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Implementing Litigation Readiness Principles and Practices

By

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INTRODUCTION

Preparing for litigation has become a complex and risky endeavor for many organizations today due to a changing legal landscape, rising costs for legal services, challenging information management environments and rapidly changing office technology systems. To be prepared for litigation requires expertise from experienced legal counsel, capable managers of information, and highly qualified support staff. Together, they must be able to prioritize information identification, as well as capture and preserve information thoroughly to respond to demands for litigation related records. Successful litigation increasingly requires a teaming relationship among law firms, their clients, and information management professionals. These collaborating individuals must become clearly communicating partners, assuming new roles and responsibilities during litigation by adopting new business models with shared responsibilities.

Records and Information Management (RIM) professionals in organizations facing litigation may find they are working with their organization's Chief Legal Officer (CLO) to place holds on records to prevent their alteration or destruction, produce information for scrutiny in court, or establish overall Information Governance (IG) policies for the enterprise. Preparing for litigation is often a major part of many RIM professionals' organizational responsibilities. "Getting ready" for litigation is simply referred to as "litigation readiness" because organizations want to be able to defend themselves in a competent and successful manner by having the information they need available and presentable upon request. Mature RIM programs with well implemented IG policies and information retention rules are universally recognized as a major factor in successful litigation.

Law firms must operate their legal services business efficiently and manage their own administrative and financial records, as well as any records transmitted to them by clients. This information must be managed as it is transferred between client organizations, law firms, and the framework of processes that are established by the United States legal system. Generally, litigants have exhausted non-legal means of resolving their disputes and have accepted the costs and risks of litigation to seek resolution, thus making their IG practices extremely important to their future.

Increasing competitiveness in changing economies, fast moving corporate acquisitions, global marketing strategies, challenging product regulatory requirements, and evolving laws can create contentious legal hurdles for business, governments, and individuals. For these reasons, preparation of law firm clients for litigation is an ongoing fact of life in today's complex business

world. And, despite the complexities inherent in any dispute the fact that records will need to be first found by the client and then produced from varied and potentially untrustworthy sources makes the litigation experience all the more risky. The possibility of lost or misplaced records is a standard warning in client RIM program business cases and corporate executives are regularly informed of potential information retention risks by RIM professionals. Once legal counsel is retained, RIM Program credibility and operations will probably be thoroughly tested.

Unfortunately, there are no universally accepted litigation readiness best practices or goals. The efforts made by law firms in advising their clients regarding records management issues can vary dramatically on a case by case and firm by firm basis. There has been much discussion about the need to apply records holds rigorously, the importance of planning for document discovery, and the implications of recent revisions to the Federal Rules of Civil Procedure. Document discovery, a pre-trial phase of litigation, is a particularly important and risky aspect of litigation, where opposing parties exchange potential evidence, provide answers to questions, exchange calls for admissions and take depositions. In addition, there is widespread respect for the Electronic Discovery Reference Model and the growing role of data forensics in evaluating evidence quality and relevance. However, guidance on managing information varies significantly. So, for many reasons, attorneys, litigants, corporate records managers and legal industry services companies have divergent approaches to “best practices” in litigation readiness and associated records management issues. There are many very different perspectives and priorities regarding litigation readiness:

1. Records Management professionals in the clients of law firms focus on retention rules, legal holds, custodian relationships, records preservation and production, and inventories of both electronic and physical records,
2. Information Technology (IT) support in the clients of law firms focuses on IT systems, resident data, assistance with electronic records inventories, data maps and e-discovery requests,
3. Client internal legal counsel focuses on compliance with court orders, case management, overall legal strategy, issues affecting each case, and overseeing records production, as well as retaining needed outside counsel and litigation support services,
4. External legal counsel typically retained by the client’s internal legal counsel focuses on legal strategy issues, high level e-discovery activities, and retaining additional litigation support services,
5. Law firm Records Management professionals focus on conflicts identification, client contact information management, client information ingest, retention of client files, and law firm administrative records,
6. Law firm attorneys typically focus on legal issues specific to a case and document review issues, as well as case assessment and preparation,
7. Law firm internal litigation support teams focus on case specific litigation preparation, specific electronic discovery activities, vendor identification for electronic discovery

support, as well as, the management of the document capture and review stage of the EDRM life cycle, and

8. Outside legal consultants, legal services vendors, and e-discovery technology firms with specialized resources may also be retained to focus on specific litigation process and planning challenges.

