IRON MOUNTAIN®

DEFENSIBLE DISPOSITION REPORT

2017 LAW FIRM INFORMATION GOVERNANCE SYMPOSIUM

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INTRODUCTION

Historically, records disposition initiatives have been a significant challenge for law firms to undertake. In fact, for many firms, retention policies have been drafted and even published for several years, yet their disposition programs are either just starting, have been discussed but not implemented, or are non-existent. Traditionally, the resistance to disposition programs was largely due to the potential loss of client service that many attorneys assumed (and often incorrectly) would happen if information were not available for "just in case" situations – regardless of the vintage of the information itself.

In recent years, however, many firms have had to take a more active step forward to execute their retention programs. This step forward is triggered by growing physical and electronic storage costs, reduced office real estate, and in a growing number of cases, client requirements. Such programs require obtaining stakeholder support, procuring the necessary resources to conduct the program, and developing an overall realistic project plan. It also requires a firm to have a solid understanding of exactly *what* data has been maintained historically in paper records (work product and copies versus original documents), as well as how electronic records are being maintained within and outside a firm's systems (replete with definable client/matter metadata and descriptions versus ad-hoc email folders and file shares).

Such information is not always easy to obtain; technology and correlating policies/procedures have changed, attorneys have retired or moved to new firms and clients have been acquired by other companies, or in some situations, have dissolved. Such challenges must be considered when understanding a firm's overall risk tolerance to implementing a disposition program, and how much of a hindrance they present when trying to move ahead.

This report further elaborates on the above topics and proposes guidance on how to implement a defensible disposition program. It also takes in to account regulatory and client considerations, and provides examples of how firms are currently performing this task. Lastly, it looks at how to demonstrate ROI for a disposition program (including calculating the time such ROI is realized with the associated destruction costs), and address what future opportunities and technology may be available to assist firms in this process.

A few final notes before we get started. Disposition in the legal sense means the transfer or relinquishment of tangible property to another party. Our focus on disposition for this paper is when a record is destroyed -- or determined to be permanently retained. We also want to note that the change in names of the information/records function at law firms from Records Management to Information Governance is discussed in detail in other white papers and information management blogs, magazines, and books around the globe. In this paper, we refer to the function solely as Information Governance (IG) or the Information Governance Department, even though in many law firms the function and the people who perform the tasks are still known as the Records Management Department. Companion to that notion, and to reduce confusion, "records" and "data" is used to mean all information, emails, documents, materials, and other items that a law firm creates, captures, or collects.

STARTING A DISPOSITION PROGRAM

GAINING EXECUTIVE SPONSORSHIP

Demonstrating the need for a disposition program can be "easy" to do so long as the IG team fully accounts for the cost of unnecessary data storage. Costs for data storage – both electronic and physical – may falsely appear inexpensive when looking at it in its simplest, smallest form. However, calculating the total storage cost for data means addressing:

- The total amount of data eligible for disposition according to a firm's retention policy,
- The associated storage costs for eligible data that has already been incurred by not effectively disposing of it,
- The projected annual storage costs for retaining that data as opposed to disposing it, and
- The associated labor costs with managing that data past its stated retention period.

The 2016 report: *ROI on Information Governance: Measuring Success* provides further detail on how to calculate associated storage costs for both electronic and physical data. It also addresses the potential discovery costs associated with producing data that is eligible for destruction but has been unnecessarily retained. In these situations, costs surrounding the preservation (including data maintenance, storage and tracking of the retained data) as well as the costs associated with processing, reviewing, and producing data should also be considered. A total cost may be difficult to calculate, as it varies based upon the types of data being collected and the number of custodians. In such situations, the IG team may instead elect to use a specific matter, or matters, to calculate the associated discovery cost and use it to illustrate the additional expense the firm could incur due to their over-retention of data.

The IG team should ensure that they communicate to stakeholders the inherent risks associated with retaining data for longer than necessary. Client retention requirements and increasing security concerns often outline the dangers of "over-retaining" records. As law firms have become an increasing target for cyberattacks, in addition to inquiring about security protocols that a firm has in place to protect its data, clients often inquire about law firm retention schedules and disposition plans, and/or impose their own retention requirements upon their outside counsel. Routine disposition in accordance with proper retention requirements not only mitigates a firm's risk but also their clients' risk. This applies to security concerns as well as potential litigation concerns and associated discovery costs that a client may encounter in the future.

While storage costs and risk mitigation are two of the key benefits of executing a disposition program, it is also critical to convey the potential time and effort lost in searching for data that is no longer useful to the firm. The proliferation of ROT (Redundant, Obsolete, Trivial) data within a firm's environment significantly impacts its systems, and by extension, its ability to leverage data as an asset. The *2015 Dark Data report* further defines ROT and the challenges it creates for a law firm.

WHO ARE THE STAKEHOLDERS?

A thorough disposition program within a law firm takes into account both administrative records as well as client/matter records, though the associated Records Retention Schedules and process steps will likely be very different for these two groups. Given the scope of the program, and the associated challenges listed above, stakeholder buy-in at a variety of levels and departments is key. Specifically:

STAKEHOLDER	PURPOSE
General Counsel	Approves and communicates retention policy and disposition process and its benefits to the firm: defines risk tolerance; makes decisions for more challenging disposition scenarios (e.g., original documents for dissolved companies or deceased individuals, determining legal hold that can/should be lifted, etc.)
Client	Authorizes disposition of files; required retention schedules; dictates data privacy, security, and confidentiality requirements
IG	Owns processes and executes IG policy
IT	Manages the systems that contain electronic content (including archived data); implements electronic disposition of data (in many cases this is a shared responsibility with IG team)
Legal Team	Supports process and program; makes decisions and approves file disposition (client/matter) through execution of routine daily activities
Business or Administrative Operations Department	Supports process and program; makes decisions and approves file disposition (administrative) through execution of routine daily activities
Knowledge Management	Manages process to identify and retain "key" intellectual property and know-how
Litigation Support or Business and Data Analytics	Uses data to extract, analyze, and report for client or organizational use; should be kept apprised of data retention and disposition requirements.
Library	Researches disposition/retention requirements in various jurisdictions, etc.
Vendors	Partners with the firm to execute IG policy as consultants, cloud providers and technology providers for overall program

POLICY AND PROCESS DEVELOPMENT

A firm should ensure disposition is included within their retention policy and schedule. While the policy structure may vary from firm to firm, it typically includes the following guidelines:

- The definition of a "record" and "non-record" as it relates to the firm and its clients, as well as the corresponding media types
- The defined schedules for various records
- The general plan for disposition (client notification v. Attorney notification, time frames associated with notification, approval for exceptions to retention schedules, etc.)
- The processes for legal holds
- The roles and responsibilities of attorneys and staff under the policy
- A brief description of the underlying technology used to support the policy
- The outline of repositories that are acceptable for storing official records
- A section on confidentiality, data, privacy, and cybersecurity.

Presumably, the disposition program is aligned with the policy, at least in the beginning. However, it may be that once the program is put into practice, the instruction set out in the original policy is not realistic or does not encompass recurring challenges within the program. As the policy is revised, the dates of those revisions and what portions of the policy are modified should be clearly marked, as this helps ensure a firm's program is clearly documented and defensible should be it called into question in the future.

CLASSIFYING RECORDS

Prior to implementing a defensible disposition process, law firms need to have a defined records classification scheme and records inventory from which to execute the program. Whether a department, process or big bucket approach is decided, the classification scheme is the foundation of the retention schedules. An inventory guides where the records resides and ideally contains a listing of the more specific classes of records found within the primary categories, which may have different value to the firm, such as client records and human resources. In law firms, a logical approach is to use three high-level groups for "structured" records: client, business and non-firm/personal. In addition to structured records, firms also deal with "unstructured" data such as email and records created or received on mobile devices.

STRUCTURED RECORDS

Client Records

Client records are defined as material generated during the representation of a client. The client file is the official record of what was communicated between client and legal counsel. The guiding principle for what goes into a client file is to retain everything that is reasonably necessary to evidence the engagement. Client records are subject to varying retention requirements based on client guidelines, state laws and state Rules of Professional Responsibility. As such, within each client file, varying retention requirements may apply. Client files should be identified, organized, and tagged with a client and matter number. Documents commonly included in a client file:

- Correspondence
- Attorney work product, including substantive notes taken during meetings, internal memos, and legal or other research materials
- Official documents, including pleadings, transcripts, expert reports, and exhibits
- Documents and materials that the client has provided
- Administrative items: engagement letters/closing letters, conflict reports and waivers, billing information and responses to auditors. These are commonly kept within a client file but ultimately owned by the business units. They may be retained when the client file has met its retention period and subjected to a firm's disposition plan for the business unit.

