

Protecting your firm and its information assets

Mitigating Risk Through Effective Records Retention Programs:

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Objectives of this resource:

- Steps necessary to establish a records retention program,
- Establish the need to effectively managing records and information,
- Review how technology and global business requirements impact the records and information business, and,
- Address a potential business opportunity for law firms.

What is a record?

The term “record” is defined to include any recorded information created, received, and maintained as evidence by an organization in pursuance of legal obligations or in the transaction of business. This includes both physical and electronic records.

Why do we need a RIM program if everything is electronic?

- 95% of all records are created electronically.
- The same records management concepts and methods apply to all medias.
- Computerization is viewed as a solution.
- But electronic data has unique problems.
 - Sheer volume of electronic records pushes computer storage to the limits.
 - Technological innovations have reduced the cost of storage, but have little impact on the need to convert the data as applications are changed and data is migrated.
 - Single adverse events could affect a large quantity of information.
 - Computerization is no guarantee that data can be retrieved when needed.
 - Retention times are often longer that the usable life spans of the media on which they are stored.
 - Data migration policies and procedures are critical to ensure that electronic records are readable throughout their retention period.

How does a RIM program affect your firm’s bottom line?

Properly implemented, RIM programs can reduce operating costs in the following ways:

- By ensuring compliance with retention requirements in legal statutes and regulations, they avoid costly fines or other penalties, including criminal penalties to which your senior executives may be subject.
- Reducing the risks and burdens in discovery processes, investigations and audits.
- Minimizing storage requirements (office, equipment, supplies)
- Reducing the time and effort to reconstruct mission critical information in the event of disaster, theft or other loss.
- Reducing labor requirements for the retrieval and dissemination of recorded information.

Steps to establish a records retention program

- Identify staff.
- Conduct a records survey.

- Conduct legal research.
- Appraise legal, operational, and archival needs by creator and secondary users.
- Identify vital records.
- Develop disaster recovery plan.
- Assign program responsibilities.
- Select tools.
- Implementation and training.
- Establish compliance audit process and schedules.
- Monitor program consistently.

Providing Clear Directives to Employees

- Provides insight to employees on what management believes is important, thereby helping to establish the organization's culture and to set employee and management expectations.
- Clarify in plain language what each employee's records management obligations are, why the obligations exist, and what will happen if the employee fails to follow the directive. Define the potential consequences.
- Provide consistent guidelines for employee behavior that lasts beyond the residency of a particular manager or executive. Good policies live on long past their authors, and provide a compass for ongoing organizational behavior.

Why records retention policies and schedules?

- Fast changing legal requirements for document management and retention have increased the risks for firms around the world.
- Partners and employees have entered a new era of enormously increased personal responsibility.
- We must carefully retain records that may be demanded for investigations, litigation or audits. Premature destruction is no excuse.
- Senior executives have a fiduciary responsibility to (1) protect their client's information and (2) protect their firm's brand and image in the court of public opinion.

Records Management Policies and Procedures

There are a number of ways to structure policies and procedures depending on the size and complexity of your firm. But, they typically start with broad, high-level policies that govern the entire organization.

- **High-level Records and Information Policy** – provides high-level principles-based guidance for the entire organization and provides the minimum standards that must be followed by all sections and functions. It must be broad enough to accommodate different needs, yet specific enough to provide useful guidance.
- **Retention Rules** – a detailed document that provides a list of record types that are created and maintained, including retention periods, legal, regulatory or business reasons for each retention period.
- **Electronic Records Policy** – although electronic records are addressed in the retention rules, it may also be necessary to create a separate policy to address specific electronic records issues. This document can be useful in terms of bringing specific focus to electronic records issues, and addressing issues that may be generally new or unfamiliar to employees.
- **Records Hold Policy** – a mechanism for informing affected individuals and departments when normal records management practices must be suspended due to anticipated or commenced investigations, audits, or litigation. Provides forms and other standard documents used to disseminate information on the occasion of a Records Hold.
- **Retention Change Process** – Develop a process for updating the changing the retention schedule and policy based on new regulations and additional record types.

