Wisconsin Ethics Opinion EF-16-03
The Ethical Obligation of the Lawyer to Surrender the File upon Termination of the Representation
December 29, 2016[1]

Though maintained in the lawyer's office, the client's file is the client's property and SCR 20:1.16(d) requires a lawyer to surrender the file at the request of the client or successor counsel upon termination of the representation. The lawyer must honor a request for the file from a client or successor counsel, unless the client has instructed that the file not be provided to successor counsel. When a client requests that documents be provided in an electronic format and the lawyer has maintained those documents electronically, the lawyer should provide those documents in the electronic format. A lawyer may have to convert electronic files to paper format if the client lacks the technological expertise or financial means to access digitized images, but a lawyer normally is not required to provide both a hard copy and an electronic copy of the former client's documents.

The fact that the lawyer may have previously provided copies of documents to the client during representation does not relieve the lawyer of the duty to provide the client with the complete file when representation is terminated. Further, the duty to surrender the file is not conditional and the lawyer may not withhold a file to coerce payment of fees, or for other reasons that benefit the lawyer. A lawyer may retain a copy of the client file for the lawyer's own records, but because copying the file is for the lawyer's benefit, a lawyer who chooses to retain copies of documents surrendered to a client may not charge the client for the duplication costs.

Wisconsin Formal Ethics Opinions E-00-03, E-84-5, E-82-7 and Memorandum Opinion 4/78 B are withdrawn.

Introduction

A lawyer's duty to promptly surrender the file upon termination of the representation is well established, yet questions often arise about the scope of this duty. In this opinion, the State Bar's Standing Committee on Professional Ethics (the "Committee") addresses the following questions regarding the duty to surrender the file upon termination of the representation:

1. What materials must a lawyer include when a former client requests the file?
2. Does a law firm have a duty to provide, at the former client's request, a copy of the former client's file in an electronic format?
3. If a lawyer has provided copies of all materials to the client during representation, is the lawyer required by SCR 20:1.16(d) to provide, at the lawyer's expense, duplicate copies to the former client when representation is terminated?
4. May a lawyer retain client papers to secure payment of the lawyer's fee?
5. May a lawyer charge the former client to copy the file?
6. How should a lawyer respond to a request from successor counsel for a former client's file?

[1] This opinion was amended on March 8, 2017 to clarify that the duty to surrender the file arises only when the file is requested by a client or successor counsel.

This opinion addresses the ethical duties of a lawyer pursuant to the Wisconsin Rules of Professional Conduct for Attorneys (the "Rules").[2]

I. What materials must a lawyer include when a former client requests the file?

The Committee has previously recognized that the client's file is the client's property even though it is maintained in the lawyer's office.[3] This view is widely shared by other jurisdictions as well.[4] This duty to surrender the file arises when the client or successor counsel requests the file upon or after termination of the representation. Although the duty to provide a former client with the file is rarely disputed, what materials must be included in the file has been the subject of debate. Consequently, acknowledging that the client owns the file and that the lawyer has a duty to provide the client with the file does not answer the question of what comprises the file.

SCR 20:1.16(d)[5] governs the lawyer's duties when representation ends and is the Rule primarily applicable when a former client requests the file.[6]

> (d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.[7]

Two portions of paragraph (d) are particularly relevant to our opinion.

First, the Rule requires a lawyer to take steps that are "reasonably practicable to protect a client's interests." "Reasonably" is defined in SCR 20:1.0(k) as "the conduct of a reasonably prudent and competent lawyer." ABA Comment [9] to SCR 20:1.16(d) cautions that a lawyer must take all reasonable steps to mitigate the consequences of withdrawal, even if the lawyer has been unfairly discharged by the client.

Second, paragraph (d) mandates that the lawyer surrender "papers and property to which the client is entitled." The Rule does not define "papers and property to which the client is entitled," and

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[2] This opinion does not address a client's property rights or other legal rights to the file or materials in the file. Nor does this opinion address the obligations of a lawyer when a discovery demand is made for some or all of a client file.

[3] See Wisconsin Ethics Opinion E-00-03 (2000).

[4] See, e.g., Colorado Ethics Opinion 104 (1999); Michigan Ethics Opinion RI-203 (1994); Kansas Ethics Opinion 92-05 (1992); Alaska Ethics Opinion 95-6 (1995).

[5] ABA Model Rule 1.16(d) is identical to SCR 20:1.16(d).

[6] SCR 20:1.15(d)(1) also requires that a lawyer shall promptly deliver to the client other property to which the client is entitled. This would include original documents provided by the client. See ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 471 (2015).

