) General Rule: An attorney may not use a former client's confidential information to the detriment of the client or reveal a former client's confidential information, unless otherwise permitted by the Rules.

(b) Rules of Professional Responsibility

Rule 1.9(c): A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter: (1) use confidential information of the former client protected by Rule 1.6 to the disadvantage of the former client, except as these Rules would permit or require with respect to a current client or when the information has become generally known; or (2) reveal confidential information of the former client protected by Rule 1.6 except as these Rules would permit or require with respect to a current client.

Rule 1.6(a): . . . "Confidential information" consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential.

(c) It is important to note that there is a distinction between "using" information and "revealing" confidential information. Under the Rules, there are

circumstances in which a lawyer may be entitled to use information gained from a prior representation but not entitled disclose or reveal the information, either to a subsequent client or in the course of that client's representation. By way of illustration, a lawyer who represents a client against Company X uncovers a series of incriminating emails from the CEO to upper management. In a subsequent representation against Company X, the lawyer may be allowed to use the documents to formulate questions at a deposition and to frame document requests, but not be allowed to show the documents to the second client. Of course, the lawyer may both use and reveal the documents if the former client gives her informed consent.

A lawyer is only restricted from using information related to the representation of a client where using the information would “disadvantage” the client.³ A broader set of information – all information “relating to the representation of a client,” is protected by Rule 1.6. This Rule does not prohibit a lawyer from using the information – only from revealing the information, without informed consent. See ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 00-417 (April 7, 2000) (“[F]rom a policy point of view, the subsequent use of information relating to the representation of a former client is treated quite liberally as compared to restrictions regarding disclosure of client information.”).

Before using information gained in the course of representing one client in a subsequent representation, a lawyer should carefully consider whether the use of the information will disadvantage the prior client. If the information is

³ This prohibition protects both current clients and former clients. Rule 1.8(b) (current client); Rule 1.9(c)(1) (former client).

general information about the employer's policies and practices, like payroll data, human resources policies, or internal company memoranda, its use is not likely to affect the prior client's interests. If however, use of the information could lead to liability for the prior client, or damage the prior client's reputation, the lawyer should not use the information in a subsequent representation without the prior client's informed consent. See Rule 1.9.

If use of the information obtained in discovery will not disadvantage the prior client, a lawyer may use it in a subsequent representation but may not reveal it without the client's informed consent. However, in some circumstances, where the information has become generally known, through public filings or otherwise, the restrictions on using information might not apply, even if the use of the information would be disadvantageous to the former client. See Rule 1.6(a) (exempting information that is generally known in the local community or in the trade, field or profession, from definition of confidential information); Jamaica Pub. Serv. Co. Ltd. v. AIU Ins. Co., 684 N.Y.S.2d 459 (1998) (plaintiff's law firm, whose attorney formally served as in-house counsel for defendant, not disqualified for using generally known information about defendant).

In order to avoid dancing on the line between "using" and "revealing," and to avoid any question about propriety, a lawyer should undertake to obtain the former client's informed consent before using or revealing the information. The requirements for such informed consent are beyond the scope of this paper, but would certainly include explaining to the prior client exactly what

information the lawyer plans to use or reveal, and how it could affect the prior client's rights.

The duty of confidentiality to former clients may create a bar to representing new clients. The NYCBA Ethics Committee issued an opinion addressing, among other things, the question of when possession of information from a former client operates as a bar to representation of a new client. See Formal Opinion 2005-02, 2005 WL 682188 (2005) (“NYCBA Opinion 2005-02”). The Committee explained that a lawyer may not represent a client if the lawyer possesses information that, for whatever reason (ethical limitations, legal limitations, etc.), the lawyer cannot use for the new client's benefit and the information is so material to the representation of the second client that not using the information would compromise the lawyer's exercise of independent professional judgment. Id. at *5.

III. Former Client's Right to the File

A. The General Rule. A former client presumptively has full access to the entire attorney's file, with narrow exceptions, where there is no claim outstanding for unpaid legal fees.

(1) Rules of Professional Conduct

(a) Rule 1.15(c)(4)

A lawyer shall:

. . .

