Recordkeeping 101
(Or – “I have to keep what for HOW long?”)

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Learning Objectives

• Learn the foundational pieces that must be considered before executing a disposition program
• Understand big bucket theory to create retention/disposition policy
• Identify starting points and blocks to implementation
• Recognize and navigate potential obstacles and areas of risk in implementing your plan
Who Am I & Why Am I Here?

Leigh Isaacs, IGP, CIP is the Director of Records & Information Governance at White & Case LLP. With over 30 years of combined legal, records and information governance experience, her expertise includes strategic development and implementation of enterprise programs, process improvements, risk assessments and mitigation, on- and off-site storage considerations, including outsourcing, the evaluation and deployment of technology solutions, disposition of information for newly-merged or dissolved entities and translating legal, regulatory and business needs into technical requirements.

An active member of the International Legal Technology Association (ILTA), Leigh currently serves as the Information Governance Peer Group Vice President. She is also a founding Steering Committee member for the Law Firm Information Governance Symposium, serves on the Advisory Board for the Information Governance Initiative and has served in leadership roles for ARMA. Leigh has developed and taught InfoGovCon IG Certification programs. She is a published author and speaker on issues relating to information governance.

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Why?

- Ethical duty to maintain a complete client file, including relevant emails

- Mitigate Risk
  - Protect the records and interests of clients
    - Client security audits
  - Preserve the confidentiality of client information
  - Manage and reduce risk to the Firm (eDiscovery, etc.)
  - Comply with Outside Counsel Guidelines
  - Meet obligations associated with protective/destruction orders
  - Meet MPC requirements
To be or not to be?

That is the question.

—William Shakespeare

(As amended by Leigh)
Can’t I Just Destroy & Delete?

- Policy
- Research & Due Diligence
- Schedule
- Supporting Procedures
- Ownership
- Advocacy & Awareness
What Categories of Files Do We Have?

- Client Work Product
- Client Files/Data
- Administrative
  - Functional Departments
  - Practice Groups, Committees, Etc.
  - Personal Files
  - Vital Records
- Junk!
Client Administrative Materials

- Examples:
  - Engagement Letter
  - Disengagement Letter
  - Client Agreements
  - Records Disposition Information

- Best Practice for Storage & Organization – keep separate from client file
Know Where Files & Data Are!

Easy, right? It’s just:

Paper files and

Document Management System

4/27/2016
Think Again

- Records Management
- Document Management
- Marketing/Business Development
- HR Systems/Alumni
- Finance/Accounting Systems
- Reporting

- SharePoint
- InfoPath
- Import tools
- Data warehouse
- Scanning technologies
- Shared Drives
- Cloud!
- Other third parties!
Research and Due Diligence - How

- Determine resources
  - People
    - Records, a librarian, a lawyer
    - But you still need to understand the findings
  - Research sources

- Define scope (all types of records?)

- Do the research

- Deliver the results – legal memorandum
Now that we know content is everywhere - what needs to be done?

- Policy
- Program Logistics
- Research
  - Regulations
  - Statutes
  - Case Law
  - Ethics Opinions

Remember: The Client owns the file!
It’s Not Just About Retention Periods…

- Develop a “Records Management Policy”
  - Defines what a “record” is to your Firm
  - Defines processes for:
    - Creation
    - Use
    - Maintenance
    - Storage
    - Disposition

Remember all those places content is tucked way? Define the Use Up Front
Without a Policy

- Thousands of Boxes of Inactive Files are Stored
- Average Storage Cost is $0.18-$0.28 per box, per month
  (ex. 100,000 inactive boxes @$0.22 per box/per month = $22,000 monthly)
- Potential Liability “Time Bombs”
- Up to 40% likely are duplicate files and other “non-critical” items such as office supplies, old marketing materials, etc.
- It is likely that almost 50% have been stored longer than 20 years
Time For…

Ethics Research

Statutory Research

Case Law Research
Ethics Research

- Ethics Opinions
  - Chief source for retention guidance
  - No clear, set rules—require interpretation