[7] The Rule uses the term "client" rather than "former client," despite the fact that most requests for the file come from former clients. For that reason, the use of the term "client" in this opinion encompasses requests from former clients.

jurisdictions differ in how they interpret this duty. While discipline is frequently imposed for failing to surrender a file, the Wisconsin Supreme Court has never defined what "papers and property" the lawyer must surrender upon termination.[8]

SCR 20:1.16(d) requires a lawyer to take steps to the extent reasonably practicable to protect a client's interest and to mitigate the consequences to the client of the termination of the representation. It is important to bear in mind this purpose – protection of the client's interests – in considering what materials must be provided to the client.

With that purpose in mind, we reaffirm the conclusion reached in prior opinions that lawyers have an obligation to surrender the file, with certain exceptions, upon termination of the representation, and, given the variety of formats in which information is stored today, we also provide the following guidance concerning certain types of materials (or information) that normally comprise the lawyer's "file" on a matter.

Materials that the Lawyer Must Provide to the Former Client

The following materials that must be provided to the former client, unless prohibited by other law:

- Any materials that were provided to the lawyer by the client;[9]
- Legal documents filed with a tribunal or those completed, ready to be filed, but not yet filed;[10]
- Discovery, including interrogatories and their answers, deposition transcripts, expert witness reports, witness statements, and exhibits;[11]
- Orders and other records of a tribunal;[12]
- Executed instruments such as contracts, wills, trusts, corporate records, and similar records prepared for the client's actual use;[13]
- Correspondence issued or received by the lawyer in connection with the representation of the client on relevant issues, including emails, texts, and other electronic correspondence that have been retained according to the firm's document retention policy;[14]
- Legal opinions issued at the request of the client;[15]

[8] Many jurisdictions follow either "entire file" or "end product" approaches in considering this question, with a majority of jurisdictions following the "entire file" approach. See ABA Formal Ethics Opinion 471. When considering either an "entire file" or "end product" approach, the Committee notes that it has been suggested that differences between the two approaches "may not be substantial." See *In re ANR Advance Transp. Co.,* 302 B.R. 607 (E.D. Wis. 2003). Therefore, the Committee did not consider it useful to label the approach taken in this opinion as either "entire file" or "end product."

[9] ABA Formal Op. 471.

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.*

- Third-party assessments, evaluations, investigative reports or records paid for by the client;[16]
- Legal research and drafts of documents that are relevant to the matter[17]; and
- Any materials for which the client has been billed, either directly or through lawyer or staff time.

This does not represent an exclusive list, but rather materials that commonly comprise a client's file on a matter. The fact that some type of material is not listed above does not mean that lawyers may not have an obligation to provide the material if it is necessary to protect the interests of the client. Lawyers should err on the side of providing the complete file.

Materials that the Lawyer May Withhold from the Former Client

The following materials may be withheld:

- Materials that would violate a duty of nondisclosure to another person, such as when the lawyer uses the document of another client as a model;[18]
- Materials containing information, which, if released, could endanger the health, safety, or welfare of the client or others;[19]
- Materials that could be used to perpetrate a crime or fraud; [20]
- Materials containing only internal firm communications concerning the client file, such as conflicts checks, personnel assignments,[21] and advice the lawyer receives concerning the lawyer's own conduct, such as compliance with the Rules;[22] and
- Materials containing the lawyer's assessment of the client, such as personal impressions and comments relating to the business of representing the client.[23] If a lawyer's notes contain

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[16] *Id.*

[17] This should not be construed as a requirement that lawyers must preserve all drafts of all documents. Rather, if lawyers have preserved drafts, they should be provided to clients who request the file.

[18] *Id.* A lawyer has the right to withhold pleadings or other documents related to the lawyer's representation of other clients that the lawyer used as a model on which to draft documents for the present client. However, the product drafted by the lawyer may not be withheld. *See, e.g.* Utah Ethics Op.06-04 (2006)

[19] *Id.*

[20] Utah Ethics Op.06-04 (2006); District of Columbia Ethics Op. 350 (2009); *Restatement (Third) Law Governing Lawyers* (2000) §46 cmt. C (2000) (no duty to surrender document if lawyer reasonably believes that client would use it to commit a crime).

[21] *Id.*

[22] An increasing number of jurisdictions have recognized an "intra-firm privilege" for communications with counsel representing the law firm. See e.g. *Stock v Schnader Harrison Segal & Lewis LLP,* 142 A.D.3d 210, 35 N.Y.S.3d 31 (2016). While Wisconsin is yet to recognize such a privilege, in the event that the intra-firm privilege is recognized in Wisconsin, this category would cover materials protected by such a privilege.

