

Records Management in Law Firms — From the Basement to the Boardroom

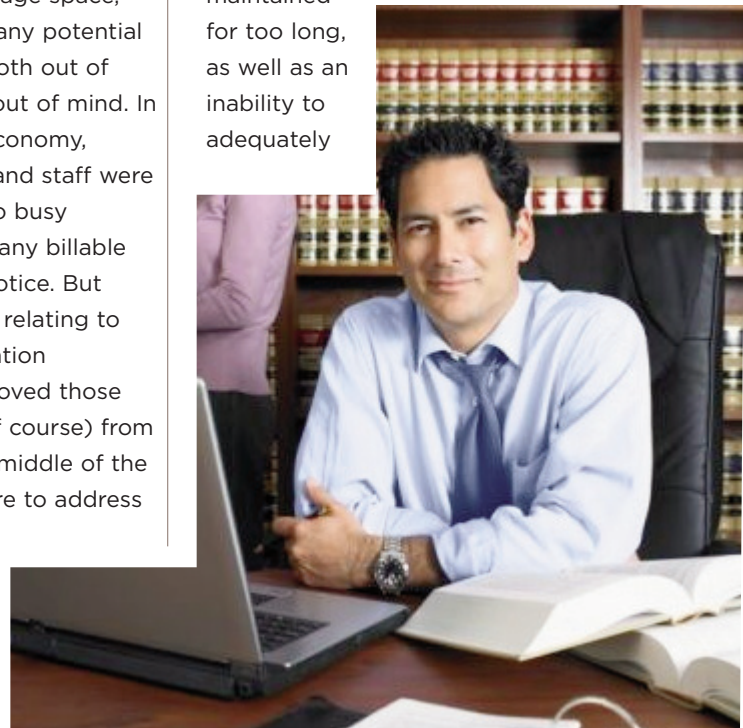
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Law firms have likely never had more plates in the air; tough decisions on down-sizing both attorneys and staff, strategic decisions relating to mergers and acquisitions to offset the impact of a weak economy, complicated technical adjustments for compliance with E-discovery rules, etc. And just when they thought they might be able to juggle it all, many law firms are beginning to realize the impact of new laws and regulations on the management of their records; i.e., the mass amount of documents they have created during many years of practice, which continues to increase at an alarming rate in both electronic and paper format.

“A good records management system will strengthen the firm’s performance in ethical decision-making.”

For those many years, boxes of documents no longer referenced with any consistency, could be relegated to some isolated corners of the office, usually in a basement, or to an offsite storage space, rendering any potential problem both out of sight and out of mind. In a robust economy, attorneys and staff were happily too busy working many billable hours to notice. But recent developments relating to specific records retention requirements have moved those boxes (figuratively, of course) from the basement to the middle of the boardroom. The failure to address issues relating to the organization, maintenance, preservation, or

destruction of either paper or electronic documents could result in the firm’s vulnerability to lawsuits from clients whose documents have been lost, damaged, or, in some cases, maintained for too long, as well as an inability to adequately



defend the firm itself from cause of actions based on real or fabricated misdeeds.

In times of abundance, the cost of storage for boxes, often containing unknown items, was less of a problem than diverting staff to determine their continued value. But now, as firms have both the time and the necessity for analysis of their ongoing overhead costs, the storage and maintenance costs of numerous useless boxes is no longer acceptable. And, while it would be nice to have the luxury to continue to ignore these dusty areas, the resulting problems are growing at an accelerated rate. The longer the problem is ignored, the more difficult it will be to solve.

Once a law firm grasps the task at hand in organizing and determining the value of, in many cases, the entire work product that the firm has ever created and maintained, the project can seem overwhelming. But once the shock subsides, most firms realize that there is never a better time than now to attack the problem head-on.

Rather than set out all of the issues that will need to be addressed to streamline records management in a manner that will protect the firm, better serve the clients, and improve the practice of law, I have limited this introduction to address what appear to be the top ten most

pressing aspects to developing a sound records management system in today's law firm.

1. Too Much Stuff

In the practice of law, it is common for everyone working on a document to want his or her "working" copy of every draft. There are far too many duplications leading not only to costs in the creation, but to costs later in the maintenance and destruction. Often many copies of many drafts exist in multiple formats far beyond any possible value. Usually, it is the secretary or the file room staff's responsibility to systematically de-dupe identical documents at the time of the matter's closing. More often, multiple copies of useless drafts are maintained indefinitely because de-duping is labor intensive and storage is...well...easier.

2. Retention Plan/Schedule

Is there a working retention policy with relevant schedules in the firm? It is unlikely that any attorney would not understand that a solid retention plan for clients' records is an ethical duty. While states vary on the amount of time a client's general documents must be maintained and accessible, a minimum acceptable retention period exists pursuant to ethical rules, court rules, etc. A failure to adequately maintain such documents for the specified period could result in liability to the client.



In addition, certain records, such as trusts, wills, divorce decrees, etc., will require a longer retention period due to the nature of the documents as controlling events that will occur beyond the time period relevant to other documents.

