

Why Matter Mobility Management should now be a key competence for law firms

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Chris Giles and Kandace Donovan | 17.10.2022

Given the increased frequency with which law firms now have to transfer client data, they should try to get better at it. In this article, **Chris Giles** and **Kandace Donovan** discuss the drivers and challenges around matter mobility management and suggest some key strategies, processes and approaches for reducing matter mobility risks and costs.

First, where does the increased requirement for matter mobility come from and will it continue? In fact, there are several drivers. One is that there's now a markedly increased propensity for clients to move law firm. The financial shocks of 2008 eroded traditional loyalties as corporate clients in particular began looking instead for the best deal. They're now managing law firm activity and billing via Outside Counsel Guidelines (OCGs), and keeping track of firm performance using dedicated software, to an extent never seen before 2008. It's done with a view to ensuring they're getting plenty of bang for their legal buck, but for many it's also with a view to systematically culling the poorest performing firms on an annual basis.

At the same time, and taking their clients with them, lawyers are also moving firm more often in their careers than they used to. This is either in search of a bigger salary, more status and more challenge, or conversely for less challenge and a better work life balance.

Lawyers have probably always been ambitious, but they're now practicing in an altogether more competitive era, in which talent is more than ever recognized and rewarded as a lucrative commodity. Firms are jostling for that talent, so restless lawyers have more opportunity to move.

Meanwhile, the desire for a better work life balance existed before the pandemic. Yet the COVID-19 lockdowns provided both an interval in which individual law-

yers could take stock of life and demonstrated the degree to which modern technology can seamlessly support remote working. For some that flexibility is now what they seek or demand, sparking more lateral movement.

Plus, of course, remote working both extends the geography within which a lawyer can offer their services; and lowers the barrier to “moving” because it can eliminate the upheaval of relocation when changing firms. Notionally at least, a lawyer can simply switch off a Zoom or Teams call with one firm on Friday and switch on to a new Zoom or Teams call for the same client, but with a different firm, on the Monday. It follows that if there’s more choice of where you can move to, and it’s less painful to change firm – more lateral movement is likely to take place. Combine these reasons and Thomson Reuters reported that turnover among US lawyers had rocketed from 15 per cent to nearly 25 per cent in the 12 months to January 2022.¹

All that said, perhaps the largest driver of all was alluded to above. It’s the aggressive competitiveness among law firms that first emerged after 2008. Firms that seek prosperity through growth, or that want to further round out their offer, can choose the M&A route and/or can target the acquisition of talent from other firms, hopefully bringing new clients and matters with them. Highly acquisitive firms will seek rainmakers with the capacity to bring in lots of new clients to turbocharge their expansion.

Finally, this competitiveness may be thought of as the preserve of large law – but there’s no reason why it should be. Certainly, it’s the large firms that are now retaining external resource to target and poach lawyers or that have appointed Chief Talent Acquisition Officers. They’re also offering other incentives: one firm is apparently awarding a \$50,000 bonus to lawyers who bring in valuable new hires.² That said, medium-sized and even small firms can also make lateral hires to inject growth. Whether it’s a single lawyer with a handful of clients and cases, or a whole department or team of lawyers bringing corporate clients and potentially many thousands of matters – lateral hiring is now a well-recognized route to quick growth that isn’t going to go away.

Management of offboarding

Given this backdrop of permanently increased matter mobility, what then are the issues and the key governance considerations that firms should pay attention to? Helpfully they can be neatly divided into the challenges of offboarding data, and those of onboarding data – and firms should have policies, systems, processes and procedures for both.

The bad news is that offboarding is the sticky end of the lollipop. It promises negligible upsides (the chance to burnish a reputation for efficiency?) and a

lot of unrewarding and unremunerated work, which should only be triggered by the receipt of a client transfer request. However, often the first the firm knows about anything happening is when a lawyer gives in their notice or a client transfer request is received. At which point the lawyer may submit a list of the firm’s clients that they expect to take with them.

The keyword here is “expect”. It’s very often the case that a defecting lawyer, or team of lawyers, will over-estimate the number of clients that will follow them to the new firm. So, caution should be exercised. The firm shouldn’t immediately assume that all the listed clients will leave. In addition, remember that even if the departing lawyer was the main client contact, the firm continues to have a contractual relationship with the client by virtue of the engagement agreement. Also, firms must remember that throughout the transition period clients are still entitled to competent and unimpeded representation, and that their matter transfer should not affect the client adversely.

Notwithstanding, unseen by your firm, the new firm will probably be given the same list of would-be defecting clients and will likely use this to approach each of your clients with a standard data release or transfer document that they’ll ask the client to complete and send to you. It’s on receipt of these formal client transfer requests that the firm needs to start the offboarding process.

