

Records Management A to Z

From Compliance Issues to Best Practices

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Editors’ Note

Is it time to rethink records management? You bet! New regulations, new gadgets and gizmos and e-everything are causing RM people to scratch their heads and wonder what needs to be done to comply, to keep up and even to get ahead. While contemplating these issues, you need to ask if your records management and retention policies are adequate to handle these changes. And what about the onerous task of tracking ever-changing stockholder records? Although not typically under the RM umbrella, it is still a task that many firms need to manage effectively.

Our authors ask if your firm or law department is ready to go “digital,” ready to institute a new or improved records management policy, ready for RFID, or ready to plan and execute a retention policy. The technologies and processes our authors discuss underscore that the gap between RM and IT is rapidly shrinking, making clear communication between the two imperative.

We hope you benefit from the insight and information provided herein, and we wish you success in conquering your records management issues.

Ken Hansen and Randi Mayes, Editors

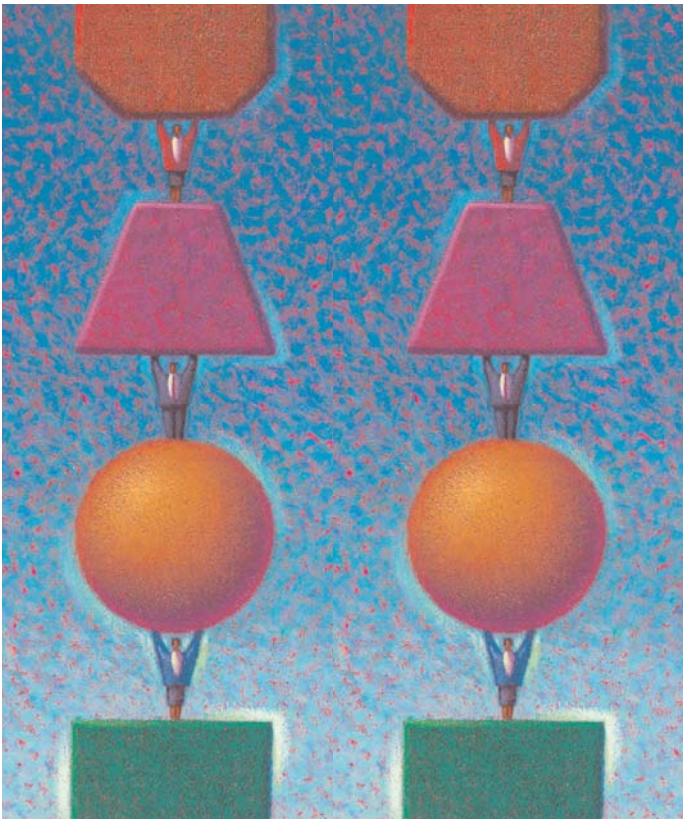
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Critical Issues in Legal Records Management

A Mid-Decade Review

by Lee R. Nemchek of Morrison & Foerster, LLP



In future years, the first decade of the twenty-first century will undoubtedly be remembered as a period when corporate records management came of age as a professional discipline. Beginning with the events of September 11, 2001, when many businesses lost both their physical and electronic records, and the image of New York City streets littered with paper embedded itself forever in the minds of the world's population, through the Arthur Andersen document shredding scandal and the passage of the Sarbanes-Oxley Act,¹ which requires strict record-keeping practices and stiff penalties for noncompliance, a spotlight has been focused on the records management profession.

Historically, law firms tend to be insulated enclaves, untouched by the kinds of scandals that rock the corporate world. But this is no longer true. Lawyers and law firms were among the hardest hit by the World Trade Center tragedy. In addition, lawyers are now heavily involved in records management compliance matters, helping clients deal with new laws and regulations designed to ensure that corporations do not repeat the mistakes of the past. With respect to the internal records management practices of lawyers and their clients, records management (RM) has never been hotter.

Misfortune and tragedy notwithstanding, the focus on records management has had a tremendous marketing/public relations effect on RM professionals in all industries, including law. These days, one cannot pick up a legal or business periodical without seeing at least one article on records-related management or compliance issues. Some of these issues have been at the forefront for several years now. For example, there is no longer any doubt that law firms *must* develop and implement inhouse programs for both records retention/destruction and emergency preparedness/business resumption. This mandate is so universally accepted as to be considered *old news*. The blurring of boundaries between the library and RM department is another area that has gained considerable acceptance over the past ten years, especially in large firms with sophisticated conflicts-of-interest systems. However, as we enter the last half of the current decade, compelling new issues have emerged. These are *the* RM issues of our time, the ones being written about every day, in every prominent legal publication. Here, then, in no particular order, are today's critical issues in legal records management.

RFID Technology

Every librarian is intimately familiar with the various headaches associated with tracking the movement of materials within and outside their organizations. These headaches include, among others, (1) finding and reshelving incorrectly shelved materials, (2) following the trail of materials handed off from one patron to another within an organization and (3) the expense in time and money of replacing lost materials. Libraries that already use bar coding technology to electronically manage circulation can still experience problems, such as long checkout lines, frequent mis-shelving, sorting and shelving backlogs and repetitive strain injuries among staff who spend a lot of time handling books and bar code scanners. In the RM arena, the cost of misplacing or losing a client file can potentially be hundreds of thousands of

dollars. That's why radio frequency identification (RFID) technology is so exciting.

RFID, which may eventually replace bar codes as an inventory management tool, works by placing special microchips — RFID tags — on or in goods, animals and even people.² The tags signal their location across a network of readers that are placed in strategic locations throughout an organization, enabling staff to monitor an item's location as it travels across floors, from office to workroom, to a different office and back to the library or records center. The tags can be read in bulk from distances of 20 to 30 feet, making manual scanning of individual items unnecessary.

Picture a typical scenario in a law firm RM department: five carts of client files are wheeled into the center by a facilities clerk who has been cleaning out an abandoned workroom. An RFID system can check in all incoming folders simultaneously, without anyone having to touch the folders. This may sound like technology of the future, but in fact, RFID systems are already in place or will soon be installed at over 300 libraries in the United States, including the University of Nevada and San Francisco public library systems. Law firms will follow suit as soon as standardization, cost and privacy issues have been satisfactorily resolved.

Outsourcing

Media coverage of the outsourcing phenomenon is at an all-time high, with the current focus on offshoring American jobs to India and other locations. In law firms, outsourcing has morphed, seemingly overnight, from a business arrangement targeting back office clerical functions such as reprographics, messengering and mailroom services to 24/7 technology help desk operations to, most recently, provision of contract legal services, including research, document drafting and review, litigation support, due diligence and competitive intelligence reporting. These days, it seems that every conceivable law firm task can be done by someone who isn't actually employed by the firm, including the job of lawyer!³ Moreover, the multi-billion dollar outsourcing industry has created a new and growing niche practice area for law firms: representing corporate clients in complex global outsourcing transactions in both IT and core business operations.