(4) Promptly pay or deliver to the client . . . as requested by the client . . . the funds, securities, or other properties in the possession of the lawyer which the client . . . is entitled to receive.

(b) Rule 1.16(e)

Even when withdrawal is otherwise permitted or required, upon termination of representation, a 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

(2) The seminal case on the issue of a client's right to the contents of a file is Sage Realty Corp. v. Proskauer Rose Goetz & Mendelson, LLP 91 N.Y.2d 30, 666 N.Y.S.2d 985 (1997).

In Sage Realty, Proskauer represented Sage Realty in a \$175 million mortgage financing deal. After the transaction was completed, Sage Realty terminated its client relationship with Proskauer and retained new counsel, Nixon, Hargrave, Devans & Doyle, LLP. Nixon assumed the representation of various matters ancillary to the principal financing transaction, and Nixon requested that Proskauer turn over all of its files related to the deal. Proskauer had been paid in full for its legal services as of the time of the request.

Proskauer produced the closing report (which consisted of 14 volumes and more than 550 documents) and also produced client-supplied papers and other supporting documents and correspondence. However, Proskauer refused to turn over internal legal memoranda and research, drafts of documents and instruments, notes on contracts, negotiation notes, and other non-final, non-end product documents.

The lower court agreed that Proskauer's level of disclosure satisfied its obligation to its former client. Relying on Zackiva Communications Corp. v. Milberg Weiss Bershad Specthrie & Lerach, 223 A.D.2d 417, the court distinguished between documents which represent the end product of attorney services (which the court held belong to the client), and preliminary or in-progress documents which are in the nature of

attorney work product (which the court held belong to the attorney) and need not be produced to the client absent some showing of particularized need.

The Court of Appeals reversed, and, in doing so, rejected the distinction between end product and attorney work product. The Court adopted the broad standard of access set forth in the American Law Institute Restatement (Third) of the Law Governing Lawyers § 58 (1996):

The draft Restatement provides that a former client is to be accorded access to “inspect and copy any documents possessed by the lawyer relating to the representation, unless substantial grounds exist to refuse” (Citation omitted)(Emphasis in original). Even without a request, an attorney is obligated to deliver to the client, not later than promptly after representation ends, “such originals and copies of other documents possessed by the lawyer relating to the representation as the . . . [former] client reasonably needs” (Citation omitted).

See 666 N.Y.S.2d at 987.

The Court made clear that a former client’s right to the file includes not only final versions of documents or correspondence but also legal memoranda, drafts and notes and so on. Even so, the Court acknowledged a few situations where other interests trump a client’s presumptive right of access. For instance, disclosure is not mandated if doing so would violate a duty of nondisclosure owed to a third party. Of more practical implication, the Court acknowledged an exception for “firm documents intended for internal law office review and use”. This exception is designed to cover a firm’s internal assessment of a client, or preliminary impressions of the legal or factual issues which are recorded primarily for the purpose of directing the representation or provision of legal services.

At least one court has interpreted this exception broadly. In Lippe v. Bairnco Corp., 1998 U.S. Dist. LEXIS 20589 (S.D.N.Y. 1998), the court held that internal research notes, internal research memoranda, and conflict checking memoranda did not need to be disclosed. The court reasoned that the notes and legal memoranda at issue were prepared by junior attorneys for review by senior attorneys and therefore qualified as “tentative preliminary impressions” or were notes to facilitate “internal direction”. However, the court found that billing records for the matter did have to be disclosed.

Other courts seemingly have accorded the exception a stricter reading, allowing attorneys to withhold only documents which squarely fit within the “internal direction to facilitate performance of legal services” or “an attorney’s private thoughts in describing specific occurrences personally known to the attorney”. See e.g., Getman v. Petro, 266 A.D.2d 688, 701 N.Y.S.2d 447 (3rd Dept. 1999); Gamiel v. Sullivan & Liapakis, P.C., 289 A.D.2d 88, 733 N.Y.S.2d 610 (1st Dept. 2001).