Administering client mobility

Law firms are obligated to pass on all client materials on receipt of proper authorization from the information owner (the client). However, this is less straightforward than it might first appear. The first question to be answered is, “Does the client owe us money?” If the answer is “Yes”, the firm needs to use discretion on how to proceed. Which in turn poses the question: “What processes are in place to ensure the right decisions are being taken at the right level?”

The next step is the retrieval or extraction of the client’s material. This will likely reside in both electronic and physical media. The former will probably be in several different repositories and systems including a document management system (DMS), File Shares, Outlook, Microsoft 365 and Teams. It’s also the case that some material might be hard to access. For example, even when the firm has a DMS, sometimes lawyers don’t like it and don’t use it, necessitating some more searching to ensure that everything is being retrieved.

Meanwhile physical records can take several forms – videos, photographs, blueprints, audio tape recordings, and paper files and folders. They can reside in the firm’s office, or in the basement, or are perhaps distributed among several offices, nationally or

internationally, or in off-site warehousing or archives. All physical and electronic materials must be gathered and made available for appraisal.

The appraisal process is about deciding which materials will be sent on, copied, destroyed, retained or culled. The appraisal should include all the materials that relate to active matters and recently concluded matters, but the firm ought also to have a retention and disposition policy that ensures that when materials reach a predetermined age – depending on jurisdiction or other factors, including OCGs – they are securely destroyed. The firm should also be checking on specific retention requirements, preservation of litigation holds or pending destruction orders.

Materials must then be sifted to remove all billing information, including engagement letters and anything else confidential to the firm or competitively sensitive, including information on matter management. Firms should also excise emails exchanged internally about the client. All content should be examined to ensure the removal of anything with the potential to embarrass the firm, including bad language or derogatory remarks. Bear in mind that however this appraisal process is conducted, it's worth structuring it in systems that are as user friendly as possible for the lawyers doing the review.

It will also sometimes be the case that materials should be copied. This is so that the firm has some evidence with which to contest a future malpractice action, since the incidence of clients suing their own (former) lawyers is another of the things that is increasing. However, the firm should only keep data that it has a legitimate reason to keep.

As well as a policy on who should be making these decisions – usually someone at a senior level in the firm such as the general counsel, department heads, and senior partners – it's also important to be clear about who exactly will be tasked with enacting these decisions. This may be split between e.g. the IT department, and Facilities and Records Management teams. It's necessary to have procedures, systems and processes that ensure the firm's policy on matter transfers is upheld, including approvals, chain of custody and security.

Next, consideration must be given to how and when materials will be transferred. Electronic material needs to be encrypted and uploaded to a place from which it can be securely downloaded by the onboarding firm. It would be great if the whole exercise could be completed in a few days, but in reality it can take several weeks, if not months, to track down dispersed data, evaluate it, decide on its fate and enact that fate. The probability is that materials will be sent piecemeal: electronic files in days, possibly, but physical files more likely in weeks.

Finally, the firm needs to keep a record of the decisions made and the actions taken in respect of all the



materials it has assembled. As well, during the transition period, both the departing lawyer and the law firm have a duty to the client to keep them informed as circumstances change.

The challenges of onboarding client data

The first challenge of matter mobility for onboarding firms is the wait for the client's data to be received and cleared. As noted above, delivery may well be piecemeal, and on an uncertain timeline, since the offboarding firm will likely feel no great urgency to facilitate its successor's/competitor's success. (That said, there's no competitive advantage in the long-term to making life difficult for defecting clients, who may potentially return at some future date.)

The second challenge of onboarding is conflict checking. Helpfully this can be dealt with by some specialist conflict of interest systems that will also handle anti-money laundering (AML) checks in the jurisdictions where they're required. What's important is that all the data received is held in an interim space while conflict and other onboarding checks are gone through.

This delay has the potential to set up a terrible tension between IT and governance on the one hand and lawyers on the other. Upon transferring to a new firm, lawyers will want to start proving themselves by posting billable hours as soon as possible; and will equally want to keep their transferring clients happy by immediately dealing with their matters. The firm will also want to get its relationship with its new clients off on the right foot by showing them some early love and attention.

That said, the onboarding firm must resist the immediate wholesale ingestion of the data as soon as it arrives, for two reasons. Firstly, it's not unknown for the firm that's losing the client to make that client a counteroffer – such as a lower billable rate – that they accept. Or the client may have other reasons for changing their mind about the move – to do with personalities, relationships, known expertise and so on.

The situation can arise that even after the client transfer request has been submitted and the transfer of some data taken place, the client enacts a U-turn. In this circumstance, the firm in receipt of the data has no legitimate reason to keep it and needs a mechanism for making a business risk decision on destroying electronic data and returning physical data as soon as possible. Keeping any of this electronic data will expose the firm to risks that it needn't take.