Traditionally, information departments such as library, records management, conflicts and docket/calendar have been the least likely to fall victim to full-scale departmental outsourcing. This is still true, despite the fact that law firm libraries and RM departments have been successfully using selective outsourcing for years to manage functions, projects and staff positions.⁴ Now, however, many legal administrators are taking a more serious look at RM as a potential target for some level of

outsourcing. Records managers who prepare in advance for this development will fare best over the next five years.

Practice Area Development

Outsourcing is not the only new practice area that law firms have recently developed. A sure sign that records management has *arrived* as an important consideration in the lives of lawyers is the emergence of RM-related practice areas. This emergence is the direct result of this decade's focus on corporate compliance,⁵ including Sarbanes-Oxley, Gramm-Leach-Bliley,⁶ HIPAA⁷ and the implications of *Zubulake*.⁸

Some firms market RM expertise under the umbrella of privacy and information management. For example, the Hunton & Williams Privacy and Information Management Practice Group advertises "strategic business consulting on all aspects of information policy, including privacy, information security and records management."⁹ The approach of Reed Smith's Records Management and E-Discovery Group is to focus on electronic records management strategies.¹⁰ Blackwell Sanders Peper Martin takes this concept a step further. Its Records and Information Management program, run by a partner whose practice focuses "on a single issue of central importance to companies today — how best to manage company records and electronic data,"¹¹ offers legal services in creating and validating records retention policies and schedules, RM compliance systems, legal hold strategies and electronic records risk management.¹²

It can be predicted that before the end of the decade some law firms will develop a further specialization within the RM niche: providing records management compliance services to law firms and other legal organizations. Such a practice will offer librarians/records managers working in those firms a rare opportunity to contribute to client service by providing reference and research assistance in an area in which they possess professional expertise.

Electronic Records Management

Whereas records retention/destruction was *the* hot topic of the 1990s in legal RM, it has been replaced by electronic records management (ERM) as the number one priority of most law firm records and IT managers. "More than 90% of all new information is created and stored in electronic form ... Not since the adoption of the Xerox machine 45 years ago has the centuries-old legal profession been so affected by new technology."¹³

It is a Catch-22 that law firms must invest in sophisticated records management technology in order to deal with the new sophisticated records creation technologies. In other words, firms must automate their RM operations at a high level of

sophistication in order to manage a wide variety of electronic records, including e-mail messages and their attachments, electronic documents, Web pages, database output, digital images and recordings, and instant messaging.

To date, the legal world has only scratched the surface of ERM. Although a lot of time and effort is being devoted to worrying about electronic records, most firms have only recently begun to implement an e-mail management solution. The most advanced firms are beginning to incorporate e-document management as well, but this is about as far as we've gotten. Moreover, the development of ERM in law firms is being driven by IT concerns and by the changing nature of the legal profession, not by RM. For example, the primary reason that lawyers are accepting e-mail management functionality is that they are being forced to by (1) mailbox volume limits imposed by IT, and (2) increased lawyer mobility, which requires that electronic client records be easily portable. Similarly, mandatory e-filing in the courts is driving the integration of e-document management technologies in the firms.

Regardless of why and how it is happening, lawyers are being dragged slowly but surely, kicking and screaming, into the ERM world of the twenty-first century, if not for themselves, then for the benefit of their clients.¹⁴ In coming years, look for voice mail and instant messaging to emerge as the next big ERM concerns.

Electronic Discovery

What can one say about electronic data discovery (EDD) in a few hundred words that can begin to convey the enormity of the subject? Not much, considering that several treatises have been written by leading legal authorities and whole conferences are being devoted to this area. This doesn't include newsletters and online resource portals. A recent article states that about 160 commercial companies offer EDD services, most of which sprang up in the past five years. Total revenues of these companies have increased tenfold, from \$40 million in 1999 to \$430 million in 2003.¹⁵

To date, records managers have not played a significant role in law firm EDD. Whereas in the business world the corporate RM department is usually heavily involved in coordinating EDD efforts, EDD in law firms is most typically handled by a litigation support department, and the department manager is most often an IT professional, a specialized paralegal or an attorney. Although EDD is all about the records, law firm records managers are generally left out of the loop in the electronic discovery process.

Realistically speaking, no law firm records manager has the time or the staff to manage EDD in addition to running a traditional active/inactive RM operation. In all but the smallest firms, EDD must be compartmentalized in a

separately functioning unit. Most law firms outsource their EDD projects to specialized vendors, but inhouse EDD is emerging as an alternative for firms willing to make the necessary investments for hardware, software, space and personnel. In return for this investment, bringing EDD inhouse "theoretically opens a new — potentially substantial — profit center, and it can have a significant impact on revenue for many firms."¹⁶

There is a future role in EDD for legal records managers. First, such managers might look at litigation support as a change of pace or a promotional opportunity. Those who have the requisite IT qualifications, or who are willing to train and learn, can make good use of their extensive knowledge of hard copy and electronic records to assist with EDD. Records professionals in small firms that have not yet had to tackle EDD should be especially proactive in promoting themselves and their abilities, because it is likely that they can greatly increase their value by offering services in this area. In firms starting up an inhouse unit, there is an opportunity to get in on the ground floor and get the RM department involved at the outset.

Conclusion

This is a very exciting time to be a records manager. The landscape of RM is changing rapidly with every new regulatory and ethics ruling, court decision and technological innovation. Almost nothing is routine anymore; it seems every day brings new twists to job responsibilities and tasks that were once upon a time considered dull and monotonous. Moreover, as lawyers come more and more to acknowledge the complex and critical nature of records management, they are affording RM professionals increased credibility in the workplace. Toward the end of this first decade of this century, legal records managers may finally attain a level of respect that has formerly been reserved for librarians!