Key Points

- Develop your programs on industry best practices and records management international standards. (ISO 15489 International Records Management Standards)
- Monitor compliance routinely. Ensure that you can identify problems quickly by conducting compliance audits. Insist that this be part of your program operating procedures.
- Work closely with the IT staff to make email part of your records program. Very few firms have effectively addressed this media, but emails are records!
- For additional information on email destruction, go to <http://armaedfoundation.org/main.html> for a free white paper on “Legal Obstacles to E-mail Message Destruction” by John C. Montana, J.D.
- RIM policies should be technology-neutral. That is, they should be written so that they do not go out of date when a firm’s technology practices change or when new technology is adopted.
- Address disposition of records on a routine basis so that unneeded information and records that have met retention guidelines are approved and processed for destruction.
- Take the privacy laws seriously. Ensure that records that contain private information of employees, stakeholders, clients, business partners, etc. are identified and carefully managed to ensure confidentiality.

Legal Research Process

- 15,000+ related records regulations and considerations.
- There are a number of comprehensive legal regulations, legal considerations and statute of limitations databases that can be developed and linked to the record types identified on the records retention schedule.
- This level of information is critical to enable you to quickly address challenges to legal requirements.
- Addressing ongoing changes in the laws and regulations will require changes to the firm’s retention schedule through an annual review process.

Records Retention Policies and Procedures as a Business Opportunity

- Frequently work with outside law firms to develop client records retention policies and schedules.
- Organizations are increasingly aware of the need to develop a program that is consistently implemented, trained and audited.
- Law firms need to establish their own program and then consider assisting their clients in developing and overseeing their policies and retention schedules.

Professional Records and Information Management Associations:

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Purposes of a Records Management Policy and Retention Schedule

It is clear that proper records management deserves the attention of senior management. Before an organization can begin to effectively develop a policy or revise its current procedures, however, it must recognize and understand the full benefits of a good policy. A well-designed program should serve not merely as a shield from potential liability, but also as an important business tool capable of adding significant value to the organization. The most valuable document management policies serve four major purposes: compliance with legal and business requirements; assistance in litigation; improved office efficiency; and enhanced public perception.

Compliance with Legal and Business Requirements

Requirements for everyday maintenance of records – Federal and state legislative and regulatory entities have implemented specific laws and regulations that require specified categories of organizations and individuals under their jurisdiction to maintain certain types of documents and other records for fixed periods of time. These requirements are especially pervasive in highly regulated industries such as securities or healthcare and generally apply regardless of particular circumstances or specific needs. Furthermore, as noted above, violation of these requirements can lead to significant civil and possibly criminal penalties, often imposed with no opportunity to remedy the infraction. An effective records management policy will identify all such requirements applicable to a business and implement procedures to ensure compliance.

Requirements for compliance with discovery obligations – The U.S. court system allows discovery of all relevant materials, and therefore imposes on all parties an obligation to preserve documents that are or might reasonably be expected to become discoverable. This obligation applies not only when litigation is pending, but also any time it may be reasonably foreseeable. An effective records management policy not only incorporates these requirements, but establishes procedures by which personnel responsible for keeping up with litigation can efficiently inform employees of relevant developments and suspend the organization's ordinary procedures to ensure that no documents are improperly discarded.

Business requirements – Today's businesses create a staggering volume of documents, records and data. Although some of these may become useless immediately after their creation, many will have some lasting value and therefore should not be instantly discarded. A common measure of a record's valuable life is the statute of limitations period that might apply to actions involving the particular document. For example, if the applicable state statute allows a party to bring a breach of contract action up to six years after the alleged breach, the parties to the contract should keep that contract, and all related documents, for a minimum of six years from the time the contract is no longer in effect. A good records management policy will identify the beneficial life of all types of business documents, establish procedures for maintaining the documents, and provide for periodic review and proper destruction.

