

Implementing Disposition Programs in Law Firms

What You Need to Know!

SPEAKERS



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Discussion Outline

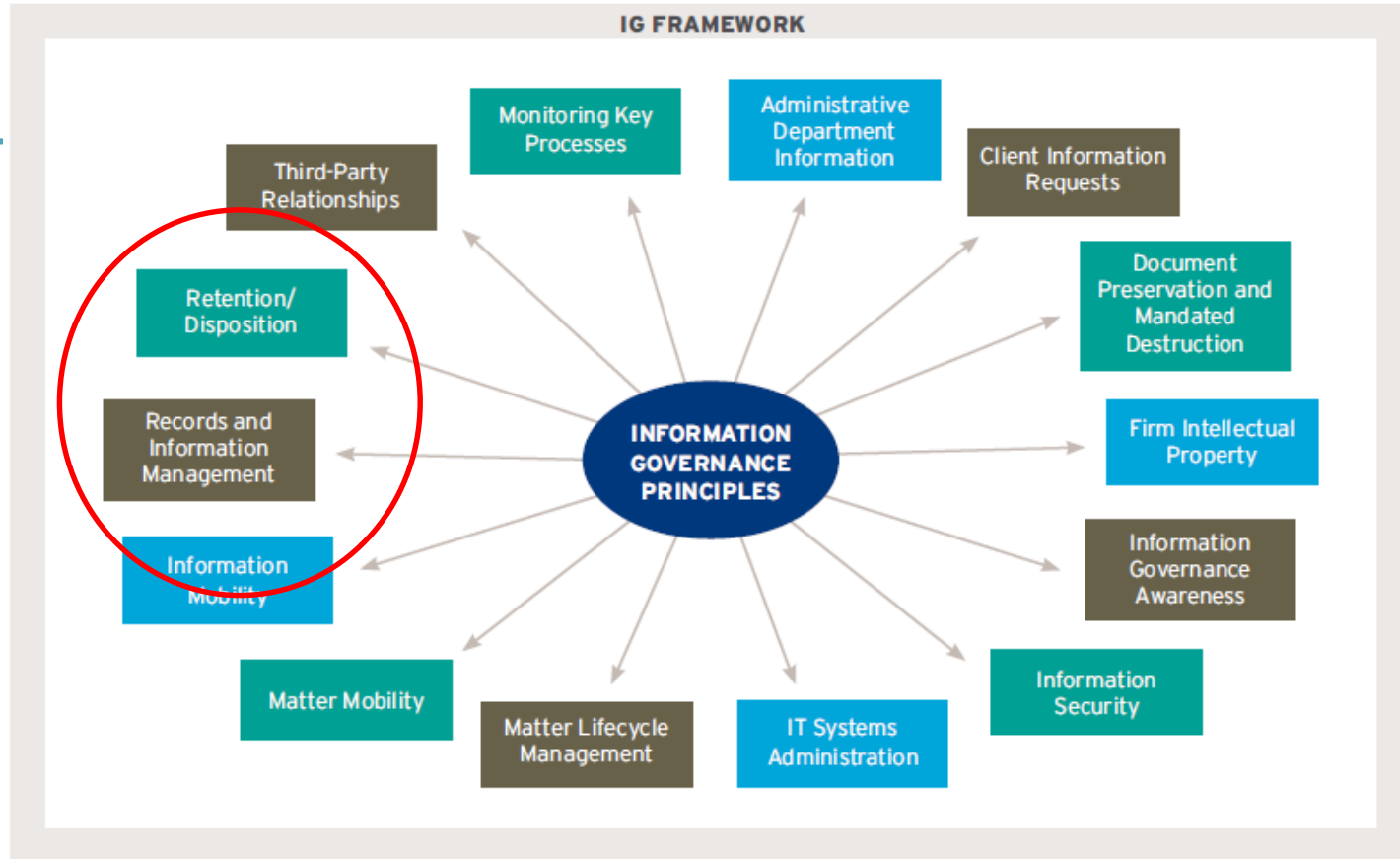
- Unique issues applying records retention in a law firm
 - Distinctions between administrative + client representation
 - Requirements for client communications associated to the destruction of client representation records
- Implementing retention go-forward vs. applying retention to legacy “back-file” collections
- Tensions between disposition + knowledge management

LAW FIRM RECORDS RETENTION CHALLENGES

WHY IS RETENTION A CHALLENGE IN LAW FIRMS?



LFIGS KEY PROCESSES



WHY DO WE CARE?