Business Records

A firm's business records pertain to information necessary for its operation and does not include information pertaining to the engagement of client work. Disposition of business records should have a schedule separate from client retention schedules. Firm business information commonly includes information from the following administrative areas:

- Finance, including tax records, payroll, accounting, timekeeper records
- Human Resources, including employee files, benefits information, policies, and procedures
- Information Technology, including contracts and project documentation
- Firm Operations including facility leases, contracts
- Firm Governance, including partnership agreements, New Business Intake, Information Governance
- Practice support areas such as Marketing, Business Development, Knowledge Management and Library and information resources contracts

Firm business records are subject to state and Federal laws. When determining retention periods for each category, research should be conducted on categories within each business unit to ensure the minimum legal retention requirements are met. Once that has been determined, continued operational or historical value the firm places on the information should also be considered.

The IG Department should direct and track chain of custody for paper and electronic records, whether client or business unit records.

NON-FIRM/PERSONAL RECORDS

Personal records are generated for use only by an individual employee and are not directly related to client work or firm business functions. Personal records are typically allowed to be stored on firm systems for convenience and are not generally distributed to others in the firm. These records fall into two broad categories: professional development reference materials or wholly personal documents such as outside business interests, personal finance, and family related email communications.

A firm's technology use policy should clearly state what information is considered "personal" and that there should be no expectation of privacy if "personal" information is stored on any firm application, device, or network. Personal records should have a designated category to organize the information stored on the firm systems (typically a client number called "Personal," then a matter for every employee with a unique matter number; some firms use the employee ID as the matter number). Many firms also specifically state that client files placed in a personal folder, whether accidently or otherwise, are not deemed personal and are still considered client property and subject to client and firm retention policies.

Before the employee leaves the firm, he or she should identify all personal files for transfer out of the firm. These personal files are subject to inspection and review before release by the IG department. They should also be informed, in writing, that any personal records not taken with him/her will be destroyed within a stated time period. The IG department will review these files before destruction to ensure no client or firm data is inadvertently destroyed.

The devices and repositories subject to deletion of personal records may include:

- Email (e.g. Outlook email, contacts, calendars)
- Cloud services (e.g., Onedrive, box)
- Enterprise file sharing services
- Files saved on local computer directories
- Tablets/ipads/mobile phones
- Personal workspaces in the dms
- Personal file shares, and
- Offsite physical files

UNSTRUCTURED RECORDS

Data that exists in firm systems but is not organized according to a pre-defined classification system (like client/matter) is considered unstructured. Sources of unstructured information can include email, unstructured file shares, cloud based repositories, mobile devices, and a pile of unmarked files in the corner of a conference room.

Email

Email is a large and challenging source of unstructured information due to storage demands and associated costs, risk related to discovery requests, and responding and complying with client transfer or destruction requests or orders. Email programs were not designed for long-term storage and are generally not easily searchable.[1]

To reduce the amount of email in unstructured systems and follow a defensible destruction program, firms should encourage, if not require, personnel to move email to a structured repository. This allows a firm to ensure compliance with its records retention policy, as well as reduce the administrative burden associated with client files transfers, legal holds, and destruction orders.

It is important to work with areas of the business such as technology leadership, general counsel, and technology committees to determine when and how the email is be moved to a structured repository and then define a retention period for the emails that remain in the native email program or email archive. Once the email is in the structured repository, retention policies for client and business records can be applied.

[1] Records Management: A Law Firm Guide, Attorneys' Liability Assurance Society, Inc. 2009, p. 6.

Mobile Devices

The use of smartphones, mobile devices such as tablets, and personal laptops have become commonplace for law firms and their clients for ease of use and constant connectivity. Many law firms have moved to "bring (or use) your own device" practices (BYOD/UYOD). Managing information on personal mobile devices presents a host of IG challenges. Law firms need methods to defensibly dispose of content from a personal mobile device at an appropriate time, whether that is when a device is lost or stolen or an attorney or employee is leaving the organization. To ensure sound BYOD disposition practices, a firm should:

- Require that the use of mobile devices for firm and client work be on firm- managed devices
- Create a mobile device policy that clearly establishes how mobile devices are managed and used for firm and client work.

Databases and Cloud Systems

Most databases and cloud systems, with the exception of cloud-based document management applications, contain unstructured data. Defensible disposition for unstructured data is not yet a mature discipline. It is equally important that records residing in a database or cloud repository are retained and disposed of following the same retention and disposition protocols as all other records stored within the firm. With adoption of cloud repositories on the increase in the legal industry, it is important for firms acquiring new systems to determine the disposition requirements at the outset.[2] There are several topics that should be considered when determining retention of data in the cloud:

- Privacy, jurisdictional, and security considerations
- Establishing and applying disposition authorities
- Executive disposition authorities
- Documenting disposal actions
- Reviewing disposition, and
- Integration with other systems

(InterPARES Trust, 2016)

When determining cloud service options, it is important to ensure that agreements with the providers are clear about ownership and custodial responsibility of data, including client requirements, and are aligned with information governance and security standards. Once the database or cloud service has been established, IG should track its existence in a records management database index or other inventorying system. This should be associated with the client, matter, or business classification scheme. It also allows for consistent application of the firm's retention schedule. The 2017 report: Information Governance in the Cloud further covers managing cloud repositories.

Legacy Databases

Many firms should deal with legacy databases stored in application directories on a local network or databases archived to portable media which are stored with physical files. This data is not easily identified by client or matter and the format of the data may no longer be supported. Handling the disposition of unstructured data should be no different than dealing with unstructured physical records.

[2] Retention & Disposition in a Cloud Environment, Final Report prepared for InterPARES Trust by the members of the R&D in a Cloud Environment Project Committee, May 17, 2016

Legacy Materials Brought to a Firm

IG policies should prevent attorneys and staff, particularly those who are joining the firm from another firm, from transferring any information that relates to a client that will not become a client of the firm. These files can be structured (clearly identifiable), unstructured or both. The following are steps that can be employed to defensibly dispose of legacy personal files.

1. Start a new day forward policy.
    - A best practice is to clearly state in a policy that records are not accepted or stored unless the legal work will be opened as an active matter. If the client is already a client of the firm, even if the work for the matter was performed at an attorney's previous firm, the new firm may accept the files. However, if they do so, client/matter numbers must be established to organize the materials either under the existing client number or under the attorney's personal number.
    - Recognize that negotiations may need to occur particularly in instances where the client expressly requests the transfer of closed files.
    - Treat the records as if they are from an untrusted source. Clearly demarcate and label all incoming materials. If the incoming attorney provides the IG Department with the electronic files on removable media, mount that media on a computer that is not connected to the network.
2. Explicitly inform all departing attorneys and staff that any files brought to the firm (and personal files) must be taken with them or they will be destroyed following their departure.
3. Before destroying personal files perform a cursory review to confirm if there are documents of intrinsic value or related to client work. Index these files under the appropriate client. If that is not possible, use a generic "Unknown Documents Found" client ID to catalog the materials providing a detailed description. Full text index the documents for search and future access.
4. Establish a retention period for this content. It is unlikely that there is a legal retention period for unknown data, so discuss the operational and historical value of the data when determining the best length of time to retain it.
5. Consistently document procedure exceptions.

RECORDS RETENTION SCHEDULE

Prior to engaging in the disposition of a firm's records, it is vital to understand the types of records the firm has and the legal and business needs for maintaining those records. A Records Retention Schedule is an essential tool to document this information. Generally, such a schedule addresses all records, regardless of media or location, delineates the legal practice area or business unit owning the records and the length of time each record type should be retained (as governed by legal and business needs).

A functional Records Retention Schedule should be concise and user-friendly, yet comprehensive enough to address the information and record types for all of a firm's legal and administrative functional areas. There are several different types of schedules on which the firm can base its policy. It may be necessary to use an amalgamation of the various types briefly described below:

- Department Retention Schedule: This system is based upon the use and purpose for keeping a record. It is often used when there is very little crossover between departments in an organization. This may be used to set up retention schedules for a firm's administrative departments. For example, the Finance/Accounting and Human Resource departments would have separate retention schedules created for their unique sets of records.[3]
- Process Based Retention Schedule: The retention in this version is based upon the process or function of the individual in the business unit. This type of retention may be necessary for specific practice areas who provide representation in heavily regulated areas. Deliverables in specific representations may require that the firm classify these records according to the process and maintain them according to regulatory or ethical reasons. An example might be an ethics opinion which states that wills, estate work and criminal proceedings may need to be kept longer if not indefinitely.[4]
- Big-Bucket Retention Schedule: This approach was designed to simplify the records retention policy making it easier for the users in the organization to manage the files correctly. It uses broad categories or buckets rather than requiring users to learn many detailed, granular categories in filing their records. This type of retention schedule is easier to adapt to machine-driven classification processes and is commonly used by law firms when creating a retention policy based upon client-matter files versus firm administrative files. The expectation is that the users only need to get the records information in the correct client matter number.[5]

The schedule itself may be one large comprehensive document with subsections for each of a firm's practice and administrative groups, or it may be a compilation of schedules for each of these groups tied together by a cohesive records retention policy.

