

PRACTICE TIPS

DEVELOPING AND MAINTAINING YOUR RECORDS RETENTION POLICIES

by W. Brian Ahern, RPLU

One of the most often-asked questions regarding risk management is how long client files of closed cases must be kept. While the expense of indexing and storage of such files can be expensive, a law firm runs a great risk by disposing of files too early. However, there is no benefit in keeping your client files forever.

Every firm should have in place a records retention policy for both physical and electronic files. The process of developing a records retention policy can be extensive, and there is no one-size-fits-all solution. When creating your policy, involve key members of your management team and consider such issues as technological and physical resources, ethics rules, malpractice statutes of limitation and cost.

It is also important to note that different states have different rules regarding the retention and destruction of legal files. If your firm practices in more than one state, you must follow all rules accordingly.

Education is a key component of any records retention policy. It is important to educate and train internal staff and attorneys before implementing your policy. Your policy should also include a monitoring component to ensure it is being followed carefully and completely. Excellent off-the-shelf software programs are available to help firms of all sizes manage the retention and disposition process once your policy is established.

As for the specifics of a records retention policy, the State Bar of California Standing Committee on Professional Responsibility and Conduct has issued [Formal Opinion 2001-157](#) (undated), which provides guidance as to what should be retained and when items should be destroyed. The ABA has summarized California's opinion as follows:

"A lawyer must retain original papers and property received from a former client...according to the law of deposits and

the Probate Code. Other client papers and property in civil cases, including correspondence, pleadings, deposition transcripts, exhibits, physical evidence, and experts' reports, may be destroyed, absent a prior contrary agreement, after the lawyer uses reasonable means to notify the client of their intended destruction and gives the client a reasonable time to respond.

"If the lawyer is unable to locate the former client, the lawyer may destroy items whose retention is not required by law and is not reasonably necessary to the client's future legal representation. Anything the former client will reasonably need to establish a right or a defense to a claim should be retained for an amount of time determined by the lawyer's 'good common sense.' Files in criminal cases should never be destroyed while the client is alive without the former client's express consent. The lawyer must protect client confidentiality when destroying any client files."

Reviewing your professional liability insurance policy regarding any specific guidelines/requirements it may have – or your carrier may have – in terms of records retention is also important. Your insurance broker can help you with this important step of developing and maintaining a policy.



W. Brian Ahern, RPLU, is President / CEO of Ahern Insurance Brokerage, one of the largest independently owned insurance brokerage firms specializing in the insurance needs of law firms. Ahern Insurance Brokerage is the Designated Professional Liability Broker for the OCBA.

AHERN | INSURANCE
BROKERAGE