# White Paper

# *Information Governance*

**Article Reprint:**

The Elephant in the Room —
The Hidden Costs and Risks of Electronic
Records Retention

**FileTrail**®

# The Elephant In the Room

## *The Hidden Costs and Risks of Electronic Records Retention*

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**I**s the unchecked accumulation of digital files across your DMS, file shares and cloud repositories putting your firm in jeopardy?

Since law firms started adopting the first document management systems 25 years ago, we've seen tremendous growth in the number of electronic files stored digitally. As of August 2019, NetDocuments was managing over 9.1 billion files across more than 2,500 organizations globally,[1] while iManage was serving more than 2,000 law firms.[2] And that's just one piece of the puzzle. A typical law firm may have client matter information stored in as many as 30 different types of repositories, and the volume of data continues to grow every day.

Given the industry trend to embrace more "paper-lite" approaches, it's understandable that most records management and information governance teams have focused on reducing the volume of physical records in offsite storage, rather than worrying about the impact of cumulative growth in electronic records over time.

However, the reality is that most law firms today are now storing virtual mountains of digital records they no longer need—including matter files from ex-clients which have been inactive for more than a decade. The costs and risks of this "keep everything just in case" approach are significant—and pose looming threats for law firms that fail to act. This concern was raised repeatedly by information governance leaders during a series of events which FileTrail recently hosted across the U.S. together with ILTA.

The cost of digital storage adds up, especially when you are keeping terabytes of data that you actually no longer need—whether the data is stored in the cloud where your firm pays by the gigabyte or on-premises where your IT department is responsible for maintaining the hardware, software and security infrastructure and paying for power, cooling and all the physical overhead associated with digital storage.

Retaining electronic records beyond the time required also significantly increases your firm's exposure to legal, regulatory, financial and reputational risks. Today, the inability to demonstrate rigorous policies and procedures for electronic disposition could disqualify your firm during an RFP process, as prospective clients start to ask tougher questions about law firm information governance. Even if you do manage to get by through the initial screening process, your failure to properly dispose of electronic records could come to light during a subsequent audit.

Isn't it time to address the information elephant in the room? But where do you even begin?

## Surveying the Information Elephant

The first step is to understand the landscape of electronic information within the firm.

For most firms, the scale of the challenge is enormous. The reality is that at the same time that law firms adopted their first document management systems, they also started using file shares, often resulting in a proliferation of unstructured and unmanaged data throughout the firm.

A large volume of client matter information also typically resides in email. Many IT departments attempt to impose email quotas as a means of gaining control—only to be met with lawyer rebellion or the de facto creation of yet another electronic archive that will need to be searched in the future.

In truth, it's not just one elephant; it's a herd. Most firms today store client matter information electronically across multiple repositories and business systems. Without a clear understanding of what information the firm has, where it resides and how it flows, it is impossible to enforce effective information governance.

Mapping all the electronic data repositories within the firm usually requires dedicated resources including internal project team members, as well as external consultants tasked with surveying each practice group and department. Getting "neutral" third-party consultants involved often can help in gathering detailed information about current practices and providing an objective analysis of any gaps.

## Reviewing the Rules (and Comparing with Reality)

Reviewing your firm's information governance policies—particularly with regard to the classification of information, as well as retention and disposition—is essential. An assessment of how well the firm is following its own policies can help in determining whether and how current processes need to be adjusted and/or whether the policies themselves need to change.

Many firms find that IG policies are in need of a periodic update to take into account evolving legal and regulatory requirements, the shift over time from paper to electronic documents, the aftermath of mergers and acquisitions over time involving firms with different approaches to records retention, other organizational changes within the firm and the complexity of the constellation of business systems in use. Firm leaders themselves, when presented with the business case for a more rigorous approach to electronic disposition, may also change their stance on "keeping everything" and agree to decrease the firm's standard retention periods if they are excessively long.

In addition, firms today contend with the proliferation of outside counsel guidelines issued by clients, often specifying different requirements with regard to retention. Firms need to ensure that they have processes in place to evaluate and capture client-specific requirements centrally, to ensure that the firm is not agreeing to problematic, unreasonable or conflicting demands and to avoid noncompliance due to lack of visibility.

## Strategic Approaches to Automating Disposition

Once you have a clearer understanding of all the information repositories within your firm and the relevant retention requirements defined by your firm's IG policy as well as client policies, work with key stakeholders to define a strategy to identify and eliminate the backlog of electronic records that

are due for disposition, as well as a strategy for enforcing retention and disposition requirements moving forward.