A Records Retention Schedule should include the following information:

- The practice group or business unit that owns the record. Many record types (e.g., correspondence, agreements, etc.) can be found in multiple units within the firm, but those record types are likely to have retention requirements unique to each group. The schedule is best organized by these units, with the record types found in each unit identified for each unit. Gaining input from each practice group and business unit is necessary to classify its records and determine appropriate retention periods for each unit and its record types.
- The record type: Records should be classified into types, which may include correspondence, presentation materials, court and regulatory filings, meeting notes, research, forms, industry association information and many other varieties. The most effective way to gather this information is by interviewing the members of each practice group and business unit.
- The retention period for each record type. The retention period identified for each record type indicates the base or minimum retention period for the firm as a whole; the base retention period for each practice group or business unit; the triggering event of the retention period (e.g., matter closure for client matter records); the legal and regulatory requirements for retention length; and the business need for retention length. Legal and regulatory requirements and business needs often require a retention period that differs from the base retention period for the firm or the practice group or business unit. Those exceptions must be clearly specified in the schedule.

[3] Creating a Process-Focused Retention Schedule, Tina Torres, CRM, PMP, The Information Management Journal, September/October 2006 pg 62

[4] Id.

[5] Big Buckets for Simplifying Records Retention Schedules, Susan Cisco, Ph.D., CRM, Hottopic, www.arma.org, 2008 ARMA International

ATTORNEY ETHICAL RULES FOR DISPOSITION OF CLIENT MATTER RECORDS

Development and ongoing updates to retention schedules are managed by the IG Department along with the practice group or business unit responsible for the records. Final retention schedules must be signed off by business unit and the firm's OGC before they are executed. Before attorneys may dispose of their client files they must ensure the manner in which they do so is compliant with the ethics rules and guidelines for the states in which a firm does business. Some states have specific rules that explicitly cover the retention and disposition of client records (see Appendix A), while others have offered ethical opinions that state, for instance, client property and trust fund records must be held for a specified period of time after a matter closes.

This section discusses ethical rules governing attorneys specific to the United States. Firms with international offices should work with those locations to determine the rules on disposition of client files in each country and jurisdiction.

ABA MODEL RULES

The ABA Model Rules, on which many states' Rules of Professional Responsibility are based, do not specifically identify a time period for the retention of a closed client file. Rule 1.15, which deals with attorney trust accounts, states that attorneys are to maintain records of client funds and other property for five years after termination of representation. The ABA addressed the issue of retention of client files more directly in its Informal Opinion 1384 (March 14, 1977). The opinion instructed attorneys to retain a file for a "reasonable" time if the client advises it does not want its file returned or has given no direction on the issue. The opinion instructs attorneys to:

- Not destroy items that clearly belong to the client, such as original documents or other items of intrinsic value
- Not destroy information that the attorney should realize will be useful to the client in asserting a claim or defense in a matter in which the statute of limitations has not expired
- Not destroy information that the client may need and not have readily available to it, or which the client would reasonably expect the attorney to preserve
- Use discretion and consider the nature and contents of files, which may require longer or indefinite retention
- Retain documentation of what has been destroyed as a business record.

ABA Model Rule 1.16, which discusses the termination of representation, does not provide a minimum time period for attorneys to hold a client's files. It does, however, require the attorney to take steps to protect a client's interests, such as returning the client's property. Rule 1.16 applies attorney confidentiality requirements to a client's closed files.

STATE ETHICS RULES AND GUIDELINES

A majority of the states that have addressed the issue of retention, either in their Rules of Professional Conduct or in ethics opinions, have determined that an appropriate period of retention is between 5 and 7 years generally for civil matters. These provisions apply the Rule 1.15 rule on trust account and client property records to closed matter files and take into account the state's statute of limitations on attorney malpractice actions. This is because, in most states, the client file belongs to the client. The rules and guidelines note that these are minimum periods. Some states have specifically delineated longer or indefinite retention periods for certain matters and records, such as probate and estate matters, criminal matters, trusts, certificates and deeds, contracts, leases, and matters involving juveniles.

Where the states have addressed notice of destruction to clients, the requirements vary. Some say that informing the client of the attorney's retention policy at the onset of representation via the engagement letter or by providing a copy of the policy is sufficient, and no follow up is required before destruction may occur. Other states provide for "reasonable" or a set notice period to the client prior to destruction.

The other common provisions from the state ethics rules and guidelines on client file disposal are:

- The records that have been identified for destruction must be reviewed, prior to destruction, to remove original client documents/documents of intrinsic value (e.g., Wills, stock certificates)
- Destruction must be carried out in a manner that preserves the confidentiality of the records
- A record of what was destroyed and when must be maintained.

THE ISSUE OF SPOLIATION

In an attempt to find legal precedent to help better inform a law firm's creation and implementation of a retention policy, it has been difficult to find instances of a law firm destroying client files, according to its retention policy, that were later needed. The closest factual scenarios found are cases where attorneys were subject to spoliation sanctions when the client files are no longer available (usually as a result of mistakes or carelessness). Spoliation is described as "the destruction or significant alteration of evidence to preserve property for another's use as evidence in pending or reasonable foreseeable litigation." *West v. Goodyear Tire & Rubber Co., 167 F.3d 776, 779 (2d Cir. 1999).* The three elements for a finding of spoliation are: (1) that the party having control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the records were destroyed 'with a culpable state of mind'; and (3) that the destroyed evidence was 'relevant' to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense. *Byrnie v. Town of Cromwell, 243 F.3d 93, 107-112 (2d Cir. 2001)*

Focusing on the first element of the spoliation review, the duty to preserve the information in the attorney's control, courts in *In re Moses 547 BR 21 and FDIC v. Malik 2012 WL 1019978* both looked to the holding in *Byrnie v. Town of Cromwell, Bd of Educ 243 F.3d 93*. This holding states that a regulation requiring retention of certain documents can establish the preservation obligation necessary to meet the first element of the three-element review for a finding of spoliation.[6] In both cases, the courts then turned to ethic opinions and the Rules of Professional Responsibility, in the respective jurisdictions, to determine if the attorneys had an obligation to preserve. The ethics opinions referenced in each respective case, according to its jurisdiction, were Assoc. of Bar of city of N.Y. Comm. On Prof. & Judicial Ethics Formal Op. 2008-1 (July 2008) and N.J. Comm on Prof'l Ethics, Op. 692 (2001). Both speak to the attorney's ethical obligations to retain client files relating to the representation of the client. The courts use these opinions to hold that the attorneys had an obligation to preserve the client files for at least a minimum number of years after the matter concluded.

While neither of these cases is exactly on point, they can be referenced to give a law firm guidance in structuring a retention policy which may be determined defensible by future courts. Each of these cases also emphasize the importance of the local ethics opinions on this issue.

[6] Neither of these cases contained facts that indicated that the attorney should have known there would be problems or litigation after the representation and thus providing a more immediate duty to preserve.

OUTSIDE COUNSEL GUIDELINES

Outside Counsel Guidelines ("OCG") is a document that clients provide to their attorneys to give guidance on details that are important to them. When clients first began issuing these guidelines, they were comprised of mostly billing instructions to control fees and costs. These documents have evolved to address a multitude of areas, most importantly, for our purposes, they can include data security, confidentiality and record retention guidelines. Increasingly OCGs contain provisions regarding the retention and destruction of records for the matter engaged within the law firm. The range of these clauses varies greatly, potentially directing the following concerns:

- Ownership of records and materials provided to the firm and/or generated by the firm pursuant to the engagement
- The law firm's responsibilities for providing copies of records to the client throughout the term of engagement
- The law firm's responsibilities to return, maintain or destroy records upon conclusion of the matter
- Ensuring the manner or storage, return and/or destruction complies with the other OCG provisions, e.g., data security, confidentiality
- Notification responsibilities to the client
- A mandate of record destruction within a set period of time following closure of the matter
- Detailed security guidelines ensuring the protection of both physical and electronic records.