Endnotes

- 1 Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (July 30, 2002).
- 2 RFID technology is currently being developed, or is already in use, for applications as diverse as the following: (1) embedding in currency and medicine bottles to combat counterfeiting; (2) tracking children in amusement parks; (3) tracking lost pets; (4) tracking airline luggage and dry cleaning; (5) implanting in patients to speed the delivery of vital medical history information to doctors and hospital personnel; and (6) implanting in humans to curb identity theft and kidnapping and to tighten building security.
- 3 A study done by Forrester Research indicates that in 2005, "1 percent of the work traditionally done by U.S. lawyers will be sent offshore to places like India and China." The number is expected to rise to 8 percent by 2015. For paralegals, the statistics are even grimmer. "[B]y 2015, 18 percent of the work traditionally done by U.S. paralegals and legal assistants will be outsourced." Steve Seidenberg, "Time to Get Rid of the Lawyers?" 25 *California Lawyer* (January 2005): 14. These statistics are echoed in Altman Weil's fifth annual Chief Legal

Officer Survey. In October, 2004 when data for the survey was collected, two percent of respondents indicated that they were currently offshoring legal work, “although eight percent indicated that they would pursue such an initiative within the next 12 to 18 months.” Press Release, Altman Weil, Inc., “Chief Legal Officers Face Increasingly Demanding Environment, New Survey Reports” (December 7, 2004), available at <http://www.altmanweil.com/news/release.cfm?PRID=47>.

- 4 In the private legal environment, there are seven different outsourcing configurations for library and RM departments: (1) *functional areas*, e.g., loose-leaf filing, messengering, micrographics, imaging, offsite storage of inactive files; (2) *projects*, e.g., catalog and/or classification conversions, automated records management system (ARMS) conversions, inventories, retroactive retention policy implementation; (3) *individual staff position* outsourcing; (4) *nonexempt staff* only; (5) *management* only; (6) *full-scale* departmental outsourcing (management and staff); and (7) *shared service centers*. For further discussion, see Jean Barr, Beth Chiaiese and Lee R. Nemchek, *Records Management in the Legal Environment: A Handbook of Practice and Procedure* (Lenexa, KS: ARMA International, 2003): 34-37.
- 5 “The most important client relationship issue chief legal officers identified is compliance/Sarbanes-Oxley, including implementation, execution, training and records management in the new regulatory environment.” Press Release, Altman Weil, *supra* note 3.
- 6 Financial Modernization Act of 1999, Pub. L. No. 106-102, 113 Stat. 1338 (November 12, 1999) (privacy of financial information).
- 7 Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (August 21, 1996) (privacy of health and medical information).
- 8 *Zubulake v. UBS Warburg LLC, et al.*, No. 02 Civ. 1243 (SAS) (S.D.N.Y. July 20, 2004) (provides guidance to lawyers on managing electronic discovery and litigation holds).
- 9 http://www.hunton.com/practices/practice_detail.aspx?gr_H4ID=943&desp=true.
- 10 <http://www.reedsmith.com/specialtopics/specialtopics.cfm?topicID=9>.
- 11 <http://www.blackwellsanders.com/bio.aspx?id=4534488c-34af-44f3-910a-66cac6f500f1&type=Firm>. Partner Peter B. Sloan’s firm biography shows that he is a member of two prominent international records management associations, AIIM and ARMA.
- 12 <http://www.blackwellsanders.com/programDetails.aspx?id=d4cef059-4983-4771-936f-64837a14fbc8>.
- 13 Tricia Bishop, “Electronic Records Open Up Fertile Legal Research Field,” *Los Angeles Times* (December 27, 2004): C3.
- 14 See Barr, et al., *supra* note 4, at 366-422, for an in-depth discussion of electronic records creation and management technologies in the legal environment.
- 15 Bishop, *supra* note 13.
- 16 See, e.g., Richard E. Davis, “In-House EDD: Pot of Gold or Can of Worms?” *e-Discovery Law & Strategy* (November 3, 2004): <http://www.law.com/jsp/ltn/PubArticleFriendlyLTN.jsp?id=1099217123685>. See also Matthew Levy, “In-House EDD Departments Help Law Firms Scale the Digital Mountain,” *The E-Discovery Standard* (Fall 2004): 3, 10.

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RFID: Is Now the Right Time?

by Greg Lambert of King & Spalding, LLP



Although Radio Frequency Identification (RFID) technology had its start many decades ago, it has not become a commercially viable product until the past few years. The potential for RFID technology in the area of law firm or legal department records management is enormous. Imagine taking inventory of an entire records center in a matter of seconds or finding misplaced files simply by taking a handheld device and walking through the office. The potential of time savings, inventory control and office space reduction are all benefits of RFID technology.

RFID has typically been a governmental or commercial product where electronic radio tags are placed on items to be tracked remotely, or to place information about the item to quickly pass information to the recipient. The basic components of an RFID system are: tags containing encoded information, readers to translate the information on the tag, encoders to place information on the tags, middleware to operate the RFID equipment, and

application software used to integrate the information into the business' current data structure.

Large companies like Wal-Mart and Ryder are implementing wide-scale RFID inventory tracking systems in order to improve productivity. Effective RFID systems allow businesses to move inventory quickly through distribution centers and into stores. Even government agencies like the Department of Defense are requiring contractors to use RFID technology for verifying shipping invoices to speed the process of moving parts to the appropriate facilities. The overall cost of the RFID system can be justified through basic return on investment calculations. Is the cost of the system less than the benefit of getting the product to market more efficiently? Such cost-benefit analyses are harder to define in a law firm or legal department.

How Would RFID Technology Benefit the Law Firm?

Most law firms currently view the cost of an RFID system as too high to justify the return on investment. Start-up costs for an RFID system could conservatively be as low as \$10,000, but more realistically begin in the \$25,000 to \$100,000 range, with additional annual costs for RFID tags, equipment and software upgrades. With initial costs this high, any firm's budget committee is going to need a serious business plan to detail the benefits the firm would get for its investment. Making the case for an RFID system requires looking at the two biggest costs that face all firms: building and personnel costs.

A well planned RFID system reduces the amount of square footage required for storing files, as records can be filed in vertical file systems rather than boxes until they are ready to be shipped offsite. Storage boxes are very inefficient for onsite storage and can take up to twice as much cubic space as a vertical file shelving system. The vertical shelving not only saves space in the records department, it can also help save space in file and war rooms.

An RFID system could also reduce the number of hours that personnel spend locating files. Because an RFID-tagged file can be located with a handheld wireless reader, less time is spent trying to locate files that have been misplaced or moved from one room to another. There are thousands of anecdotes describing the number of hours staff spends tracking down missing file folders. Being able to track these files throughout the office would significantly reduce the amount of time a secretary or file clerk would typically spend finding rogue files. The savings in building and personnel costs are only the most obvious benefits of an effective RFID system. Additional arguments for cost savings could be the reduction of duplicate

files, costs of storage boxes and faster turnaround in fulfilling file retrieval requests. Therefore, the RFID system allows for more efficient use of staff and space.