- Issued by the ABA or state/local ethics committees
  - Responses to specific fact questions
  - Not law, but guidance
  - Pretty persuasive to most lawyers
Ethics Opinions are Based on Rules of Professional Conduct:

• Most states base their rules on the ABA “Model Rules of Professional Responsibility” (Model Rule States)

• Applicable rules
  • 1.4 Communication
  • 1.6 Confidentiality
  • 1.15 Safekeeping Property
  • 1.16(d) Declining or Terminating Representation
ABA Model Rules Concepts

1.4 Communication: A duty to keep our clients informed of the status of a matter
   - *Retention Interpretation:*
     - Send material documents to clients on a routine basis
     - Notify client of retention policies

1.6 Confidentiality: A duty to keep client confidences
   - *Retention Interpretation:*
     - Exercise care in the disposition of client information
     - Do not release client information without consent
1.15 Safeguard Client Property: A duty to preserve and protect client property

- Retention Interpretation:
  - Keep a catalog of client records
  - The client owns the documents it gave the Firm
  - The Firm has an obligation to return any materials the client is entitled to receive

1.16(d) Termination of Representation: A duty to return documents to the client on reasonable request

- Retention Interpretation:
  - Return client property (i.e., documents) upon reasonable request or at the end of the engagement
  - The lawyer can retain materials permitted by other law
The Client Is ALWAYS Entitled To Its Property

- Client property
  - Documents the client gave the firm during representation
    - Discovery documents
    - Other business records
  - Intrinsically valuable documents
    - Documentation of rights
    - Client paid for them
- Under Rules 1.15 and 1.16(d) – there is an ethical obligation to return these upon reasonable request or at the end of the matter
Statutory Research

- Few statutes apply specifically to law firms
- Each group/area of law may have its own unique requirements
- Limitations on Actions
  - Statutes of Limitation and Statutes of Repose
  - How long before an action can be brought against the firm?
  - In law firms, we are interested in limitations on:
    - Professional/legal malpractice
    - General negligence
    - Breach of Contract
- Sarbanes
  - Doesn’t apply to law firms unless we destroy evidence
  - Importance of litigation hold procedures in policy
- USC sections on patents, trademarks, copyrights
Case Law Research

- Common law – law by precedent
  - Facts on point
    - Cases that deal with client access to law firm files
      - Proskauer: Former client is granted access to inspect and copy any documents (unless violates a non-disclosure duty to a third party)
      - Cases that deal with retention periods – are there any?

- Zubulake cases
  - Deal with discovery and litigation holds
  - Not relevant for retention schedule
  - Very relevant for records management policy
Supplement Legal Research With…

- Operational Research
- Analysis of Areas of Practice
- Creation of an Inventory/Data Map
- General Fact Finding
- Client Agreements/Outside Counsel Guidelines
Analyze Areas of Practice

- Practice types where retention is “easy”
  - Litigation
  - Commercial Transactions
  - Regulatory Matters

- Practice types where retention is more problematic
  - Estates/trusts
  - Intellectual property
  - Incorporation or general counsel clients
  - Real Estate
  - Securities
  - Criminal work
  - Client is a minor
How long do lawyers need access to inactive client files?

How often are files retrieved from storage?

- Trends re particular clients
- Trends re practice areas

Tip: Do a study to track retrieval rates – when do they start to decline?
Other Issues To Consider

- Ongoing Advice Matters
  - Do you keep materials indefinitely
  - Or, will you permit periodic disposition

- Litigation: Discovery Materials
  - Client
  - Third Party

- Regulatory Practice Areas
  - Regulatory Guidelines

- Documents with Long Review or Performance Periods
  - Contracts and agreements
  - Bonds
  - Loan documents
Classification/”Big Bucket”

- Users can more easily manually classify records for retention. When users have to manually classify records, presenting fewer, better-defined choices is more likely to lead accurate and consistent selections, less frustrated and more confident users, and simplified training. Law firms have the luxury of built in taxonomy – client/matter numbers!

- Correctly classifying records helps mitigate risk from retaining records too long. When users are confident that they know how to classify records for retention correctly, they are more likely to do it consistently, and fewer unnecessary records are retained “just in case.”