A firm should have a process that disseminates the retention requirements in the OCGs to the IG team. Ideally, any inconsistencies among these would be resolved prior to the matter commencing. If that is not the case, it should be discussed with the client as soon as the discrepancy is discovered. If the client is unavailable then the terms of the OCGs should govern destruction.

For more information on how to manage clients' Outside Counsel Guidelines, see the 2014 report: "*Outside Counsel Guidelines Management: An Information Governance Issue*,"

INFORMATION INVENTORY

To defensibly dispose of both structured and unstructured information firms must know where records reside. An inventory of all records ensures that appropriate repositories are captured and accounted for when making disposition decisions. A firm's records management system serves as an inventory for its physical records. One way to conduct an inventory of electronic files is to interview all system owners to determine what systems exist that contain client data and business data. Later, should the firm be involved in litigation, this inventory can also function as an Electronically Stored Information (ESI) Data Map that tells others where all of a firm's valuable information is located.

For a large international firm, a sample list of information repositories might include:

REPOSITORY	CLIENT	BUSINESS	NON-FIRM	STRUCTURED	UNSTRUCTURED
Document Management System (DMS)	**Yes**	**Yes**	**Yes**	Yes	No
Email	**Yes**	**Yes**	**Yes**	No	Yes
Mobile Devices (including laptops)	**Yes**	**Yes**	**Yes**	No	Yes
Records Management System	**Yes**	**Yes**	**No**	Yes	No
Network File Shares	**Yes**	**Yes**	**Yes**	Yes	Yes
Email Archive System	**Yes**	**Yes**	**No**	No	Yes
Physical Media (Files, Portable Media)	**Yes**	**Yes**	**No**	Yes	Yes
FTP / File Sharing Services (e.g., OneDrive, Box)	**Yes**	**Yes**	**Yes**	Yes	Yes
SharePoint / Extranets	**Yes**	**Yes**	**No**	Yes	Yes
E-Signature	**Yes**	**Yes**	**Yes**	No	Yes
Desktop Computers	**Yes**	**Yes**	**Yes**	Yes	Yes
Legacy Databases	**Yes**	**Yes**	**No**	Yes	Yes
Web Content (intranet, external web, social media)	**Yes**	**Yes**	**Yes**	Yes	Yes
Instant Messaging	**Yes**	**Yes**	**Yes**	No	Yes
eDiscovery Databases	**Yes**	**Yes**	**No**	Yes	Yes
Experience and Knowledge Management Systems	**Yes**	**Yes**	**No**	Yes	Yes
Customer Relationship Management	**Yes**	**Yes**	**Yes**	Yes	Yes
Routine IT Back Ups	**Yes**	**Yes**	**Yes**	Yes	Yes
Practice-specific systems (IP docketing, tax/corporate forms databases)	**Yes**	**No**	**No**	Yes	Yes

PROCESS

Disposition should be a well-documented and repeatable process designed in alignment with a firm's IG policy ("policy"). Further, disposition should be conducted concurrently for information pertaining to a particular client matter or administrative business operation and applied regardless of format. Firms may conduct this process applying unique and organic strategies, however for the purposes of this paper, the distinction will be divided into two categories: manual and automated.

MANUAL

For myriad reasons, some firms may not possess applications designed for the management of physical and/or electronic records. For these, a manual process that relies on information obtained from other data sources to identify records eligible for disposition is necessary. Information obtained from a time and billing system or similar source can be used to identify client-matters that have been closed, and, have met the retention period set forth in the firm policy and retention schedule. This information can then be used to identify eligible physical records that are managed in hardcopy form or electronic documents such as Word or Excel. Electronic content may be more difficult to identify based on the type of repository (semi-structured or unstructured) where it is maintained. It is recommended that a firm develop a clearly defined manual process prior to progressing to developing an automated workflow and disposition solution.

AUTOMATION

Fully Automated

An automated workflow includes tools or applications designed to locate eligible content stored in the records management and document management systems, including other data sources the firm may want to identify, but have been designated as official storage repositories in a firm's IG policy. Using an established query and reporting tool, items eligible for disposition can be identified and compiled into an interactive report and routed to the person(s) responsible for the review and authorization of the appropriate disposition. The review process is captured on the interactive reports and once the disposition decision is made, a built-in workflow routes the report back to the department responsible for executing the disposal or transfer of information. Obtaining additional approvals may be required, if needed, to extend the retention period. Often, the disposition can be updated by the application itself, requiring no manual intervention at all.

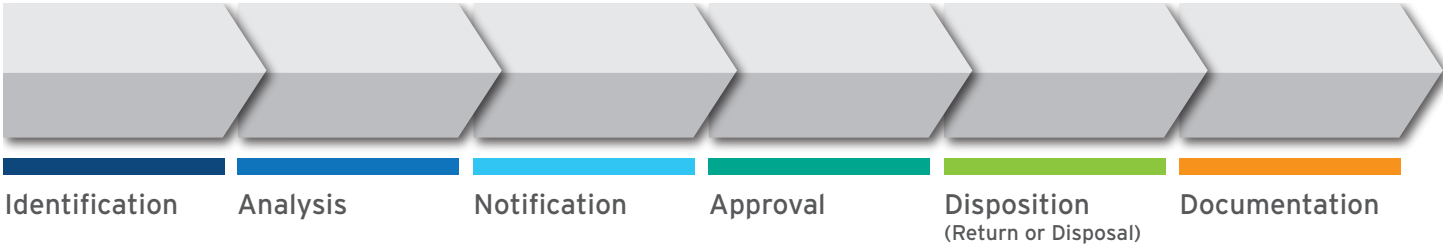
Semi-Automated

An IG program with an evolving workflow combining its established manual process with a maturing automation process creates a hybrid capability for conducting disposition. In general, these workflows of hybrid manual-automated workflow solutions may take myriad approaches at report generation methods. Some reports may be created manually and attached to a workflow form, likely in an Excel or PDF format. The reports themselves may not be interactive but must be updated in the selected application being used, and then comments or further direction printed or marked up on the printed report and the report reloaded. Basically, the only part of the workflow that is automated in this type of scenario is the movement of the form itself.

PROCESS STEPS

Retention schedules appended to the IG policy can be organized by functional areas within the three "big-bucket" categories (Client, Business and Non-firm/Personal) that contain varying numbers of records series. This categorization defines the applicable steps and the nature of the related process for each of these business lines (please see Illustration 9.3.A below)

Process Steps for Records Disposition



(Illustration 9.3.A)

Process Step 1 - Identification

Research and analysis of inventories (comprised of both physical and electronic records) should be conducted applying defined criteria for determining disposition eligibility for all records. This effort is conducted to identify the relevant records that will be reviewed and analyzed in the next step of the process. The most important aspect of the disposition process is strict adherence to the firm-approved Records Retention Schedule.

Metadata is often defined as "data about the data" and includes items like title, date, status and location. This metadata may be grouped by client-matter ID and description, practice group, records series, responsible attorney, office, date range or other categories. To provide a more complete context or history of the records that are being evaluated, some of the data may be consolidated and cross-referenced with other reports.

Validation of the information is a necessity. A quality and accuracy check on collected data should be conducted. Where possible, records should first be evaluated in their native format. Metadata may be incomplete and/or not be 100% accurate. In some instances, records may be located but not identified. It may be necessary to reach out to applicable stakeholders (i.e., attorneys or paralegals who worked on the matter or department managers for business records) for clarification and additional detail to make an informed decision regarding classification. The objective in this identification step is to assemble enough information about records to assure accuracy, and, to qualify records eligible for disposition based on available data.

Further, an essential component of the identification process is ensuring that all records designated under a legal hold in force are excluded from the disposition process until the hold has been lifted and clearance granted to re-classify them as eligible for disposition.

Process Step 2 - Analysis

Completion of identifying records designated for review allows for the next step. The analysis of relevant data and metadata of records stored on archive servers or with an offsite vendor (by box/other container) that may be deemed potentially eligible for scheduled disposition. These records can then be listed into a data organizational tool (i.e. an Excel spreadsheet) for reference and tracking purposes using varying methodology that aligns with procedurally-defined criteria.

If a box contains accounting records with slightly different retention period or an entire box of the same matter, the analysis of that box may result in the determination that the entire contents of those records can be destroyed in accordance with the retention period set forth in the retention schedule.