[23] Restatement (Third) Law Governing Lawyers (2000) §46 cmt. C (2000) ("The need for lawyers to be able to set down their thoughts privately in order to assure effective and appropriate representation warrants keeping such documents secret from the client involved. Even in such circumstances, however, a tribunal may properly order discovery of the document when discovery rules so provide.").

> both factual information and personal impressions, the notes may be redacted or summarized to protect the interests of both the lawyer and the client.

Unfortunately, when discussing documents that may be withheld, some ethics opinions and other authorities refer to "personal attorney work product."[24] This term most often refers to the materials containing internal firm communications and the assessment of the client and is consistent with this opinion. That term, however, led to confusion with the evidentiary notion of "work-product," which is entirely different. Therefore we do not use the phrase "personal attorney work product" as a category of materials that may be withheld.

II. Does a law firm have a duty to provide, at the client's request, a copy of the former client's file in an electronic format?

Yes, with exceptions. Lawyers have an obligation to provide the file in a format that is usable by the client. If the lawyer keeps the file in electronic format, and the client or successor counsel request that it be provided in that format, the lawyer must comply. A lawyer may also be obligated to convert an electronic file to hard copies if the client lacks the ability to access the file in electronic format. Lawyers do not, however, have an obligation to convert file from one format that is usable by the client to another simply for the convenience of the client or successor counsel.

Competent representation includes organized file-keeping practices. These practices safeguard the documentation of information necessary for the lawyer to readily retrieve the information required for the representation and to be adequately prepared to handle the client's matter.[25] The standards for keeping files in electronic format are the same as the standards for keeping files in paper format. Moreover, a lawyer must exercise competent legal judgment when deciding which format, electronic or paper, is the most appropriate for the retention of the file. [26] Regardless of the format in which the file is kept, in order to protect the interest of the client upon termination of the representation, the file must be provided to the client in a format that is usable to the client.

Many former clients or successor counsel prefer to receive the file in an electronic format: they have the ability to open, use or reproduce the documents without experiencing any problem or undue expense. However, some clients or successor counsel do not have that ability and need to receive the file in paper format. When so asked, the lawyer may be obligated to convert the file from one format to another if doing so is in the client's best interest and can be accomplished without too much expense.[27] North Carolina Ethics Opinion 2013-15 provides guidance:

> Records that are stored on paper may be copied and produced to the client in paper format if that is the most convenient or least expensive method for reproducing these

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[24] Colorado Bar Ass'n Formal Op.104 (1999).

[25] North Carolina Ethics Op. 2013-15 (1/24/14).

[26] *Id.* "Electronic records must be organized in a manner that can be searched and compiled as necessary for the representation of the client and for the release of the file to the client upon the termination of representation." When choosing a document management system or configuring their electronic filing systems, lawyers should anticipate clients' requests for their files and consider the ease of access and retrieval.

[27] *Id.*

> records for the client. If converting paper records to an electronic format would be a more convenient or less expensive way to provide the records to the client, this is permissible if the lawyer or law firm determines that the records will be readily accessible to the client in this format without undue expense. Similarly, electronic records may be copied and provided to the client in an electronic format (they do not have to be converted to paper) if the lawyer or law firm determines that the records will be readily accessible to the client in this format without undue expense.
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> A lawyer should in most instances bear the reasonable costs of retrieving and producing electronic records for a departing client. However, a lawyer or law firm may charge a client the expense of providing electronic records if the client asks the lawyer or law firm to do any of the following: (1) convert electronic records from a format that is already accessible using widely used or inexpensive business software applications; (2) convert electronic records to a format that is not readily accessible using widely used or inexpensive business software applications; or (3) provide electronic records in a manner that is unduly expensive or burdensome.
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> Nevertheless, if the usefulness of an electronic record in a client file would be undermined if the document is provided to the client or successor counsel in a paper format, the record must be provided to the client in an electronic format unless the client requests otherwise. For example, providing a spreadsheet without the underlying formulas or providing a complex discovery database printed in streams of text on reams of paper would destroy the usefulness of such data to both the client and successor counsel. Similarly, a video recording cannot be reduced to a paper format and therefore must be provided to the client in its original format.