- Risk of a data breach
- Increasing client expectations to dispose (OCGs)
- Expanding set of regulatory requirements (e.g., GDPR)
- Discovery exposure
- Firm wanting to minimize on-going storage expense
 - Email is out of control
 - Hardcopy storage is still huge!
- Reducing the office footprint

CLIENT REPRESENTATION RETENTION CHALLENGES

- Defined by AOL/matter type defined at opening
- Various considerations:
 - Ethics rules
 - Status of limitations
 - Client service requirements
- Poor matter closing hygiene
- Tension between applying retention by matter vs. record type
- Disposition at matter close vs. end of retention period

FIRM ADMINISTRATIVE RETENTION CHALLENGES

- Client/matter hierarchy may not suit admin records
- Follows a more classic approach for retention
- Considerations:
 - State & Federal laws & regulations
 - Optional requirements
 - GDPR + Privacy
- Administrative departments often work out side of firm approved repositories

POLICY CONTENT – TOC EXAMPLE

Section 1: Statement of Purpose _____

Section 2: Definitions _____

Records.....

Convenience Materials.....

Official Files.....

 Client Files.....

 Firm Administrative Files.....

Retention Schedules.....

Preservation Holds.....

Section 3: Governance and Accountability _____

Policy Acknowledgement and Compliance Reviews.....

Specific Responsibilities.....

 General Counsel.....

 Director of Records Management.....

 Records Management Department.....

 Information Technology Department.....

 Office Administrators.....

 Practice Group Leaders and Department Heads.....

 Matter Billing Partner.....

Section 4: Ownership of Records and Information _____

Client Records and Information.....

Client Property.....

 Client Originals.....

 Litigation Support.....

Firm Property.....

Third-Party Property.....

Administrative Records.....

Records Labeled "Personal".....

Section 5: Official Records and Information Repositories _____

Records Management System (RMS).....

Document Management System (DMS).....

Network FileShares.....

Email.....

Offsite Storage.....

Non-Firm Devices.....

Computer System Backups.....

Section 6: Confidentiality and Security of Records and Information _____

Precedent.....

Section 7: Transfer of Records to/from the Firm _____

Acceptance of Records.....

Release of Records.....

 Release or Transfer of Client Files.....

 Lawyers and Staff Leaving the Firm.....

Section 8: Disposition of Records and Information _____

Notice to Client.....

Disposition Approval Process.....

Suspension of Records Destruction.....

Acceptable Methods for Records Destruction.....

Documentation of Destruction Activity.....

RETENTION SCHEDULE: CLIENT REPRESENTATION – SAMPLE 1

Client Representation				
Record Category Name:	Record Category Description:	Trigger Event:	Retention Period:	Legal Group Authority:
.Client Engagement Governance	Documents related to the Firm's evaluation and acceptance of new clients, including client level engagement letters, conflict of interest reports, outside counsel guidelines, etc.	Life of Client	--	Client Representation
.Declined Representation	Documents used to evaluate potential clients and/or matters resulting in a declination of representation. Includes conflict of interest, financial analysis, and letter of declination.	End of Calendar Year	10 Years	Client Representation
.Docketing	Calendar entries used to ensure that the firm satisfies its future obligations for the client.	End of Calendar Year	10 Years	Client Representation
.Matter Engagement Administration	Documents related to the Firm's evaluation and acceptance of new matters, including conflicts checks, new matter forms, engagement letters, disengagement letters, waiver letters, lateral hire processes and clearance, etc.	Matter Close Date	10 Years	Client Representation; Money Laundering
Matter Representation Files - Litigation	Materials created or received during the course of a client/matter representation for an adversarial action matter.	Matter Close Date	7 Years	Client Representation
Matter Representation Files - Real Estate	Materials created or received during the course of a client/matter representation for a real estate matter.	Matter Close Date	25 Years	Client Representation
Matter Representation Files - Transactions	Materials created or received during the course of a client/matter representation for a business matter.	Matter Close Date	10 Years	Client Representation

RETENTION SCHEDULE: CLIENT REPRESENTATION – SAMPLE 2

Folder Type	Closed 6 Months	Closed 10 years
Client Papers	*R/D	
Corporate Documents	*R/D	
Vital Records	*R/D	
Administration		
Administration	Destroy	
Billing	Destroy	
Cases/Legal Authorities	Destroy	
Document Production	Destroy	
Drafts	Destroy	
Extra Copies	Destroy	
Notes	Destroy	
Press	Destroy	
Research	Destroy	
Retained Materials	Destroy	
Working File	Destroy	
Agreements		
Agreements	Retain	Destroy
Application	Retain	Destroy
Closing Documents	Retain	Destroy
Correspondence	Retain	Destroy

