

# AHERN Update



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## Key Issues In Retaining Client Files In California

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

Records retention presents important issues of ethics (protecting client property and maintaining confidentiality and loyalty), risk management (avoiding ethical violations and claims), and expense (controlling the cost of maintaining records).

### How Long Must Client Files Be Retained?

In California, absent an express agreement with the client, there is no specific time period that client files from a civil matter must be retained. The Los Angeles County Bar Association proposes at least a five-year retention period for "potentially significant" papers and property in civil files. (L.A. County Bar Assoc., Formal Op. No. 450 [1994].)

The State Bar and other county bars have not, however, adopted a set period for retaining files. (See, Cal. State Bar, Formal Op. No. 2001-157 and BASF Op. No. 1996-1.) They reason that destroying closed files requires an exercise of judgment, and that even if an item has no intrinsic value, but its loss could harm the former client, it should be retained or the information preserved.

According to the California State Bar, original documents with intrinsic legal importance – such as estate planning documents like wills and powers of attorney, real estate documents such as deeds and deeds of trust, and financial documents such as securities and promissory notes – need to be retained essentially indefinitely.

Likewise, files from representing criminal defendants must be retained for the life of the client.

The five-year period recommended by the Los Angeles County Bar Association for civil files provides a reasonable time period for retaining documents with no intrinsic legal importance or which could be destroyed without harming the client.

### Exercise Judgment Over What Can Be Destroyed

There is an ethical obligation to 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.

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 therefore 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 concerted (and 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. (See, L.A. County Bar Assoc., Formal Op. No. 450.).

### 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

Finally, an attorneys' duty of confidentiality requires that file destruction take place in a manner that will preserve its 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.