Benefits Galore

Another benefit of an RFID system is its flexibility. Almost every department in a firm could take advantage of an RFID system. An IT department could track computer hardware throughout the office, with this type of tracking being particularly useful for portable devices such as laptops, PDAs and BlackBerry devices. The library and research departments could track materials that have been checked out and quickly find these materials when requested by other attorneys or when there is a need to update the items. Office services could track furniture and artwork without having to handle the items to find the physical tags. Although the primary beneficiary of an RFID system would be the records department, the argument could be made that most departments would reap the rewards of a well-designed system.

The benefits of an RFID system are not limited to money. There are additional benefits in the areas of quality of service, records policy adherence, inventory control and record security. All of these benefits produce a confidence in the records management system that is reflected both inside and outside the firm. When the firm's partners are confident in the records management of the firm, that confidence is relayed to clients. In a time where clients increasingly submit requests for proposals to obtain a firm's business, an effective RFID system is one more item that could place the firm ahead of the competition.

RFID in Action

The use of RFID systems in smart room technologies and offsite security are two areas that could be used to bolster your case for implementing this technology in your firm. Smart room or smart shelf technologies are used by commercial operations to track inventory automatically and can be adjusted to the law firm environment to monitor file usage, as well as prepare materials for offsite storage. Offsite security is a major consideration, as there is a large amount of sensitive information contained in the boxes sent to offsite vendors. However, there is very little ability to actually track the material once it leaves the office.

Get Smart with Smart Rooms

In the retail industry, there is a vision of smart shelf technology that would track each piece of inventory on a shelf and notify the ordering agent when an item needed to be reordered, or it would take an instant snapshot of the entire store's inventory for tax purposes. In the law firm records management environment, the smart shelf idea could be

modified to create a smart room where each record is individually tracked and accounted for.

Individual rooms could be set up as smart rooms to track the items within the room. War rooms, where multiple attorneys may be in and out preparing for a case, stand to benefit directly from this technology. Knowing what files are in the war room, attorneys can focus immediately on trial preparation, confident that the materials needed are at their fingertips. Attorneys could also audit the war room before leaving their offices and determine if they need to request additional files be sent to the war room before their arrival.

Records departments could be set up as smart rooms to monitor onsite storage, prepare items for offsite storage or to inventory items that are coming back from offsite storage. The ability to quickly find files is essential to the records department's service objectives. When attorneys, secretaries, paralegals and file clerks are confident that files can be retrieved in a matter of seconds, they are more likely to keep the items in the records department instead of tucked away at their desks. As cases close and files are ready to be shipped to offsite storage, smart rooms allow the quick tracking of all the files associated with a case and prepare those items for shipment. When items with RFID tags come back from offsite storage, the smart room allows the receiver of the shipment to quickly scan the pallet without having to physically move each box and scan files individually.

The biggest drawback to RFID smart rooms is the overall cost, but there are also potential technical obstacles to smart rooms. Would smart rooms be able to work with other technologies in the firm? Would smart rooms overlap and thus double count items in different rooms? Many of these situations have not yet been fully tested in a law firm environment.

Offsite Security

One of the hottest topics in the business industry today is the ability to secure information. Whether the information is business records, human resource information or client information, everyone expects a law firm to ensure this information does not find its way into unauthorized hands. Sending items to third-party offsite storage facilities is now being viewed as a possible security risk. What control does your firm have over these items once they leave the office? How can you inventory these boxes to determine that each offsite box is still there and has not been tampered with?

RFID systems can help monitor offsite items by allowing a representative of the firm to quickly inventory the material with RFID tags without having to directly search each storage box. The boxes themselves could be sealed with security tape

and the contents scanned without having to break and reseal the security tape. Information on the RFID tags could be encrypted to allow for secure records even if other items in the offsite storage location contain RFID tags.

Clients expect their information to be handled in a professional and secure manner. RFID systems can be used as part of your client information handling that is not physically in the control of your firm. Once again, clients are looking for details that set you apart from other firms and how seriously you take their business. Implementing an RFID system as part of a secure method of tracking client data is one more step toward retaining existing clients and obtaining new clients.

Why Would You Not Use an RFID System?

Implementing an RFID system is not a magic bullet for law firm records management systems. RFID systems are expensive, complicated, time-consuming and they require additional training for everyone using the system. However, if you have a record system that is working well but needs to move to the next step to help with accuracy and efficiency, an RFID system will help take it to that next level.

Understanding the cost benefit of using an RFID system is the primary consideration in determining your firm's readiness. Serious review of the technology by managers in the records, information technology and knowledge management departments are the first step in seeing if an RFID system can be implemented into current technologies. Most firms will not add additional technology that will not coexist with existing technology. It is especially important to make sure that your current records management software works with RFID technology. If implementing an RFID system means completely eliminating your current records management software, then there may be no economic benefit to installing a new system.

Determine if there is a labor cost benefit to implementing an RFID system. Honestly review how the RFID system will be used. Is it eliminating current steps, or is it just adding to the current process? Will people use the new system? Will there be sufficient training available? As with any new technology, these questions should be asked to determine if there is a justification for bringing in the new system.

One of the most important questions that should be asked before an RFID system is implemented is whether the RFID system is fail proof. Just as you would question contingency planning for any technology, you must determine the backup plan in case of failure of the RFID system. RFID components — tags, readers, antennas and software — can fail. Most of these items can be replaced or repaired. In order to minimize

the effect of a component failure, there should be backup equipment and software recovery systems in place. A properly planned RFID system does not allow for a single point of failure. For example, you should not rely on the RFID tag as the sole provider of information. Tags should be used in conjunction with standard barcodes or some other type of print labeling system which allows for physical files to be found. Files should still be organized in a systematic order (alphabetically, numerically by barcode, etc.) in order to locate files without using an RFID reader.

What are the security risks of an RFID system? Can RFID information be stolen by hackers? Because the RFID system sends out information, the information should be secured or at least kept to a minimum (*e.g.*, unique id number only) that is useless if intercepted. Because advanced RFID tags can hold large amounts of information, it will be tempting to encode the tags with all of the information that your records management software has on that item. If you do not encrypt the information, you are potentially opening a huge security hole in your records management system. Anyone with a reader and access to your building, or access to files in the offsite locations, could intercept this information. Just as with all information gathered by a firm for its clients, there should be a concerted effort on the part of the records department to keep all information encoded on an RFID tag confidential.

