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Over Managing of Records

How too much retention can actually harm you

By Daniel S. Carroll, ECMp

"Better Safe Than Sorry" Isn't Always Safe

How keeping records too long can cost your firm in the long run.

The record-retention strategy for many law firms can be summed up in one short phrase: "Better safe than sorry." In practice this philosophy becomes "keep everything, *forever*." Most lawyers quake at the very notion of not being able to deliver old client records to their peers or, worse yet, to the government or the court. The 2011 Law Firm Information Management survey of 224 legal professionals showed that 35 percent of firms cited attorney reluctance to destroy client files as the single largest barrier to destruction programs. So while clients may have divested themselves of the documents long ago, their law firms frequently keep on keeping them.

But legal administrators charged with record management rarely examine the flip side of this practice. The fact is, retaining everything forever can have tremendous negative consequences. Storing documents in perpetuity can expose firms to fines and sanction, or legal action for bad faith, information spoilage or obstruction of justice. Ironically, avoiding legal action is the reason most professionals keep records too long in the first place!

Yet, most courts allow electronic archiving and the good faith destruction of files if these steps are in line with industry best practices and are undertaken as part of a consistently applied records and (electronic) information management (RIM) policy. A RIM policy is a risk management tool that covers both paper documents and electronically stored information (ESI). While 79 percent of law firms have a record management policy, 31 percent of those firms report that their policy only covers paper, not electronic records. By implementing a RIM strategy that addresses a document's entire lifecycle, legal administrators can help their firms save money, save time and reduce the risk of litigation.

The Downside of Forever

Records management is an unglamorous – but necessary – fact of life in the legal profession. For many, the task has become even more arduous with the advent of electronic record keeping. But legal administrators in small and midsized firms are often given little direction on document retention and destruction strategies, and fewer resources to implement document management systems (DMS).

Without a DMS and RIM policy, records kept beyond legally prescribed retention periods can be terribly detrimental to the firm.

- Storing boxes onsite occupies valuable office space, effectively raising a firm's per-square-foot cost on its lease or mortgage.
- Storing boxes offsite is simply a matter of dollars and cents; more space costs more.
- Over-retention can sap productivity, chewing up man-hours on document searches, recovery and preservation.
- Firms are responsible for locating and delivering documents under subpoena if they still have it, regardless of the document's age. The firm would not be required to do so had it properly managed the record.
- A suit can be brought if malpractice is identified in records that a firm has kept beyond the legally prescribed retention period. Again, timely record destruction could prevent this situation.

The guidelines and best practices for record retention and destruction vary by state and the specific type of document. There are, however, a number of opinions, best practices and other guidelines to help legal administrators avoid these common record management pitfalls.

Avoiding Over-Retention

Getting a handle on documents and files starts with implementing a record retention policy to properly manage the record's lifecycle. The lifecycle, however, must be defined before it can be managed. Establish your definition based on these core steps:

1. Create a list of the "must keep," the "maybe keep" and the "discard" documents and ESI based on type of record.
2. Identify the legal requirements for retention time for record types.
3. Spell out all storage parameters: new record induction process, locations, access policies, maintenance processes and destruction processes.
4. Designate responsibilities, rights and restrictions for personnel involved with RIM, including specifics on enforcing, monitoring and updating the policy.
5. Author a compliance policy (including penalties for non-compliance) for all employees and makes sure that the policy is distributed and unilaterally acknowledged.

With this in place, firms should look to move as many records as possible from hardcopy to electronic format as early as possible in the office workflow. A centralized electronic DMS is inherently more efficient than a paper system that is later converted to electronic format solely for archiving. Electronic DMS reduce errors and office clutter (don't discount the negative effect physical clutter has on workplace efficiency). While some may squirm at the idea of going entirely electronic, the practice is well established and the guidelines well accepted.

An opinion issued by the New York Bar Association's Committee on Professional Ethics interprets Rule DR 9-102(D)(8) to require "all checkbooks and checkstubs, bank statements, prenumbered canceled checks and duplicate deposit slips" and other documents referred to in that subsection be kept in their original paper form for a seven-year period. In the same opinion, however, they found that where the Rule permits copies, copying to electronic media is completely acceptable. Paper records may be destroyed only after the transfer to electronic form is complete.