We agree with the guidance provided by North Carolina, and note that other ethics opinions agree that a lawyer may have to convert electronic files to paper format if the client lacks the technological expertise or financial means to access digitized images.[28]

In Wisconsin Formal Ethics Opinion E-00-03, the Professional Ethics Committee noted that former clients increasingly request documents in an electronic format, either in addition to or in lieu of hard copies, for convenience or cost-saving. The Committee concluded that nothing requires the lawyer to provide both a hard copy and an electronic copy of the former client's documents. When a former client requests that documents be provided in an electronic format and the lawyer has maintained those documents electronically, the lawyer should provide those documents in the electronic

[28] E.g., Arizona Ethics Op. 07-02 (2007)("A lawyer who has chosen to store his or her client files digitally cannot simply hand a disk or other storage medium to a client without confirming that the client is able to read the digitized images. If the client does not have either the technological knowledge or access to a computer on which to display the electronic images, or if the client has hired substitute counsel who is in the same position as the client, the original lawyer may need to provide paper copies of the documents. If the lawyer has opted to store the file solely as digital images for his or her own convenience, the lawyer will need to bear the cost of providing those paper copies, absent other agreed-upon arrangements."); Maine Ethics Op. 183 (2004) ("If an attorney dispenses with the retention of paper files in favor of computerized records, the attorney must be mindful that the obligation to the client may require the attorney to maintain the means to provide copies of those records in a format that will make them accessible to both the attorney and the client in the future."); Missouri Formal Ethics Op. 127 (2009). District of Columbia Ethics Op. 357 (2010) concludes that absent an agreement to the contrary, lawyers must comply with client's reasonable request to convert electronic records to paper form.

format.[29] The lawyer does not, however, have an obligation to convert a paper file to an electronic format simply at the request of a client if the paper format is usable by the client. We reaffirm that position, but we note that the guiding principle should be protection of the client's interests.

To minimize disputes and to facilitate the effective transfer of files, lawyers may wish to discuss with the client at the beginning of representation any specific needs the client may have and the format in which the file will be produced at the termination of the representation. Lawyers may also wish to include in their engagement agreements the format in which the file normally will be produced at the termination of representation and any special needs the client may have.

III. If a lawyer has provided copies of all materials to the client during representation, is the lawyer required by SCR 20:1.16(d) to provide, at the lawyer's expense, duplicate copies to the client when representation is terminated?

Yes. The duty to surrender the file arises upon termination of the representation and serves to protect the interests of the client. During the course of the representation, lawyers frequently provide clients with copies of materials as a means of keeping their clients informed of the progress of the representation. The provision of such materials during the course of a representation may be an effective way to communicate with the client, but does not fulfill a lawyer's obligation to surrender the file upon termination of the representation.

Two Wisconsin Formal Ethics Opinions have concluded that a lawyer is not required to provide duplicate copies of file items that have already been provided to the client at the lawyer's expense.[30] We conclude, however, that these two opinions are no longer consistent with the way that SCR 20:1.16(d) is enforced and interpreted in Wisconsin, are inconsistent with opinions from other jurisdictions and, most importantly, are inconsistent with the obligation to protect the interests of the client.

Other jurisdictions have rejected the argument that a lawyer has no duty to provide duplicate copies of file items that have already been provided to the client at the end of the representation when the lawyer has provided copies of the documents during the course of representation. These jurisdictions reason that such an argument fails to acknowledge that the client paid for the documents in the file. These jurisdictions also reason that is not the client's duty to maintain a file on the client's own behalf; rather, it is the affirmative duty of the lawyer to protect the client's interest upon termination of representation.[31] Moreover, in many instances, it may be unlikely that the client will be provided with all of the documents during the course of representation, or will have retained everything previously sent by the lawyer, and provision of the complete file best protects the interests of the client upon termination of the representation.

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[29] While we agree with E-00-03's conclusion that nothing requires the lawyer to provide both a hard copy and an electronic copy of the former client's documents, we disagree with its conclusion that that a lawyer is not required to provide duplicate copies of file items that have already been provided to the client at his or her expense when representation is terminated. Consequently, we are withdrawing Wisconsin Formal Ethics Opinion E-00-03.

[30] See Wisconsin Formal Ethics Opinion E-82-7 and Wisconsin Ethics Opinion E-00-03.

[31] See, e.g., *In re Brussow*, 286 P.3d 1246 (Utah 2012); *Travis v. Supreme Court Comm. on Prof'l Conduct*, 306 S.W.3d 3 (Ark. 2009).

Consequently, we conclude that the "fact that the lawyer may have previously provided copies of documents to the client does not relieve the lawyer of this responsibility,"[32] and we withdraw Wisconsin Formal Ethics Opinion E-00-03, Wisconsin Formal Ethics Opinion E-82-7, and Memorandum Opinion 4/78 B.