Identifying which electronic records to dispose of can be a mammoth task initially, particularly if your firm has not disposed of electronic records previously.

Technology can help. An advanced records management system will be able to provide you with an integrated view of all repositories across your firm—indexing all items within the DMS, file shares, e-discovery archives and even your physical archives. Legal holds related to specific client matters should be applied consistently regardless of where the information resides.

Advanced information governance systems can then help you identify the exact scope of aging electronic records that are overdue for disposition. For example, if your firm's IG policies specify that all records associated with matters that have been closed for over seven years should be destroyed unless specified otherwise, you can apply search criteria to identify the relevant files and proceed with the required review and approvals to eliminate the backlog.

Automating retention workflows is the key to managing and enforcing information governance policies on an ongoing basis moving forward. When documents are received or created by the firm, the correct policy for each document should be automatically assigned according to predefined rules that are applied based on practice area, document type and client or matter.

Prior to the end of the retention period, your information governance system should trigger workflows for the review, approval and disposition of specific records, with notifications sent to the appropriate lawyers, paralegals, compliance team members, office of the general counsel and administrative staff as required.

In other words, once the information life cycle is fully automated, your information governance system should automatically identify which documents and records are eligible for disposition and put them into the review cycle at the right time—so you no longer have to worry about manually tracking retention schedules, searching for records, chasing approvals and missing deadlines.

## Facing Fear, Uncertainty And Doubt

Just inches from the finish line, some firms find that the biggest challenge for them is getting final sign-off on destroying the massive backlog of aging electronic records that should be destroyed.

The hesitation might stem from a variety of factors, including changes in executive committee leadership during a project or lack of clarity on final sign-off authority. Lawyers are also trained to be cautious, and in a culture where "having a memory like an elephant" is prized, it can be difficult to let go of the "keep everything" mindset, even if they accept that the status quo is untenable.

While every firm is different, there are several steps you can take to help your firm successfully navigate the transition to a more proactive electronic disposition program. Presenting a clear and compelling business case for disposing of aging electronic records can help in securing management buy-in. In a typical scenario, a firm that has accumulated electronic records over 25-30 years may find that 90% of these records can be deleted based on

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the matter close date, reducing storage requirements by 30-70%. This translates to significant cost savings in onsite and/or cloud storage.

You can also work with the office of the general counsel to present the risk factors in failing to comply with retention periods specified by clients or by the firm and in retaining sensitive data for longer than strictly necessary, including increased exposure to security breaches, litigation, fines and reputational damage. Presenting metrics and graphical reporting from your information governance system to demonstrate current levels of compliance can be particularly informative and persuasive.

Furthermore, it's worth educating your information governance committee about the configurability and flexibility of your proposed workflows. A firm that prefers to take a more cautious approach to disposing of a large volume of electronic records can do so in stages (e.g., disposing of all matter files more than 10 years old as a first step) or with extra review cycles.

## Realizing the Full Potential of Paper-Lite

One thing is certain: Left unchecked, the information elephant will continue to grow. For most firms, the volume of digital information received and produced on a daily basis is staggering. Data growth is likely to continue at an accelerated pace, and the strain on firm resources could soon reach the breaking point for many.

Taking a more proactive approach to electronic disposition is a critical step toward more effective information governance, risk management and client service delivery and more cost-efficient use of your digital infrastructure. By eliminating the backlog of electronic records that are no longer needed and automating retention and disposition moving forward, firms can take control and finally start to realize the full rewards of transitioning to "paperless" and "paper-lite" environments. **ILTA**

## BONUS CONTENT!

In this associated article podcast, Darrell Mervau, President of FileTrail, sits down with ILTA to talk all things Information Governance. His fantastically titled article "The Elephant in the Room: The Hidden Costs and Risks of Electronic Records Retention", starts out the White Paper conversation.

Listen along as we talk about changing and adapting to new legal tech, how IG must continue to evolve as we head in to 2020, and what's next for File Trail, ILTA, and IG.

**Tune in here! »**

**Darrell Mervau** is a co-founder and president of FileTrail Inc., a global leader in records management and information governance, where he provides the vision and overseas product strategies that have propelled FileTrail to its current market leadership position. Having spent his entire career in the field of information management and governance, Mervau previously held executive roles with two different start-up companies and was instrumental in their early growth and successful sale. Mr. Mervau can be reached via email at dmervau@filetrail.com.