



**SUFFOLK ACADEMY OF LAW**  
*The Educational Arm of the Suffolk County Bar Association*  
560 Wheeler Road, Hauppauge, NY 11788  
(631) 234-5588

**BETTER BILLING SERIES:  
Retaining & Charging Liens**

**Presenters:**

**Robert Cohen, Esq.**

**Program Coordinators: Allison C. Shields, Esq. and Debra L. Rubin, Esq.**

**August 3, 2016  
SCBA Center - Hauppauge, NY**

# RETAINING LIENS AND CHARGING LIENS

*“Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”*

*1. The foregoing shall not apply to matrimonial lawyers.*

## SCHEDULE/CONTENTS

- I. Introduction (15 minutes)
  - a. What are Retaining Liens and Charging Liens
  - b. How do they work (and not work)
  
- II. The Law (60 minutes, including 25 minutes on ethics issues)
  - a. Overview and Judiciary Law 475 and 475-a;
  - b. Case Law
  - c. Ethical Issues and Ethics Opinions
  
- III. The Forms (20 minutes)
  - a. Retainer provisions for a Charging Lien;
  - b. Retainer provision for Retaining Lien;
  - c. Sample Notices of Charging Liens;
  - d. Sample Order to Show Cause and Affirmation to Enforce Charging Lien
  
- IV. The Real World (20 minutes)

## *Overview and Introduction:*

The retaining lien was established under the common law. In a very general sense, it allows an attorney to maintain possession of the client's legal file until a balance due is paid or secured...with many exceptions and rules.

The charging lien is statutory and governed by Judiciary Law Section 475. In a very general sense, it allows an attorney who is owed money to impose a lien on certain types of money coming to the client as a result of the attorney's work...with many exceptions and rules.

An attorney discharged for cause does not have the right to maintain a retaining lien or a charging lien. However if a client asserts that an attorney was discharged for cause, the retaining lien must be respected until a hearing is held to determine whether or not the attorney was discharged for cause.

## The Law

### I. McKinney's Judiciary Law § 475

#### § 475. Attorney's lien in action, special or other proceeding

From the commencement of an action, special or other proceeding in any court or before any state, municipal or federal department, except a department of labor, or the service of an answer containing a counterclaim, or the initiation of any means of alternative dispute resolution including, but not limited to, mediation or arbitration, or the provision of services in a settlement negotiation at any stage of the dispute, the attorney who appears for a party has a lien upon his or her client's cause of action, claim or counterclaim, which attaches to a verdict, report, determination, decision, award, settlement, judgment or final order in his or her client's favor, and the proceeds thereof in whatever hands they may come; and the lien cannot be affected by any settlement between the parties before or after judgment, final order or determination. The court upon the petition of the client or attorney may determine and enforce the lien.

#### McKinney's Judiciary Law § 475-a § 475-a. Notice of lien

If prior to the commencement of an action, arbitration, mediation or a form of alternative dispute resolution, or a special or other proceeding, an attorney serves a notice of lien upon the person or persons against whom his or her client has or may have a claim or cause of action, the attorney has a lien upon the claim or cause of action from the time such notice is given, which attaches to a verdict, report, determination, decision, award, settlement or final order in his or her client's favor of any court, arbitral tribunal or of any state, municipal or federal department, except a department of labor, and to any money or property which may be recovered on account of such claim or cause of action in whatever hands they may come; and the lien cannot be affected by any settlement between the parties after such notice of lien is given. The notice shall, (1) be served by either personal

service or registered mail; (2) be in writing; (3) state that the relationship of attorney and client has been established, the nature of the claim or cause of action, and that the attorney claims a lien on such claim or cause of action; (4) be signed by the client, or by a person on his or her behalf whose relationship is shown, and which signature shall also be witnessed by a disinterested person whose address shall also be given; and (5) be signed by the attorney. A lien obtained under this section shall otherwise have the same effect and be enforced in the same manner as a lien obtained under section four hundred seventy-five of this article.

## II. Retainer provision:

“Should any fees be due and owing to this firm at the time of our discharge, or at the time that we make an application to the Court to withdraw as your attorneys, or if we discontinue our representation (if applicable), we shall have the right, in addition to any other remedy, to seek a charging lien, i.e., a lien upon the property that is awarded to you as a result of equitable distribution in the final order or judgment in your case. The Law Firm shall also be entitled to a retaining lien on the contents of your file, as provided by law.”

\*Note, language that also appears in the Statement of Client’s Rights: “Your attorney’s written retainer agreement must specify under what circumstances he or she might seek to withdraw as your attorney for non-payment of legal fees. You have the right to withdraw from the attorney-client relationship at any time. If an action or proceeding is pending, the attorney may assert his/her right to a retaining lien on the contents of your file and the court may give your attorney a ‘charging lien’, which entitles your attorney to payment for the services already rendered at the end of the case out of the proceeds of the final order or judgment.”

SAMPLE NOTICE OF CHARGING LIEN:

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF SUFFOLK

----- x  
WILMA FLINTSTONE,

Plaintiff,  
- against -

Index No.: xxxxxxx-xx

NOTICE OF CHARGING  
LIEN

FRED FLINTSTONE

Defendant.

----- x

PLEASE TAKE NOTICE that pursuant to Section 475 and 475-a of the Judiciary Law, DEWEY, CHEATEM & HOWE, LLP, former attorneys for plaintiff, has a charging lien upon the proceeds of this action (including any property settlement, equitable distribution and counsel fee award, but excluding maintenance and child support) in whatever hands they may come in the amount of TWENTY TWO THOUSAND NINE HUNDRED TWENTY TWO and 42/100 Dollars (\$22,922.42) in legal fees and disbursements.

This lien shall not be affected by any settlement between the parties before or after judgment, final order or determination.

PLEASE TAKE FURTHER NOTICE that pursuant to applicable law, anyone who disregards said lien may be held to be personally liable to DEWEY, CHEATEM & HOWE LLP [Judiciary Law §475; LMWT Realty Corp. v. Davis Agency, Inc., 85 N.Y.2d 462, 649 N.E.2d 1183, 626 N.Y.S.2d 39 (Ct. of Appeals 1995)].

Dated: Hauppauge, New York  
August 3, 2016

Yours, etc.,

\_\_\_\_\_  
LAW FIRM, LLP

TO: Attorneys for Plaintiff and defendant

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF SUFFOLK

-----X  
[REDACTED],

Plaintiff,

- against -

[REDACTED] L,

Defendant.  
-----X

Index No.: [REDACTED]

NOTICE OF ATTORNEY  
CHARGING LIEN PURSUANT  
TO THE COMMON LAW AND  
JUDICIARY LAW §475

Assigned Justice:  
Hon. William J. Kent, III

To: **Judith A. Pascale, Suffolk County Clerk**  
**Suffolk County Clerk's Office**  
**310 Center Drive**  
**Riverhead, New York 11901**

[REDACTED]  
**Dix Hills, New York 11746**

[REDACTED]  
[REDACTED]  
**Huntington, New York 11743**  
[REDACTED]

**NOTICE** is hereby given that [REDACTED]

an Officer of the Court, of [REDACTED]

[REDACTED] claims an Attorney's Charging Lien pursuant to the Common Law and/or New York Judicial Law §475, which reads in relevant part: "From the commencement of an action... the attorney... has a lien upon his client's cause of action... and the proceeds thereof in whatever hands they may come; and the lien cannot be affected by any settlement between the parties before or after judgment..." for services rendered to the Defendant [REDACTED], who has an equitable distribution interest in the marital

residence to wit: real property located at [REDACTED] Suffolk County, New York in the above captioned pending divorce action between the parties.

