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Electronically stored information and reasonable retention vs. hoarding

By [Daniel Kegan](#)

Traditionally lawyers saved documents long past the conclusion of the matter. When storage costs were low, files thin, and future use unlikely this avoided destruction decisions and provided psychological comfort that if needed, closed documents would be available. The explosion of electronically stored information (ESI) and its intrusion into most areas of business and personal life has radically changed and challenged the rationality of law firm storage procedures.

Electronically Stored Information, ESI

Federal and state courts, Legislatures, and agencies have moved to accepting ESI as the preferred medium of document submission, retention, retrieval, and display. ESI usually is less expensive, and makes search, retrieval, and display faster and easier. Computers and ESI have impacted most sectors of society, from *Prosecuting Computer Crimes* (Department of Justice, Office of Legal Education) to Internet available sermons.

Various cases have found spoliation and sanctions when ESI is lost, others have provided a FRCP 37(e) safe harbor. May 2014 the Advisory Committee on Federal Rules of Civil Procedure recommended revising the rule to permit greater court discretion and to focus on solving the problem of innocently missing ESI, rather than punishment. (Charles S Fax, *Less Is More: Proposed Rule 37(e) Strikes the Right Balance*, 39 *Litigation News* 18 (ABA), Summer 2014; Report to the Standing Committee on Rules of Practice and Procedure, <bit.ly/standing-committee-report>.)

The American Bar Association's (ABA) *2012 Legal Technology Survey* reports 100% of the responding law firms use e-mail; 95% use Web browsers, 94% create Portable Document Format (PDF) documents, 47% use instant messaging, and 21% use software as a service (SAAS) (id., vxii, xix, xxviii).

As with most major technological and cultural changes, optimists and pessimists debate the future impact of the Internet and digital communications. (Berin Szoka & Adam Marcus, eds, *The Next Digital Decade: Essays on the Future of the Internet*, 2010) Most agree the impact is and will be strong and permanent.

While legal technology has changed since strict writs and quill pens, human characteristics, foibles, and disabilities have persisted. Some lawyers maintain neatly ordered files, with clear indices on confidential and privileged information, explicit written guidance for destruction dates, and sequestering of the few documents that should be longer preserved. Others use

the shoebox method, throwing everything into the file sans apparent organization. Modifying Arnold Arnaud Amalric's 1244 comment on the Cathar massacre,¹ to "save them all, a future attorney will know what to discard," ignoring the future cost of deferred decision-making.

Although ESI has greatly increased, the reports of the death of paper are greatly exaggerated. Most law firms have many paper records from the past as well as the present. Few organizations have implemented a true paperless office. Joe Kissel's helpful ebook, "Take Control of Your Paperless Office, (Take Control Books, 2d edn, 2014, <<http://www.takecontrolbooks.com/paperless-office>>), provides a practical guide to paperlessness. The hardest part of the process is likely deciding what is no longer needed.

Kroll Ontrack recognizes a human tendency "to seek out short term solutions even when long-term alternatives are a safer bet and offer superior results." It suggests a "long-term, comprehensive portfolio management approach to ediscovery" is needed to "minimize data transfers, decrease the amount of stored documents and has everything needed for ediscovery in one place" ("Let It Go—Discarding Past Ediscovery Protocols; the Portfolio Approach is the Future," <www.jdsupra.com/legalnews/let-it-go-discarding-past-ediscovery-p-25901/?utm_source=LU_E-mails>, 1Sept2014; also see "Procrastination," <<http://en.wikipedia.org/wiki/Procrastination>>, 11Oct2014).

While every piece of paper can be scanned, indexed, and preserved, such a process is inefficient, wasting both staff and attorney time as well as money. "The fewer documents requiring human review, the more money is saved" (Nelson, Matthew D., *Predictive Coding for Dummies*, p. 9, Symantec Edition, 2012). While large firms in multi-million dollar cases are often seen as likely prospects for eDiscovery services, all firms, litigation-focused or not, large, medium, or solo, will benefit from rationally reviewing and revising both their record retention policy as well as the likely organizational and psychological barriers to more efficiency (Daniel Kegan, *Discovering ESI: Self-Reliance and Rule 26, 5 Technology for the Litigator*, ABA Litigation Section, November 2010).

Hoarding and the Anxiety of Deciding to Discard

Consider what law firms might learn from psychologists, focusing on hoarding. Although diagnostic criteria and definitions for psychological traits change over time, a consistent core concept may provide a useful reference. Hoarding characteristics include "*persistent difficulty discarding or parting with personal possessions, even those of apparently useless or limited value, due to strong urges to save items, distress, and/or indecision* associated with discarding (emphasis added).

