

Managing Information Risk Before Law Firm Mergers Begin

By: Nancy Beauchemin, President, InOutsource

Protecting client confidentiality is a cornerstone of an attorney's professional and ethical duties to their clients and as such a critical component of a successful law firm records and information management program. If a law firm is contemplating merging with another firm, it is essential they have infrastructure in place to safeguard client information prior to making any moves. It is impossible to protect client information unless you know where it exists. Firms that have established designated repositories to store client matter information are in an advantageous position to implement systems that will restrict access to client confidential information.

Generally speaking, most state bar professional guidelines agree that the matter file belongs to the client. Firms should research the jurisdictions in which they practice to determine what aspects of the file are considered to be client owned and what aspects of the file are considered attorney work product or firm owned. Firms often communicate their understanding of file ownership in the engagement letter to the client. However, the systems firms use to manage information often do not segregate client information in accordance with ethical obligations of file ownership. For example, if attorneys are using Outlook® as the main repository to manage client matter information and the firm's position is to provide departing attorneys with their Outlook mailbox when they leave the firm, and subsequently purge their mailbox after they have left, the firm often may be left with an incomplete set of information for matters the attorney worked on. If the firm does not retain the client, the firm still may be at risk for claims arising from work done by the firm on behalf of this former client. Furthermore, many attorneys do not organize e-mail messages and attachments in a way that distinguishes client-owned information from attorney work product.

In assessing viability of a merger, typically both firms will exchange lists of their top clients to determine if there are any conflicts significant enough to stop merger discussions from proceeding. At this early stage, it is important that both firms have a process to conduct conflicts due diligence secretly and efficiently. Rumors surrounding possible mergers could seriously hamper negotiations and put the firm at risk for poaching of key attorneys by other law firms and recruiters. Depending upon the size of the firm and the volume and integrity of the data in the conflicts system, there can be an unusual amount of information that needs to be evaluated. A factor in determining whether an actual conflict exists can be attributed to whether the conflict is with a former or current client. Firms that do not close matters may receive many potential conflicts hits for current clients that should have been closed long ago. This results in additional work in assessing potential conflicts with current firm clients and merged firm clients. Firms that are considering merging as part of their growth strategy can better prepare themselves through evaluating data in conflicts system and initiating a project to clean up data. Cleaning up conflicts data may involve projects to eliminate duplicate data elements and implementing a project to close inactive matters.

In certain circumstances, potential conflicts for matters are not substantially related and may be waived with consent by the client. As a condition of obtaining a waiver of consent, the client may require that an ethical screen is established to limit access of client information to those attorneys working on the matter. Many firms have some capabilities to manage and enforce ethical walls through a records management system. Some firms place stickers on physical matter files to indicate the file is subject to an "ethical screen."

Many firms do not have complimentary processes or systems to protect electronic matter information with an ethical screen but rely instead on notifying the affected attorneys that they are subject to an ethical screen. As the volume of electronic client matter data continues to increase, clients will expect firms to have established processes and implemented technology to erect and manage screens to ensure their confidentiality is not breached.

The decision to grow through merging or acquiring another law firm is intended to provide economic benefit to the firm as a whole. Firms consider growth through merging to add additional practice areas and/or expand their geographical footprint. Recognize that some attorneys will not be on board with a merger decision and as a result, they will choose to leave the firm. To preemptively prepare for possible attorney defections, law firms need to have established systems to monitor unusual behavior by key stakeholders. Checking out high volumes of documents from the firm's document management system can be a key indicator that an attorney is preparing to exit. Having a system in place to alert management of possible defections will allow the firm to proactively address concerns and perhaps retain attorneys and clients.

When an attorney has formally announced their resignation, protocols need to be established to ensure that documents leaving the firm are limited to what has been authorized by the firm and the client. Historically, law firm records departments were the gatekeepers of client matter files and enforced policies to ensure proper documentation was obtained before releasing client files with a departing attorney. While these policies were effective when the client file was only made up of paper-based documents, many firms have not updated them to reflect electronic client matter information. Firms need to develop a protocol and proactively train IT help desk employees and support staff on these policies so they can respond appropriately to requests. Firms need to develop policies to formally notify the client of their understanding as to what matters have been transferred with the departing attorney. Information that documents the chain of custody of client information needs to be maintained indefinitely.

Law firms like many other businesses rely on the calendaring functions available in Outlook® e-mail to keep track of critical client dates. American Bar Association and liability insurer carrier statistics assert that many client malpractice claims are a result of administrative errors attributed to missed deadlines. Law firms that rely on individual attorneys to manage dates in individual e-mail systems are exposing their firm to the risk of potentially missing a critical deadline. Many law firms have implemented firm-wide docketing systems to provide central management of future court dates and other filing dates. These systems can be effective if there are also supporting policies to define attorney roles and responsibilities, and procedures to notify the docketing department of upcoming calendar dates. There must be a policy for outgoing attorneys to follow to notify the firm of any pending court or calendar dates related to a client matter.

Firms need to consider the degree of oversight that must be present when attorneys leave the firm and new clients join the firm to ensure they are honoring their duty to protect their client's interests and information. Firms often benefit from a review of their processes to expose gaps in policies and technology. By making these considerations and reviewing systems and processes now, and applying any changes that must be made, firms will be well positioned when they decide to grow through mergers, acquisitions, and lateral hires.

About the Author

Nancy Beauchemin, President, InOutsource. Ms. Beauchemin has spent more than 20 years working with law firms advising on records management best practices given rising costs, new technologies and risk management issues. She has earned a Certified Records Manager (CRM) designation from the Institute of Certified Records Managers, and is a member of ARMA International. She holds a B.S. Degree from Northeastern University. Ms. Beauchemin can be reached at nbeauchemin@inoutsourc.com.