The lien arose in connection with attorney [REDACTED]'s representation, demand for equitable distribution and counterclaim seeking equitable distribution of the above referenced marital residence of Defendant, [REDACTED], in the above captioned matrimonial action between himself and his wife, the Plaintiff [REDACTED], in which the firm is representing Defendant, [REDACTED]. [REDACTED] is seeking equitable distribution of marital property which includes the above referenced real property.

This Charging Lien cannot legally be nullified or avoided by settlement between the parties. If any person or entity with knowledge of this Charging Lien distributes money or property arising out of and/or subject to this action to Plaintiff, [REDACTED], to Defendant, [REDACTED] or to a third party on his or her behalf and thereby causes the attorney asserting the Charging Lien not to be paid, the person or entity distributing the money does so at their/its own risk and may become personally liable for the entire debt and/or lien amount.

According to the unanimous ruling of the Court in Peri v. New York Cent. & H.R.R. Co., 152 NY.S. 521, 46 N.E. 849 (1897),

"The lien operates as security and if the settlement entered into by the parties is in disregard of it and to the prejudice of the [parties'] attorney, by reason of the insolvency of the client, or for other sufficient cause, the Court will interfere and protect its officer by vacating the satisfaction of judgment and permitting execution to issue for the



enforcement of the Judgment to the extent of the lien, or by following the proceeds in the hands of third parties, who received them before or after judgment impressed with the lien." See Rubin & Rubin & Rothman v. McNelis, 130 A.D.2d 643, 515 NYS2d (2d Dept. 1987) and McKinney's Forms on Judiciary Law §475.

The recovery to which attorneys [REDACTED] Charging Lien attaches may be described as follows: Defendant, [REDACTED] equitable interest in the real property known as [REDACTED] Suffolk County, New York 11746, District [REDACTED]; Section [REDACTED]; Block [REDACTED]; Lot [REDACTED], and any money due him from the sale of that property.

[REDACTED] claim is for the contracted fee and/or for the reasonable compensation of any recovery in the above captioned case.

To date, Defendant [REDACTED] has failed to pay the sum of \$\_\_\_\_\_ justly owed to his attorney [REDACTED]

Dated: [REDACTED] New York  
April \_\_\_\_, 2009

[REDACTED]

**VERIFICATION**

I am the attorney above named. I have read the attached Notice and am familiar with its contents. At all times relevant to the Notice I was and have been licensed to practice law in the State of New York. To the best of my knowledge, the contents of the Notice are true.

[Redacted signature line]

By:

[Redacted signature line]

Subscribed and sworn to before me on  
this \_\_\_\_ day of April, 2009

\_\_\_\_\_  
Notary Public

STATE OF NEW YORK     )  
                                      : ss.:  
COUNTY OF NASSAU     )

On the \_\_\_ day of April, 2009, before me, the undersigned, personally appeared [REDACTED] personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledge to me that he executed the same in his capacity, and that by his signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.

\_\_\_\_\_  
Notary Public

At a Special Term, Part \_\_ of the Supreme Court of the State of New York, held in and for the County of Nassau at the Courthouse located at 400 County Seat Drive, Mineola, New York on the [redacted] day of [redacted], 2012

PRESENT:

HON. [redacted]  
JHO

-----X  
[redacted]

Plaintiff,

-against-

[redacted]

Defendant.  
-----X

ORDER TO SHOW CAUSE

Index No.: [redacted]

Upon the reading and filing of the annexed Notice of Charging Lien dated November 1, 2011, Honorable [redacted] Decision After Trial dated [redacted] 2012, the Affirmation of [redacted] Esq., dated [redacted] 2012, upon all the exhibits annexed hereto, and upon all the prior pleadings and proceedings heretofore had herein,

LET the plaintiff, [redacted] or her attorney, show cause before this Court, before HON. [redacted] at the Courthouse located at 400 County Seat Drive, Mineola, New York, on the [redacted] day of [redacted], 2012 at 9:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, why an Order should not be made and entered granting plaintiff's former counsel, [redacted] the following relief:

) )

1. Fixing the lien granted by Judiciary Law §475 in favor of plaintiff's former counsel, [REDACTED] for legal fees, disbursements and interest owed to [REDACTED] by plaintiff in connection with this matrimonial action in the sum of \$ [REDACTED]

2. Directing that said lien be enforced against plaintiff's distributive award of approximately \$ [REDACTED] (specifically against the [REDACTED] to be paid to plaintiff by defendant on or before [REDACTED] 2012) granted to her pursuant to Honorable [REDACTED] Decision After Trial dated [REDACTED] 2012;

3. Granting [REDACTED] a money judgment in the sum of \$ [REDACTED]

4. Enjoining and restraining the defendant, his agents and/or representatives, from making any distributive award payments to plaintiff pursuant to Honorable [REDACTED] Decision After Trial dated [REDACTED] 2012 or otherwise unless and until the lien in favor of [REDACTED] is satisfied;

5. Awarding [REDACTED] such other and further relief as the Court may deem just and proper.

SUFFICIENT CAUSE APPEARING THEREFOR, it is

ORDERED, that defendant, his agents and/or representatives, are hereby enjoined and restrained from making any distributive award payments to plaintiff pursuant to Honorable [REDACTED] Decision After Trial dated [REDACTED] 2012 or otherwise unless and until the lien in favor of [REDACTED] is satisfied; and it is further

ORDERED, that service of a copy of this Order To Show Cause, together with the papers upon which it has been granted, upon the plaintiff, through her current attorneys,

) )  
[REDACTED] New York [REDACTED] pursuant to CPLR §2103(b)(6) on or before the [REDACTED] day of [REDACTED], 2012 shall be deemed good and sufficient service; and it is further

ORDERED, that service of a copy of this Order To Show Cause, together with the papers upon which it has been granted, upon the defendant, through his attorneys, [REDACTED] [REDACTED] New York [REDACTED] pursuant to CPLR §2103(b)(6) on or before the [REDACTED] day of [REDACTED], 2012 shall be deemed good and sufficient service.

ENTER:

HON. [REDACTED]

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU

-----X  
[REDACTED]

Plaintiff,

-against-

[REDACTED]

Defendant.

-----X

**AFFIRMATION IN SUPPORT  
OF APPLICATION TO FIX AND  
ENFORCE A CHARGING LIEN**

Index No.: [REDACTED]

[REDACTED] an attorney-at-law, duly admitted to practice in the Courts of the State of New York, pursuant to CPLR §2106 and under the penalties of perjury, affirms as follows:

1. As this Honorable Court is well aware, our firm, [REDACTED] was plaintiff's counsel since the commencement of the above captioned action, *to wit*: [REDACTED] 2006, and was replaced by the firm of [REDACTED] without cause, on or about November 1, 2011 after all matters were tried before Hon. [REDACTED]. A copy of the filed Consent to Change Attorney Form is annexed hereto as Exhibit "A". After being replaced, this firm forwarded a copy of plaintiff's last invoice dated [REDACTED] 2011 both to plaintiff and her current attorneys. A copy of this firm's [REDACTED] 2011 invoice is annexed hereto as Exhibit "B". Following the submission of Post-Trial Memoranda by all sides, this Honorable Court issued a decision dated [REDACTED] 2012 (a copy of which is annexed hereto as Exhibit "C" for the Court's convenience).