RETENTION SCHEDULE: FIRM ADMINISTRATION – SAMPLE 1

Accounting & Finance				
Record Category Name:	Record Category Description:	Trigger Event:	Retention Period:	Legal Group Authority:
Financial Planning and Analysis	Documents related to creating and implementing financial plan. Reports created and analyzed to perform work, support decision-making, and document events.	End of Calendar Year	7 Years	Tax
Fixed Assets	Documents used to document the acquisition and depreciation of fixed assets. Includes authorizations to sell or otherwise dispose of a fixed asset. Documents should be retained until the fixed asset is sold, disposed of, or fully depreciated.	End of Calendar Year	15 Years	Tax
General Ledger	Monthly and annual summary of financial transactions and accounts. Includes subsidiary ledgers and journal entries.	End of Calendar Year	7 Years	Tax
Investments	Documents of Firm investments and compliance with the investment policy.	End of Calendar Year	15 Years	Abandoned Property; Tax
Partner Compensation	Documents of partner compensation, draw accounts, and partner tax accounting. Includes retirement annuities.	Life of Firm	--	Data Privacy; Employment; Employment - Compensation; Tax
Property Taxes	Documents related to the calculation and payment of property taxes at the state and municipal level.	End of Calendar Year	10 Years	Corporate; Tax

RETENTION SCHEDULE: FIRM ADMINISTRATION – SAMPLE 2

FINANCE – PARTNER TAX						
	Document Type	Paper, Electronic, Both	Location(s)	C-M for Official Repository	Trigger Event	Retention Period
	(IIT) Returns & <u>Workpapers</u>					
5.	UK Partnership Tax Returns & <u>Workpapers</u> UK Composite Tax Returns & <u>Workpapers</u> Singapore Partnership Tax Returns & <u>Workpapers</u> Singapore Quarterly VAT Returns & <u>Workpapers</u>	Both	Paper - Office/Offsite Storage Y:drive (SF users-tax team) DM (unofficial)	99990-268	Attorney Departure	C+5
6.	MoFo Foundation Tax Returns & <u>Workpapers</u> Global Privacy Alliance Tax Returns & <u>Workpapers</u>	Both	Paper - Office/Offsite Storage Y:drive (SF users-tax team) DM (unofficial)	99990-268	Date of Document	C+7
7.	Belgium Partnership Tax Returns & <u>Workpapers</u> Belgium Withholding Tax Returns & <u>Workpapers</u>	Both	Paper - Office/Offsite Storage Y:drive (SF users-tax team)	99990-268	Attorney Departure	C+4

LEGAL REQUIREMENTS MATRIX - SAMPLE

Legal Group				
Jurisdiction	Description	Citation	Records Affected	Retention Requirement
Tax				
Federal	Itemized Deductions for Individuals & Corporations	26 C.F.R. § 1.162-17 (d)(1)	Individual taxpayer expense account records of travel, transportation, entertainment, and similar business expenses as practical	No retention specified
	Itemized Deductions for Individuals & Corporations	26 C.F.R. § 1.170A-13	Records re charitable contributions deductions	No retention specified
	Itemized Deductions for Individuals or Corporations	26 U.S.C.A. § 162	Trade and business expense records	No retention specified
	Limitation on Assessment and Collection	26 C.F.R. § 301.6501(a)-1	Tax substantiation records, limitation on assessment and collection	3 years from filing
	Limitations on Assessments	26 U.S.C.A. § 6501 (a)	Assessments and collection records	3 years from tax filing
	Limitations on Assessments	26 U.S.C.A. § 6501 (c)(8)	Assessment on certain foreign transactions	3 years after date on which Secretary is furnished information required to be reported
	Limitations on Assessments	26 U.S.C.A. § 6501 (e)(1)(A)	Civil action on omission from gross income of an amount properly includible therein which is 25% of amount of gross income stated in return	6 years after return is filed
	Limitations on Collections	26 U.S.C.A. § 6502 (a)(1)	Books of account	10 years from assessment
	Limitations on Credit or Refund	26 U.S.C.A. § 6511 (a)	Credit or Refund	3 years from date tax return filed or 2 years from date tax paid (whichever is latest)
	Limitations on Credit or Refund	26 U.S.C.A. § 6511 (d)(1)	Claims re bad debts and worthless securities	7 years from filing return