Ideally, the process can be centralized and exposed by a shared interface (i.e., SharePoint, a custom web application, etc.) to facilitate review and feedback on eligible materials. More so for physical records, the cost of destruction should absolutely be a concern. Depending on the cost vs. risk factor, a firm may decide to approach the destruction of materials in two different ways: 1) at the file level, or 2) at the box level. Multiple files stored in the same box with

different dates of eligible destruction cause the cost of destruction for that box to multiply for every instance of expiration (retrieval, validation, handling, and destruction costs for each eligible item at each eligible instance). If eligible files make up the entire box, the disposition process is easier. However, this scenario introduces risk where information that can be identified in the discovery phase of litigation is retained longer than necessary (or desired) during the interim wait for the matter with the longest retention date to expire and the box to become viable for disposition in whole.

As analytical data exists across multiple resources, the goal is to report from the systems natively being used to reduce redundancy in record keeping (matter status, physical records locations from a RMS, documents relating to a matter in a DMS). This allows the end users of these systems (records staff, attorneys, and secretaries) to continue filing and managing documents with minimal disruption. With this process in place the firm can report on demand or on a desired interval (monthly, quarterly) matters and their related materials that are eligible for destruction.

A web application or database can be a better solution for firms with large amounts of records. There is more control of data and its history if review activities need to be rolled back with a database - rather than an excel spreadsheet - which can get messy with many operators. These information capture tools will be kept for the life of the firm to provide evidence of the disposition process.

Process Step 3 - Notification

At this point, records that have been designated for disposition come under the provisions of the IG policy that determine how the notification process should be conducted.

Primary stakeholders (i.e. billing/responsible attorneys, practice group and firm business leaders, and/or designees) should be contacted in writing by the IG department and provided a reasonable amount of time i.e. 30-60 days to review and comment on the release or destruction of the content in question before steps are taken to enact the disposition.

Regardless of the specifics of notification response times, it is advisable that these policy rules be considered and broadly socialized across a firm. Risk management, professional responsibility and governance steering committees with wide membership representing a good sampling of the firm should be consulted.

This is an opportunity for custodians to provide any business justifications for further retention (which the IG policy should require that a firm's general counsel or his/her designee approve).

For client materials, it is recommended that the IG department work with custodians to determine whether to contact the client along with any other special considerations. Policy language should address how legacy, terminated and defunct clients' records should be managed. Likely, unique, and varying conditions exist with these types of clients and special considerations which may impact method, time and required resources should be considered. As previously discussed, various states have ethics opinions that may discuss when and how a firm would need to contact a client regarding the disposition of their files. Clients may also have given the firm parameters about how long they wish for their files to be retained by the firm.

The question at this point becomes a matter of judgment on the part of the relevant attorney, and whether the effort and expense is justified to contact the client to determine if they want their files returned. There are multiple variations and scenarios that can play out at this stage. This report recommends that details regarding the disposition of a client's file should be determined at the time of engagement so that clear records disposition instruction exists regardless of the representation outcome. The engagement letter should state that, unless the client contacts the firm, the files will be disposed of according to their retention policy and that no subsequent attempt to contact the client will be made at the point of disposition eligibility.

Process Step 4 – Approval

There are currently two lines of thinking on whether it is necessary to require attorney approval before client file destruction can occur. The firms that do think attorney approval is necessary circulate reports to relevant stakeholders (decision-makers) for review and approval to proceed with disposition. If any of the stakeholders are aware of an audit, legal dispute, or other justification to suspend scheduled disposition, this step presents an opportunity for them to raise

awareness of the situation and request the placement of a legal hold over the relevant records. In contrast, however, requiring universal approval may slow the process to a complete stop.

Alternatively, a pre-determined process may be set forth by terms and conditions outlined with the client in the engagement letter, which should clearly establish how the retention and disposition of the relevant client's records are managed.

Requesting approval from relevant stakeholders may promote the unintended consequence of an attorney using their veto power to suspend or extend retention for reasons that may not warrant a strong justification. This typically occurs if the attorney has a personal interest in retaining the files often citing client service or precedent as valid reasons.

This is a subject that can (and has) been debated in most firms. Best practices and success stories in this area promote the position that a firm's policy should be self-executing (i.e., without attorney review or approval) for the purpose of minimizing the attorneys' time. Firms that take this approach agree that stakeholders should receive just a notification with minimal information listing the relevant records designated for disposition eligibility and not require that they "approve" the destruction. The retention requirements are met at this point, and approval is a more of a concurred agreement with established policy – policy that is consistently and uniformly executed across the enterprise.

Process Step 5 - Disposition

Files designated for release to the client (per their written request) should be processed using IG department procedures for secured delivery of files outside of the firm.

A responsible staff member, i.e. an archives and disposition coordinator, should be designated to facilitate the destruction of physical files by providing lists of boxes approved for destruction to the contracted offsite storage vendor. Upon completion, the vendor should provide the firm with a Certificate of Destruction for each destruction order.

The IG department should collaborate with the IT department (and any applicable vendors) to delete files located within electronic repositories (e.g. document management system, hard drives, or discs). The person who performs the deletion should confirm and document the destruction each time a request is completed. Depending on the repository and its backup strategies, special plans might need to be made to permanently delete or "double' delete the files.

Process Step 6 - Documentation

All relevant documentation memorializing the significant aspects of the disposition process should be coded, classified and maintained with a permanent retention value for the life of the firm. IG professionals should advise applicable custodians of the secured destruction scheduling of the physical and electronic materials by an industry certified approved vendor. Deletion of electronic records on firm systems are "electronically shredded" by authorized engineers at the direction of the IG department, and deletion history is captured in the auditing history and logs of structured repositories i.e. DMS. Affidavits can also be used to certify these actions if the relevant application does not have logging or audit history capabilities. For physical destruction, the vendor can provide a certificate of destruction that should be retained for the life of the firm and which may be provided to the court and/or applicable parties for verification purposes if needed. (For an example of a Certificate of Destruction please see Illustration 9.3.6.B below.)

(Illustration 9.3.6.B)

CERTIFICATE OF DESTRUCTION

Iron Mountain certifies that the contents of the (#) of (bins/boxes) requested for destruction by (insert firm name) on order number # XXXXXXXX, serviced on (insert date). have entered the destruction process in accordance with our secure shredding workflow so that the information cannot be reconstructed.

Client Provided Information:

(Iron Mountain cannot attest to the contents of the bins or boxes)

(Account Manager Name)
(Date)