2. As is readily apparent from reading the Court's [REDACTED] 2012 decision, this Court ordered defendant to pay [REDACTED] the sum of \$ [REDACTED] as and for his

contribution to plaintiff's legal fees owed to [REDACTED]. Also apparent from the Court's decision is the fact that this firm worked very hard on behalf of plaintiff and obtained an outstanding result for her. After receiving this Court's decision, your affirmant wrote to plaintiff seeking to make arrangements with regard to the balance of this firm's statement for services rendered in the sum of \$ [REDACTED] (which, to date, has increased to \$ [REDACTED]). A copy of your affirmant's correspondence dated [REDACTED] 2012 and statement to plaintiff is annexed hereto collectively as Exhibit "D". In response to this correspondence, plaintiff's current attorneys, [REDACTED] advised that plaintiff would not pay more than \$20,000.00! Given the years of hard work and dedicated effort put forth by [REDACTED] this offer was flatly rejected.

3. Prior to the [REDACTED] 2012 Decision after Trial, this Honorable Court (as well as both parties and plaintiff's current counsel) was well aware of our firm's request for outstanding legal fees (excluding interest) in the sum of \$ [REDACTED] in that this firm had submitted a Post-Trial Affirmation for counsel fees indicating the amount due after we were replaced, without cause, by plaintiff. A copy of this Affirmation, without exhibits, is annexed hereto as Exhibit "E". The plaintiff and her current attorneys were also served with our invoice dated November 1, 2011, indicating this balance due. A copy of this invoice is annexed hereto as Exhibit "B".

4. Throughout this firm's almost six year representation of plaintiff (which includes the one year prior to commencement of this action when this firm attempted to negotiate a settlement between the parties hereto), none of our billing statements were ever objected to by plaintiff (or anyone else on her behalf), and indeed, plaintiff signed several affidavits in

---

<sup>1</sup> [REDACTED] (amount due and owing as of November 1, 2011) + [REDACTED] (accrued interest from November 1, 2011 to date) - \$ [REDACTED] (amount of plaintiff's legal fees that defendant was ordered to pay directly to [REDACTED] pursuant to this Honorable Court [REDACTED] 2012 decision) = \$ [REDACTED]



) )

connection with her requests for interim legal fees confirming that the work performed by this firm was done in a satisfactory fashion. In addition, plaintiff repeatedly indicated to the Court that she requested that defendant pay said fees. Copies of her affidavits in connection with her applications are annexed hereto in seriatim as Exhibits "F", "G", "H", "I" and "J". In fact, plaintiff even made partial payments on our invoices throughout this firm's representation of her.

5. Clearly, [REDACTED] is entitled to a charging lien. Section 475 of the Judiciary Law states, in relevant part,

"From the commencement of an action... in any court... the attorney who appears for a party has a lien upon his client's cause of action, claim or counterclaim, which attaches to a verdict, report, determination, decision, judgment or final order in his client's favor, and the proceeds thereof in whatever hands they may come; and the lien cannot be affected by any settlement between the parties before or after judgment, final order or determination." (emphasis added).

See also *N.K. v. M.K.*, 19 Misc. 3d 1124(A), \*7, 862 N.Y.S.2d 816 (Supreme Court, Kings Co., 2008) ("It is well settled that '[u]nder Judiciary Law §475, a charging lien automatically comes into existence, without notice or filing, upon commencement of the action' [citation omitted]"). Of course, "an attorney need not be counsel of record at the time the judgment or settlement fund is created in order to be entitled to the lien afforded by Judiciary Law §475". *Klein v. Eubank*, 87 N.Y.2d 459, 462, 640 N.Y.S.2d 443, 444 (1996).

6. Cases are legion that an attorney who has appeared on behalf of a client in a matrimonial action is entitled to a charging lien. See *Moody v. Sorokina*, 50 A.D.3d 1522, 856 N.Y.S.2d 755 (4<sup>th</sup> Dept. 2008) *lv. denied* 11 N.Y.3d 713 (2008); *Gurvitsch v. Gurvitsch*, 239 A.D.2d 465, 658 N.Y.S.2d 42 (2<sup>nd</sup> Dept. 1997); *Cohen v. Cohen*, 160 A.D.2d 571, 554 N.Y.S.2d 525 (1<sup>st</sup> Dept. 1990); *Noble v. Noble*, 2011 N.Y. Slip Op. 30835(U), 2011 WL 1430041 (Supreme Court, Albany Co., 2011); *Goldman v. Goldman*, 30 Misc.3d 1222(A), 924 N.Y.S.2d

) )

309 (Supreme Court, Rensselaer Co., 2011); *N.K. v. M.K.*, 19 Misc. 3d 1124(A), 862 N.Y.S.2d 816 (Supreme Court, Kings Co., 2008); *Zelman v. Zelman*, 15 Misc.3d 372, 374, 833 N.Y.S.2d 375, 377 (Supreme Court, New York Co., 2007). Thus, since this firm not only appeared on behalf of plaintiff in this divorce action, but prosecuted every aspect of this action (short of submitting post-trial memorandum), it is respectfully submitted that [REDACTED] is entitled to a charging lien.

7. Perhaps the case most directly on point with the instant application is *N.K. v. M.K.*, *supra*. In *N.K.*, defendant's two prior attorneys (who were both terminated without cause) applied to the Court to, *inter alia*, fix and enforce a charging lien pursuant to Judiciary Law §475 for legal fees and disbursements in connection with their representation of defendant in the underlying matrimonial action. Just as this firm did in the instant action, the defendant's two prior attorneys in *N.K.* served notices of their charging liens on plaintiff's and defendant's current and prior counsel. A copy of this firm's Notice of Charging Lien is annexed hereto as Exhibit "K". After considering both applications and defendant's opposition thereto, the Court in *N.K.* held that both of defendant's prior attorneys were entitled to a charging lien<sup>2</sup>. Therefore, based on the facts of this action, it is clear that [REDACTED] is entitled to a charging lien.

8. It is further respectfully submitted that the amount of the charging lien sought by [REDACTED] to be fixed is beyond dispute. As the Court in *N.K. v. M.K.*, *supra*, held, a hearing was not required in order to determine the amount of the charging lien since both attorneys established that they were entitled to an account stated.

---

<sup>2</sup> In fact, the Court also held that since "It is well settled that '[u]nder Judiciary Law §475, a charging lien automatically comes into existence, without notice or filing, upon commencement of the action' [citation omitted]", the attorneys' Notice of Charging Lien was not even required in order to be granted a charging lien.

) )

“An account stated exists where a party to a contract receives bills or invoices and does not protest within a reasonable time’ (*Bartning v. Bartning*, 16 AD3d 249, 250 [1 Dept., 2005] [finding that court erred in dismissing appellant attorney’s claim to fix his fees and impose a lien where the attorney sent out regular invoices, including a final invoice, to which he received no objection from his client and the client also failed to establish that he objected in a timely fashion to the invoices)].... The ‘account stated’ cause of action has been held to apply to legal fees accrued in matrimonial matters [see *Bartning*, 16 AD3d at 249 [1 Dept., 2005]; see also *Marshall v. Marshall*, 264 A.D.2d 824, 825–826 [[2 Dept., 1999] ], *lv dismissed in part and denied in part* 94 N.Y.2d 899 [2000]; *Paul, Weiss, Rifkind, Wharton & Garrison*, 4 Misc.3d 447, 450).”

*N.K.*, 19 Misc. 3d 1124(A) at \*8. Many other cases have also held that under similar circumstances (account stated), a hearing is not required in order to fix and enforce a charging lien. See e.g., *Mintz & Gold, LLP v. Hart*, 48 A.D.3d 526, 852 N.Y.S.2d 248 (2<sup>nd</sup> Dept. 2008); *Landa v. Dratch*, 45 A.D.3d 646, 846 N.Y.S.2d 256 (2<sup>nd</sup> Dept. 2007); *Lapidus & Associates, LLP v. Elizabeth Street, Inc.*, 25 Misc.3d 1226(A), 2009 N.Y. Slip Op. 52306(U) (Supreme Ct. N.Y. Co. 2009).

