

Peer to Peer

ILTA'S QUARTERLY MAGAZINE

SUMMER 2019

SUMMER 2019

Article Reprint:

Outside Counsel Guidelines and
Client Retention Requirements —
The Information Governance Opportunity

FILETRAIL®

This article originally appeared in the Summer 2019 issue of the International Legal Technology Association's (ILTA) Peer to Peer Magazine and is reprinted with permission.

Outside Counsel Guidelines and Client Retention Requirements

The Information Governance Opportunity

BY DARRELL MERVAU



High-profile security breaches and tougher laws and regulations governing data protection and data privacy have led to heightened client awareness of the risks associated with poorly managed information.

Law firms now face more client scrutiny of their information governance policies and procedures than ever before. RFPs from clients and prospects are requiring detailed information on how firms manage and apply IG, while clients' outside counsel guidelines are making very specific demands regarding records retention.

"RFPs come in to our IT security team. There are usually questions about how the records department is run, how we manage compliance, proof of policies and procedures and how we manage retention, destruction and chain of custody . . . As a result, the role of records management has become more prominent. The attorneys, risk and general counsel all value what we do now. Similarly, the CIO and the security team also value our input and are trying to ensure that we're more integrated with security."

**— John Churchill, Records
Department Manager, Nelson
Mullins**

Audits to assess how firms are enforcing these requirements are also happening more frequently, causing a significant strain on internal resources. Clients requesting copies of their files can also cause a significant strain on firm resources, particularly if the firm does not have the right systems and processes in place to quickly gather and review the relevant records prior to release back to the client.

Is your firm making the most of technology to manage client-specific IG and retention requirements? The challenge that most firms now face is significant, particularly if their own IG policies and programs need to be brought up to date.

Changing Perceptions

Information management professionals that are embracing this challenge, however, are finding strong internal support for their information governance efforts.

Client scrutiny is now an opportunity for differentiation. If you can demonstrate to clients and prospects that your firm has well-established IG policies and procedures and can show how you are protecting client information, it can set you apart—and give them confidence that your organization has what it takes to manage information in line with their requirements.

It can also provide leverage when negotiating outside counsel guidelines. Firms that have the necessary controls in place and a well-informed understanding of standard industry practice generally find it easier to identify which terms are inconsistent with the firm's own policy and push back on nonstandard retention periods, for example.

We'll review some of the best practices which information governance and records management leaders have raised during a recent series of strategic briefings and discussions across the U.S.:

- **Get management buy-in and support.**

Getting firm leadership on board in supporting your IG initiatives is key to overcoming the culture of "keep everything forever." With a clear mandate from above, it becomes easier to set priorities, collaborate cross-functionally, enforce policies and secure the necessary resources to make changes. Many IG, records and IT teams we work with have support from the general counsel, CIO or COO, with additional backing from the managing partner and/or the executive committee. Firms working with clients in highly regulated industries (e.g., banking, financial services and insurance; health care and pharmaceuticals; energy; and government) often find

that management is very receptive to taking action with a sense of urgency due to stricter regulatory requirements, the prevalence of OCGs and the frequency of security audits.

- **Map the information you have and how it flows.** Identify existing information repositories, including client matter information. Ask team members in each department what information they receive, create and collect and where they store information, how long they retain that information and who has access. Be sure to capture the "official" repositories such as the document management system, databases, email archives and other business applications such as the new business intake system and practice management systems, as well as file shares, local drives and paper files. Mapping how client matter data flows through the company's systems can also help you identify where controls may need to be tightened.

"It's hard to negotiate client requirements if you don't have an information governance program as a foundation . . . It starts with mapping information. You can't govern what you can't see."

— Christopher Egan, Assistant General Counsel for Information Governance, Akin Gump

- **Set policies and standards and educate users.** It's not uncommon for firms to have a multitude of policies related to information governance, which are enforced haphazardly and which may even conflict with each other, or which may need to be brought up to date with relevant legal and regulatory guidelines as well as

current practice. By breaking down information silos and building better communication channels across departments (such as IG, records, IT, security, compliance and the office of the general counsel), you can start to reconcile and/or integrate policies (covering topics such as RIM, security and data privacy) collaboratively and iteratively.

