EF-17-01
Retention and Destruction of Closed Client Files
February 28, 2017

There is no one answer to the central question of how long a lawyer must keep closed files before they may be destroyed. As a general rule, if the former client has not requested the file, the lawyer should, at a minimum, retain the closed files until six years have passed after the last act that could result in a claim being asserted against the lawyer. While six years is a floor, it is not a ceiling. A lawyer should carefully consider whether the file contains items that the lawyer should retain for a longer time or whether special circumstances exist such that the file should be retained for a longer time. Certain practice areas, such as estate planning, normally create those circumstances that require the lawyer to preserve closed files for a longer period of time. Before closed client files are destroyed, a lawyer must ensure that important original client property is returned and that steps are taken to preserve the confidentiality of client information. Lawyers should inform clients both of their right to the file and of the firm's file destruction policy in the engagement agreement and in any letter terminating or completing the relationship or engagement. The lawyer should keep a record or index of files that have been destroyed for a reasonable period of time.

Wisconsin Ethics Opinions E-84-5 and E-98-1 are withdrawn.

Introduction

How long must a lawyer retain closed client files? This question arises in several contexts: many times, a lawyer has former client files that are twenty or thirty years old, and the lawyer no longer has room to store them; sometimes, a lawyer is closing his or her office or retiring; and sometimes, a lawyer has died. This question is also difficult to answer because it often depends on a host of other questions, such as: whether the client files contain original client documents or records; whether a minor is involved in the representation; and what type of representation was involved.

This opinion addresses the questions of how long closed client files should be kept by the lawyer and what steps the lawyer should take before destroying closed client files. This opinion also addresses the responsibilities of the lawyer or law firm that represented the client in the matter. This opinion does *not* address the responsibilities of a lawyer who is winding up the practice of another lawyer, such as when a lawyer is appointed as a trustee under Supreme Court Rules Chapter 12.

Lawyers may choose to close client files in physical or electronic format, provided that the closed files are secure, accessible by the lawyer, and reproducible in a format that is usable by the client. The guidance provided by this opinion applies equally to physical files and files stored in an electronic format.

How long after the end of the representation must a lawyer keep closed client files?

The Wisconsin Rules of Professional Conduct (the "Rules") do not provide a required retention time for closed files, and thus there is no "magic number" to be found in the Rules. SCR 20:1.16(d) does, however, require lawyers to take steps to the extent reasonably practicable to protect the interests of the client upon termination of the representation. That Rule has consistently been interpreted to require lawyers to preserve closed files for a period of time sufficient to protect the interests of the clients.

In Wisconsin Formal Ethics Opinion E-84-5, the State Bar's Standing Committee on Professional Ethics (the "Committee") considered the question of dealing with closed client files in the lawyer's possession. While the Committee opined that lawyers did not have a duty to preserve all client files on a permanent basis, the opinion concluded, relying on ABA Informal Opinion 1384 (1977), that "former clients reasonably expect that valuable and useful information in their attorney's files, not otherwise readily available to the clients will not be prematurely and carelessly destroyed." The Committee, also relying on ABA Informal Opinion 1384, recognized the reasonable expectations of the former client, cautioned lawyers to maintain files for at least the duration of any applicable statute of limitations that might pertain to a client's claim, and instructed lawyers to return important documents to the client or to maintain them in storage.

In Ethics Opinion E-98-1, the Committee took the position that, if the former client had not requested the file, the lawyer should, at a minimum, retain the closed files until six years have passed after the last act that could result in a claim being asserted against the lawyer, and we reaffirm that guidance here. This six year minimum is consistent with SCR 20:1.15(g)(1), which requires lawyers to preserve complete records of trust account funds and other trust account property for at least six years after the date of termination of representation. It is also consistent with the statute of limitations for most malpractice actions,[1] and for most matters, should provide a sufficient period of time to protect the interests of the client.

While six years is a floor, it is not a ceiling. The interests of the client may require that the lawyer retain a closed client file for longer than six years. A lawyer should carefully evaluate whether the file contains items that the lawyer should retain for a longer time or whether circumstances exist such that the file should be retained for a longer time. Some files must usually be retained longer than six years, such as files involving claims of minor children, estate planning, and certain tax matters.[2] In determining how long to retain closed client files, the lawyer must be mindful of relevant statutes of limitations as well as the needs of the client in the particular matter. A lawyer's own interest may also cause a lawyer to retain closed files for more than six years.[3] Many firms have written file retention policies that specify different

[1] See Wis. Stat. § 893.52. Note, however, that in actions for legal malpractice the date of injury, rather than the date of the negligent act, commences the period of limitation. *Auric v. Continental Casualty Co*., 111 Wis. 2d 507, 331 N.W.2d 325 (1983). Moreover, the "discovery rule" could extend the period even further.