9. In the matter at bar, prior to the commencement of litigation, our firm entered into an agreement with plaintiff for the limited purpose of attempting to negotiate a settlement between the parties. However, after approximately one year of negotiations, it became readily apparent that the parties would be unable to agree on settlement terms. Therefore, this firm entered into another express agreement with plaintiff for legal services in order to litigate this matter (a copy of plaintiff’s litigation retainer is annexed hereto as Exhibit “L”), and we sent plaintiff invoices every other month as required by Court rule which explained, in detail, all services rendered; plaintiff made partial payments towards these invoices, and neither the plaintiff nor anyone on her behalf ever objected to these invoices, even after she terminated our services! All of those documents have been provided to the Court in connection with plaintiff’s

) )

numerous fee applications. Therefore, in light of the aforementioned facts and caselaw, it is respectfully submitted that [REDACTED] has established an account stated and, accordingly, no hearing is necessary to determine the amount of this firm's charging lien.

10. Moreover, pursuant to this firm's February 15, 2012 correspondence (see Exhibit "D") and paragraph "6(a)" of this firm's retainer agreement with plaintiff (a copy of which is annexed hereto as Exhibit "L"), the charging lien sought by [REDACTED] should include interest which accrued on the unpaid portion of plaintiff's legal fee in the sum of \$[REDACTED]. See *N.K. v. M.K.*, 19 Misc. 3d 1124(A) at \*10 ("In summary, the court finds that [defendant's prior attorneys] are both entitled to charging liens fixed in the amounts sought by them and supported by their submissions to the court, taking into account any applicable interest accrued" (emphasis added)).

11. Yet another argument in support of this application was also addressed by the Court in *N.K. v. M.K.*, *supra*, namely, judicial estoppel. "The doctrine of judicial estoppel provides that 'a party is precluded from inequitably adopting a position directly contrary to or inconsistent with an earlier assumed position in the same proceeding' (*Nestor v. Britt*, 270 A.D.2d 192, 193 [1 Dept., 2000])." *Id.* at \*9. In fact, as was the case in *N.K.*, plaintiff herein was awarded substantial attorney's fees during the pendency and after the trial of this action based on the very bills and invoices which form the basis of this firm's instant application for a charging lien! Therefore, since the plaintiff in the instant action repeatedly represented to the Court her satisfaction with this firm's representation of her pursuant to her Affidavits in support of her various applications for attorney's fees, she should be estopped from arguing that this firm's invoices are excessive, inflated or that [REDACTED] is not entitled to receive

---

<sup>3</sup> \$[REDACTED] per diem interest (based on plaintiff's unpaid legal fee of \$[REDACTED] x 125 days from November 1, 2011 to present = \$[REDACTED])

) )  
the full amount of our legal fees, disbursements and interest in connection with our representation of plaintiff in this matrimonial action.

12. Moreover, the case law is clear that under the above factual scenario, this firm is not only entitled to a charging lien in the sum of [REDACTED] which should be granted without a hearing, but said lien should be enforced against plaintiff's distributive award of approximately \$ [REDACTED] (specifically against the \$ [REDACTED] to be paid to plaintiff by defendant on or before May 8, 2012) granted to her pursuant to Honorable [REDACTED] Decision After Trial dated [REDACTED] 2012. See *Haser v. Haser*, 271 A.D.3d 253, 707 N.Y.S.2d 47 (1<sup>st</sup> Dept. 2000); *Noble v. Noble*, 2011 N.Y. Slip Op. 30835(U), 2011 WL 1430041 (Supreme Court, Albany Co., 2011); *Cohen v. Cohen*, *supra*; *Zelman v. Zelman*, *supra*.

13. In addition to enforcing this lien against plaintiff's distributive award, this firm should also be awarded a money judgment in the sum of \$ [REDACTED] which may also serve as a lien until this firm is paid in full. See *Marshall v. Marshall*, 264 A.D.2d 824, 696 N.Y.S.2d 60 (2<sup>nd</sup> Dept. 1999) *lv. denied* 94 N.Y.2d 894 (2000); *Noble v. Noble*, 2011 N.Y. Slip Op. 30835(U), 2011 WL 1430041 (Supreme Court, Albany Co., 2011); *N.K. v. M.K.*, 19 Misc. 3d 1124(A), 862 N.Y.S.2d 816 (Supreme Court, Kings Co., 2008).

14. Finally, it is clear that when an attorney is seeking to enforce his or her charging lien against a party's distributive award, the Courts of this State are empowered to grant a temporary restraining order prohibiting the transfer and distribution of any funds representing distributive award payments pending the outcome of the attorney's application to enforce his or her charging lien. See *Tunick v. Shaw*, 6 Misc. 3d 1014(A), 800 N.Y.S.2d 358 (Supreme Court, New York Co., 2004) *aff'd as mod.* 45 A.D.3d 145, 842 N.Y.S.2d 395 (1<sup>st</sup> Dept. 2007); *White v. White*, 107 Misc.2d 551, 435 N.Y.S.2d 535 (Supreme Court, Nassau Co., 1981); *N.K. v. M.K.*,

) )  
*supra*. Accordingly, it is respectfully submitted that this firm's request for a temporary restraining order enjoining and restraining the defendant, his agents and/or representatives, from making any distributive award payments to plaintiff pursuant to Honorable [REDACTED] Decision After Trial dated [REDACTED] 2012 or otherwise unless and until the lien in favor of [REDACTED] is satisfied, be granted.

15. Pursuant to 22 NYCRR §202.7(f), the attorneys for plaintiff and defendant were given notice of this application via e-mail and facsimile at approximately 1:00 pm on Tuesday, [REDACTED] 2012. See Exhibit "M" annexed hereto.

16. Other than plaintiff's and this firm's previous applications for attorney's fees from defendant as set forth herein, no prior application for the same or similar relief has been made to this or any other Court.

WHEREFORE, it is respectfully requested that the Court grant [REDACTED] all of the relief requested herein.

Dated: [REDACTED] New York  
[REDACTED] 2012

[REDACTED]  
[REDACTED]

) )  
The attached ORDER TO SHOW CAUSE and SUPPORTING PAPERS are hereby certified pursuant to 22 N.Y.C.R.R. 130-1.1-a.

[REDACTED]  
[REDACTED]  
(516) [REDACTED]

By: [REDACTED]

Dated: [REDACTED] New York  
[REDACTED] 2012

V. Retaining liens:

Questions you need to know the answer to:

*May a court compel an attorney to turn over his or her files?*

*Does the attorney need to put the client on written notice of the retaining lien? Must the Court fix and secure the fee before compelling an attorney to turn over the file?*

*What constitutes an "exigent circumstance that would allow a court to effectively negate the retaining lien?"  
Can an attorney challenge a claim of indigence? Should such claim be subject to a hearing?*

*Is there a distinction between client's personal papers and litigation documents?*



## VI. Charging liens:

### Questions you need to know the answer to

*What happens when the client's indigence is valid?*

*When does a charging lien come into existence?*

What happens if an arbitration demand has been served by either the attorney or the client?

What is required to establish a charging lien?

Can a charging lien attach to your former client's share of the marital residence?

Who pays to copy the file?

## **Ethical opinions:**

### **Restrictions on the rights of lawyers to exercise retaining liens:**

#### **NY County Lawyer's Association Opinion 678: Restrictions on the right to exercise a retaining lien:**

1. The lawyer must be satisfied that the fees billed are justly owed for services properly rendered;
2. The lawyer must take such 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 is necessary to protect the client from foreseeable prejudice;
3. Where the client has a compelling need for papers, such as defense of a murder charge, the lawyer must relinquish the lien;
4. In cases of less compelling need, the lawyer may be required to relinquish the lien if the lawyer is given adequate bond or other security to secure his or her fee.