However, a concept that escapes many attorneys is that they can actually retain clients' documents for too long. If a client has disposed of documents according to the entity's valid retention plan, and that document becomes discoverable from the law firm that has retained it beyond its valid retention schedule, an arguable claim would exist against the law firm.

Some attorneys think that it is safer to avoid creating a firm retention policy if it is not likely to be implemented; i.e., that the consequences of having a policy being ignored, would be more severe than not having one at all. I respectfully disagree.

3. Determination of Vital Records

Is there a system for determining key documents, to ensure that they are maintained in the safest

manner possible? Again, many of these documents; wills, trusts, etc. could control events far into the future. Are they being stored in the format best suited to the time frame during which they will be valuable?

4. Disaster Planning

Is there a system in place that would quickly get the firm back in business in the event of a major disaster? As many are aware, most of the companies that did not recover from the 911 disaster were those with their backup for records in the other tower. Firms of all types need to have a remote backup system far enough away to be protected from catastrophic events. At the same time, firms should not be complacent if they are located in areas less likely to experience catastrophes, since many “disasters” are the result of broken water pipes, lit cigarettes, spilled coffee, etc.

5. Electronic Records Avoiding Capture

Not all records that need to be captured for the firm’s protection morph into paper. Many potentially important documents remain in an electronic document management system without distinction from the document announcing upcoming events at the firm’s picnic.

Should the important documents become discoverable, their retrieval from a massive amount of both transient and important

documents could become extremely problematic. In general, courts show no mercy to the party incapable of providing easy access to relevant documents and will sometimes require the payment of fees to the requesting party to sort through large amounts of information.



in effect for fifty years, is a tape backup really adequate?

7. Documentation and Training

Are the firm’s policies and procedures, as well as implementing guidelines, relating to retention, disaster planning, and

preservation readily available?

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Are the relevant employees adequately trained in these areas?

The best retention policy in

existence would be useless if the attorneys and staff were not educated on the definition of a record, and how to designate it as such at the time of its creation. Disaster plans are only as good as the responsible party’s knowledge of the best way to implement them, with the tools needed to put it into effect.

For example, are emails and other messaging systems being managed in a way that would protect the firm should those records be discoverable? Are employees involved in blogging, or similar activities that could lead to potential discoverable information that could be prohibitively expensive to produce?

6. Preservation Issues

Is the firm considering all aspects of obsolescence in its IT planning as it relates to records management? While the transition from paper to electronic documents is slowly becoming more acceptable, is the electronic format of the document the most appropriate for its retention schedule? For example, if a trust is likely to be

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8. Authority Issues

Is records management considered management, or is it relegated to a level where it cannot be effective in making changes necessary to the well-being of the firm? As stated earlier, records management needs to be moved from the basement to the boardroom. The decisions that need to be made regarding retention policies and procedures require the partici-

pation of the highest level management as well as departmental leaders. A working committee must include a knowledgeable records management representative to provide direction relating to technology, staffing, relevant system standards, etc.

9. Legal Holds

The impetus for enactment of federal statutes such as the Sarbanes-Oxley Act was primarily the result of suspect accounting by financial institutions and affiliated entities, and their systematic approach of destroying evidence to protect them. However, the scope of the Act in limiting the destruction of evidence relevant to a cause of action or regulatory investigation was far reaching. Like other entities, law firms must have the capacity to cease the destruction of any documents potentially relevant to any cause of action, or regulatory investigation, at the first hint the possibility that it will come to fruition. If a retention policy and schedule is not functioning, a law firm does not have the capacity to implement a valid hold pursuant to law. Many law firms cease destruction of all documents as a solution when a legal hold is warranted. As discussed previously, such decisions could lead to the retention of documents to the detriment of other clients. Many of the law firms without the

capacity to implement a legal hold due to a lack of a legitimate retention policy actually advise clients on the establishment of their retention plans to avoid problems in the event of litigation. Like the shoe maker whose kids have no shoes, those attorneys just don't get around to their firms' needs. But the shoe maker would not likely be as red faced as the attorney on a witness stand testifying on this issue.

10. Ethical Walls

With the many mergers and acquisitions occurring in the U.S., the protection of a client's confidential information from an adversary, can become difficult. A good records management system tracks members of a firm who must not have access to files of clients when information could be relevant in a matter handled by the same firm. A breach of the protection of client information in such instances could lead to malpractice claims. Firms will argue that their honor system works. Perhaps it does, but it would be tough to prove in a court of law.

CONCLUSION

Records Management in law firms differs from other entities since much of the information for assessing conflicts in the future resides in boxes somewhere. A good records management system will strengthen the firm's performance in ethical decision-

ABOUT THE AUTHOR

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making. In addition, many attorneys aggressively protect former work product beyond its retention schedule because of its potential value in future cases. This desire to capture valuable work product should be respected with records management personnel working with attorneys to identify documents to be culled prior to destruction for redaction of client information and then inclusion into a knowledge bank for the firm's future use in similar cases.

Once attorneys understand the critical importance of a solid records management system considering the criteria discussed, they are much more likely to cooperate in the quick development of a firm plan. Showing them the relatively quick return on investment derived from the implementation of a good retention plan, and the substantial long term reduction in overhead costs provides further incentive.