Office Efficiency

A valuable records management policy can facilitate the smooth operation of your business. Proper implementation will force employees to periodically examine the information they have gathered and eliminate what is no longer needed. Periodically purging unnecessary records can often lead to significant savings of office space, storage costs and related expenses. At the same time, this process will have the added benefit of making the retrieval process more efficient for records that are retained.

Enhanced Public Perception

In addition to the direct benefits to your organization, adopting and following a comprehensive records management policy can yield indirect advantages as well. Due in large part to the corporate scandals discussed above, the American public has grown increasingly skeptical of corporate operations. The implementation of a rigorous records management policy can strengthen the public image of a company as a

proactive, law-abiding organization. Furthermore, Congress and state legislatures have enacted groundbreaking privacy-protection laws, and further bills regarding personal privacy are pending. A document management policy will provide evidence to the public of your company's compliance with these laws, and the organization's commitment to the maintenance of personal privacy of its customers.

Elements of an Effective Records Management Policy

Implementation of a policy requires consideration of two primary issues: (a) what substantive requirements should the policy contain, and (b) what administrative steps must be taken to ensure the policy's effectiveness and on-going compliance.

Substantive Elements

The substantive elements of a records management policy should direct the overall requirements for employee-level execution of the policy. While describing the myriad requirements for maintaining specific types of documents is well beyond the scope of the article, for each document or record type generated by a business there are three basic questions that every policy must answer:

1. How long must the item be kept?
2. How should the item be stored?
3. When disposal is proper, how should it be accomplished?

Obviously the answers to these questions will vary from one business to the next. Record keeping requirements, both legal and business-related, vary significantly from one industry to another, and even within single organization. Moreover, the needs of specific offices, branches and affiliates need to be considered. No single "form" of records management policy can adequately address the needs of all possible businesses, making the level of customization a crucial element of a policy's effectiveness.

In addition, a records management policy should establish a process for suspending routine destruction and affirmatively preserving any items that must be retained due to potential litigation. The process should clearly establish what levels of management have this authority and create definite deadlines and procedures for compliance. Again, proper customization of your policy to fit your business's structure and approach to operations is essential to its success.

Administrative Elements

The administrative elements of a document management policy contain the procedures for development, implementation and maintenance of the policy. These must be developed on a case-by-case basis, and must be structured to conform to an organization's operating procedures. Implementation of new procedures and rules that will be a burden to employees are unlikely to result in an effective policy. Finally, any new policy needs to consider, as part of the policy implementation, employee training and education.

Managers responsible for the new policy should work closely with legal counsel and experienced records management consultant as the policies developed and formulated. These organizations have significant experience and expertise in developing policies for a wide range of businesses, and their input can save time in the development process and ensure that the policy meets your specific needs.

Senior Executive Buy-In

Following development, senior-level management should approve the policy. Action by the management committee or senior executives will signal the importance of the new policy and stimulate a greater degree of compliance than lower-level directive might accomplish. This is a commonly overlooked aspect of implementation, but as recent events show, has become critical to achieve the policy's goals.

Follow-up

After implementation of the employee-level responsibilities, managers should implement a regular monitoring program to ensure across-the-board compliance. Such a program could include random inspections of employees' workspaces and files to ensure that important documents are present and outdated ones have been discarded, and continued training and update of policy procedures. A records management policy is essentially worthless if not consistently followed. Finally, the policy should undergo periodic reviews and updates designed to ensure that the policy reflects current laws and changing business needs.

Summary

Although there is no single solution to every records management issue, the potential benefits of a well-designed, consistently applied records management policy should be obvious. Such a policy can help limit potential liability both in the ordinary course of business and in litigation, while at the same time creating significant office efficiencies, improve public perceptions, and making your business a safer and smoother overall operation.