**NYSBA Ethic Opinion 780:** A lawyer may generally retain copies of the client's file at the lawyer's own expense, even over the objection of the client. As a condition of foregoing this right, a lawyer may seek to have the client release the lawyer from malpractice liability.

QUESTION NO. 678

TOPIC: RETAINING LIENS.

DIGEST: The common law in New York gives a lawyer a retaining lien over all property, documents, moneys or securities that come into the lawyer's possession in the course of employment as a lawyer. However, both courts and ethics committees have restricted the right of lawyers to exercise a retaining lien.

CODE: DR 2-110(A), DR 5-103(A)(1), EC 5-7, DR 9-102(B)(4).

QUESTION:

Under what circumstances may a lawyer exercise a retaining lien on the property of a client?

OPINION:

In most circumstances, a lawyer must promptly pay over the client's property to the client. DR 9-102(B)(4) provides that:

A lawyer shall promptly pay or deliver to the client as requested by a client the funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive.

However, DR 5-103(A)(1) authorizes a lawyer to acquire a lien granted by law to secure legal fees or expenses. See also EC 5-7 ("[I]t is not improper for a lawyer to protect his right to collect a fee for his services by the assertion of legally permissible liens".)

There are two types of liens that a lawyer may acquire. A charging lien attaches to the judgment a lawyer obtains for a client. In New York, charging liens are granted by statute. See Judiciary Law § 475. A retaining lien is a possessory lien recognized under common law over all property, documents, moneys or securities that come into a lawyer's possession in the course of employment as a lawyer. Robinson v. Rogers, 237 N.Y. 464 (1924); Matter of Heinsheimer, 214 N.Y. 361, 364 (1915); see Note, Attorney's Retaining Lien Over Former Client's Papers, 65 Colum. L. Rev. 296, 301 (1965).

Whether a lawyer has acquired a lien on client property is a matter of law upon which this committee cannot pass. However, we note that both courts and ethics committees have restricted the right of lawyers to exercise a retaining lien, and, in order to provide guidance to the Bar, we have undertaken in this opinion to summarize the extent of the lien and those restrictions. Although it is our belief that not everything that is legal

*Opinion Number 678*

capacity, for example, as trustee or escrow agent. Mayeri Corporation v. Shea & Gould, 112 Misc.2d 734, 447 N.Y.S.2d 413 (1982), United States v. J.H.W. & Gitlitz Deli & Bar, Inc., 449 F. Supp. 1010 (S.D.N.Y. 1980).

Limitations on the Assertion of a Retaining Lien

Because the retaining lien is such a powerful weapon, both ethics committees and courts have placed limitations on the circumstances in which it can be exercised. For example, the New York State Bar Association Ethics Committee has warned that the inconvenience and annoyance of a retaining lien should not be inflicted lightly. The lawyer should first be satisfied that the fees billed are justly owed for services properly rendered. N.Y. State 591 (1988).

Lawyers often assert a retaining lien when they have been dismissed by a client who has hired substitute counsel. Accordingly, this Committee has previously found guidance in the provisions of DR 2-110 on withdrawal from representation. N.Y. County 613 (1973). DR 2-110(A)(2) provides:

"a lawyer shall not withdraw from employment until the lawyer has taken reasonable steps 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 . . . ."

In light of this provision, in N.Y. County 613 we held that the lawyer must take such 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 a description of all legal matters on which the attorney is currently working, and such information as is required by the client or the new lawyer to protect the client from foreseeable prejudice.

Several courts have held that, where the client has a compelling need for papers, such as the defense of a murder charge, and lacks the means to pay the lawyer's fee, the lawyer must relinquish the retaining lien. Hauptmann v. Fawcett, 243 A.D. 613, 276 N.Y.S. 523, modified 243 A.D. 616, 277 N.Y.S. 631 (1935); Pomerantz v. Schandler, 704 F.2d 681 (2d Cir. 1983); People v. Altvater, 78 Misc.2d 24, 355 N.Y.S.2d 736 (N.Y. Crim. Ct. 1974). Compare Artim v. Artim, 109 A.D.2d 811, 486 N.Y.S.2d 328 (2d Dep't 1985)(absence of exigent circumstances); Petrillo v. Petrillo, 87 A.D.2d 607, 448 N.Y.S.2d 44 (2d Dep't 1982)(absence of exigent circumstances).

In the absence of this "compelling need", a court may require the lawyer to release the client's papers only if the parties settle their fee dispute or the client posts adequate security for payment. N.Y. County 609 (1972). See Rosen v. Rosen, 97 A.D.2d 837, 468 N.Y.S.2d 723 (1983)(court in matrimonial action awarded the discharged attorney a charging lien on any proceeds to be received by the wife upon the resolution of the action instead of a retaining lien on the wife's file, finding that it would have been inequitable for the attorney to retain the wife's papers, since it would have been almost impossible for her to prepare her case without them); Manfred & Sons, Inc. v. Mortillaro, 69 A.D.2d 1010, 416 N.Y.S.2d 156 (1979)(Trial Term correctly directed attorney to turn over client's documents to enable client to comply with a production order in another court, but court erred

in failing to provide for adequate security to protect attorney's retaining lien).

Where the client is impecunious, and thus unable to pay the lawyer's fee, courts have also ordered the release of a retaining lien upon substitution of a charging lien. Tiringer v. Grafenecker, 38 Misc.2d 29, 239 N.Y.S.2d 567 (Supt. Ct. 1962); Hernandez v. Nierenberg, 15 Misc.2d 818, 179 N.Y.S.2d 322 (Sup. Ct. 1958).

#### CONCLUSION:

The common law in New York gives a lawyer a retaining lien over all property, documents, moneys or securities that come into the lawyer's possession in the course of employment as a lawyer. However, both courts and ethics committees have restricted the right of lawyers to exercise a retaining lien. For example, (1) the lawyer must be satisfied that the fees billed are justly owed for services properly rendered, (2) the lawyer must take such 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 is 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.

April 5, 1990



# NASSAU COUNTY BAR ASSOCIATION

Long Island, New York

## BAR ASSOCIATION OF NASSAU COUNTY COMMITTEE ON PROFESSIONAL ETHICS

Opinion No. 1991-1  
(Inquiry No. 294)

Archive of Ethics Opinions

**Re:**  
Retaining advanced nents and other properties of the client to secure reimbursement of expenses he course of representation

**Digest:**  
An attorney may withhold documents and other property of the client in order to assert and protect a retaining lien for expenses advanced by the attorney without breaching the general duty to deliver a client's property promptly

**Code Provisions:**  
DR 5-103 (A) (1)  
DR 9-102 (C) (4)  
EC 5-7

**Described Facts:**  
An attorney has handled several foreclosure matters for a client, who now owes a sizeable legal fee. Attorney has withdrawn from further representation. Client has requested the forwarding of his files to successor counsel. Inquiring counsel has requested reimbursement for out-of-pocket expenses of foreclosure searches and service of process, and wishes to assert a retaining lien on the documents and other properties of the client to secure reimbursement for these expenses only.

**Inquiry:**  
May an attorney, who has been replaced by new counsel, assert a retaining lien upon the documents and other properties of the client in order to secure reimbursement for expenses advanced by the attorney in the chance of the representation?

**Determination:**  
Although an attorney generally has the professional obligation to deliver a client's property to the client promptly when requested, that obligation may be subordinate to the attorney's right to assert a retaining lien to enforce the right to be reimbursed for expenses advanced by the attorney in the course of the representation.