In all litigation, the need for document identification, preservation and production is extremely important. Legal counsel, whether internal or external, directs and oversees the capture, preservation, and delivery of information for the case. But the client organizational personnel actually identifying and organizing the information may be the individuals with the hands-on experience working day to day with the information even when a third party is awarded a contract for this work. Responsibilities for planning and implementing litigation related activities must be very clear. Inclusion of all active information repositories and document custodians are critical to credible records identification and hold processes.

Organizations involved in litigation vary dramatically in size and that usually has an impact on resources available. In some cases, litigants are members of small organizations with consistent retention policies and information that can be relatively easily identified. In other cases, larger organizations that have been in business for years may actually have minimal experience with a well-planned comprehensive Records and Information Management (RIM) Program. In these situations, the usually expected policies, procedures, retention schedules, records inventory, file plan, or documented legal holds processes may not exist. This organizational deficiency can pose special hazards due to the significant effort required for managing information responsibly, especially in large organizations. Unfortunately, these situations are clear evidence of the cost of failing to have an on-going fully developed RIM Program.

Every law firm retained by a client will likely have different approaches to preparation for litigation. RIM Program concepts such as Information Governance, records identification, data preservation, and electronic discovery procedures may be entirely new to some attorneys. Internal legal counsel, external legal counsel, and the client must communicate clearly about their relative responsibilities and the need for client engagement in records identification, preservation and production during early case assessment, ongoing litigation, and post litigation activities, as this is primarily the client's responsibility. In addition, the need for the client to have consistently repeatable litigation related business processes becomes critical in serial litigation or when adverse rulings indicate the possibility of continuing litigation. Information management credibility can be especially at risk when there is no history of attention to the creation of a formal RIM Program with policies and procedures that have been practiced rigorously.

To remain financially successful, law firms are under increasing pressure to embrace new legal services models and new technologies for information management. Many firms are now reviewing the actual legal skills required for specific areas of work.¹ Legal process outsourcing of

frequently occurring high volume activities, such as litigation related document reviews, is often considered.² There is evidence of some weakening in the demand for law firm services overall and a growing resistance to rate structures that have been successful in the past. These financial challenges are accompanied by a number of law firm mergers.³ The changing market for legal services means that many law firms are reevaluating the overhead costs of some services, including the depth of involvement in clients' litigation readiness activities. These perspectives may tend to re-emphasize client activities required for litigation.

Budgetary constraints are encouraging law firms to reduce unnecessary internal steps in legal services delivery and reduce costs to clients wherever possible, including outsourcing some formerly billable hours, such as repetitive staff and associate activities.⁴ Self-collection of electronically stored information (ESI), for instance, can be a strategy toward cost reduction, but may have legal consequences if the methods of collection can be shown to be questionable. Each of these factors in the litigation process must be evaluated carefully to avoid negative downstream litigation consequences.

Thoroughness and competence in litigation readiness preparations should be a first consideration when litigation is possible. An understanding of the roles and responsibilities of attorneys, outsourced legal services, and client personnel is required. A number of attitudinal and organizational changes may need to take place for both law firms and clients before excellence in litigation readiness will be commonplace. In fact, clients are now expecting the law firms representing them to understand the information supplied to the firm and be able to manage it appropriately. A recent lawsuit, in which J-M Manufacturing Company, Inc. successfully sued the law firm McDermott, Will, and Emery for allowing the release of 3,900 privileged documents to the plaintiff, reinforces the understanding that law firms must be responsible for the information supplied during litigation.⁵

Litigation readiness and litigation related document production should be a partnership wherein responsibilities are shared between the clients' information management personnel, inside legal counsel, outside legal counsel and other related service providers. The overall goal for society should be a legal system that operates efficiently and effectively in achieving justice and is not prohibitively costly to clients or law firms. For this goal to be realized, litigants and their legal counsel need to assure they are thoroughly prepared to access and provide the information needed when facing legal system challenges.