The proposed 5th edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-V), still controversial in many aspects, newly lists hoarding as a separate disorder. This newly separate disorder was expected to "increase public awareness, improve identification of cases, and stimulate both research and the development of specific treatments for hoarding disorder" (Mataix-Cols, D, RO Frost, A Petusa, LA Clark, S Saxena JF Leckman, DJ Stein, H Matsunaga & S Wilhelm, *Hoarding Disorder: A New Diagnosis for DSM-V?*, 27 *Depres Anxiety* (6) 556-72, Jun 2010).

Three of the five DSM-V hoarding symptoms are:

- A. Persistent difficulty discarding or parting with personal possessions, even those of apparently useless or limited value, due to strong urges to save items, distress, and/or indecision associated with discarding.
- B. The symptoms result in the accumulation of a large number of possessions that fill up and clutter the active living areas of the home, workplace, or other personal surroundings (e.g., office, vehicle, yard) and prevent normal use of the space. If all living areas are uncluttered, it is only because of others' efforts (e.g., family members, authorities) to keep these areas free of possessions.
- C. The symptoms cause clinically significant distress or impairment in social, occupational, or other important areas of

functioning (including maintaining a safe environment for self and others). (<<http://unclutterer.com/2010/02/18/hoarding-disorder-a-new-disorder-in-the-draft-of-the-dsm-v/>>, 23Nov2012.)

Wikipedia summarizes human hoarding:

Some hoarding in humans may be a form of an anxiety disorder such as obsessive-compulsive disorder (OCD), where the perceived importance of the hoarded items far exceeds their true value. Humans may lose the desire to throw away unneeded items because of a feeling of attachment to these items. In severe cases, houses belonging to such people may become a fire hazard (due to blocked exits and stacked papers) or a health hazard (due to vermin infestation, excreta and detritus from excessive pets, hoarded food and garbage or the risk of stacks of items collapsing on the occupants and blocking exit routes).

(<en.wikipedia.org/wiki/Hoarding>, 20Aug2014). Also see Wikipedia's "Compulsive_hoarding" and "Digital hoarding" pages.)

For a summary of hoarding research, see American Psychological Association, Research Roundup: Hoarding, 10May2012, <<http://www.apapracticecentral.org/update/2012/05-10/hoarding.aspx>>.

The Collyer Brothers, Homer and Langley, died March 1947 in their Fifth Avenue, Manhattan home, surrounded by 140 tons of collected items. (<http://en.wikipedia.org/wiki/Collyer_brothers>, 10May2012). Now, 2014, local officials increasingly are attending to hoarding as a serious public health hazard, increasing the risk of house fires and vermin infestations. (Task Forces Offer Hoarders a Way to Dig Out, *New York Times*, 27 May2013). As many as 3 to 5 % of Americans may suffer from hoarding. Id. Contemporary hoarding has become popular media entertainment; A&E Network's Hoarders tv show ran for six seasons and 82 episodes. (<<http://www.today.com/popculture/ae-throws-out-hoarders-after-six-seasons-8C11267714>>, 5Oct2014 cf. "Does TV accurately portray psychology?" American Psychological Association, <www.apa.org/gradpsych/2011/09/psychology-shows.aspx>, 20Aug2014). Robin Zasio, a therapist who appeared on A&E's *Hoarders*, offers help for non-clinical hoarding and clutter in her *The Hoarder in You: How to live a happier, healthier, uncluttered life* (Rodale, 2011).

Commenting on DSM Hoarding, Mark Amdur suggests that traditionally hoarding has been considered an obsessive-compulsive disorder (OCD) of repetitive behaviors, while he sees hoarding usually arising from inaction (162 *Am J Psychiatry* 1031, 2005). Amdur performed close to 800 guardianship evaluations over 15 years, typically involving home visits, and found hoarding highly prevalent. He suggests the "problem is not so much that these people collect. The problem is that they are unable to discard."

While most lawyers and law firms may not suffer as extremely as the Collyer Brothers or A&E's hoarders, sometimes the similarities can be striking. Compare the Collyer Brothers room with an attorney's 2014 storage of non-current documents:

Even if a law firm comprehensively indexes documents and neatly places them in sturdy, liftable boxes, it is likely paying for unnecessary storage. Moreover, for the infrequent events when old documents may be desired, the retrieval costs will be higher for hoarded case paper documents than for reviewed and early-culled electronic archives.

Busy attorneys and cost-conscious firms may resist culling unnecessary documents after a matter has concluded. Cross-indexing paper documents is often undone, while indexing digital documents can be automated. Four reasons support prompt post-matter culling.

First, memories are sharper at the end of a matter than years later, making the cull/retain decision faster and easier. Second, fewer documents to be stored reduce storage costs. Third, when a closed matter needs to be reviewed, retrieval is easier without the haystack straws cluttering the search for the desired needle. Fourth, just as society has started to recognize full



life-cycle costs should be born by manufacturers and buyers—beverage bottle deposits, air and water pollution regulations, carbon taxing—the costs of neatly wrapping up a matter should be budgeted by the firm and charged to the client.