[2] Similarly, the Tennessee Supreme Court Board of Professional Responsibility in Op. 2015-F-160 concluded that the type of representation is relevant because files should not be destroyed before the expiration of applicable statutes of limitations, which also vary from matter to matter. Accordingly, files "pertaining to minors should be retained until their majority," and certain tax files "should be maintained until the client is no longer exposed to tax liability," the board said. "A lawyer might also wish to consider retaining closed files for six (6) years, the usual statute of limitation period for contract claims in Tennessee, after the conclusion of the representation," it added. The Tennessee board's guidance aligns for the most part with advice in Kan. Bar Ass'n Ethics Advisory Comm., Op. 15-01, 9/28/15. The Kansas committee emphasized that "no hard-and-fast rule can be declared" regarding how long lawyers must retain client files. Like the Tennessee board, it said the "nature and contents of some files may indicate a need for longer retention" because applicable statutes of limitations in client matters will vary.

[3] For example, SCR 21.18 establishes the time limitation for action by the Office of Lawyer Regulation: "(1) Information, an inquiry, or a grievance concerning the conduct of an attorney shall be communicated to the director within 10 years after the person communicating the information, inquiry or grievance knew or reasonably should have known of the conduct, whichever is later, or shall be barred from proceedings under this chapter and SCR chapter 22."

retention periods for different types of files. For example, some firms may have policies mandating longer retention periods for estate planning files than for criminal defense files.[4]

While Wisconsin Ethics Opinion E-98-1 recognized that maintaining former clients' files forever was not practicable and that lawyers should not be burdened by the attendant economic costs, it also recognized that certain safeguards should be followed before a file is destroyed. While we agree with most of the safeguards recognized in E-98-1, we do not agree with all of them. One of the safeguards with which we disagree required that "[a]bsent an express agreement with the client, the lawyer should at a minimum try to reach the client by mail at the client's last known address, should advise the client of the intent to destroy the file absent contrary client instruction, and should wait a suitable period of time (perhaps six months) before taking action to destroy the files."[5] Although some practitioners may choose to follow this or a similar practice, such a requirement, regardless of the age of the file or the type of the matter, is not required by the Rules of Professional Conduct, nor by any Wisconsin case and can be unduly burdensome.

We, therefore, adopt the following minimum safeguards that should be followed before closed client files may be destroyed. In doing so, we stress, as other ethics opinions have done, that there is "no one safe answer to the central question of how long must [a lawyer's] closed files be kept before they are destroyed."[6]

---

[4] In some circumstances, it is possible for a lawyer to obtain the client's express agreement to keep files for a lesser period. The client's agreement must meet the informed consent standard, as set forth in SCR 20:1.0(f), meaning the lawyer must fully describe the material risks of and alternatives to the lesser retention period to the client. The lesser retention period must still be reasonable under the circumstances (e.g. routine traffic cases). In most circumstances, lawyers should observe six year minimum retention period for closed client files.

[5] E-98-1 recognized the following safeguards:

> 1. The lawyer has specific responsibility to hold client property in trust under SCR 20:1.15. The lawyer must be satisfied that the files have been adequately reviewed. To do otherwise, such as a spot check, would run the risk that client property or original documents would be destroyed.
> 2. The existence of client property, or information that could not be replicated from other sources if necessary, and the age of the materials in the files are all factors that should be considered in determining the reasonableness of the decision to destroy the file. For example, client property or original documents such as wills or settlement agreements ordinarily should not be destroyed under any circumstances, and the level of effort to locate a missing client should be more diligent where there is actual client property involved than where, for example, the file is a long resolved collection file. *See* S.C. Ethics Op. 95-18, ABA/BNA Man. Prof. Conduct 45:1208.
> 3. At a minimum the files should not be destroyed until six years have passed after the last act that could result in a claim being asserted against the lawyer. *Cf.* Kaap, *The Closed File Retention Dilemma*, 1 Wis. B. Bull. 25 (Jan. 1988).
> 4. In the ideal situation, the lawyer would have discussed the issue of file retention/destruction in either the engagement letter with the client or in the letter terminating or completing the relationship or engagement. Absent an express agreement with the client, the lawyer should at a minimum try to reach the client by mail at the client's last known address, should advise the client of the intent to destroy the file absent contrary client instruction, and should wait a suitable period of time (perhaps six months) before taking action to destroy the files. *See* Los Angeles County Ethics Op. 475 (1993), ABA/BNA Man. Prof. Conduct 1001:1703.
> 5. The lawyer should keep a record or index of files that have been destroyed for a reasonable period of time. *See* ABA Informal Op. 1384.