**Analysis:**  
Disciplinary Rule 9-402(C) (4) requires a lawyer promptly to "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". DR 9-402(C) (4). BANC 87-40. This obligation does not, however, overcome the attorney's right to be paid for services and expenses, and is subordinate to the attorney's right to assert a refusal to relinquish possession of the file in order to ensure payment of the attorney's fee. See DR 5-103(A) (1) See *M.E. v S.G.*, 124 Misc. 2d 851, 478 N.Y.S. 2d 539. *Cholst v Cholst*, 75 A.D. 2d 527, 426 N.Y.S. 2d 772. *Judiciary Law Sec 475*, BANC 87-40

Where a lawyer's fees and expenses remain unpaid, regardless of the reason for non-payment, the lawyer has a lien on all legal papers for which the client has made a demand. *New York County Opinion 609* (1972)

As this Committee discussed in BANC # 85-7,

At Common Law, the liens available to an attorney were of two kinds: (1) a retaining lien on all papers, securities or monies belonging to his client which came into his possession in the course of his professional employment which was, in essence, a general lien for the entire balance of the account, and was dependent, however, upon possession, and, (2) a charging lien, which was a judgment recovered through the attorney's efforts, but this lien was not dependent upon possession, as the very reason for its existence was to save the attorney's rights where he had been unable to get possession. In *Re Heinsheimer*, 214 N.Y. 361(1915). An attorney's retaining lien is a lien for the entire balance of accounts on all papers, securities or monies belonging to a client in the possession of an attorney and is dependent upon the attorney's physical possession of the client's property. *First Nat'l Bank of Ellenville v Hyman Novac Realt.*, 72 A.D. 2d 858 (1979)

As this Committee observed in BANC 90-10 "A retaining lien permits an attorney to retain all property and papers of the client that came into his possession until he has been paid for his legal services. The retaining lien affords the attorney as any other workman who is entitled to retain the things upon which he has worked until he has been paid for his work. It is a possessory lien only, depending for its existence on the attorney's possession of the papers. It is a passive right and cannot be actively enforced" (citations omitted)

We conclude that inquiring counsel may ethically assert a retaining lien on the documents and other properties of his former client to secure reimbursement for expenses and payment for services rendered, and that counsel's duty to deliver the documents and other properties to the client does not override the attorney's right to retain possession in asserting the retaining lien

The inquiry is answered in the affirmative

{Approved by Executive Subcommittee on 1/15/91 approved by Full Committee 1/23/91}

## ETHICS OPINION 780

[LAWHUB™ \(HTTP://MYLAWHUB.NYSBA.ORG/\)](http://mylawhub.nysba.org/) [CLE \(/CLE/CONTINUING\\_LEGAL\\_EDUCATION\\_HOME/\)](#)

[EVENTS \(/STORE/CALENDARSCHEDULE.ASPX?EXCLUDEEVENTTYPE=X\)](#)

[SECTIONS & COMMITTEES \(/SECTIONSANDCOMMITTEES/\)](#) [PUBLICATIONS \(/CUSTOMTEMPLATES/SECONDARYSTANDARD.ASPX?ID=43579\)](#)

[PRACTICE RESOURCES \(/PRACTICERESOURCES/\)](#) [LEADERSHIP & ADVOCACY \(/LEADERSHIPANDADVOCACY/\)](#)

[MEMBERSHIP \(/CUSTOMTEMPLATES/SECTIONLANDING.ASPX?ID=50848\)](#) [MEMBERS ONLY \(HTTP://WWW.NYSBA.ORG/MYNYSBA.ASPX\)](#)

[Home \(/\)](#) [Ethics Opinion 780 \(/CustomTemplates/Content.aspx?id=5389\)](#)

  
[\(/CustomTemplates/Content.aspx?id=5389&css=print\)](#)   
[Like 0](#)

NEW YORK STATE BAR ASSOCIATION  
Committee on Professional Ethics

[Opinion #780 \(12/08/2004\)](#)

Topic: Retaining copies of client's file over  
client's objection; limitation of attorney liability.

Digest: Generally proper for a lawyer to retain  
copies of a client's file; proper to require a release  
of malpractice liability as a condition of returning  
the file without retaining copies.

Code: DR 2-110(A)(2), 4-101(C)(4), 6-102(A), 9-  
102(C)(4); EC 4-6.

### QUESTIONS

1. May a lawyer retain copies of the client's file over the objection of the client?
2. May the lawyer demand a release from liability as a condition of not retaining copies?

### OPINION

#### 1. May copies of file documents be retained by the lawyer?

When a lawyer's employment by a client ends, whether because the lawyer withdraws, the client terminates the engagement or the matter is completed, the lawyer is required to deliver to the client property, including files, which the client is entitled to receive as a matter of law. The New York Code of Professional Responsibility (the "Code") does not provide guidance on which documents the client is entitled to receive as a matter of law. Rather, the Code provides in various sections only that the lawyer is ethically obligated to return to the client that which the client is legally entitled to receive. DR 2-110(A)(2) of the Code, governing withdrawal from employment, requires a lawyer contemplating withdrawal to "[deliver] to the client all papers and property to which the client is entitled." Similarly, DR 9-102(C)(4) of the Code provides that a lawyer shall "[p]romptly 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 which the client or third person is entitled to receive."

The question of which documents the client is entitled to receive is "generally a question of law, not ethics." N.Y. State 766 (1993). See N.Y. State 623 (1991) ("Which documents may be deemed to belong to the lawyer is not always easy to ascertain; in certain instances, the lawyer's ownership of such documents may be a complex issue of both law and fact."). See Restatement (Third) of the Law Governing Lawyers §46(2).

Although the Code does not explicitly address the issue of whether the lawyer has an interest in the file that would permit the lawyer to retain copies of file documents, there can be little doubt that the lawyer has such an interest. As a preliminary matter, nothing in the Code prohibits a lawyer from retaining copies of the file, while EC 4-6 refers to "personal papers of the client" as distinguished from "papers of the lawyer." DR 4-101(C)(4) of the Code provides as an exception to the general rule of confidentiality the lawyer's right to reveal a client's confidences or secrets in order to collect fees or defend against an accusation of wrongful conduct. Implicit in that rule is the lawyer's right to retain copies of the file in order to collect a fee or to defend against an accusation of wrongful conduct. New York case law appears to recognize that both the client and the lawyer have an interest in the file.<sup>[1]</sup> Finally, the lawyer's right to retain copies of the file may be reflected in a retainer agreement or an engagement letter.

In summary, we agree with the several ethics opinions from other jurisdictions that a lawyer may retain copies of the file at the lawyer's expense.<sup>[2]</sup> This general rule may be subject to exceptions that we are not required to elaborate on in this opinion, such as 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.

## 2. May a lawyer demand a release as a condition of not retaining copies of the file?

Although this Committee has previously held that a lawyer may not insist on a general release as a condition of returning the client's file, N.Y. State 339 (1974), it has not addressed the question whether a lawyer's agreement to give up the right to retain copies of the file may be conditioned on such a release. Because we believe that a lawyer has a right to retain copies of the file, if the client objects to the lawyer's retention of copies, we hold that the lawyer may insist on a general release as a condition of acquiescence.

DR 6-102(A) of the Code prohibits a lawyer from "prospectively" seeking to limit liability to a client for malpractice, but does not prohibit a lawyer from seeking a release for work *already completed*, as contemplated here. A lawyer may "ethically negotiate with a former client for the settlement or release of potential malpractice claims, but only after the lawyer takes specific steps to insure that the negotiations are fair", which steps include advising the client to seek independent counsel in the negotiation and consummation for the release. N.Y. State 591 (1988).<sup>[3]</sup>

## CONCLUSION

A lawyer may generally retain copies of documents in the client's file at the lawyer's own expense, even over the client's objection. As a condition of foregoing this right, a lawyer may seek to have the client release the lawyer from malpractice liability.

