

Creating an Effective Law Firm Records Retention Policy

*By Eric Mosca of InOutsource**

Performing the necessary research to support your records retention policy is not a small task. While this work is vital to a defensible policy, standardizing your approach and getting your firm's risk management resources, IT and records departments, and attorneys on board is likely the piece of this project that will take the most time. While some aspects of policy and procedure development will be the same for every law firm, there are many decisions to make and a great deal of detail to share with the firm's executive management.

A records retention policy must apply to both physical and electronic client material. Your firm will have to face serious questions about where data lives and whether retention rules can effectively be applied. If you allow users to save data on local hard drives and unstructured network drives, applying retention rules will be a manual and extremely cumbersome process. Only structured data that is clearly associated with a particular legal matter will allow automated application of retention rules. Exchange mailboxes do not fit this definition, however, necessitating a method for users to move e-mails into a matter-centric repository such as a document or records management system. Many firms spend a great deal of time on the software infrastructure that will allow them to centralize client data in relatively few approved electronic repositories so that retention rules can effectively be applied.

The method of applying retention for most law firms centers on the matter-centric approach. While an entire client matter will be considered for retention at one time, both the physical and electronic files must still be well-organized according to a practice-based or firm-wide standard. Even for routine scenarios such as a client requesting their files or a lateral attorney departing the firm, the file must be organized in a manner that enables administrative staff to easily make decisions regarding what should be transferred. Many jurisdictions recognize that certain aspects of the file are NOT owned by the client and typically would not be release from the firm. Likewise, there are aspects of most client files that a firm may want to retain for long past the required retention period, such as engagement letters and file release authorization letters.

During the active phase of the matter it may make sense to apply disposition rules such as culling the file of exact duplicates and removing printed online research. A well-organized

file allows a firm to automate the application of these rules based on record or document types assigned to client material when it is saved to firm-approved repositories. In many cases, the application of standardized organization principals (at the point that information is created) allows attorneys to more comfortably authorize release and destruction actions that may come years later. In addition to categorizing a matter's files, it is important that the matter itself is tagged with important metadata regarding the type of legal work that was performed. Important exceptions to the firm's retention rules will certainly apply to matters involving minors and criminal defendants, among other situations.

The model of records retention borrowed from government entities and corporations typically relies on records series, organizing records by their content. This concept does not apply smoothly in a law firm, where the matter is usually treated as a whole. The American Bar Association, state bar associations and various opinions and case law have clarified records retention requirements, but sometime provide conflicting views. Large law firms practicing in multiple states will have to navigate these inconsistencies. Research for multiple states may uncover varying guidance as to who owns aspects of the file, and what degree of effort is required to notify clients and gain permission prior to destruction of client files. Your firm may decide to apply the most restrictive guidelines or to vary retention periods and procedures based on where the client resides or where the matter originated.

While respecting the duty to preserve client confidentiality and protect the clients' interests stands paramount, law firms must also consider the business relationship that is established with a client. Many corporate clients have multiple law firms competing to handle their legal work and may contend with strong internal retention requirements of their own. For years, large firms have used a solid records retention policy as a competitive advantage when attracting new clients. Interestingly, many lawyers seem to be reluctant to contact clients regarding the conclusion of a matter and to question the client about ongoing maintenance of their files. Matter closing can be an opportunity to remind the client of the work that was performed and the firm's desire to represent them in the future. Reminding the client of the firm's retention policy at matter closing can preclude the need to contact the client years in the future, in some jurisdictions. Some states have required that clients be contacted again at the conclusion of the retention period, allowing them to halt destruction or take possession of files. Other jurisdictions have opined that a law firm simply cannot destroy client files without explicit authorization or exhaustive attempts to contact a hard to locate client.

Law firms must institute strong processes to understand when a matter has concluded and to formally close the matter in the firm's billing system. If a matter is closed purely for administrative purposes, most systems will allow you to apply an alternative code to indicate that the matter has not formally concluded. A single code or method of reference must be reserved to indicate that a matter has concluded, as this will be the trigger for starting the retention timetable calculation. Many firms settle on a single length of time for which the file will be retained, such as seven years after matter closing. A records retention policy gains flexibility by formalizing the matter closing process. Exceptions by practice area no longer have to be built into the retention policy directly. A Trust & Estates attorney can authorize a matter to stay open despite inactivity, ensuring that the retention period does not start counting down for that matter.

Drafting the retention policy and performing research must be a collaborative process including executive management working in concert with records management experts, attorneys and the firm's IT department: a Records Retention Committee. This group should meet regularly to divide the policy drafting effort into manageable pieces. Begin with an outline of the policy and make sure that the team is on the same page as to what is being accomplished. A law firm may need multiple versions of the policy appropriate for internal users and also for sharing with clients. Procedures for carrying out the policy should be kept separate, but must be discussed as part of the policy drafting process. The Committee must consider the reality of processing retention rules across a wide array of records.

Performing the legal research associated with a firm's retention policy is a time-consuming process. Research must be well-documented and will be required for internal or external legal review against the text of the firm's draft policy language. Specific rules of professional conduct, opinions, articles and cases should be cited to support the Retention Committee's policy decisions. Responsibility for reviewing updated information as it becomes available must also be delegated to someone within the firm. This research will only provide a broad outline, at best, of a firm's obligations with regards to records retention. You may find that the research results provide little more than general guidelines supporting the need to protect client interests at all times. In this case, expand to other states that have established more detailed recommendations, such as California and Colorado.

It is important to educate internal staff and attorneys well before the implementation of a records retention policy. The firm must also decide how this updated policy will be

communicated to clients, as discussed above. The updated policy should be communicated to existing clients, and ideally would be communicated as part of every new matter in the client engagement letter. A firm's Records Department will most likely need to perform additional steps when processing retention for clients that have not been notified of the firm's policy. Also, if record keeping did not conform to firm standards that allow automatic application of retention rules, Records and the responsible attorney(s) will normally need to review the file prior to making final disposition decisions.

With the exception of small firms, it is not conceivable that a records management program could comply with a records retention policy without software in place to notify the firm of candidates for retention disposition processing. A number of records management software packages are available to assist a firm in applying these rules, with the goal of automatically triggering notifications on client files that are candidates for retention processing. A workflow component to monitor and track attorney notification and their response will also be needed in most firms. Remember that different applications offer a range of functionality related to processing retention, so your policy and procedures must take into account the particular capabilities of your firm's records management software.

While developing a retention policy seems like a daunting task, dividing the project into achievable sections and collaborating amongst various departments make this effort possible. The end product will be a policy that allows a law firm to comfortably apply retention rules that will reduce costs and risk. A formalized process will ensure that the firm adheres to strong records management principals while being flexible enough to accommodate protecting client interests and attorney business needs alike.

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