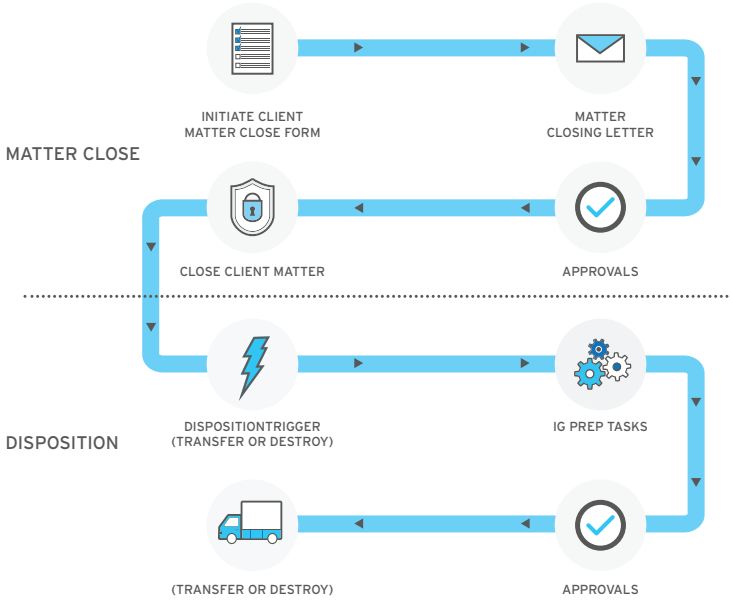
DISPOSITION PROCESS BEST PRACTICES

- Consideration should be given to designing the oversight governance framework (policy; schedule; standard operating procedures) as self-executing for the purpose of reducing the imposition on attorney/stakeholder time. For a self-executing disposition process to be successful, the process must be conducted in a responsible manner.
- Clear language should state a firm's retention rules in the engagement letter with the clients and relative contingencies explained at the outset of the relationship. In a trend occurring with ever-increasing frequency, clients are requiring firms to adopt the clients' own retention schedules as set forth in Outside Counsel Guidelines or amended in the engagement letter. The level of granularity of these retention requirements may be applied, and vary, at the matter level.
- The criteria for determining eligibility should be defined and documented. Rules determining eligibility should drive the strategy adopted for analyzing records. There may be multiple strategies developed that are determined by records format and data structure.
- Matters that have become eligible for disposition should be presented in an understandable and organized format (i.e. a report generated from a records management system). The report should be directed to the responsible stakeholder for review. For example, in the case of client records, this report could be directed to the attorney responsible for the client engagement, or their designee, or the functional or department business leader for firm business records.
- Responsible stakeholders (Responsible Attorney or Business Leader) should be provided a reasonable time period to review and properly respond to the disposition eligibility report that was sent to them (i.e. 30-60 days). A desired and timely response will include approval to proceed with disposal of the relevant information, or, a request to notify the client.
- After the close (or conclusion) of a matter representation, and, at the Responsible Attorney's discretion, clients should be provided the opportunity to take possession of the official file. Unless a liability concern is present, good business practice and risk mitigation warrant this action be taken right as the matter concludes. Retaining this information beyond matter conclusion incurs additional cost and risk.
- In some jurisdictions, a reasonable attempt to contact the client to offer this option is discussed in ethics opinions. California (Rule 3-700(D) of the Rules of Professional Conduct of the State Bar of California) and Kentucky (KBA Ethics Opinions E- 235 (1980) and E-395 (1997) are two examples, and outline" reasonable attempt" obligations by the attorney to the client to provide their file at the conclusion of the representation firms that engage clients (and subsequently accumulate relevant records) absent of these notification requirements may elect to adopt policy exceptions to the client notification rule.
- Requests to modify or extend the retention period and the governing policy should state that approval be granted by a designated party, such as the general counsel, or the governing authority over the policy. This is type of extension should only be granted under extraordinary circumstances and supported with a legitimate business justification. Otherwise eligible records should be dispositioned in accordance with the policy.

DISPOSITION WORKFLOW APPLICATION

Over the years, firms have invested a significant amount of time and money into developing automated, highly customized, new business intake workflow applications to streamline the client matter opening process. It is highly recommended that firms develop similar automated workflow applications to streamline the client matter closing, as well as the disposition (i.e. transfer or destruction process), which are similar in complexity to the client matter opening process. See below illustrations.

Client Matter Closing /
Disposition Automated Workflow Process



The suggested Client Matter Closing / Disposition automated workflow application described in the remainder of this paper is intended to be "go forward" as opposed to legacy records. The application would need to be highly configurable (and/or customized), allowing firms to modify settings that match their records retention policy / processes (no different than new business intake).

There are two phases: Matter Close (which takes place immediately after the work is completed), and Disposition (generally triggered by an attorney departure / transfer out of records, OR the retention period has been satisfied (e.g. matter close + 10 years, etc).

The Client Matter Closing / Disposition automated workflow application should integrate with other applications (e.g. Time & Billing System, Records Management System, Document Management System) – no different than a Client Matter Opening automated workflow application.

The functionality envisioned for the Client Matter Close process includes completion of an electronic "Matter Close" form, typically by an administrative staff member. If there are any outstanding balances on the matter, the form would route to both Accounting and the billing attorney for handing (write-off, transfer, etc). Once billing is resolved, Information Governance is notified to initiate an automated Matter Closing Letter, which acts as a reminder / notification to the client of the firm records retention policy, factoring in any unique records retention requirements stated in the Outside Counsel Guidelines for the client. Finally, the Matter Closing Letter (and any other supporting information) is routed electronically to the responsible attorney for review / approval, and then back to Information Governance to ensure the matter is closed, and the Matter Closing Letter is sent to the client.

DISPOSITION – TRANSFER (ATTORNEY DEPARTURE)

The catalyst for transfer of records out of a firm is generally a client-signed release letter received by IG (associated with a specific attorney departure). Therefore, a new workflow item would be initiated by them, with the client-signed release letter attached, to allow for others in approval process to view the release language, as needed. IG has the responsibility to tag at the client and / or matter level what specific matters have been requested for transfer.

Once IG gives their approval, the item may proceed to the Accounting department, to document the billing / collections status of the client / matters released for transfer, noting anything for the Practice Group Leader, who provides the final transfer approval. For any open matters that will not be transferred, meaning only specific matters have been requested for transfer, this is the point where Accounting could initiate a change of responsibility from the departing attorney to another active attorney for the matters that will stay open.

The final transfer approval is generally performed by the Practice Group Leader (PGL). At this point in the approval process, the PGL would have the ability to easily view: 1) the attached client-signed release letter; 2) the list of the client / matters the client has instructed should be transferred; 3) the physical and electronic records that will be transferred (or held back if firm property); and 4) all billing / collections comments made by Accounting. The PGL has the authority to re-assign the open / active matters that the client has instructed should stay with the firm.

Finally, the workflow item is returned to IG for initiation of the approved transfer of both the electronic and physical records. After a specific time period (e.g. 30 days) the electronic records earlier transferred should be deleted.

DISPOSITION (DESTRUCTION)

The catalyst for an initiating a new disposition item should be automatic, driven by firm technology programmed to generate a new item when the retention for a specific matter has been satisfied (e.g. matter close + 10 years).

IG would be the first group to receive the disposition item for review of the electronic and physical records eligible for disposition. If the firm retention policy dictates, at this point a draft retention letter could be generated and attached for the responsible attorney to review / approve. After IG has completed their steps, the item should route to the responsible attorney for review / approval. It may be helpful for the responsible attorney if any recent file activity (electronic or physical) could be noted. Once the responsible attorney has reviewed, the item is then returned to IG for processing, including sending the letter to the client indicating their files will be destroyed unless they return the letter within 30 days. If after 30 days the letter has not been returned, the electronic and physical files are destroyed.

Another catalyst may be that one year has passed since a matter was closed and firm technology has been flagged to indicate that there are client provided materials associated with the matter that must be destroyed or returned to the client one year after a matter closes.

Matters subject to a legal hold would of course not be eligible for disposition until the hold is released. This should be determined by firm technology, indicating a matter is subject to a legal hold.

WAYS TO REDUCE PHYSICAL STORAGE INVENTORY

For years, law firms have been striving to move towards a "paper-lite" office environment. With most correspondence occurring electronically, combined with the advancements in modern technology, such an environment even seems attainable. However, the million-dollar question remains, what steps can firms take to reduce physical storage inventory (both on-site and off-site) to ensure their defensible disposition programs are efficient and cost effective. The following are alternative methods that include or avoid scanning.

CONTROL INBOUND CONTENT

The average employee now sends or receives 121 emails per day, according to the Radicati Group Inc., based in Palo Alto, Calif. Some of these messages contain attachments of crucial transactional documents that should be saved directly to the document management system. If a convenience copy is needed in paper format, it can be printed and then discarded in the normal course of business. Some firms have utilized watermarking technology in order to clearly identify that a document is already filed in the document management system and can therefore be discarded. A simple rule of thumb: if the document is created electronically, it should be saved electronically. Further, if there is no legal reason to retain a document in paper format, an electronic copy should be retained and the paper should be discarded.

MAKE PRINTING INCONVENIENT

If organizations want to achieve paper-lite success, they must make printing inconvenient. The typical office worker prints 10,000 pages per year at an average annual cost of $725. Furthermore, a recent survey by Gartner Inc. found that 90% of organizations don't know how many printers they have scattered around the office. If your organization is in that category, the time is now to conduct that much-needed inventory.

The reality of having no printers in the office may be a bit farfetched. However, if employees can't click the print button, think about how much less paper organizations would have.

PURCHASE ELECTRONIC SIGNATURE SOFTWARE

Many countries all over the world, including the U.S. and Canada, have passed legislation (ESIGN Act and Uniform Electronic Transactions Act, among others) permitting the legal use of electronic signatures in court. Unfortunately, the majority of organizations still print and sign a document, only to rescan the document back into the electronic repository. That process is both counterproductive and makes no sense; it de-digitizes electronic material and makes the paperless office harder to achieve.

The market for electronic signature software is maturing and comes in at a reasonable price point. Organizations can purchase this software and sign related transactional documents with a click of the mouse. Business deals can be executed in minutes, rather than days or weeks. Gone are the days of printing documents simply to execute them with a wet signature. The only thing left to do is to embrace the change and realize the benefits.

GIVE EMPLOYEES TWO COMPUTER MONITORS

Provide employees a second computer monitor, so they do not need to print to reference documents or perform document comparisons. Numerous studies indicate that having two monitors in an office setting can increase productivity by 20 to 50 percent. If that is the case, spending $100 per monitor seems like an easy decision.

SCAN DAY FORWARD

"Scanning day forward" means that all incoming paper is scanned, profiled and stored in the document management system (DMS). Of course, the individuals involved vary from firm to firm, but to be successful this workflow needs to involve a team including, but not limited to, the legal secretary, paralegals, IG staff and extended mailroom operation.