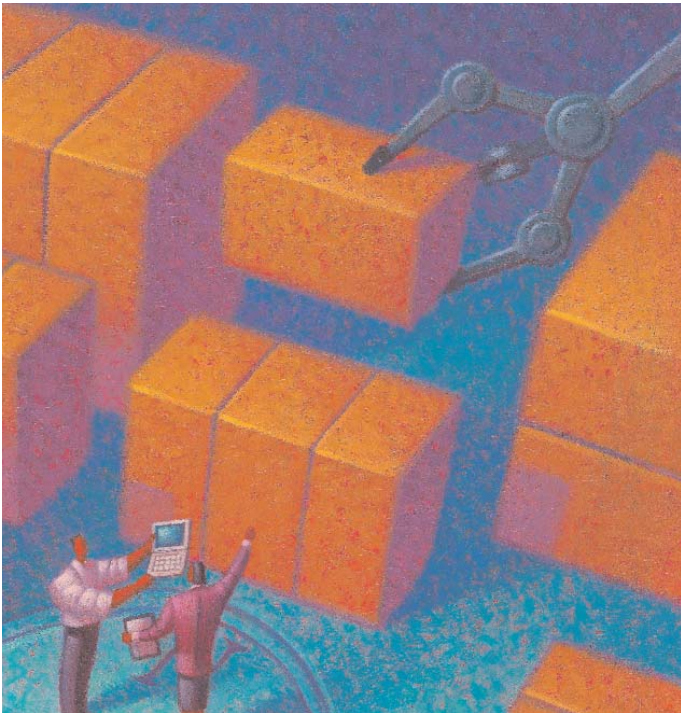
The Future of RFID in Records Management

The potential for RFID systems in law firm records management is enormous. Limited only by imagination and cost, the RFID system could enable records management teams to track records instantly throughout the firm's offices. Lost or mis-shelved files could be found in a matter of minutes. RFID smart room technology could increase the efficiency of the records department by streamlining the shipping and receiving of offsite storage boxes. The firm's clients would feel confident that all of their records held by the firm are secure. Even those records sent offsite could be easily audited by the firm's records department.

While the potential uses of RFID systems are incredible — it is the cost of the systems that keeps them out of reach of most law firms. Many in the field of RFID technology see the costs decreasing over the next five years; RFID tags that currently range from forty cents to a few dollars could decrease to a few cents per tag. If this occurs, there would be more justification to switch from a standard barcode system to an RFID system. Until the time where the cost-benefit ratio can be justified to the budget committee, however, only a few firms will be willing to invest in RFID technology.

Building a Solid Records Retention Policy

by Nancy Beauchemin of InOutsource



Consider the following:

Can all files be tracked and managed, regardless of media type or origin?

How quickly can the firm produce both physical and electronic files required for discovery? How much would it cost?

Is the firm's retention policy consistently applied and enforced? Does it apply to electronic files?

Can the firm respond to potential client concerns regarding procedures for safeguarding sensitive information?

First things first — what exactly is a retention policy? A retention policy details a firm's responsibilities pertaining to the handling of information throughout the entire lifecycle of a record. From file creation to storage to disposition, a systematic and legally sound approach should be established and adhered to for both firm and client protection.

Specifically, a retention schedule determines how long files should be kept by the firm based on record type, activity level, client input, and operational, legal and historical values. The established retention policy of most law firms has arisen from legal statutes and ethics opinions based on ABA Rules of Professional Conduct, as there are very few regulations that are applicable to law firms. Client-matter files, as discussed below, have been at the forefront of retention planning; however, retention policies should also be expanded to apply to administrative records as well (e.g., billing, human resources and marketing).

Assemble the Crew

Because client-matter information touches so many departments within a firm, it is important to involve practice department chairs and representatives from each of the following support areas: records, new matter intake, marketing and IT, as well as the firm's general counsel and/or risk management partner. Given that business is increasingly transacted electronically, it is critical that IT play an integral role in ensuring that the firm has the technology infrastructure necessary to support the retention schedules. Consider contracting with an independent consultant to help clarify the issues and revise information management processes within the firm.

Develop a Blueprint

Developing and implementing a retention policy is an enormous undertaking and there is no "one size fits all" approach. Prior to implementing a retention policy for

Q: What's one of the greatest challenges facing law firms today?

A: Understanding, establishing and complying with a retention policy.

The importance of properly handling client-matter records has proven to be a great equalizer among firms, regardless of size, practice specialty or technology sophistication. Today's complex legal, regulatory and best practice mandates are driving firms to take a closer look at how client-matter files are retained. However, as records (both physical and electronic) continue to increase in complexity and volume, many firms are either unsure where to begin or are wondering if they've gone far enough with records retention.

managing client information, the firm must have a structured, disciplined approach for managing all client information. There must be an integrated technology infrastructure that allows client information to be retrieved, shared and managed across multiple repositories.

People, processes and technology must all come together for optimal records retention. Prior to setting policy, conduct an internal audit. Map existing practices, procedures, staff responsibilities and technology systems to see how they measure up against the firm's ethical and risk management protocols. Understand the firm's responsibility regarding client information retention and document the way that information is created, how it travels, and how it is utilized and stored. Ask and answer questions at every stage. What constitutes a record? Where and how are they stored? What factors determine when a file is closed? How long should records be retained? What information should be returned to the client at the conclusion of a matter? How are records reviewed prior to destruction? How are exceptions handled?

Establish the Foundation

As the firm begins to build its retention policy, apply the following framework:

Consult the ethics committee, general counsel and/or risk management partner. The retention policy should correlate with the firm's overall ethical, risk management and cost control goals.

Review the technology systems used to manage information. Whether the firm is considering, utilizing or upgrading its records and document management system, find out the specific features and functionality that can assist with records retention. Be sure the system can apply retention rules to electronic as well as hard copy documents. Do not hesitate to ask the vendor for input in addressing the firm's needs.

Address all client documents, regardless of medium. Technology has transformed records management, both in terms of the types of files produced (*e.g.*, e-mail, voice mail, PDF files, images) and the systems used to track and manage this information (*e.g.*, document management, records management, e-mail repository). As a result, a retention policy must encompass all files, regardless of medium, and should apply the same taxonomy and rules to both physical and electronic files.

Define procedures and policies for complying with all aspects of records management. The policy developed should account for every stage in the record life cycle (*i.e.*, beginning with new matter creation, to active status, to inactive status, to matter closing).

Address retention and records management policies with clients from the beginning. The new client intake process should include discussions about the handling of client information, beginning with the firm sharing its policies regarding records management and retention, as well as how the policy is enforced. Similarly, the firm should understand and be able to respond to the client's own retention rules. The client engagement letter can be used to outline the firm's responsibilities for retention and file management — from the beginning to the conclusion of a matter.

Determine file ownership and rights. File ownership issues should be discussed with firm management and each of the practice areas. Questions such as whether to retain drafts in the client file may vary according to practice group and firm policies.

Consider confidentiality. Some client communication is confidential and should be protected.

Define when a matter is closed. Have clear guidelines for closing a matter, including procedures to cull files upon conclusion and returning client-provided originals.

Track and manage one official matter file. Institute policies that ensure that all client records are forwarded for inclusion into one official file.