(19-04)

[1] In *Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn*, 91 N.Y.2d 30, 37 (1997), the Court of Appeals observed that courts have "refused to recognize a property right of the attorney in the file superior to that of the client." The New York Supreme Court case cited in *Sage* for that proposition is *Bronx Jewish Boys v. Uniglobe, Inc.*:

Under New York law, an attorney has a general possessory retaining lien which allows an attorney to keep a client's file until his/her legal fee is paid. Implied in this is the rule that attorneys have no possessory rights in the client files other than to protect their fee. *In other words, the file belongs to the client.*

*Bronx Jewish Boys v. Uniglobe, Inc.*, 166 Misc.2d 347, 350, 633 N.Y.S.2d 711, 713 (Sup. Ct. 1995) (citation omitted, emphasis added). Although *Bronx Jewish Boys* held that the "file belongs to the client", the Court of Appeals in *Sage* observed that both the lawyer and client have an interest in the "client's" file. See also *in re Grand Jury Proceedings (Vargas)*, 727 F.2d 941, 944-45 (10<sup>th</sup> Cir.) ("So far as we can determine, it is a general principle of law that client files belong to the client. . . the attorney's interest is only that of a retaining lien and his interest at best is a pecuniary one, not an interest of ownership, nor privacy"), cert. denied *sub nom. Vargas v. United States*, 469 U.S. 819 (1984); *Matter of Celestini*, 321 F. Supp. 1313, 1316 (N.D. Ca. 1971) ("In the instance of a legal file, the client has the right to the file. It is therefore 'property' of the client"). But see Michigan Ethics Committee Op. R-19 (2000) ("There is no legal support in Michigan for the proposition that the files are the property of the client. The applicable legal precedent involving other professionals closely analogous to lawyers demonstrates that the courts have recognized that such professionals provide services, not goods.")

[2] For instance, Nebraska adopted the rule that "a client is entitled to (1) the documents he gave the lawyer; (2) anything acquired in discovery; (3) all correspondence; and (4) all notes, memorandums, and briefs generated by the lawyer," although "[t]he lawyer may retain copies of the file, but may not charge for photocopying unless the fee agreement provided otherwise." Neb. Op. 2001-03 (2001), indexed in ABA/BNA Lawyers' Manual on Professional Conduct 1201:5501 (emphasis supplied). Similarly, Massachusetts demands that an attorney return to the client any "original documents supplied by the client," as well as "any investigatory or discovery documents for which the client has paid out-of-pocket expenses." Mass. Op. 92-4 (1992), indexed in ABA/BNA Lawyers' Manual on Professional Conduct 1001:4603. Massachusetts allows the firm to keep copies of those documents at its own expense. *Id.* A similar opinion was reached by San Francisco, which recognized that although "[t]he lawyer must return all materials the client delivered to him . . . the lawyer may copy a client's file before turning it over." S.F. Bar Op. 1990-1 (1990), indexed in ABA/BNA Lawyers' Manual on Professional Conduct 901:1851. San Francisco also concluded that the lawyer must copy the file at his own expense. *Id.* Alabama allows an attorney to retain a copy of a client's file so long as the attorney bears the cost of reproduction.



Ala. Op. 86-102 (1988), indexed in ABA/BNA Lawyers' Manual on Professional Conduct 901:1048 ("A lawyer who previously served as counsel for a client and is replaced by other counsel may keep the client's files only if the client so directs because the files belong to the client. The lawyer may, however, retain copies of the client's file at her own expense").

Ukewise, the Ohio State Bar Association requires an attorney to promptly deliver a file to a former client, but permits an attorney to retain copies of the file at the attorney's own expense. Ohio Op. 92-8 (1992), indexed in ABA/BNA Lawyers' Manual on Professional Conduct 1001:6856 ("A lawyer whose former client requests receipt of her case file and has paid the lawyer in full must promptly deliver the file to the client. The lawyer may keep a copy of the file but may not charge the client for the copying costs"). The Colorado Bar Association arrived at the same conclusion, requiring that, upon termination, lawyers "surrender papers and property to which the client is entitled." Colo. Op. 104 (1999), indexed in ABA/BNA Lawyers' Manual on Professional Conduct 1101:1902. Colorado permits a lawyer "to retain copies of documents surrendered to a client," but adds that the lawyer "may not charge the client for duplication costs." *Id.* Similarly, the Kentucky Bar Association opined, "When a lawyer is discharged, he should deliver to the client all property and files to which the client is entitled...[t]he lawyer may wish to copy items in the client's file." Ky. Op. E-235 (1980), indexed in ABA/BNA Lawyers' Manual on Professional Conduct 801:3902.

[3] To maintain fair negotiations with a former client, a lawyer must adhere to the following conditions: "a client must be fully apprised of the facts pertaining to the representation that may give rise to specific claims against the lawyer; the lawyer has been discharged or has withdrawn from the representation in accordance with DR 2-110; and the lawyer has advised the client to secure independent counsel in the negotiation and consummation of such an agreement." N.Y. State 591 (1988); N.Y. State 275 (1972). To maintain fair negotiations, an attorney may not retain a lien on a client's papers and documents. *Id.* ("Fair negotiations over a release are not possible while the lawyer retains a position of advantage by withholding the client's papers"). Although an attorney may retain a lien on a client's papers until the client compensates the attorney for any unpaid legal fees, N.Y. State 567 (1984), the attorney may not retain the file as a mechanism to secure a release from malpractice. N.Y. State 591 (1988) ("The lawyer may not retain the client's files as a bargaining chip to secure a release). See also Wis. Op. E-85-12 (1986), indexed in ABA/BNA Lawyers' Manual on Professional Conduct 801:9117 ("A lawyer may not condition the return of client documents and the settlement of his related fees upon the client's release of any legal malpractice claims ... unless the client is advised in writing to secure independent counsel in the negotiation and consummation of such agreement") (emphasis supplied).

Related Files

Opinion 780 ([http://old.nysba.org/Content/ContentFolders/EthicsOpinions/Opinions751825/EO\\_780.pdf](http://old.nysba.org/Content/ContentFolders/EthicsOpinions/Opinions751825/EO_780.pdf)) (PDF File)

COMMUNITY RESOURCES

- [Hire a New York Attorney](#)  
(<http://www.nysba.org/CustomTemplates/SecondaryStandard.aspx?id=26544>)
- [Find a Mediator](#)  
(<http://www.nysba.org/CustomTemplates/SecondaryStandard.aspx?id=26540>)
- [Family Healthcare Decisions Act Resource Center](#)  
(<https://www.nysba.org/EHCDA/>)
- [Client's Rights and Responsibilities](#)  
(<https://www.nysba.org/CustomTemplates/SecondaryStandard.aspx?id=26544>)
- [Free Legal Assistance](#)  
(<http://www.lawhelp.org/nv/>)
- [Judicial Election Information](#)  
(<http://www.nysba.org/CustomTemplates/SecondaryStandard.aspx?id=26540>)
- [A Guide to Attorney Disciplinary Procedures in New York State](#)  
(<https://www.nysba.org/CustomTemplates/SecondaryStandard.aspx?id=26561>)
- [When Mass Disaster Strikes](#)  
(<https://www.nysba.org/CustomTemplates/SecondaryStandard.aspx?id=26564>)
- [Law, Youth and Citizenship Program](#)  
(<http://www.nysba.org/CustomTemplates/SectionLanding.aspx?id=27693>)
- [Mock Trial \(NYS Mock Trial\)](#)