After the documents are scanned, profiled and stored in the document management system, they can be distributed digitally. The paper proceeds through a process that applies records retention and destruction policies. Quality controls check that the scanning process has properly captured and stored the related images. The few types of paper documents that must be retained physically (e.g., stock certificates, prior art, original wills, etc.) are separated out. Eventually, based on a firm's policy, a majority of the paper can be destroyed.

The result is that previously managed paper records are now available digitally from the document management system, as part of the active digital matter file. Attorneys and staff become much more efficient because the entire matter is managed, retrieved and shared from the DMS and can be accessed from anywhere in the world. File room operations become greatly reduced and the square footage dedicated to file space firm wide is dramatically reduced, as is the corresponding cost for such real estate. The information is more secure in the DMS because it is backed up and protected from incidents of fire, theft, or a water leak. Lastly, the flow of paper to off-site storage is stopped, along with the corresponding cost.

SCAN AND SHRED CLOSED MATTERS

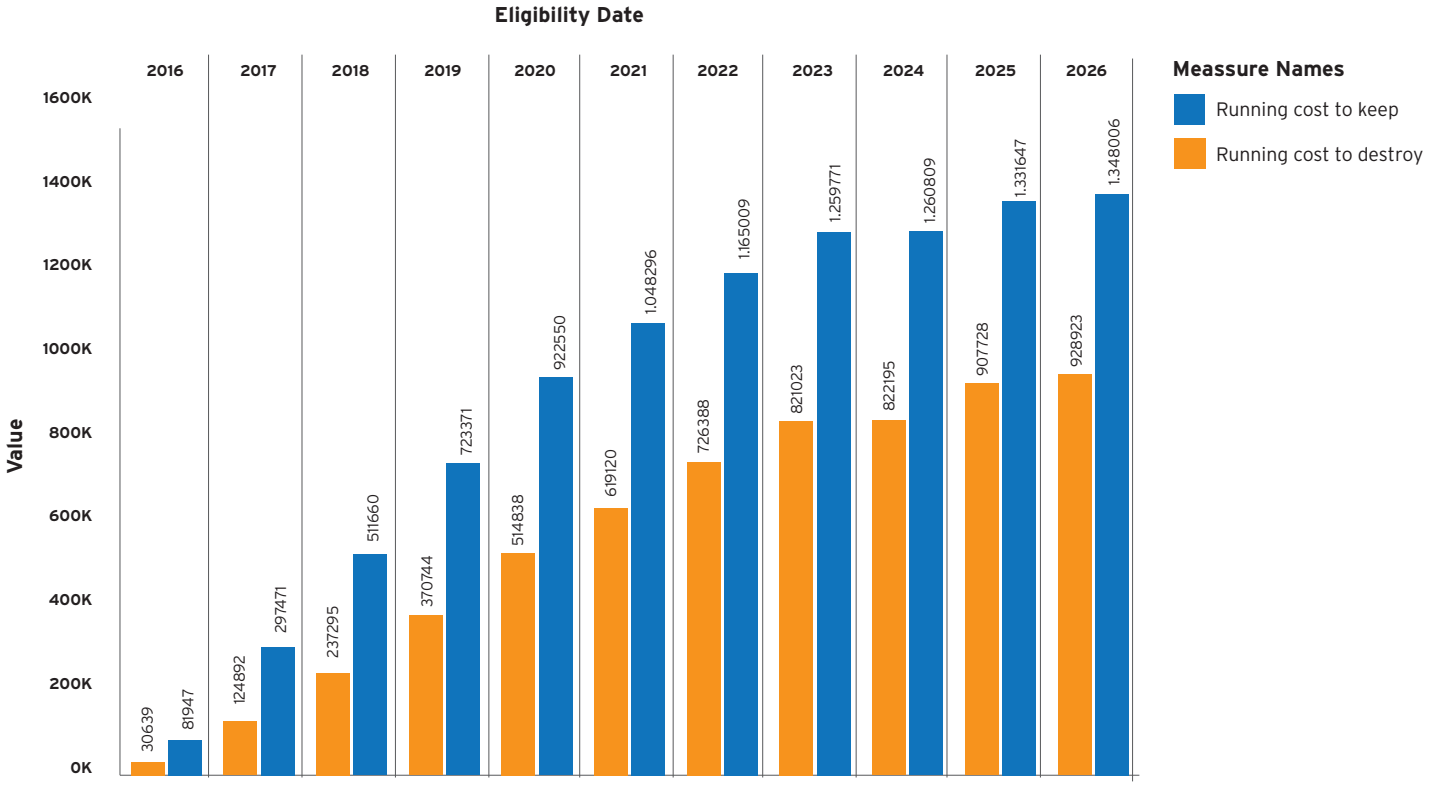
By scanning and shredding closed matters, a firm scans inactive matter files instead of sending them to off-site storage. Firms get a quantified payback by cutting off the growing cost and risk of offsite paper storage. Records retention and destruction policies is applied and the paper documents are scheduled for destruction, not boxed for offsite storage.

Scanning and shredding closed matters in year one is going to be more expensive in labor than year one off-site box storage costs. But over the years, scanning and shredding closed matters provides a meaningful cost reduction. To mitigate this cost, some firms have created an internal network of "under-utilized" staff to perform the profiling and scanning or documents that need to be retained. Receptionists, secretaries whose attorneys are out of the office and even paralegals with downtime can assist. An added benefit to not outsourcing this function is that a firm's staff is more familiar with the clients and types of documents that are produced on their behalf so the naming and profiling of the documents is of a higher quality. Since the file is being reviewed for scanning, it is also a good opportunity to eliminate duplicates such as convenience copies.

BUDGETING AND ROI

There are few things the C-Suite hates more than the rising cost of storage. A common misconception is that destroying boxes results in immediate and noticeable cost savings which is why it is important to set reasonable expectations related to the cost saving benefits. One of the most significant challenges of executing a defensible disposition program is cost; therefore, understanding the resources and hard costs necessary to execute a dedicated program and incurred over time is a principal consideration. It is important to start the partnership as early as possible and set reasonable expectations. Depending on a firm's vendor rates, it could cost up to seven dollars and take as long as three or more years to recuperate the cost to destroy one carton; the prospect of which can halt or further delay a firm's appetite for the disposition program. However, putting aside the risk, holding on to records longer than needed is not the answer and procrastination is not an effective cost-saving strategy. The cost of storing one matter's records can eventually catch up to, or at the very least cut into, the profits generated from that one matter. However, true cost savings can be expected if you combine this effort with other cost-saving initiatives, such as scanning, e-filing, a robust end of matter clean up protocol, and even modest savings are worth the effort.

Procastination Chart



If we were to implement retention policies today, between now and 2026 the running cost totals of destruction is less expensive in the long run vs. retaining the same documents throughout the same period.

CONCLUSION

Clients are expecting their law firms to have retention and disposition practices in place and are including them in outside counsel guidelines and ongoing audits. The bottom-line is that today defensible disposition is a critical component to managing costs and risk and is a key element of law firm IG policies and procedures. When considering where to begin (or perhaps regroup), firms should focus on building a disposition program that best fits its culture, organizational needs and available resources.

The very notion of disposing of years of records, whether they were maintained for client representation work, firm business operations or for an individual attorney or staff's professional or personal use, can seem insurmountable. The sheer volume of physical records, compounded by growing and varying electronic formats, can cause considerable pause. Couple that with the outlay of resources and funding required to maintain a defensible disposition program and it seems downright impossible. What we do know is that doing nothing perpetuates the problems and continues to increase IG program costs. Conversely, once a defensible disposition program is in place, there is a definite return on investment.

Regardless of a firm's size, legal and executive sponsorship is paramount to achieving organizational buy-in and support. Equally important is documenting policies and procedures that incorporate applicable client and regulatory requirements. Having a solid classification and inventory of information and its location is an important step to placing value on the records and developing methods for destruction and deletion.

Once you have sponsorship, policy buy in and you know where your records are stored, you can employ various strategies to execute your program. You may decide to establish day forward practices to improve information management to reduce future growth of paper records by investing in a disposition process and workflow solution. Or you may begin by cleaning up legacy information. In either case, remember that defensible disposition is an ongoing commitment, not a one-time project. The defensibly disposition of information should not strive for perfection but rather aim to establish consistent, sustainable approaches that demonstrate your firm's good faith and compliance with client and regulatory requirements.

