



**New York State Bar Association
Committee on Professional Ethics**

Opinion 1164 (March 21, 2019)

Topic: Returning client files without keeping a copy; conditions on compliance.

Digest: A lawyer has an interest in maintaining a copy of client-owned documents provided to the lawyer during a representation, but in certain instances that interest must yield to a client's legitimate request to destroy those copies. To protect the lawyer's exposure to later suit, the lawyer may condition compliance on the client's request on receipt of certain protections that are reasonable in light of all the facts and circumstances attending the client's request.

Rules: 1.6, 1.15, 1.16

FACTS

1. The inquirer is a New York lawyer who represented a client in an intellectual property matter adverse to the client's former employer. During the course of the representation, the client provided the inquirer with a large amount of data in digital form relating to the dispute between the client and the client's erstwhile employer (though the inquirer does not know the provenance of all the data). In the dispute, the latter alleged that the former had misappropriated proprietary information, some of which is embodied in the data given to the inquirer. Subsequently, the client decided to retain different counsel to handle the dispute, thereby ending the inquirer's attorney-client relationship with the client. The inquirer delivered to successor counsel all the materials comprising the client's file, doing so in the manner that successor counsel requested, but the inquirer retained one or more back-up copies of the data provided by the client during the representation.

2. The inquirer's former client thereafter settled the dispute in a confidential agreement, one provision of which requires the former client to retrieve and destroy all data comprising the subject of the dispute. The inquirer is not a party to the settlement agreement, but the inquirer's former client has requested the inquirer to destroy (and certify to the destruction of) the data in question. The inquirer is concerned that, in complying with this request, the inquirer would be without information that may be needed in the event of a subsequent lawsuit brought either by the former client or by the former client's onetime employer, who claims ownership of the data at issue. To protect against this prospect, the inquirer seeks guidance on the extent to which a lawyer may condition a request to destroy a file on receipt of a release and indemnity – from each party to the settlement agreement – and insistence on maintaining an index of the files destroyed in keeping with the former client's request.

QUESTIONS

3. The inquirer poses two questions:

(a) Does an attorney have an obligation to delete backup copies of files or data provided by a client after the client has terminated the legal engagement?

(b) May the attorney condition compliance with such a request on obtaining a release and indemnification (including advance of attorneys' fees and expenses), as well as creating an inventory of file names, sizes, and dates to prove what files were or were not in the attorney's possession?

OPINION

4. Rule 1.15(c)(4) of the N.Y. Rules of Professional Conduct (the "Rules") says that a lawyer shall "promptly . . . deliver to the client . . . as requested by the client . . . properties in possession of the lawyer that the client . . . is entitled to receive." Rule 1.16(e) provides that, "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, among other things, "delivering to the client all papers and property to which the client is entitled." The Rules offer no guidance on which "papers and property" the client "is entitled to receive." Rather, the question of whether documents (including electronic versions) belong to the client is "generally a question of law, not ethics." N.Y. State 766 (1993). Which documents may belong to the client is "not always easy to ascertain" and may entail "a complex issue of both fact and law." N.Y. State 623 (1991). *See generally Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn*, 91 N.Y.2d. 30, 37 (1997). Our Committee does not resolve issues of law, and so for our purposes we assume, without deciding, that the data in question belongs to the client.

5. In N.Y. State 780 (2004), we addressed whether a lawyer may retain a copy of documents belonging to a client despite the client's objection. There we said that "there can be little doubt" that a lawyer "has an interest in the file that would permit the lawyer to retain copies of file documents." Citing opinions from other jurisdictions, we concluded that, as a "general rule," a lawyer may retain "copies of the file at the lawyer's expense," notwithstanding a client's objection. *See* Rule 1.6(c)(5)(i) (lawyer may reveal or use client confidential information to the extent that the lawyer reasonably believes necessary to defend the lawyer against an accusation of wrongful conduct); Restatement (Third) of the Law Governing Lawyers § 46, Cmt. d (Am. Law Inst. 1998) (a "lawyer may keep copies of documents when furnished to a client.") In recognition of this interest, we said in N.Y. State 780, a lawyer may insist on a release from a client as a condition of forgoing the lawyer's interest in maintaining a copy.

6. This interest is not unqualified. The Restatement notes that "extraordinary circumstances" may exist in which the very nature of the lawyer's assignment overrides the lawyer's interest in maintaining a copy; as an example, the Restatement cites "when a client retained the lawyer to recover and destroy a confidential letter." Restatement § 46, Cmt. d. Our N.Y. State 780 took a somewhat less narrow view of the possible exceptions to the "general rule" that a lawyer may always maintain a copy of a client file; without attempting to anticipate all conceivable circumstances, we said there that exceptions might include "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 circumstances." These qualifications require a fact-intensive inquiry balancing factors favoring a lawyer's interest in maintaining a copy of a client file and factors favoring a client's interest in destruction of that copy. This 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.

7. No exhaustive catalog of these factors is practicable, but certain common considerations are likely to recur, among them the strength of the client's claim to ownership; the sensitivity of the documents; the centrality of their sensitivity to the object of the representation; the legitimacy of the client's request for destruction; the extent to which the documents slated for destruction comprise the client file (*i.e.*, one document versus the entire file); the difficulty associated with destruction of the documents; the degree to which the lawyer is subject to a meaningful risk of later liability; and the availability and feasibility of provisions protective of the lawyer's interests. In balancing these and other factors, the weight to be given each depends on the facts and circumstances, with the overriding concern that a lawyer's demand for protections for the lawyer's benefit must be reasonable in light of those facts and circumstances.

8. Applying these considerations to the current inquiry, we believe that it would be reasonable for the lawyer to request a release and a simple hold-harmless agreement from the lawyer's former client in exchange for the lawyer's agreement to destroy the documents at issue. Because the documents originated with the client (no matter their original provenance), the client's claim to ownership is strong. The nature of the dispute – that the documents embody proprietary information – reflects their sensitivity, which appears to be core to the nature of the lawyer's initial engagement, and the settlement agreement supplies a legitimate basis for the client's request. The documents are in an electronic format, so we detect no undue difficulty in achieving the client's aim. If the lawyer destroys the documents as requested, the risk of later liability is correspondingly diminished. Maintaining an inventory of the documents, with which we see no problem, affords the inquirer an additional layer of protection from a subsequent claim. Merely asking for advance payment of legal fees and expenses in the event of suit, or requesting a release and indemnity from the non-client former employer, may not alone violate the Rules, but we are dubious that the lawyer may insist on these conditions before complying with the former client's request that the documents be destroyed and that the lawyer certify to their destruction.

CONCLUSION

9. Compliance with the terms of a settlement reached by a former client provides a legitimate reason to comply with that former client's request to destroy client-owned documents in a lawyer's possession. The lawyer may condition deletion of the file on obtaining a release and a simple hold-harmless clause from the former client, and may maintain an inventory of the file names, sizes, and dates for data supplied by the former client to the lawyer during the representation and maintained in the lawyer's files.

(18-18)