Updating your IG policies is also an opportunity to reexamine how the firm defines what constitutes a client matter file, a business record, personal information or sensitive information; where this information should reside; who has access to it; how long it should be retained and preserved; and how it should be disposed of. Once policies and procedures are set, it is essential to work with a cross-functional team to ensure that employees throughout the firm are fully trained on relevant policies and help foster a culture of information governance.

- **Implement governance systems.** Technology can play a critical role in helping your firm implement and manage the controls necessary to comply with the firm's IG policies—and track and manage compliance with any client-specific requirements. With so much information today stored electronically, it no longer makes sense to try to manage everything manually via spreadsheets, email and human memory. It can also be problematic to use multiple systems in silos.

As you evaluate solutions, ask: Does this technology provide us with visibility across all our information repositories such as our document management system, file shares and

physical records (with the right access controls)? Is it connected with our other business systems? Or does it actually still require users to log into multiple systems in order to manage compliance? Is the system capable of tracking and managing retention schedules and exceptions, applying them to all relevant documents, and triggering the appropriate workflows for disposition once the retention period has expired?

- **Adopt a proactive approach to retention and disposition.** Many firms have undertaken only limited destruction of physical records that have accumulated over the past 15-20 years. Even fewer firms have sought to actively dispose of electronic records for client matters that have been closed for seven years or more. This is despite the dramatic savings firms stand to realize by cutting storage costs—up to several hundred thousand dollars a year—not to mention the considerable liability risks. The hesitation often stems from concern that it will take too long and be too difficult to manually review and identify which files can be destroyed safely and a culture at some firms to “keep just in case.”

Resetting your firm's approach to ensure timely disposition of client records can have a significant impact — improving compliance, reducing risk, and realizing long-term cost savings for the firm. Develop a disposition plan as part of your information governance program that reduces the potential destruction costs of eliminating a sizable backlog and disposing of records on an ongoing basis. Renegotiate vendor contracts and take advantage of technology that will make the disposition process more efficient, so you can destroy files quickly and with confidence.

- **Assess compliance.** Information governance programs should be linked to measurable outcomes. Reports on overall compliance—both with the firm's own IG policies as well as client-specific requirements—should be issued on a regular basis to key stakeholders and to clients as needed. High-risk matters can be highlighted by monitoring the document inventory, security rules and retention policies. In addition, it's essential to ensure that the firm is audit-ready at any time—regardless of whether the audit is instigated by the client or the firm itself. Having the right systems in place can help you monitor compliance, take action to address any issues, and capture a clear record of past decisions and activity.

“We will utilize FileTrail for retention exceptions that come as a result of Outside Counsel Guidelines. A new records rule or series can be very simply created and linked to either a specific client or matter. This will be of assistance to the firm in ensuring compliance with our clients’ internal retention policies.”

**— Bradlee Davis, Director
of Records and Information
Governance, Jackson Lewis**

Information Governance as a Strategic Advantage

With clients under increased pressure to manage the information governance, security and retention practices of their vendors, it is imperative that law firms rise to the challenge of bringing their own IG policies, procedures and systems up to date. Improving your law firm's approach to IG won't happen overnight. However, with the support of senior management, IG professionals are well positioned to help their firms not only defensively (i.e., pushing back on client terms, passing audits, reducing risk and liability and avoiding blacklists), but also in terms of helping the firm strategically from a marketing and business development point of view. A well-defined, well-managed IG program leveraging advanced technology can be a competitive advantage, improving efficiency, enforcing compliance and measuring risk while enhancing client service delivery and contributing to profitable growth for the firm. **ILTA**

FILETRAIL
CLIENT RETENTION
HINGES ON
INFORMATION
GOVERNANCE



DOWNLOAD EBOOK

INTERESTED IN READING MORE ABOUT HOW AUTOMATION CAN MAKE IG POSSIBLE?

Download this eBook to learn:

- What's driving clients' increasingly stringent IG expectations – and why audits are the new norm
- Why meeting complex OGC requirements today requires highly specialized retention software
- How to move away from a reactionary approach to retention towards a proactive workflow that automates the process, saves money, and reduces risk