Wisconsin Formal Ethics Opinion E-98-1: Disposition of Closed Client Files

What are a law firm's responsibilities with regard to dormant client files? Do those responsibilities change when the law firm has dissolved and the files are being maintained by lawyers who may not have had contact with the clients involved?

Discussion

In E-84-5, this committee dealt with the question of dealing with closed client files in the lawyer's possession. While the Professional Ethics Committee conceded that the lawyer did not have a duty to preserve all client files on a permanent basis, the opinion concluded that the lawyer needed to exercise care to avoid the destruction of client property or continuing valuable or useful information. The committee relied on ABA Informal Opinion 1384 (1977) to caution lawyers to maintain files for at least the duration of any applicable statute of limitations that might pertain to a client's claim and to instruct the lawyer to return important documents to the client or to maintain them in storage.

Although the Model Rules of Professional Conduct were adopted in Wisconsin in 1988, nothing in the rules or in the ethics opinions from Wisconsin or other jurisdictions has modified the significant duties placed on lawyers in dealing with client files, even where the client cannot readily be located. Under SCR 20:1.16, at the conclusion of a representation, the lawyer must take steps to the extent reasonably practicable to protect the client's interests, such as surrendering papers and property to which the client is entitled. *In re Cowen*, 197 Wis. 2d 512 (1995).

The fact that the client cannot be located provides a complicating factor. The treatment of property where the client cannot be located must be determined on a case-by-case basis, although "the standard fiduciary duties regarding client property clearly come into play." *See* Mich. Informal Ethics Op. CI-1143 (1986); ABA/BNA Man. Prof. Conduct at 45:1204. Some commentators have recommended that the best approach may be not to destroy closed files. *See, e.g.*, D.N. Stern, *File Maintenance*, 36 Va. B. News 30 (1987). While that may not be practicable, and while lawyers should not have the burden of maintaining client files forever given the attendant costs and economic burden, it is clear that certain safeguards should be followed before a file is destroyed.

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.

The fact the firm has dissolved or that the lawyers maintaining the files may not have been involved in the representation does not alter the duties of either the lawyer or firm that performed the engagement or the lawyer or firm that now maintains the files. Each retains responsibilities to the client. Lawyers in firms that are dissolving should agree among themselves on the handling of client files, and shall transfer files to a departing or new lawyer upon client request. However, those arrangements do not obviate the ethical and fiduciary duty to maintain and properly handle client files. *See* Nassau County B. Ass'n Op. 93-23 (1993). Both the lawyers who handled the engagement and the lawyers who may have voluntarily assumed custody of the file owe the same obligation to handle the return or destruction in a reasonable fashion as described above.

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. SCR 20:1.5(e). In addition, in actually disposing of files, lawyers must exercise care to ensure that confidential information is not disclosed. The duty to maintain confidentiality continues after the termination of the representation under SCR 20:1.6. *See also* E-89-11; E-77-5.