B. Class Action Rule: An absent class member does not enjoy a presumptive right of access to the file.

In Wyly v. Milberg Weiss Bershad & Schulman, LLP, 12 N.Y.3d 400, 880 N.Y.S.2d 898 (2009), the Court of Appeals declined to extend the Sage Realty presumptive right of access rule to absent members of a class action. The Court determined that absent class members do not have a traditional attorney-client relationship with counsel, and, in the interest of shielding class action counsel from being inundated with requests for documents, the Court articulated a different standard. In class actions, the determination as to file access is to be made on a case-by-case basis, with the first consideration being whether the class member has a

substantial financial interest at stake. If so, the class member must demonstrate a legitimate need for the requested documents.

C. Costs Associated with Producing the File

The firm may charge the client for costs related to the assemblage and delivery to the client of the requested file documents. See Sage Realty Corp., 666 N.Y.S.2d at 989. See also NYSBA Formal Opinion No. 766 (2003). The charged costs must be in line with the firm's customary billing and/or retainer arrangements with the client.

D. Electronic Documents

In 2008, the New York City Committee on Professional and Judicial Ethics considered Sage Realty's application to electronic documents. See NYCBA Opinion 2008-1. The Committee opined that internal email communications between firm attorneys, such as instruction on performing a certain task, discussing an administrative issue, or a preliminary analysis by a lawyer about a factual or legal issue, are not presumptively accessible by a former client. Similarly, the Committee found that inconsequential, administrative-type emails sent to third parties, such as a communication confirming a deposition time, or an email to an expert asking for transcripts of recent testimony, are not presumptively accessible. However, beyond those exceptions, the Committee interpreted Sage Realty as requiring an attorney to produce to a former client electronically maintained information, subject of course to the client's payment of a reasonable fee associated with the search. That being said, the Committee assumed that there might be circumstances where a client could reasonably expect that the electronic information associated with a matter could and should be able to be accessed with little if any cost to the firm.

IV. The Attorney's Right to Retain A Copy of File Documents

As a general rule, a lawyer has an interest in retaining a copy of the file post-representation and may do so, at his own expense, even over the client's objection. See NYSBA Formal Opinion No. 780. Exceptions to the general rule include situations where the former client has a legitimate right or need to ensure that no copy of a document is available to anyone under any circumstances. Id. If a client objects to the lawyer's retention of copies of file documents, the lawyer is permitted to demand a release from potential malpractice claims as a condition of agreeing to not keep any copies. Id. The release may not be entered into prospectively, but may cover work already completed at the time the release is signed. Id. However, the negotiations for the release must be fair, meaning: (a) the lawyer apprises the client of any facts pertaining to the representation which may give rise to a malpractice claim; (b) the lawyer advises the client to obtain separate counsel to advise the client as to the release; and (c) the lawyer's withdrawal from the representation is in accordance with the lawyer's ethical obligations. Id. This same set of criteria apply to a situation where a lawyer negotiates a release from malpractice claims in exchange for a reduction in the lawyer's fee. See NYSBA Formal Opinion No. 591.

V. Collecting An Unpaid Fee

Presumably, most fee disputes will result in a client becoming a "former" client. If, however, a fee dispute arises and the representation is ongoing, an action to collect the fee poses a conflict of interest which may or may not be subject to waiver under the circumstances. See Professional Code Section 1.7. See also Zito v. Fischbein Badillo Wagner Harding, 2008 N.Y. Misc. LEXIS 8297 (N.Y. Co. 2008)(granting attorney's motion to withdraw and, in reliance on conflict of interest rules, rejecting client's request that attorney be compelled to continue representation while arbitrating the fee dispute).

A. Arbitration

In the event of a fee dispute, a lawyer may be obligated to allow the client an opportunity to arbitrate the issue See Rule of Professional Conduct 1.5(f). The Fee Dispute Resolution Program (FDRP) applies to fee disputes in civil cases where the amount in dispute is between \$1,000.00 and \$50,000.00. 22 NYCRR Part 137.1. Where FDRP may be applicable and a written letter of engagement is required, the letter of engagement must include a statement that the client may have a right to arbitrate a fee dispute. See 22 NYCRR 1215.1