Also – as an aside – firms should note that individual lawyers might have different perceptions of file ownership and custody that need to be carefully managed. This might include some education on data security, and on the ethical and compliance risks of file transfers, and policies on the use of flash drives and BYOD etc.

It gets even more complicated in instances where the client decides that its interests are best served by leaving some matters with the original firm and moving others. For example, a big corporate client might decide to leave conveyancing with the first firm, because they feel their portfolio is well known and understood by the lawyers there; while their M&A Director wants to go with the lawyer who's leaving, because of a strong

working relationship. In cases like this a huge amount of care needs to be taken to ensure that the right data is being processed.

Meanwhile the second reason why the data shouldn't be too hastily ingested is because the conflict checks may well turn up a genuine reason why the onboarding firm is indeed conflicted out of the work. This could be a conflict of interest with an existing client, or it could stem from prohibitions on who the firm can work with in an existing client's OCGs. In which case, as above, the firm must destroy the data without delay. It's also possible that there are other reasons – strategic or ideological – why a firm would prefer not to take on a putative new client. The receiving firm needs a process for accepting each new client in principle before the ingestion of its data begins.

Understanding the data

At the point at which the firm is confident it can accept the new client, the next step is understanding the large volumes of data that are being transferred: the formats that electronic data are held in – from Word documents and emails to Excel spreadsheets and PDFs – and the systems they've come from; the volume and types of physical data. This can be a challenging task because often different offices have different systems, even within the same offboarding firm, plus the firm may not have taken much time to organize the data well.

Relatedly, the capabilities of the individuals tasked with enacting the transfer will vary. You can have an



information governance professional or records manager who's really savvy and knows how to get the information out of the exporting database in a format that the onboarding firm can easily accept. Or you might be dealing with a person who's used to scanning barcodes on files and boxes and has no idea beyond writing out an email listing what's in each box.

Then the data must be ingested into the onboarding firm's systems – which has its own complications. One consideration is each document will have a unique number and (it's a number of authors?) author – but these aren't part of the new firm's systems so often it becomes about managing how the new data is pushed in the onboarding firm's DMS. The firm may have to understand who to allocate as new authors of each piece of content and how to assign new matter numbers so that the new data is ingested successfully. And all the while fee-earners are screaming to get access to their clients' data.

Merry-go-round

It's a pity that matter mobility is becoming more common, because, all told, it's a costly business for law firms. The cost in senior lawyer time alone is considerable. In addition, firms are exposed to business, compliance, and reputational risks (and fines) if something goes wrong, for example, the wrong information falls into the wrong hands or data privacy laws are breached.

It's also a merry-go-round. As offboarding firms lose lawyers to their competitors, they're backfilling those roles by recruiting their own lateral hires who in turn are hopefully bringing across their existing clients. The net result becomes an understanding that "what goes around, comes around". Everyone is learning that no one wins by making life hard for their counterparts in rival firms. It's at the point where relationships are being built between people in competing large firms that are continually trading partners back and forth. Since these individuals are constantly working together on facilitating lateral moves, they've become friends.

The way forward must surely be to make the processes of managing these cross-cutting risk and professional responsibilities easier for everyone. The ideal might be to agree a standardized approach covering the business decisions, technical requirements, and risk aspects of exporting and ingesting data, taking into consideration the technical and organizational challenges and conflicts. This would streamline the process and result in a better client experience.

For now, firms should seek out solutions that automate as much of the work as possible and streamline the rest with workflow wrappers that manage processes and authorizations and make it relatively easy for senior lawyers to review content. Matter mobility is a growing

challenge for firms. The time has come to take it seriously and get some help.



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- 1 <https://www.chambers-associate.com/career-moves/trends-in-lateral-recruitment/10-trends-affecting-legal-recruitment-in-2022> and <https://www.thomsonreuters.com/en-us/posts/legal/state-of-the-legal-market-2022/>
- 2 <https://www.law.com/international-edition/2022/03/14/recruiters-expect-lateral-demand-to-continue-but-firms-growth-may-be-hampered/?slreturn=20220622104217>

About iCompli, from LegalRM

iCompli, from LegalRM, is an intuitive information governance platform for risk-savvy law firms that want to manage the life cycle of their assets from a single, comprehensive application.

For numerous law firms across the world, iCompli simplifies and automates client file transfers, retention, disposition, and overall compliance of both physical and electronic assets from multiple information repositories, seamlessly and securely.

Plus, it delivers the most powerful physical records tracking database available on the market today. Firms have the option of using iCompli's barcode tracking or RFID capabilities for managing physical records in conjunction with the system's information governance features, all within a simple user interface.

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