Maine Opinion 183 (1/28/04) finds that firms may store client correspondence and documents in electronic format without keeping paper copies, so long as it's done in a way that permits both client and lawyer access to them in the future. The State Bar Ethics Committee of Virginia found no per se ethical prohibition against maintaining paperless client files. The panel advised that lawyers are allowed to require clients to consent to the use of electronic files as a condition of representation. It further concluded that firms may destroy paper documents with client consent, and may retain only scanned electronic copies. The exceptions are items that have independent legal significance, such as testamentary documents and marriage certificates.

To Keep and Kill

Knowing the start and stop dates for records is the most critical step in efficient records management. The American Bar Association and many state bars provide detailed guidance on how long to keep client files and how to communicate with the client about destruction policies. Industry associations and third-party information management partners are also good sources for best practices and information to help firms get comfortable with all aspects of RIM, including defensibly destroying client files.

A lawyer's obligation to maintain client records has its foundation in rule 1.15 of the *ABA Model Rules of Professional Conduct*, which states in pertinent part:

> (a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property… [P]roperty shall be identified as such and appropriately safeguarded. Complete records of such… property shall be kept by the lawyer and shall be preserved for a period of [five years] after termination of the representation.

Firms have an obligation to preserve evidence once they are notified that litigation *might* occur. [*Renda Marine v. United States*, 58 Fed. Cl. 57 (Fed. Cl. 2003).] At the latest, the duty to preserve arises when the complaint is served.

So once the preservation starts, how long must a record be kept? That depends on the state and the type of record. New York specifies a seven-year retention period as its standard.

The American Bar Association (ABA) recommends the following:

> "… retain original papers and property received from clients, including estate -planning documents, 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 former client is alive without the former client's express consent.

The ABA also refers to Maine Opinion 187 (11/5/04) that requires that a lawyer must preserve and, upon request, deliver to the client all client property and any material not otherwise available to the client that another lawyer or the client would reasonably need to take up representation in the matter. This would typically exclude timesheets, billing accounts, internal administrative papers, memos on staffing options and similar documents not useful in continued representation.

The best policy for disposal of closed records, once the minimum retention period time is reached, is simply to use sound judgment and, where appropriate, seek input from a malpractice carrier and a third-party RIM specialist.

At some point in time, the client's consent to destroy the file is implicit. It is the firm's right to actively manage its document archive to avoid a negative impact on the firm.

By implementing these strategies and addressing a document's entire lifecycle, legal administrators can help their firms save money, save time and reduce the risk of litigation.

Advice corner:

- Set out a file retention policy in every representation agreement and to reiterate it in the final letter sent to the client at the conclusion of the representation.
- Create a firm-wide RIM policy for all paper and electronic documents and update it regularly.
- Use an electronic DMS and convert paper documents to electronic files as early in the workflow as possible to improve accuracy and speed.
- Recognize the benefits to timely record destruction.

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[i] "Law Firm Information Management Benchmark Report: Find Out How You Measure Up", Iron Mountain, Inc., 2011.
[ii] Ibid.
[iii] NYSBA Ethics Committee, Opinion #680 - 01/10/1996 (57-95)
[iv] Virginia Ethics Opinion 1818 (9/30/05).
[v] "Records Retention in the Private Legal Environment: Annotated Bibliography and Program Implementation Tools", Lee R. Nemchek, 2001.
[vi] "Records and Information Management and Retention", Association of Corporate Counsel Nonprofit Organizations Committee, W. Hamel and V. Danta, March 13, 2012.
[vii] ABA/BNA Lawyers' Manual on Professional Conduct.

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About MCS Management Services and the Author

MCS Management Services is a leading provider of on-site business account services, including mail center operations, shipping and receiving, records management, in-house litigation support, document and print management, managed print services and related professional services. Organizations throughout the legal and corporate markets turn to MCS to reduce operating costs, streamline operations, and enhance internal service levels. MCS Management Services is a division of The MCS Group, Inc. and is a women-owned business enterprise (WBE) certified by WBENC (Women's Business Enterprise National Council).

Daniel is the Manager of Client Strategy and Business Solutions, and an information management professional with an Enterprise Content Management Practitioner certification from AIIM. Daniel has a lengthily history of consulting clients with records and information management (RIM) projects that consist of systems and process implementation, SOP development, and retention recommendations. Connect with Daniel on LinkedIn: www.linkedin.com/in/DanielSCarroll

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