CLIENT COMMUNICATIONS

- Ethics rules do not require “approval” for destruction – just *notice* to the client about the *intent*
- Include retention verbiage in the engagement letter around the firm’s general retention policy
- Issue a matter closing letter to reinforce retention policy and provide notice to client
- For legacy materials provide blanket letter with a list of matters previously closed, as well as intent

DEFENSIBLE DISPOSITION PROCESS

IMPLEMENTATION APPROACH

1: Data Gathering

2: Analysis

3: Define Disposition Strategy

4: Characterization

5: Execution

STEP 1: DATA GATHERING

- Review existing RM policy and processes
- Conduct stakeholder interviews (Legal, Tax, IT, Compliance, etc.) to define data points for characterization and business owner's use requirements
- Assess the organization's risk tolerance
- Identify the level of metadata available about legacy materials (for hardcopy *and* electronic)
- Identify the scope and content of the organization's structured and unstructured repositories (targeted/prioritized review)
- Access the tools available to collect information and metadata about the materials

STEP 2: ANALYSIS

- Review collected data against classification opportunities
 - Determine feasibility of bulk classification against schedule
 - Develop other characterization criteria
 - Apply risk tolerance thresholds
 - Determine disposition approach for electronic materials
- Develop business case
 - Storage savings
 - Discovery cost avoidance
 - Risk and exposure reductions
 - Potential soft ROI/efficiency gains (i.e., less time looking for materials)

STEP 3: DEFINE DISPOSITION STRATEGY

- Document the process and secure related approvals
- Identify and allocate resources to support the effort (Legal, Tax, IT, RM, and business units)
- Socialize the defensible disposition program components with stakeholders
- Implement the disposition against candidate materials in accordance with the newly-defined disposition process
- Start small... but just somewhere!

STEP 4: CHARACTERIZATION

- Divide legacy backfile materials into groups for further due diligence
- Prioritize quick win opportunities
- Confirm that existing legal holds don't apply
- Develop characterization criteria based on the organization's defined risk tolerance, for example:
 1. Associate "created/modified by user metadata" to a business function; and
 2. Identify information older than the longest non-permanent retention period on the schedule for a business function; and
 3. Consider other characteristics such as date created, last accessed date, departed authors, etc.; or
 4. As otherwise reasonably informed by other department, industry, or specific circumstance.

STEP 5: EXECUTE

- Identify records eligible for disposition
 - Apply record categories from retention schedule
 - Apply other characterization attributes
- Secure approvals per the newly-defined disposition process
- Determine appropriate destruction method
- Prepare documentation for disposed materials
- Execute appropriate destruction method
- Update RM tracking systems as appropriate
- Attach destruction certificate with internal documentation

APPLICABILITY – WHEN TO INITIATE

- Strategically
 - As part of an informed information governance initiative designed to improve controls on the front end (risk based)
 - As part of a strategic sourcing initiative to manage centralized costs (e.g., characterize legacy back file collections)
 - In response to “lessons learned” from prior discovery experiences
- Tactically
 - Office relocations
 - Firm merger or large lateral departure / onboarding
 - Consolidating or relocating off-site storage facilities
 - Implementing new RMS/DMS/Email archive technology

DISPOSITION VS. KM

THE TENSION: RECORDS DISPOSITION VS. KM

- Does the firm have a mature KM process
- Lack of KM process can result in over retention of client representation materials
- Determine KM approved repositories
- Identify KM worthy content and strip client/matter specifics to avoid conflict with retention policy
- Consider KM value in determining retention policy

WAYS TO SELL THE PROGRAM

- Out of site – out of mind... once people realize that they don't actually need it they're more willing to let it go
- Data breach – no law firm wants to be on the front page of the Wall Street Journal!
- Spend the effort to define the REAL costs to maintain/allow growth of electronic and paper storage
- Start with small steps... don't let perfection be the enemy of the good!

UNIQUE ELEMENTS OF LAW FIRM RECORDS RETENTION

- Client Representation
 - Client/matter hierarchy is mature
 - Detailed AOL codes can make assigning retention rules complex
 - Ownership – firm vs. the client
 - Requires client notification before disposition
- Firm Administrative
 - Client/matter hierarchy does not suit admin records
 - Follows a more classic approach for retention
 - Admin departments often work out side of firm approved repositories

QUESTION & ANSWER