AHERN Update

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AHERN Insurance Brokerage is one of the largest full-service insurance brokerage firms specializing in the insurance needs of law firms, with over 5,000 law firm clients.

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Key Issues In Retaining Client Files In Arizona

By Daniel W. Hager, Corporate Counsel, AHERN Insurance Brokerage

Records retention presents important issues of ethics (safeguarding client property, maintaining confidentiality and loyalty), risk management (avoiding ethical violations and claims), and cost control.

How Long Must Client Files Be Retained?

Arizona Ethics Op. 98-07 references a general five-year retention period for client files. An exception exists for probate or estate matters, homicide cases, life sentence cases, and lifetime probation cases, which must be retained indefinitely. Original documents with intrinsic legal importance – including deeds and deeds of trust, and financial documents such as securities and promissory notes – should also be retained essentially indefinitely.

The five-year retention period is a conservative recommendation. It serves as a safe default period in the absence of an agreement between lawyer and client, who may agree upon different time periods, longer or shorter than five years. The overriding objective in setting the right retention period is to meet one's duties to safeguard client confidences, client property, and client interests. (ER 1.6, ER 1.15, and ER 1.16(d).) Your file retention policy and its implications should be explained to the client in writing at the beginning of the representation.

Lawyers may fulfill their ethical obligations by tendering the entire file to the client at the termination of the representation, so long as no statute of limitations or substantive law requires that the file be kept and surrendering it to the client adequately protects the client's interests.

If there is a risk of a malpractice or other claim by the client against the firm, relevant parts of the file should first be copied – at the lawyer's expense – and maintained by the firm, at least until the relevant statute of limitations for such a claim has expired.

Exercise Judgment Over What Can Be Destroyed

Lawyers must make a reasonable effort to determine whether documents with intrinsic value are contained in a closed file. Depending on the circumstances, this may require a physical review of closed files before they are destroyed.

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At the closing of all files, a qualified person (i.e., someone with sufficient legal background to identify original documents with potential intrinsic legal importance) should review the file and document whether it contains any records that should be retained indefinitely. Such documents should be segregated in separate, clearly identified files. A documented effort to have the client take possession of such documents should then be made.

Contact Former Clients Before Destroying Files

Where the firm has not previously sought client consent to destroy files, it must be able to establish it has taken reasonable steps to contact the former client in writing at its last known address to solicit its direction on the planned destruction.

Get Client Consent Up Front

Include a provision in every engagement agreement that describes the firm's file retention policy and confirms that the client agrees that if it does not request return of its file within a specified time after its closing, the firm may destroy the file without further notice. This warning should be repeated in all end-of-engagement letters as well. If the retention policy has been communicated to the client twice, it will save the time and expense of future attempts to contact the client.

Maintain Confidentiality

The duty of confidentiality requires that file destruction take place in a manner that preserves confidentiality. Use a professional service for the actual destruction that can verify it is using a procedure that protects client confidentiality.

Taking steps such as these to implement an effective records retention policy will help your firm meet its ethical obligations, reduce risk, and lessen costs.

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