Put mechanisms in place to cease destruction. For every rule in the retention policy, make sure that there's an override in case of real or pending litigation.

Make sure the policy is communicated and enforced. A retention policy is of no use if it is not understood and adhered to. Identify who within the firm will be responsible for communicating, managing and enforcing the retention policy. Consider incorporating retention policy guidelines in the firm's employee handbook.

Building Blocks for Success

Once the preliminary mapping of procedures and critical thinking about the issues is complete, the firm will have the infrastructure to begin to develop a comprehensive retention policy.

By definition, retention schedules are a key component of the records retention policy. Retention schedules determine how long records should be kept based on legal, operational and client requirements. Retention schedules should be media-neutral and will vary depending on the client, operational needs and area of practice. The retention guidelines are typically expressed as a certain period of time after a matter is closed (Date Matter Closed + Number of Years = Retention Period).

The firm should clearly define when a matter is closed as well as the starting point for the retention schedule.

Finally, procedures for continually reviewing the approved retention policy and schedule should be outlined. Continuing legal research is necessary in order to check for new ethics opinions, case law or other statutes that may affect the policy. New record types and changing business requirements also necessitate regular updates. Procedures should be in place to

escalate challenges to the agreed upon policy or to approve special exceptions.

Once the retention policy is developed and approved, put it to use. Distribute copies to clients and within the firm. Educate staff and clients so that they can support compliance. Most importantly, consistently use and enforce the policy for optimal firm and client protection.

Is Your File Room Being Left Behind?

by David Guilbault of ImageTag

There is a gap between two important information assets: electronic documents and paper records. This gap exists in virtually every law firm, in every department and even at every user's desk. To help narrow this gap, we will look at five different areas: the disconnection between a firm's knowledge platform and the file room; the risk posed by paper-based file rooms to business continuity following destructive loss; the obstacles to *going digital*; the need for a comprehensive paper-to-digital infrastructure that can turn paper into digital records as easily as companies can print; and the business processes needed to create such an infrastructure.

A firm's paper files contain information assets that are equally, if not more valuable than information assets on the network — yet these paper records remain isolated in file rooms and unprotected.

Why is the file room being left behind? The simple answer is file rooms and dispersed paper documents are not integrated with a firm's knowledge platform. File rooms contain vital information assets, yet these paper documents have nonautomated workflows and follow manual records management procedures without an easy or practical way to be backed up or made redundant.

ILTA's 2004 Technology Survey states that more than half of surveyed firms are developing business continuity plans and a



majority of IT departments operate daily with a carefully managed backup plan. This assures that a firm's digital information assets are protected so that the business can recover and continue operating with minimal disruption in the face of fire, flood or other disasters. But what happens if there is a fire in the file room?

The vulnerability of the paper-based information at organizations has made numerous headlines in recent years. Most dramatically, but by far not the only example, Citigroup's General Counsel's Office previously located at 7 World Trade Center has no paper records prior to September 12, 2001.

Turning Paper into a Digital Asset

There are numerous benefits to converting paper documents to digital.

Backup — While making a physical copy of a file cabinet or an entire file room is impractical and in most cases virtually impossible, digital files are easy to back up and move to a redundant site for business continuity purposes.

Distribution — Paper documents require faxing or sending via overnight mail to quickly move to another part of the city or world, while digital documents can be sent via e-mail or stored in shared repositories and made available to authorized users in seconds.

Productivity — Shared repositories of documents enable timekeepers to find and retrieve information they need without leaving their desk or disrupting other employees.

Space Efficiencies — The physical management and storage of paper documents in relatively expensive office locations is reduced because documents can be stored in cartons offsite or destroyed. For example, government officials in Lee County Florida received a legal opinion that determined scanned versions of human resources files can serve as the document of record while the original paper documents are stored offsite as the legal copy.

Compliance — Conversion of paper-based records to digital is a critical aspect of a firm's comprehensive records management process (*i.e.*, "Twenty-five percent of enterprise paper documents that are misplaced will never be located," says the Datapro/Gartner Group).

Obstacles to Going Digital

"Capture," as this process has classically been termed, requires multiple steps that must be managed and controlled by humans rather than automation. The conventional document capture process consists of:

Audit receipt of the documents.

Aggregate documents to a central location.

Prepare the documents for scanning (e.g., remove staples, paper clips).

Batch the documents as "jobs" for the scan operator.

Scan, by placing the batch in the feeder.

Image process for clean-up, rotation and conversion to PDF (mostly automated).

Index for identification and later retrieval (partially automated).

Execute quality control checks.

Release for storage in the repository.

It turns out that the physical step of scanning the paper is actually the least problematic in the process. More importantly, scanned documents produce images that must be indexed for subsequent search and retrieval. Until recently, the two pillars of the process, scanning and indexing, were required to be tightly connected or coupled to insure integrity. This rigidity created inflexible work processes and larger integrated systems with multiple dependencies. Because of the necessity to pair the indexing with the scanning, it has not been realistic to expect attorneys and paralegals to complete the process. The impracticality has resulted in paper storage of documents.

Copier manufacturers have attempted to improve on this by integrating scanning into their digital copiers. When enabled, multi-function devices (MFDs) leverage their network capability (performing as printers) to scan images to shared folders, desktops or e-mail addresses.

These devices make the physical act of scanning as easy as copying. However, as discussed above, scanning may be the least problematic part of the process. The need for tightly coupled indexing to the scanned image has now required entering information at the copier keypad. As any user of a cost recovery system has experienced, the process is intended for *one document at a time*.

That workflow was acceptable for making multiple copies of a single document, but for indexing multiple documents in a session standing in front of a copier, the process is tedious and error-prone, making it impractical for firmwide adoption. Additionally, the firm's business processes become dependent upon a single vendor's hardware — not ideal when making an enterprise-level investment.

The outlook for scanning from digital copiers is not all bad. What they do very well is produce excellent image quality with relatively simple workflow. This is in contrast to learning a workstation-installed application to operate the connected scanner. The scanning application is more capable, but for most business documents, the additional capability is not required.

So, if paper-to-digital requirements are viewed as a continuum from low- to high-volume needs, the industry has created solutions that focus on the two ends of the spectrum. Either the solution is designed to capture a few documents of differing types one at a time or many documents of similar types captured in batches. The former enables workers to e-mail documents outside the firm or scan them to their

desktop. The latter is most appropriate for service bureaus providing litigation support services. As it relates to this discussion, the broader requirement of converting the contents of the file room to digital assets has not been addressed.