[6] Tenn. Supreme Court Bd. of Prof'l Responsibility, Op. 2015-F-160 (12/11/15). The Tennessee Supreme Court Board reviewed authorities from other jurisdictions and distilled three "general guidelines" for lawyers to consult when assessing how long they must retain a client's file:

1. The lawyer must preserve the file for a length of time sufficient to protect the client's reasonably foreseeable interests. As discussed above, this should normally be a minimum of six years.

2. The lawyer has specific responsibility to hold client property in trust under SCR 20:1.15, and important documents or other materials given to the lawyer by the client should not be destroyed without consent of the client. The lawyer must be satisfied that the files have been adequately reviewed or that the firm's established procedures give reasonable assurance that the file does not contain client property. To do otherwise, such as a spot check, would run the risk that client property or original documents would be destroyed. Client property or original documents such as wills[7] or settlement agreements ordinarily should not be destroyed.

3. Lawyers should review their firm's policies and ensure that the firm's engagement letters and closing letters contain a statement informing the client of the right to the file and the firm's file retention policy. While this is not explicitly required by the Rules, it is an important and relatively easy way to protect the client's interests upon termination of the representation.[8]

4. Likewise, the lawyer must take reasonable measures to ensure that the method by which closed client files are stored, whether the files are in physical or electronic format, protects the confidentiality of those files.

5. Lawyers must take reasonable steps to ensure that closed client files are destroyed in a manner that preserves the confidentiality of the information contained in the files.[9] This applies to files stored both physically and in electronic format. Normally, the retention of a professional shredding service that gives contractual promises of confidentiality will suffice for the destruction of physical files. With respect to electronic files, the lawyer must take steps to ensure that any information protected by SCR 20:1.6 is no longer retrievable from any hardware, software, or device that is no longer in the lawyer's control.

---

1. There is no Tennessee Rule of Professional Conduct that requires a retention period of greater than 5 years following the termination of representation; however, the type of representation involved may mandate a longer retention time.
2. Authority to dispose of a file should be obtained from a client whenever possible, so the better practice would be to address file retention initially or contact all clients and determine their wishes.
3. Absent client authority to dispose of files, an attorney should individually review files and be satisfied that no important papers of the clients are contained in the file before destruction.

[7] For example, Wis. Stat. § 856.05(1) states that a person having the custody of any will shall, within 30 days after he or she has knowledge of the death of the testator, file the will in the proper court or deliver it to the person named in the will to act as personal representative. If a lawyer cannot determine whether the testator has died, the lawyer must deposit the original will with the register of the probate court pursuant to Wis. Stat. § 853.09(1).

[8] Such a clause need not be lengthy and should state the firm's policy in plain language, such as:

> [Firm] will retain your client file for ten years from the conclusion of the matter. After ten years, your file will be destroyed, without further notice to you, in a manner which preserves the confidentiality of your information. Should you wish to receive your file, please notify [Firm] before ten years have elapsed and we will promptly provide your file.

[9] See SCR 20:1.6(d).

6. The lawyer should keep a record or index of files that have been destroyed for a reasonable period of time.[10]

Lawyers are reminded that they must maintain records of trust account funds and property for at least six years after the termination of the representation.[11]

Conclusion

Lawyers have a responsibility to take reasonable steps upon termination of the representation to protect the interests of the client, and preservation of client files for a minimum of six years is an important part of that duty. Lawyers must ensure, both in the storage and eventual destruction of closed files, that client information is protected. Lawyers should also include the firm's file retention policy in engagement agreements and closing letters. Maintaining files in an orderly fashion with clear records of where they are and what is in them will assist lawyers in fulfilling their duty to protect client interests upon termination of the representation.

Wisconsin Formal Ethics Opinions E-84-5 and E-98-1 are withdrawn.

[10] See ABA Informal Op. 1384.

[11] SCR 20:1.15(g)(1).