- Approvers are more likely to approve dispositions. For organizations that require pre-approval to dispose of records, approvals are more likely to approve destruction because they have more confidence that users are classifying content accurately and consistently.

- Reduced maintenance lowers the total cost of ownership. Less complexity in a retention schedule requires less training and takes less time for periodic maintenance, which lowers the total cost of ownership for an organization to maintain its schedule.

- Using big bucket approach provides benefits from the technical perspective. Having fewer buckets improves machine-driven classification and improves operating efficiencies of document management and content management solutions.

- Big bucket approach brings efficiencies to the disposition process and requires less review time. This approach also supports the effective execution of legal holds.

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Schedules

- Administrative Departments
- Client Administrative Information - indefinitely
- Client Files (Work Product)
  - Trigger for disposition
  - Practice area considerations
  - File ownership
- Caution flag re: client files and data
- Other “stuff”
Establish Retention Periods

- Retention periods are based on:
  - Conclusions from legal research
    - Balance ethical requirements against statues of limitation/repose
  - Operational needs
  - Culture
  - Your gut
Client Imposed Retention Periods

- Don’t try to follow them
- We aren’t our clients’ record keepers
- Encourage the return of client files/data as soon as it is no longer needed
Flexibility?

☐ Can you extend retention periods?
  - Long term documents – yes
  - Practice area considerations – yes
  - Reluctance to destroy – no

☐ Can you shorten retention periods?
  - Court orders – yes
  - Disclosure or confidentiality agreements – yes
  - Client request – only:
    • If in writing
    • Client documents there is no pending or potential litigation
  - Just “because” – NEVER
Disposition Process

- Decisions
  - Notification vs. Approval
  - Disposition instructions
  - Handling responses
  - Attorney involvement

- Records Return
  - What are you returning?
  - What are you not returning?
  - What can be returned
  - Attorney involvement?
Should You Ever Suspend Disposition?

Whenever the records become relevant to a pending or potential lawsuit or investigation

- “Litigation Hold”
- Spoliation
- Obstruction of justice (Sarbanes Oxley)
- Zubulake
Disposition Logistics

- File verification
- Who pays for shipping and handling
- Storage company costs?
- Where should work be performed?
Documenting/Metrics & Reporting

- Documentation
- Role setting
- Expectations
- Feeding the champion
Determine Processes For:

- Notifying Clients
- Identifying and notifying third-parties that may have data
- Closing Matters/Triggering the Schedule
- Preparing File for Storage
  - Weeding
    - Copies
    - Research
    - Drafts (?)
- Review at End of Disposition Period
- Authorization for Disposition
- Disposition
  - Destroy
  - Return to Client
  - Methods
- Updating Systems and Documentation
Challenges

- Limited budgets
- Doing more with less
- Competing resources
- Growing volume of information
- Legacy “mess”
- Gaining executive approval
Keeping Everything Forever?

- Why have we been doing it?
- Pros/Cons
- Building the business case to dispose of information
- Change management
- How to get beyond it?
Business Case for Execution of Retention Program

- Risk Mitigation
- Cost Savings
- Efficiency
- Client Demands/Requirements
Building a Business Case

- Reduce Cost
  - Reduce the cost of storage space required to retain information, including emails, that do not require longer term retention
  - Minimize potential expense in the event of litigation
  - Protect the records and interests of clients

- Increase Efficiencies
  - Email:
    - Improved Outlook performance
    - Minimize interruptions and need for technical support
  - Client Files:
    - Defined repositories and standardized processes reduce time spent searching for information
    - Supports efficient collaboration, especially for cross-office matters
Start with Low Hanging Fruit

- Files for Departed Attorneys
- Personal Information
- Paper timesheets and invoices
- Miscellaneous information (old brochures, holiday decorations, etc.)
Opportunities for Action

- Lawyers Leaving the Firm
- Office Moves/Build Outs
Fact Finding

- After doing preliminary research:
  - Interview the lawyers
    - Expertise
    - Deeper understanding of practice areas and documents
    - Consensus building
- How?
  - Standard questionnaire based on
    - Ethics guidelines
    - Analysis of practice areas
    - Best practices
Obtain Approval of Program