APENDIX

Client File Retention Requirements by State

STATE	MINIMUM RETENTION PERIOD
Alabama	6 years. Files relating to minors, probate matters, estate planning, tax, criminal law, business entities and transactional matters should be retained until contents obsolete.
Alaska	Not specified. Rules of Professional Conduct do provide 6-year retention period for client property/ trust fund records.
Arizona	5 years for most matters. Indefinite for probate or estate, homicide, life sentence and lifetime probation. Notice to client required prior to destruction if no policy previously provided to client.
Arkansas	5 years after termination of representation unless pending legal proceedings related to matter; reasonable efforts to provide notice to the client required. Notice in an engagement letter or termination of representation letter of file retention and destruction policy is sufficient.
California	5 years for civil matters. Files in criminal matters should not be destroyed without former client's consent while client is alive. Reasonable efforts required to obtain former client's consent to any disposition that would prevent the former client's taking possession of the items.
Colorado	10 years for civil matters. Destruction notice must provide a minimum of 30 days. Notice may be in engagement letter. Instead of destroying, may deliver to client without consent. Criminal matters: if death, life imprisonment or indefinite term, must hold file for life of client. Criminal - 5 years for no appeal, 8 years for appeal.
Connecticut	6 years. Original docs signed by client and docs conferring or imposing legal rights kept for 6 years from date of signing or cessation of rights (whichever is longer). No such doc destroyed without 30 days' written notice to client.
Delaware	Not specified. Rules of Professional Conduct do provide 5-year retention period for client property/ trust fund records.
District of Columbia	5 years. Notice must be given to client regarding disposition either at time of engagement or at conclusion. No destruction without reasonable notice. Exception to notice requirement for publicly available pleadings.
Florida	Not specified. Rules of Professional Conduct do provide 6-year retention period for client property/ trust fund records.
Georgia	Not specified. Rules of Professional Conduct do provide 6-year retention period for client property/ trust fund records.
Hawaii	Not specified. Rules of Professional Conduct do provide 6-year retention period for client property/ trust fund records.
Idaho	2 years after client may have suffered some damage because of attorney's conduct. Files to be kept longer: minor who is still a minor, estate plans for client while alive, contracts or agreements that are active and are still being paid off; cases in which judgment should be renewed; files establishing tax basis in property; criminal law 2 years after client released or exonerated; support and custody files in which children are minors and support obligation continues; corporate books and records; adoption files; intellectual property files; files of problem clients.
Illinois	Not specified. Rules of Professional Conduct do provide 7-year retention period for client property/ trust fund records. Must keep record of name and last known address of clients, reflecting ongoing or concluded representation (as long as attorney remains licensed). Financial records related to practice held for 7 years from termination.
Indiana	Not specified. Rules of Professional Conduct do provide 5-year retention period for client property/ trust fund records.
Iowa	6 years after the last legal service was rendered if attorney has written file destruction policy. If no written file destruction policy in place or not applicable to matter in question, the file may be destroyed 10 years after the date the last legal service was rendered. Client to be given a final notice before destruction, even if notified previously.
Kansas	Not specified. Ethics opinion advises 10 years since statute of repose in Kansas is 10 years. Documents such as wills, trusts, original loan documents, certificates, deeds, long-term leases and contracts, engagement and closing letters should be retained permanently (have intrinsic value). Notification requirement may be satisfied by the engagement letter.

STATE	MINIMUM RETENTION PERIOD
Kentucky	5 years.
Louisiana	Not specified. Ethics opinion recommends 5 years but notes 10-year period for client to lodge complaints of negligent attorney professional misconduct.
Maine	8 years.
Maryland	Not specified. 5 years after the date the record was created (changed from termination of representation) for client property/trust fund records.
Massachusetts	Not specified. Rules of Professional Conduct do provide 5-year retention period for client property/trust fund records.
Michigan	5 years. Notice must be given to client regarding disposition either at time of engagement or at conclusion. Exception to notice requirement for publicly available pleadings.
Minnesota	Not specified. Rules of Professional Conduct do provide 6-year retention period following the end of the taxable year or the completion of employment to which they relate for client property/trust fund records.
Mississippi	Not specified. Rules of Professional Conduct do provide 7-year retention period for client property/trust fund records.
Missouri	6 years (if termination of representation occurred on or after 7/1/2016, if prior to that then retention period is 10 years).
Montana	Not specified. Rules of Professional Conduct do provide 5-year retention period for client property/trust fund records.
Nebraska	Not specified. Rules of Professional Conduct do provide 5-year retention period for client property/trust fund records.
Nevada	4 years if discussion with client about this explaining risks. 7-year retention for client property/trust fund records.
New Hampshire	Not specified. Rules of Professional Conduct do provide 6-year retention period for client property/trust fund records. New Hampshire ethics committee noted that "a good rule of thumb may be to maintain files for 6-8 years."
New Jersey	Not specified. Rules of Professional Conduct do provide 7-year retention period for client property/trust fund records. Should not dispose of criminal files while the client is alive.
New Mexico	5 years. Attorney not required to seek client instruction on file retention or disposition, but must return documents or things that are the client's property.
New York	Not specified. Rules of Professional Conduct do provide 7-year retention period for client property/trust fund records.
North Carolina	With client consent, closed file may be destroyed at any time. Absent consent, closed file must be retained for minimum of 6 years after conclusion of the representation (to be consistent with retention periods for client property). Can be disposed of earlier than six years if, after notice to client, client fails to retrieve file. After 6 years, disposition allowable without notice and/or consent.
North Dakota	Not specified. Rules of Professional Conduct do provide 6-year retention period for client property/trust fund records.
Ohio	Not specified. Rules of Professional Conduct do provide 7-year retention period for client property/trust fund records.
Oklahoma	Not specified. Rules of Professional Conduct do provide 5-year retention period for client property/trust fund records. Files pertaining to claims of minors should be maintained until the child is beyond the age of majority and any statutes of limitations have expired; some probate, estate and/or guardianship matters may require an indeterminate retention period real estate title opinions and title insurance work may require a far more-lengthy retention.
Oregon	Not specified. Rules of Professional Conduct do provide 5-year retention period for client property/trust fund records.

STATE	MINIMUM RETENTION PERIOD
Pennsylvania	Not specified in rules. Ethics opinion Recommends base period of 5-7 years (RPC 1.15 - equates to trust fund records); recommends 30 days' notice by certified mail prior to destruction. Opinion provides suggested retention period minimums for: notification of professional liability insurance - 6 years, criminal - until all appeals and post-conviction habeas periods expired; divorce - following order of dissolution until time periods for performance of any terms under court order or any settlement agreement have expired; personal injury - until all claims against potential defendants exhausted, 2 years minimum for settlements involving minors; real estate - 5 years after closing on sale or foreclosure; estate planning client's death + probate; probate - estate settled and IRS audit periods expired; IRS tax records - 7 years; contract litigation - 5 years after satisfaction of judgment or five years after filing if not brought to trial; bankruptcy - 5 years after discharge.
Rhode Island	7 years
South Carolina	6 years
South Dakota	Not specified. Rules of Professional Conduct do provide 5-year retention period for client property/ trust fund records.
Tennessee	Not specified. Rules of Professional Conduct do provide 5-year retention period for client property/ trust fund records. Ethics opinion suggests 6 years to account for statutes of limitations, and offers suggested retention for specific matters: Contract actions - satisfaction of judgment or dismissal of action; bankruptcy - discharge of debtor or discharge of trustee or receiver; marriage dissolution - final judgment or dismissal except child custody (then last child reaching age of majority); probate and estates - entry of the order closing the estate; torts - final judgment or dismissal except involving minor; real estate transaction - settlement date of transaction, judgment or foreclosure; lease - termination of lease; criminal - date of acquittal or length of period of governmental control over defendant.
Texas	Not specified. Rules of Professional Conduct do provide 5-year retention period for client property/ trust fund records.
Utah	Not specified. Rules of Professional Conduct do provide 5-year retention period for client property/ trust fund records.
Vermont	Not specified - attorney to exercise discretion. States files on the administration of estates should be kept indefinitely.
Virginia	Not specified.
Washington	Not specified. Rules of Professional Conduct do provide 7-year retention period for client property/ trust fund records.
West Virginia	5 years. Ethics opinion states, "For many files, holding the file for five years with no request for it by the client can be deemed implicit consent to destroy the file." Encourages retention for 10 years -- since 10 years is the usual statute of limitations for contract cases.
Wisconsin	Not specified. Rules of Professional Conduct do provide 6-year retention period for client property/ trust fund records.
Wyoming	Not specified. Rules of Professional Conduct do provide 5-year retention period for client property/ trust fund records.

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