Additionally, the lawyer must notify the client in writing (via certified mail or personal service) of the right to arbitration at the time a fee dispute arises. 22 NYCRR Part 137.6(a)(1). (The required notice must include several elements, and Part 137.6 should be consulted for a complete listing of the requirements.) This notice requirement does not apply if the client and attorney have previously agreed in writing to arbitrate any fee dispute. See 22 NYCRR 137.6(a)(2). After service of the notice, the client is allowed thirty (30) days to decide whether to submit the matter to arbitration. Id. If the client elects arbitration, the client's election is binding on the attorney. 22 NYCRR Part 137.2. The burden is on the attorney in an FDRP arbitration to prove the reasonableness of his fee. 22 NYCRR Part 137.7. If the client does not elect arbitration timely, the lawyer may commence an action to obtain the unpaid fees. 22 NYCRR Part 137.6.

If a lawyer fails to properly advise the client of the availability of arbitration, the lawyer may forfeit any right he might otherwise have to a retaining or charging lien (discussed below), at least until he complies with the rules. See e.g., Moraitis v. Moraistis, 181 Misc. 2d 510 (Sup. Ct., Nassau Co. 1999)(ordering disclosure of file documents in fee dispute case where attorney failed to provide arbitration notice); Lorin v. 501 Second Street, LLC, 2 Misc.3d 646,

769 N.Y.S.2d 361 (Civ. Ct., Kings Co., 2003)(no right to retaining lien where attorney failed to provide client with arbitration notice even though client's refusal to pay was in based part on claimed malpractice, which is outside scope of FDRP); Messenger v. Deern, 26 Misc.3d 808, 893 N.Y.S.2d 434 (Sup. Ct. Westchester Co. 2009)(denying charging lien unless and until lawyer provided client with required arbitration notice).

B. Determining the Fee

Except where the attorney was discharged for misconduct or for cause or where the attorney's voluntary withdrawal was improper, an attorney is entitled to the reasonable value of his services. Generally speaking, the amount of the fee will be determined on the basis of quantum meruit. See Matter of Cohen v. Grainger, Tesoriero & Bell, 81 N.Y.2d 655, 602 N.Y.S.2d 788 (1993). Contingency fee arrangements may result in a different outcome, depending on nature of the fee dispute action. Unless the client has agreed to a continuation of the contingency fee arrangement, the outgoing attorney is limited to quantum meruit. Id. See also Levy v. Laing, 43 A.D.3d 713, 843 N.Y.S.2d 542 (1st Dept. 2007). However, in an action between former and substitute counsel, the former attorney may either demand that a sum be fixed based on quantum merit for his services as of the date of the discharge, or he may assert a right a portion of the litigation proceeds in reliance on the contingency arrangement. See id. at 602 N.Y.S.2d at 791.

Unlike a charging lien (discussed below), a plenary action based in quantum meruit is not limited to the proceeds of the particular action, and the former client's other assets may be used to satisfy the fees. See Butler, Fitzgerald and Potter v. Gelmin, 235 A.D.2d 218 (1st Dept. 1997). In an action for quantum meruit, a court considers several factors in determining the amount of the attorney's award.

“While the terms of the percentage agreement is one factor that may be taken into account . . . , it is not to be considered the dispositive factor Other factors, such as the nature of the litigation, the difficulty of the case, the time spent, the amount of money involved, the results achieved and amounts customarily charged for similar services in the same locality, for example, should also be considered.” See Smith v. Boscov’s Dept. Store, 192 A.D.2d 949, 596 N.Y.S.2d 575.

An attorney who fails to satisfy his obligation to enter into an engagement letter or written retaining agreement does not necessarily forfeit his right to recover in quantum meruit. See Nabi v. Sells, 70 A.D.3d 252, 892 N.Y.S.2d 41 (1st Dept. 2009). (As noted above, if FDRP may be applicable, the engagement letter must “provide that the client may have a right to arbitrate fee disputes under Part 137 of the Rules of the Chief Administrator”. 22 NYCRR 1215.1(b)). Of course, an attorney discharged for cause is not permitted any recovery for his legal services, whether in quantum meruit or otherwise. Id.