IV. May a lawyer retain client papers to secure payment of the lawyer's fee?

No. The duty to surrender the file is not conditional and lawyer may not withhold the file upon termination in order to coerce a former client to pay fees or costs. SCR 20:1.16(d) states that the "lawyer may retain papers relating to the client to the extent permitted by other law." Wisconsin Formal Ethics Opinion E-95-4 concluded that the "so-called 'retaining lien' has not been expressly recognized in Wisconsin and, therefore, any claim by a lawyer that there is, under Wisconsin law, a general right to retain client papers to secure payment of a fee is tenuous, at best." Moreover, a lawyer who asserted a retaining lien against the client's file and a charging lien against the proceeds of the divorce proceeding when he knew these assertions were unwarranted under existing law was found to have violated SCR 20:3.1(a)(1), which prohibits lawyers from knowingly asserting frivolous positions.[33]

Just as lawyers may not condition return of a file upon payment of fees, they may not place other conditions upon return of a file, such as demanding that a former client sign a release of liability.

V. May a lawyer charge the client for copying the file?

No. As discussed above, the client owns the file, and the lawyer fulfills the duty to surrender the file upon termination by providing *the* file. A lawyer may retain a copy of the client file for the lawyer's own records, but that is not required by SCR 20:1.16(d), which simply requires that the lawyer surrender the file upon termination of the representation.[34] Many lawyers will, as prudent risk management, choose to retain a copy of a file provided to a former client, but it is not requirement of the disciplinary rules.[35] Because copying the file is for the lawyer's benefit, a lawyer who chooses to retain copies of documents surrendered to a client may not charge the client for the duplication costs, including the lawyer's or the lawyer's staff's time in copying the materials.[36]

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[32] Colorado Bar Ass'n Formal Op.104.

[33] OLR Public Reprimand 2005-09.

[34] Connecticut Informal Ethics Op. 05-04 (2005) a lawyer may retain a copy of a client's file after termination of representation even though the client has requested return of all copies as well as the originals).

[35] A lawyer's malpractice insurance policy may require a lawyer to retain a copy of a file as well.

[36] *See e.g.,* Alaska Ethics Op. 2011-1 (2011); Connecticut Informal Ethics Op. 00-03 (2000); Michigan Informal Ethics Op.RI-203 (1994). While not directly on point, an attorney was disciplined for charging clients $175 per hour to retrieve their file. See *Disciplinary Proceedings against Kitchen,* 2004 WI 83, 682 N.W.2d 780.

VI. How should a lawyer respond to a request for the file from successor counsel?

It will frequently be the case that the request for a file comes not from the client, but from successor counsel. For example, a criminal defense lawyer who represented a client at trial may receive a request for the file from appellate counsel.

Lawyers owe a duty of confidentiality to their current and former clients (see SCR 20:1.6) and that duty most certainly applies to client files.[37] Consequently, lawyers sometimes demand a written "authorization" from the client before providing the file to successor counsel. There is nothing inherently wrong with such a practice. However, successor counsel is acting as an agent of the former client and a lawyer who receives a request for the file from successor counsel should ordinarily regard that request as the equivalent of a request from the client. There is no requirement in the Rules that lawyers obtain a written authorization from the client before surrendering the file to successor counsel, and to do so could be detrimental to the interests of a client when time is of the essence. All lawyers are prohibited from making false statements of material facts to third parties (see SCR 20:4.1) and a lawyer receiving a request for a file from successor counsel may ordinarily take a statement that the lawyer is making the request on behalf of the client as being truthful.

Of course, there may be unusual circumstances where a client has specifically instructed a lawyer not to surrender a file to successor counsel, and the lawyer must abide by those instructions.

Conclusion

A lawyer should promptly surrender the file to a client or successor counsel upon termination of the representation. A lawyer is not relieved of the duty to provide the client with the file when representation is terminated even though the lawyer may have previously provided copies of documents to the client during representation. A lawyer may not retain papers relating to the client to secure payment of the lawyer's fee. The so-called "retaining lien" has not been recognized in Wisconsin and, therefore, and the assertion of a "lien" for fees on a client file has been found to violate SCR 20:3.1(a)(1). A lawyer who chooses to retain copies of documents surrendered to a client may not charge the client for the duplication costs because copying the file is for the lawyer's benefit.

Wisconsin Formal Ethics Opinions E-00-03, E-84-5, E-82-7 and Memorandum Opinion 4/78 B are withdrawn.

[37] See *Disciplinary Proceedings against O'Neil,* 2003 WI 48, 661 N.W.2d 813.