The Stubborn File Room

The biggest obstacle may be that paper remains the preferred document format of many attorneys. Even in this age of e-mail, the IDC reports annual fax volume at 440 billion pages with a five percent annual growth rate. As discussed previously, conventional capture solutions are not well suited to replace the file room at a law firm because they require too much change for broad adoption.

A case in point — Duane Morris LLP, like other large firms, has practice groups, accounting and human resource departments that are burdened by paper. John Sroka, the firm's CIO, invested considerable hard and soft dollars to implement a document management system (DMS), as well as drive the adoption that is so important to the success of such a project.

Even with this significant investment and focus, Sroka was frustrated by the chasm that existed between the firm's document management technology and file rooms. He recognized that both are equal parts of the attorneys' work product and the firm's record management responsibilities.

It became clear that Duane Morris required a productive firmwide scanning solution that would include related paper with the documents already managed by the in-place DMS and fit the varying needs of the other departments.

Put another way, what Duane Morris required was a paper-to-digital infrastructure — a platform that enables workers to file paper to the network rather than in filing cabinets. This infrastructure would be available to all departments and applications providing operational simplicity, comprehensive functionality and a universally productive way to file paper related to a business process.

This ability to file paper digitally without disrupting the current workflow is particularly acute in law firms where paper is often the preferred information container for timekeepers whose work generates the firm's revenue. The task of identifying or indexing the documents ideally would be performed by paralegals, secretaries or even the attorney (assuming it was simple enough), while scanning the physical paper is best performed by workers in copy centers or the file clerks whose lives have now been simplified by digital filing.

The Ideal — A Paper-to-Digital Infrastructure

E-mail and network printing are great examples of technical capabilities that have now become part of the infrastructure of

an organization. Like the telephone or electrical system, a firm could not operate for long without such infrastructure.

Today, putting in place a paper-to-digital infrastructure is very possible and critical to enabling a firm to protect all of its information assets. Fortunately, this effort can leverage a number of advancements of the modern network:

Network Speed — 100 Gb switched networks have become the *de facto* standard for most firms. Bottlenecks for transfer of large files are dramatically reduced.

Availability of Viewers — Scanned documents are most often stored in two common formats: TIFF or PDF. Today, all Windows desktops have or have available, a free viewer for both types.

Workstation Power — The practical minimum for viewing, searching or retrieving image files is a Pentium III-class machine, 256 MB RAM and Windows 2000 — easily attainable or surpassed by most machines in firms today.

Digital Copiers — Most modern copiers today are digital, and the overwhelming majority scan or can be upgraded to do so. Scanning a stack of paper documents is as easy as copying, without installing and learning complicated scanning software.

With these leverage points, CIOs now have an easier task ahead of them to define, source and implement the technology required to transform the firm's file rooms to digital. When researching paper-to-digital offerings, keep the following capabilities in mind:

Operational Flexibility — Allow attorneys and paralegals to work with paper or digital images based on their needs or work preference. Reducing change promotes firmwide adoption.

Integration with the Firm's Knowledge Platform — Connecting to documents or case management extends the capability of those applications and leverages the investment in training and establishing work processes.

Device Independence — Work with any vendor's scanning devices, including digital copiers and multifunction devices, to enable self-service or centralized scanning.

Efficiency — Work seamlessly with applications like accounting or records management to increase the productivity of back office personnel.

Productivity — Provide the operational horsepower to handle large jobs and repetitive work processes.

Simplicity — Convert paper documents to digital as easily as a printer converts digital documents to paper.

What Should Management Do Next?

Closing the gap between paper and digital should be evaluated like other prospective projects. The cost of *not* acting should be considered first. The following steps are recommended:

Analyze the extent of assets available only in paper form.

Determine the consequences if those assets were lost, destroyed or unavailable. Consider:

How would you know if an asset was missing?

What is the liability for being unaware that a document is missing?

Once discovered missing, does the asset need re-creation?

If re-creation is not possible what is the liability of not producing the asset upon request?

Develop a plan for protection and recovery of the file rooms as digital assets.

Investigate the various paper-to-digital solutions, benchmarking them against an idealized solution.

Perform a cost analysis against the risks outlined above.

If feasible, move forward.

Tips for Getting Started — What's Ahead?

Every firm has a hot spot where a paper-to-digital solution can be immediately effective. Paper-intensive activities in the AP/AR departments are a good example; new matter intake is another. Leverage any momentum the firm may have to consolidate physical file rooms to move to a digital platform.

If the decision to move forward is made, what tasks are ahead? The following is a generic guide to implementing a paper-to-digital solution. The tasks are grouped by focus area:

Applications

Prioritize the list of applications that will be converted from paper to digital.

Apply a schedule and milestones to the prioritized list.

Identify where in the process the documents will be captured.

Map the current process, and look for opportunities to leverage the digital document.

Technology

Leverage current investment in scanning equipment such as fax machines, scanners and multifunction devices. Identify any additional devices required. Contact office equipment vendor for acquisition.

Get the recommended server configuration from the paper-to-digital vendor. Contact server vendor for acquisition.

Install server.

Implementation

Identify departments affected by targeted applications.

Insure that required scanning devices (if self-service) are in place.

Connect output of scanning device to processing server.

Deploy software and test configuration.

Train users.

Support

Train internal IT staff for administrative responsibilities and future deployments in other departments.

Establish ongoing support responsibilities internally and with vendor.

Conclusion

Acquiring or creating paper documents will continue to be the standard way information comes to an office. Forward-looking organizations that make their paper records productive and part of the digital work product will reap the short- and long-term benefits of addressing the paper problem by turning their file rooms and dispersed paper documents into digital assets.

They Just Don't Add Up:

Stockholder Record Tracking

by Gary D. Levine of Two Step Software, Inc.



It's midnight the night before a closing, and the young associate points out the elephant in the conference room: the numbers in the fully diluted cap table *almost* add up. But when it comes to multi-million dollar transactions, *almost* isn't good enough.

How Did We Get So Many Spreadsheets?

For the vast majority of privately held companies, law firms act as the transfer agent for stockholder records. Unfortunately, lawyers don't often realize when they volunteer to maintain the stock records of a newly formed company that their ownership tracking responsibilities will become a spreadsheet nightmare as these companies grow and prosper.

Thus, the ticking time bomb in records management is not the physical files or documents in-process, it's really the tens of thousands of spreadsheets used to track the stockholders of the most valuable, privately-held companies in America. It's the ownership of every major company that has not gone public; those companies that are venture-backed, family-owned, employee-held, pre-IPO or about to be acquired.

Tracking thousands of stock records in hundreds of slightly different spreadsheets over the course of many years is fraught with potential error. It puts companies at risk for securities litigation and law firms at risk for malpractice exposure. It's anything but a "best practice."