C. Liens

If a lawyer’s fees have not been paid, the lawyer may be entitled to withhold the file or other property of the client in the lawyer’s possession. See Law Firm of Ravi Batra v. Amora Rabinowich, 909 N.Y.S.2d 706 (1st Dept. 2010). A lawyer may assert either a retaining lien or a charging lien to secure payment of legal fees.

(1) Retaining liens

A retaining lien is a common law right to hold a former client’s file documents, money, or other property until the attorney’s fee is paid. The lien is case specific and applies to only to those papers or other items which came into the attorney’s possession as a result of the representation for which he has not been paid. Schneider, Kleinick, Weitz, Damashek & Shoot v. City of New York, 754 N.Y.S.2d 220 (1st Dept. 2002).

New York courts have been supportive of retaining liens. In any number of cases, courts have held that, so long as the attorney's withdrawal was proper (i.e., not a discharge for cause or an unjustified voluntary withdrawal), an attorney is permitted to withhold file documents from the client or substitute counsel until the fee is paid.

“An attorney who is discharged without cause possesses a common-law retaining lien on the client's file in his or her possession, which secures the attorney's right to the reasonable value of the services performed. . . . An attorney's retaining lien must be respected . . . and in the absence of exigent circumstances, the attorney should not be compelled to surrender the client's file until an expedited hearing has been held to ascertain the amount of the attorney's fee.” Eighteen Associates v. Nanjim Leasing Corp., 297 A.D.2d 358, 746 N.Y.S.2d 599 (2nd Dept. 2002)

See also Pomerantz v. Walter Leiter, et. al., 704 F.2d 681 (2d Cir. 1983); Artim v. Artim, 109 A.D.2d 811, 486 N.Y.S.2d 328 (2d Dept. 1985); Executive Management Co. v. BAO Technologies, Inc., 2008 N.Y.Misc. LEXIS 8811 (Nassau Co., 2008); Andreiev v. Keller, 168 A.D.2d 528, 563 N.Y.S.2d 88 (2nd Dept. 1990).

The courts recognize an exception where “exigent circumstances” exist. This exception has been applied to cases where the client is indigent and unable to pay (as opposed to unwilling to pay) and the client requires the file to continue the litigation. See e.g., Rosen v. Rosen, 97 A.D.2d 837, 468 N.Y.S.2d 723 (2d Dept. 1983). One court relied on an unspecified finding of exigent circumstances where a law firm refused to turn over the files in multiple cases after the attorney working the files left the firm on contentious terms. See Dinkes, Mandel, Dinkes & Morelli v. Ioannou, 1987 N.Y.Misc. LEXIS 2844 (New York Co., 1987). The burden is on the client to establish exigent circumstances. See e.g., Rotker v. Rotker, 195 Misc.2d 768, 761 N.Y.S.2d 787 (Westchester Co., 2003). Where exigent circumstances exist, the usual result is that the

court converts the retaining lien to a charging lien and orders the former counsel to release the file. See Cohen v. Cohen, 183 A.D.2d 802, 584 N.Y.S.2d 116 (2d Dept. 1992).

An attorney's right to assert a retaining lien is not extinguished merely because he also asserts a charging lien; the lien remedies are not exclusive but cumulative. See Butler, Fitzgerald & Potter v. Gelmin, 235 A.D.2d 218, 651 N.Y.S.2d 525 (1997). See also Wankel v. Spodek et al., 1 A.D.3d 260, 767 N.Y.S.2d 429 (1st Dept. 2003).

A few Ethics Opinions at least tacitly approve of retaining liens asserted over client files.⁴ In a 1975 Formal Opinion letter, the NYSBA Committee on Professional Ethics stated that, upon one lawyer's withdrawal from the firm, the withdrawing lawyer's clients were entitled to their papers and documents "subject to the firm's right to assert a lien thereon". See Opinion 398. See also Opinion 567 (approving of a retaining lien so long as the attorney first attempted to resolve the fee dispute with the client amicably). In a 1988 Formal Opinion, the Committee directly addressed the question of whether a lawyer may assert a retaining lien on a client's papers:

"A lawyer may assert a retaining lien pending resolution of a fee dispute so long as the lawyer acts in accord with [now superseded] EC 2-23 to resolve the fee dispute amicably. N.Y. State 567 (1984). The inconvenience and annoyance of a retaining lien, however, should not be inflicted lightly. The lawyer should first

