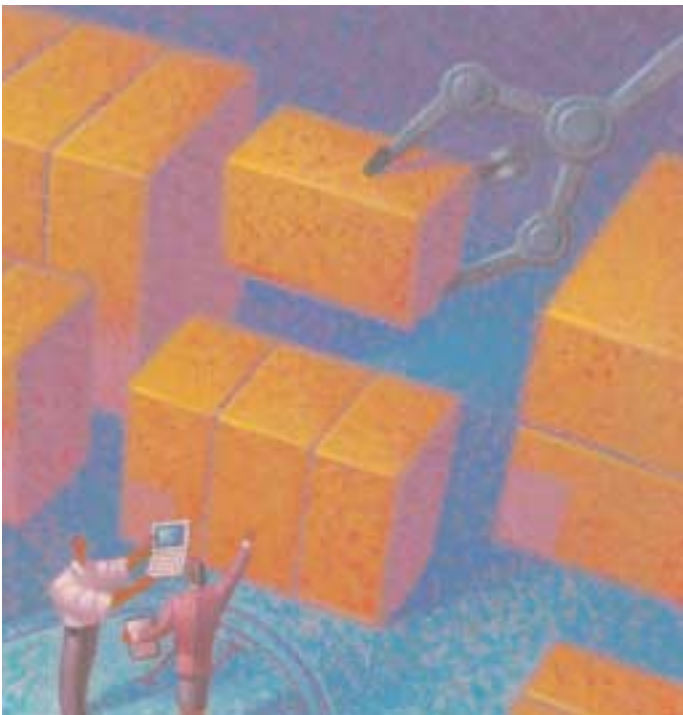


# Building a Solid Records Retention Policy

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**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.

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

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.