Suggestions for Less Paper and Reasonable Retention

Both Joe Kissel (*Take Control of Your Paperless Office*) and Robin Zaslo (*The Hoarder in You*) warn against trying to do too much too soon. Rather plan, start small, implement and evaluate your new procedures. Lessons from empty-nesters downsizing to smaller or retirement homes can be instructive to the law firm (“Moving to a Smaller Home, and Decluttering a Lifetime of Belongings,” *NYTimes*, 22Aug2014).

1. Observe

Observe how incoming US Postal Service mail (USPS), e-mail, FedEx, court downloads, and other documents and communications are currently being processed. Observe how outgoing communications are handled. Compare with your firm’s written Policy and Procedure Manual. If out of date or no Policy and Procedure Manual, start with a page describing current procedures. Review the firm’s policy for naming and storing electronic files; Observe how consistently it is applied.

2. Plan

Plan your revised document procedure. Consider how phone communications are documented. Consider how work with documents and communications are recorded for client billing and task control. Consider how government PDF documents are currently obtained and stored. Plan for digital scanning of paper documents—hardware and software (often included with hardware and/or computer operating system). Review the subsets of Portable Document Format (PDF) electronic documents. See *Adobe’s PDF as a Standard for Archiving*, (<<http://www.adobe.com/enterprise/pdfs/pdfarchiving.pdf> >, 5Oct2014); and general PDF information, <http://en.wikipedia.org/wiki/Portable_Document_Format>. Decide who will be scanning incoming documents.



Review your local and off-site backup procedures for electronic files; test your restore procedures. Consider how likely your primary, secondary, and perhaps tertiary backup storage media will be readily readable in future decades. The Internet Archive retires its hard drives after their 3-to-5-year lifetime. (Brewster Kahle, “Why Preserve Books? The New Physical Archive of the Internet Archive,” posted 6Jun2011, <blog.archive.org/2011/06/06/why-preserve-books-the-new-physical-archive-of-the-internet-archive>, 5Mar2012.)

Consider automatic backup procedures, such as Apple’s Time Machine, not requiring a person to remember the backup or rotation tasks.

Review your e-mail process and the retention and archiving procedures of your e-mail host(s). Remember Goldilocks—you want to preserve much recent non-spam e-mail but little old e-mail. Consider reformatting significant e-mails into PDF format. If handling especially sensitive matters, confirm in what state and national jurisdictions your e-mail host(s)’ servers reside.

Review your federal and state law and court local requirements for original documents, tax purposes, applicable ethics guidelines for document retention, the best evidence rule, and the admissibility of duplicates. Fed.R.Evid 1002 & 1003.² Of typical primary concern are wills, trusts, deeds, bankruptcy discharges, death certificates, and firm-client financial records. If you don't need the original, consider prompt scanning and return the original to the client.

3. Pilot

Begin small, scanning incoming USPS mail according to the firm's new written procedure. Evaluate and debug. Review and as necessary revise how e-mail and attached documents are accepted, reviewed, files renamed, and stored.

4. Revise

Revise procedures for documents your firm originates.

5. Evaluate

What's working well, where are there bottlenecks, what mistakes are common, how are staff and attorneys reacting.

6. Target

Target a small section of past documents. Perhaps a recent closed small case. Remember your state ethical requirements for maintaining past client financial and other records. Consider a large collection of similar paper documents, requiring no cull decisionmaking, such as paper client invoices for a year. Expand the target.

7. Evaluate

Evaluate and review changes in laws, ethics rules, available hardware and software, and informed opinion regarding stability and future readability of current media and formats.

8. Celebrate

Rome wasn't build in a day, a journey of a thousand miles begins with a single step. Recognize major milestones, and celebrate the progress.

9. Continue

It may well take a few years for typical law firms to substantially reduce paper storage and refine procedures for digital indexing and archiving. Patient persistence profits.

A Summary

A Sufi tale tells of an island culture with legends of now esoteric travel skills of swimming and boatbuilding (Shah, Idries, "The Islanders," in *The Sufis*, Doubleday Anchor, p 11, 1971). A prospective student inquires with the teacher:

"I want to learn to swim; I only have to take my ton of cabbage"

"What cabbage?"

"The food which I will need on the other island"

“There is better food there.”

“I don’t know what you mean. I cannot be sure. I must take my cabbage.”

“You cannot swim, for one thing, with a ton of cabbage.”

“Then I cannot go. You call it a load. I call it my essential nutrition.” ■

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1. “Kill them. For the Lord knows those that are His own,” responding to a soldier concerned about killing orthodox Catholics along with the heretics.

2. Rule 1003. A duplicate is admissible to the same extent as the original unless a genuine question is raised about the original’s authenticity or the circumstances make it unfair to admit the duplicate.

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