- General Counsel
- Executive Director
- Technology Department
- Administrative Directors
  - If including Firm administrative records
- Management Committee
Tools/Resources

- Revolution Software - http://www.revolutionsoftware.net/
- Iron Mountain (previously Fontis)
- Zasio http://www.zasio.com/
- Information Governance Solutions http://www.infogovsolutions.com/
ABA Model Rules

Helpful Documentation

- Overview of Retention/Disposition Program
- Procedures
  - What end users need to know/do
  - What records need to know/do
- Matter Closing Checklist
- Template notice/request letters
Industry Resources

- ILTA www.iltanet.org
- EDRM – www.edrm.net
- Information Governance Initiative www.iginitiative.com
- Sedona Conference www.sedonaconference.org
Industry Resources

Records Management Organizations

- ARMA International – [www.arma.org](http://www.arma.org)

Federal and Industry Specific Organizations

- AICPA – American Institute of CPAs – [www.aicpa.org](http://www.aicpa.org)
- ABA – American Bankers Association – [www.aba.com](http://www.aba.com)

Related Organizations

- IAPP – International Association of Privacy Professionals - [https://www.privacyassociation.org/](https://www.privacyassociation.org/)
- PRISM – Global Trade Association for Information Management Companies - [http://www.prismintl.org/](http://www.prismintl.org/)
Books/References
<table>
<thead>
<tr>
<th>Type of Physical File</th>
<th>Retention Guideline</th>
<th>Recommended Action</th>
<th>Additional Comments</th>
</tr>
</thead>
<tbody>
<tr>
<td>Timesheets</td>
<td>Two months or until time has been verified or finalized in TimeKM</td>
<td>Shred or save electronically. Should not be sent to Records for storage. Only barcoded files should be sent to Records for proper disposition</td>
<td>This information is maintained electronically by the Finance Dept. and can be retrieved if necessary</td>
</tr>
<tr>
<td>Expense Reports</td>
<td>Two months or until expense reimbursement has been received</td>
<td>Shred or save electronically. Should not be sent to Records for storage. Only barcoded files should be sent to Records for proper disposition</td>
<td>This information is maintained electronically by the Finance Dept. and can be retrieved if necessary</td>
</tr>
<tr>
<td>Invoice/Billing Files</td>
<td>Two months or until invoice has been submitted to the client</td>
<td>Shred or save electronically. Should not be sent to Records for storage. Only barcoded files should be sent to Records for proper disposition</td>
<td>This information is maintained electronically by the Finance Dept. and can be retrieved if necessary</td>
</tr>
<tr>
<td>Extra copies of client documents/files</td>
<td>Until End of matter or deal</td>
<td>Shred. Should not be sent to Records for storage</td>
<td>Only the official file need be maintained.</td>
</tr>
<tr>
<td>Chron Files</td>
<td>Two years maximum</td>
<td>Shred or save electronically. Should not be sent to Records for storage</td>
<td>Because significant client material in chron files should be kept in the client file, chron files do not need to be retained</td>
</tr>
<tr>
<td>Personal Files</td>
<td>Kept and maintained at the discretion of the owner</td>
<td>Should not be sent to Records for storage</td>
<td>No client related work should be kept in personal files</td>
</tr>
<tr>
<td>Inactive Client Files (Closed Matters or Deals)</td>
<td>Should not be stored on site</td>
<td>Send to Records for offsite storage</td>
<td></td>
</tr>
<tr>
<td>Empty or Unused Official (barcoded) File</td>
<td>Do not keep</td>
<td>Returned to Records for proper handling</td>
<td>Please do not throw away barcoded files</td>
</tr>
<tr>
<td>Original Client Documents</td>
<td>Do not keep; return to client</td>
<td>Original client files should be returned to the client</td>
<td>DO NOT DESTROY</td>
</tr>
</tbody>
</table>
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By thinking on behalf of our clients every day, we anticipate what they want, provide what they need and build lasting relationships. We do what it takes to help our clients achieve their ambitions.
Questions?
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Thank you