RECORDKEEPING AND LITIGATION

Litigation and Records Retention

Records for use as evidence are critical to the legal system's dispute resolution processes. There have always been challenges for organizations trying to strictly adhere to business generated records retention rules and assure consistent conformance with organizational information management policies. However, when involved in litigation, it is especially important to comply with records hold orders. It is also important to be able to generate the documentation required for successful litigation, regardless of whether one is a plaintiff or a defendant. This must be achieved while continuing business processes vital to the organization's financial survival.

Expected benefits from being thoroughly prepared for litigation may vary slightly between plaintiffs and defendants but will have some commonalities.

1. Both plaintiffs and defendants will be able to present their cases in court with the best evidence needed to support their positions,
2. Plaintiffs will be able show clearly their cause for action and have credibility in their claims, since they will have the information they need readily available,
3. Defendants can use information to show why they can dispute the claims of plaintiffs and do so without causing themselves great cost and further risk from more legal exposure,
4. Both sides in the dispute will be less likely to suffer from any claims of a lack of authenticity or accuracy in the information used for their presentations, and
5. Both sides in the dispute will benefit from having allegedly "inaccessible" records identified early in the litigation, in order that if either side asserts those records might contain information of value in justifying their claims, they can more easily assess the actual cost of records retrieval and any appropriate cost shifting that might be requested.

It is essential that measures be taken to assure one is not discarding valuable evidence needed for resolving legal disputes. History has shown that the organizational costs of not following one's own records retention schedule (such as the demise of Arthur Andersen⁶) and the risks of failing to comply with a court's requests to locate and produce information (as in Morgan Stanley's backup tape production challenges⁷) can pose serious financial and public perception risks. Even though many of the original court decisions were overturned upon appeal, the negative business impact of legal rulings on organizations can be difficult to overcome. Achieving an appropriate balance between the potentially extreme cost of keeping everything and the potential risks of discarding information needed for litigation must be the goal of all

organizations.

Unfortunately, this balance of determining the records or data to keep is not always readily apparent. The record vs. non-record dilemma impacts all organizations. The information that is considered a record worthy of retention is determined according to the information's value for the organization's operational, administrative, regulatory, or legal purposes. Non-record materials are typically discarded quickly after initial use. Obviously, within all organizations, parties will have differences of opinion on the value of specific records. Much debate and discussion occurs internally as to which records are to be preserved and for how long. There may be discussions regarding the standard criteria for identifying records for retention, including the need to distinguish between the concepts of documents (editable), records (static/unchanging), and evidence (preserved in static formats along with contextual information). Rules for identifying information considered to be a record (and then usually classifying or organizing it in some manner) can be strictly defined in a business setting based on the content of the information.

In legal settings, the term "document" is often used interchangeably with the concept of record or evidence.⁸ This perspective and terminology must be clear when directing holds on information that are subject to formally defined retention rules and schedules. And once a record is subjected to a records hold order, it must be preserved in a manner that will be acceptable to the court. Determining if information will be needed in the future is based on considering potential uses of the information. This evaluation becomes all the more complex when the information being considered for retention was produced by electronic systems that create volumes of information daily. Electronic mail (email), office documents stored on networked file servers and information stored on Internet based servers can be difficult to categorize and capture, creating a proliferation of information often referred to as the "infoglut." However, all of this information is potentially important as evidence in legal proceedings and must be subjected to scrutiny, review, and management for organizations desiring to become "litigation ready."