NEWS CENTER

- [News Center](#)  
(<https://www.nysba.org/newscenter/>)
- [News Releases](#)  
(<https://www.nysba.org/pressreleases/>)
- [Vital Statistics](#)  
(<https://www.nysba.org/CustomTemplates/SecondaryStandard.aspx?id=26992>)
- [Legislative Priorities](#)  
(<https://www.nysba.org/CustomTemplates/SecondaryStandard.aspx?id=26544>)
- [State Bar Reports](#)  
(<https://www.nysba.org/CustomTemplates/SecondaryStandard.aspx?id=26785>)
- [Press Kit](#)  
(<https://www.nysba.org/CustomTemplates/SecondaryStandard.aspx?id=26916>)
- [Media Services and Public Affairs Department](#)  
(<https://www.nysba.org/CustomTemplates/SecondaryStandard.aspx?id=26961>)

ABOUT NYSBA

- [Need password help?](#)  
(<https://www.nysba.org/newscenter/needpasswordhelp/>)
- [How Do I...?](#)  
(<http://www.nysba.org/howdoi/>)
- [History and Structure of the NYSBA](#)  
(<https://www.nysba.org/CustomTemplates/SecondaryStandard.aspx?id=27825>)
- [Legislative Priorities](#)  
(<https://www.nysba.org/CustomTemplates/SecondaryStandard.aspx?id=26544>)
- [Diversity and Inclusion](#)  
(<https://www.nysba.org/CustomTemplates/SecondaryStandard.aspx?id=27268>)
- [Leadership Profiles](#)  
(<https://www.nysba.org/CustomTemplates/SecondaryStandard.aspx?id=27051>)
- [Executive Committee](#)  
(<https://www.nysba.org/CustomTemplates/SecondaryStandard.aspx?id=27051>)
- [Section Chair Profiles](#)  
(<https://www.nysba.org/CustomTemplates/SecondaryStandard.aspx?id=27052>)
- [NYSBA Staff](#)  
(<https://www.nysba.org/CustomTemplates/SecondaryStandard.aspx?id=53139>)
- [Employment at NYSBA](#)  
(<https://www.nysba.org/employment/>)
- [Social Media Links](#)  
(<https://www.nysba.org/CustomTemplates/SecondaryStandard.aspx?id=54252>)
- [NYSBA Social Media Policy](#)  
(<https://www.nysba.org/socialmediapolicy/>)
- [NYSBA Awards and Competitions](#)  
(<https://www.nysba.org/awards/>)

ONLINE STORE

- [NYSBA Online Marketplace](#)  
(<http://www.nysba.org/CustomTemplates/SecondaryStandard.aspx?id=34501>)
- [Books and Form Products](#)  
(<http://www.nysba.org/CustomTemplates/SecondaryStandard.aspx?id=1045>)
- [Downloadable Forms](#)  
(<http://www.nysba.org/CustomTemplates/SecondaryStandard.aspx?id=1045>)
- [Practice Forms](#)  
(<http://www.nysba.org/CustomTemplates/SecondaryStandard.aspx?id=1045>)
- [CLE On Demand - Audio and Video](#)  
(<https://www.nysba.org/CLEONLINE/>)
- [CLE on CD](#)  
([https://www.nysba.org/CLE\\_on\\_CD/](https://www.nysba.org/CLE_on_CD/))
- [CLE Coursebooks](#)  
([https://www.nysba.org/CLE\\_Coursebooks/](https://www.nysba.org/CLE_Coursebooks/))

CONNECT WITH NYSBA

-  <http://www.facebook.com/nysba>
-  <http://www.twitter.com/nysba>
-  <http://www.linkedin.com/company/nysba>
-  <http://instagram.com/nysbatebar>
-  <http://www.youtube.com/nysba>
- [SITEMAP](#)  
(<http://www.nysba.org/SITEMAP.aspx>)
- [COPYRIGHT](#)  
(<http://www.nysba.org/CUSTOMTEMPLATES/CONTENT.ASPX?ID=46>)
- [PRIVACY POLICY](#)  
(<http://www.nysba.org/CUSTOMTEMPLATES/CONTENT.ASPX?ID=44>)
- [TERMS OF USE](#)  
(<http://www.nysba.org/CUSTOMTEMPLATES/CONTENT.ASPX?ID=45>)
- [CONTACT US](#)  
(<http://www.nysba.org/CONTACT/>)
- [HOW DO I...?](#)  
(<http://www.nysba.org/howdoi/>)

[Advertise with NYSBA](http://www.nysba.org/CustomTemplates/SecondaryStandard.aspx?id=27727)  
[http://www.nysba.org/CustomTemplates/SecondaryStandard.aspx?](http://www.nysba.org/CustomTemplates/SecondaryStandard.aspx?id=27727)  
[id=27727](http://www.nysba.org/CustomTemplates/SecondaryStandard.aspx?id=27727)

[Doing Business With](https://www.nysba.org/CustomTemplates/SecondaryStandard.aspx?id=27826)  
[NYSBA](https://www.nysba.org/CustomTemplates/SecondaryStandard.aspx?id=27826)  
[https://www.nysba.org/CustomTemplates/SecondaryStandard.aspx?](https://www.nysba.org/CustomTemplates/SecondaryStandard.aspx?id=27826)  
[id=27826](https://www.nysba.org/CustomTemplates/SecondaryStandard.aspx?id=27826)

[Directions to the State Bar](https://www.nysba.org/map/)  
[Center](https://www.nysba.org/map/)  
<https://www.nysba.org/map/>



One Elk Street, Albany, NY 12207  
Phone: 518-463-3200 Secure Fax: 518.463.5993

© 2016 New York State Bar Association

## **CASES**

**Theroux v. Theroux, 145 AD2d 625 (2d Dept)**

**Cohen v. Cohen (not Bob) and Bierman, 183 AD2d 802 (2d Dept)**

**Katsaros v. Katsaros and Marshall, 152 AD2d 539 (2d Dept)**

**Moody v. Sorokina, 50 AD3d 1522 (4<sup>th</sup> Dept)**

**Pillali v. Pillali and Schell (15 AD3d 466 (2d Dept)**

**Zelman v. Zelman, 15 Misc 3d 372 (NY County)**

**Haser v. Haser and Robinson, 271 AD2d 253 (1<sup>st</sup> Dept)**

**Charnow v. Charnow and McCarthy Finger (not that finger) 134 AD3d 875**

**JKC v. TWC, 39 Misc 3d 899 (Monroe County)**

**Robert A. Cohen**, one of the founding partners of Tabat, Cohen, Blum & Yovino, PC, has practiced matrimonial and family law in Suffolk and Nassau counties for more than 35 years. He was selected to the Board of Directors of the Suffolk County Matrimonial Bar Association and frequently lectures on custody, equitable distribution and support issues, as well as trial techniques. Mr. Cohen's continuing selection to the Super Lawyers list and achievement of an AV® Preeminent™ Peer Review Rating from Martindale-Hubbell® illustrates the great respect he has earned from his peers and the judiciary.

**Honors & Awards:**

- Top Lawyer in the NY Metro Area; Super Lawyers (2007- 2016)
  - Long Island's Top Rated Lawyer; ALM Legal Leaders (2014- 2016)
  - Top Legal Eagle; Long Island Pulse Magazine (2012-2016)
  - AV® Preeminent™ Peer Review Rating; Martindale-Hubbell® (2006-2016)
  - Rated 10.0 out of 10.0 "Superb"; Avvo (2013-2016)
  - Lead Counsel Rated; Thompson Reuters (2014 & 2016)
  - Top 10 Attorney Award; The National Academy of Family Law Attorneys (2015)
  - Nation's Top 1% Award; National Association of Distinguished Counsel (2015)
- Co-Captain Hewlett High School Soccer Team