⁴ The New York County Bar Association expressly authorized retaining liens in its Opinion No. 678 (1990). The Committee set the following parameters on a lawyer's right to withhold a file: "(1) [T]he lawyer must be satisfied that the fees billed are justly owed for services properly rendered, (2) the lawyer must take reasonable steps as are possible, without surrendering the retaining lien, to guard the client's rights, including furnishing the client or the client's new lawyer with such information as in necessary to protect the client from foreseeable prejudice, (3) where the client has a compelling need for papers, such as the defense of a murder charge, the lawyer must relinquish the retaining lien, and (4) in cases of less compelling need, the lawyer may be required to relinquish the retaining lien if the lawyer is given an adequate bond or other security to secure his or her legal fee. A lawyer may ethically assert a retaining lien that complies with the law of New York."

be satisfied that the fees billed are justly owed for services properly rendered.”

It should be noted that the same Opinion prohibits an attorney from using a retaining lien for the purpose of pressuring the client into releasing the attorney from malpractice claims. See id.

At face value, the concept of retaining a client’s files over the client’s objection seems inconsistent with Professional Rules of Conduct 1.15 and 1.16 which require the lawyer to turn over the client’s papers to the client. However, by their terms, those Rules apply only to papers to “which the client is entitled”, and neither Rule defines the circumstances under which a client is (or is not) entitled to those papers. Moreover, Rule 1.8(i) expressly allows a lawyer to “acquire a lien authorized by law to secure the lawyer’s fees or expenses”, and Comment 9 to Rule 1.16 states:

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.

Thus, retaining liens asserted over client files are recognized in New York and, although not favored by the Rules, are contemplated and allowed, at least to the extent such a lien complies in all respects with applicable law.

(2) Charging Liens

As noted above, courts often convert retaining liens to charging liens. However, a charging lien is an independent remedy and may be pursued regardless of whether a retaining lien is or was asserted.

By virtue of Judiciary Law Section 475, the attorney who appears on behalf of a party has a lien “as of the commencement of the action”. See N.Y. Judiciary

Law, § 475. The lien attaches only to the proceeds of the cause of action in which the attorney appeared. However, even if recovery on the cause of action occurs in a different proceeding than the one in which the attorney rendered his services, the lien will attach. See Matter of Cohen v. Grainger, Tesoriero & Bell, 81 N.Y.2d 655, 602 N.Y.S.2d 788 (1999). The lien is effective regardless of who is in possession of the proceeds, and the lien cannot be circumvented by a client's settlement agreement absent the attorney's consent. Id. Either the client or the attorney may petition the court to determine the amount of the lien, and the court is empowered to enforce the lien. Id. An attorney who voluntarily withdraws from the representation does not forfeit his right to a charging lien unless the attorney committed misconduct, the discharge was for just cause, or the attorney's voluntary withdrawal was improper. See Klein v. Eubank, 87 N.Y.2d 459, 640 N.Y.S.2d 443 (1996).

Of course, if there are no "proceeds" of the litigation (whether due to the nature of the action, dismissal of the action, etc.), the charging lien is ineffective as a means of ensuring payment. Unless there is a successful counterclaim, defense counsel are unable to take advantage of a charging lien as a means of securing payment.

If a defendant pays litigation proceeds knowing that a prior law firm asserts a charging lien, the defendant may be liable to pay the value of the lien. See Schneider, Kleinick, Weitz, Damashek & Shoot v. City of New York, 302 A.D.2d 183, 754 N.Y.S.2d 220 (1st Dept. 2002).

D. Ethical Concerns Related to Third-Party Fee Actions

Occasionally, an attorney seeks to be compensated for his services from a third-party pursuant to the client's insurance or indemnity agreement. Fee litigation in

those circumstances raises conflict issues to the extent the attorney can be said to have a proprietary interest in the outcome of the litigation which might compromise the attorney's judgment. An attorney may permissibly acquire a proprietary interest in the client's cause of action against the third-party. See NYSBA Formal Opinion 808 (2007). However, the attorney may not represent the client in the fee litigation. Id.