Is It Time to Graduate from Spreadsheets?

Although this ownership tracking problem has been around for many years, the availability of new, browser-based ownership

tracking systems designed specifically for the needs of law firms has changed the cost-benefit analysis. These new systems have greatly reduced the total cost of ownership and significantly increased the benefits to both law firms and their clients.

Total cost of ownership has been reduced because these systems are easier to learn, easier to install and support, and more comprehensive. Likewise, the benefits have increased since more time can be saved, more complex calculations are included, and it's even easier to link related legal documents. In light of the current focus on greater risk reduction, better corporate governance and improved client service, it's a good time for law firms to question whether their current methods for tracking ownership records satisfy what their clients would consider minimum standards.

Selecting a System to Limit Ownership Tracking Risk

When evaluating an ownership records management system for a law firm, the first requirement is that the system be designed for the unique needs of law firms. For example, it should be designed to track ownership records for many different, unrelated clients, not just a single company or family of companies. Then, the system must satisfy the following minimum criteria:

Consolidated System: *All information currently tracked in many different systems needs to be brought together in a single, consolidated location so everyone knows where critical ownership and related client data can be found.*

Comprehensive Tracking: *All types of ownership information and all supporting information (such as entity data, lists of officers and directors, governing documents and minutes of meetings) must be tracked together. Users should not need other sources to find supporting data or documents.*

Complex Calculations: *The system must provide checks and balances on ownership transactions and automate complex, time-consuming and error-prone calculations (e.g., fully diluted cap tables, stock option vesting and stock splits).*

Complete Audit Trail: *To rely on the data, there must be an audit trail that tracks each change made by a user, as well as dynamic links to historical legal documents (e.g., minutes of a meeting or a signed stock certificate). In this way, information can be easily verified.*

***Flexible Reports and Documents:** In addition to a complete set of standard reports, users need the flexibility to create custom reports and documents, as well as export data to spreadsheets.*

Beyond Spreadsheets — Make the Right Choice

In order to limit internal risk and provide clients with the foundation for good corporate governance, law firms need to consider implementing appropriate systems for ownership records management. The right system can showcase a firm's use of technology to provide even better service to its clients. It will also mitigate the risk of errors that develops as the volume of spreadsheets grows over time. When it comes to ownership record tracking, law firms need to choose whether to do it right — or not at all.



Random RM Tidbits

E-Mail Messages Are Records

Although e-mail has become the preferred method of business communication, many firms continue to take a haphazard approach to managing e-mail. In fact, according to ILTA's 2004 survey, *E-mail Usage and Administration*, only ten percent of firms reported having an e-mail destruction policy.

E-Records Are Special

The characteristics of electronic files are very different from paper:

Electronic files may require specific applications to view the document.

Electronic content can degrade over time.

Both file formats and storage media standards evolve over time.

Electronic files must be located frequently based on their metadata, not their physical location.

Destroying electronic records is more than just sending something to the "Recycle Bin."

IT and RM: Can't We All Just Get Along?

Records managers are not always knowledgeable when it comes to IT issues. Similarly, IT professionals don't always understand records management goals and issues. Together, they must ensure that electronic documents that need to be maintained are accessible and those eligible for destruction are destroyed. A solid understanding of how both firm and client electronic records are backed up and destroyed is critical. Regardless of where the final responsibility lies for creating and enforcing compliance of client-matter file retention, records and IT staff must work in tandem so both paper-based and electronic record issues are managed.

Effective Records Management Policy:

It's More Than a Retention Schedule

by Bob Dolinsky of eSentio Technologies

There is no one appropriate records management policy that will fit every firm. Differences in firm culture, risk tolerance, management and other issues will impact the policy that you develop.

There are, however, five basic overarching rules for an effective records management policy for nearly every law firm.

The policy should be more than a retention schedule. *There is much more that should be addressed in an effective records management policy for a law firm.*

Keep it simple. *If your policy is the size of a phonebook, it is unlikely that it will be accepted, followed or even read. A few pages are better than a few dozen pages.*

The policy should address electronic as well as hardcopy records. *Too many firms have policies that only address hardcopy records. Electronic issues are becoming more important and include e-mail as well as documents. Voice mail and instant messaging should also be considered.*

The development and enforcement of the policy should be led by someone in the senior management level of the firm. *This is usually someone at the partner level, such as the managing partner or risk management partner. Without this level of involvement, it is unlikely that a firm can develop, implement or sustain an effective policy.*

Reasonable flexibility should be built in. *Records management policies that have little flexibility are not generally accepted and approved; and those that are overly flexible have similar results. The level of tolerance for flexibility will vary from firm to firm, and there is no single answer. You will need to find the balance for your firm.*

In addition to the above rules, there are a number of other areas to consider:

Identify the responsibilities for the policy, including the responsibilities of the following groups: firm management (in particular, who has ultimate responsibility for the policy), practice group leaders, attorneys, legal assistants and paralegals, secretaries, and records management managers and staff.

Define key terms used in the policy, such as firm-owned vs. client-owned.

Define what should be included or excluded from the "official" record.

Define how records will be created (e.g., how files are opened).

Define how records will be maintained.

Create policies related to the records closing process. *In particular, determine who is responsible for this process.*

Define client notification requirements. *This starts with the engagement letter and typically includes notification when the matter is closed, as well as prior to the final disposition of the records.*

Create policies for returning materials to the client.

Create policies related to the final disposition of records. *This includes responsibilities, documentation of the task and a review process to ensure that final disposition is handled appropriately.*

Create policies for processing lateral hire records. *Few firms have addressed this. In many firms, the documents of laterals are taken in hardcopy and electronic form with little, if any, review. This can pose substantial risk to the firm if, for example, documents are accepted that may create a conflict for the firm.*

Create policies regarding the processing of records for departing attorneys. *This is not just a records management issue, there are potential knowledge management issues, as well as substantial liability issues involved.*

Define a retention schedule. *Issues to address include:*

How should the retention schedule be organized?

How detailed should the retention schedule be?

How many exceptions should there be? In general, effective retention schedules have few exceptions, and those are generally designated by practice area and/or document type.

There are a number of factors that will determine the success or failure of a records management policy, but one way to increase your chances of success is to ensure that you have a policy that goes beyond a retention schedule.



A note to our devoted fans: LawNet changed its name to **ILTA – International Legal Technology Association**. While the name has changed, the values, people and spirit that have made ILTA what it is today have not. And ILTA is expanding internationally. Which means that as our member base increases worldwide, so too does the breadth and depth of our network – and with it, our ability to share information. We are excited as we plan for the future, and we eagerly invite you to join us under our new banner.

To find out more or to become a member, visit ILTA at www.iltanet.org.



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