RIM Programs and Litigation

Organizations with robust and rigorously practiced RIM programs are more likely to be litigation ready than organizations with only rudimentary information management policies and procedures. RIM programs are the most basic form of prevention of information management problems that may occur during litigation. The primary historical reasons for practicing good records management have been based on economies and efficiencies in organizational operations and the need to prevent destruction of valuable documentary evidence. However, the rise in the use of the legal system and litigation to settle civil disputes has created a far more risky environment legally for many organizations and thus has grown the need to be prepared for the almost inevitable challenges expected to occur in business today. It is fortunate a well-planned

RIM Program can use some of the same professional practices to reduce organizational operational costs and legal risks simultaneously.

Records management policies and procedures actually practiced by employees are probably an organization's most important first line of defense during litigation. These business rules regarding the creation, use, and disposal of information are extremely important if they are followed consistently because they add credibility and authenticity to support the claims of organizations regarding the records they will use in court. If these activities are linked with a thoroughly developed and widely followed retention schedule, the likelihood of being accused of improperly destroying records can decrease markedly. If an organization has specifically designated RIM staff or other personnel assigned RIM duties, the organization will be demonstrating their support for high quality information management. In addition, having an active relationship between the RIM personnel and the document creators and custodians in an organization will demonstrate that information management is a priority for everyone.

Of particular importance is the understanding by personnel assigned RIM duties that once litigation is anticipated, events will begin to unfold of importance to a successful litigation response. "One of the first components of a defined litigation hold process is identifying roles within the corporation."⁹ Attorneys, both internal and external counsel, are responsible for specific activities during litigation, and are the principal contacts, with courts, administrators, and legal system adversaries. Subject matter experts will be needed to provide information relating to facts and processes. Executive level managers must provide perspective and context for the actions and activities of organizations. Records management staff can provide information about policies, procedures, retention rules and other parameters that affect the normal course of business in the life cycle of information within an organization. Information Technology (IT) systems administrators and engineers can provide facts about the technology systems that support information creation, transfer and storage. And end users of information often know precise details about specific records of importance during litigation.

Placing Litigation Holds on Records

The need for placing information preservation holds on records of potential use in court is increasingly obvious to the public because it is often the first step in preparation for litigation. By issuing a communication internally to "hold" records that may be subject to destruction or alteration through editing during the normal course of business, an organization assures that it stays in compliance with court orders expecting preservation of records with content of legal value. This communication is typically formulated for communication enterprise-wide by internal legal counsel. RIM program personnel may assist in its issuance and execution, and are tasked with follow-up duties to assure that an ESI hold order is actually implemented by appropriate personnel throughout the organization.

The practice of placing legal holds in a well-executed and legally responsible manner requires judgment regarding the best method of doing so. There is usually a “trigger” event that indicates a duty to preserve information, whereupon the internal legal counsel will begin formulating the hold order strategy. The exact timing of this is not always clear, and the United States Federal Rules of Civil Procedure (FRC) allows that even in those cases some information may eventually be considered inaccessible due to it residing on aging technology systems. In other cases, the ability to place a hold on the destruction of records can be a function of an organization’s ability to communicate within itself clearly and thoroughly. Thus, it is not easy or simple in process to locate, identify, and stop the destruction or deletion of information needed for legal purposes.¹⁰

In many cases, a successful outcome in litigation for plaintiffs or defendants can be the result of proper production of original records, due to the possibility of acceptance or rejection of records submitted as evidence to courts. Failing to suspend the destruction of some records or produce them, especially the original copies of the records, may lead to an assumption that an organization engaged negligently or intentionally in spoliation of evidence. For this reason, it cannot be assumed that copies of records will suffice in legal proceedings.¹¹ Making sure that accurate records are produced as a part of a “normal course of business” from repeatable business processes with good operational integrity encourages their acceptance by courts in legal proceedings when it is demonstrated that those records were properly maintained, retained, and produced. Applying legal holds to information in a well-documented and thorough manner is critical to the use of information in litigation. A legal hold stops the usual disposition process that occurs during the normal Records and Information Management Life Cycle.

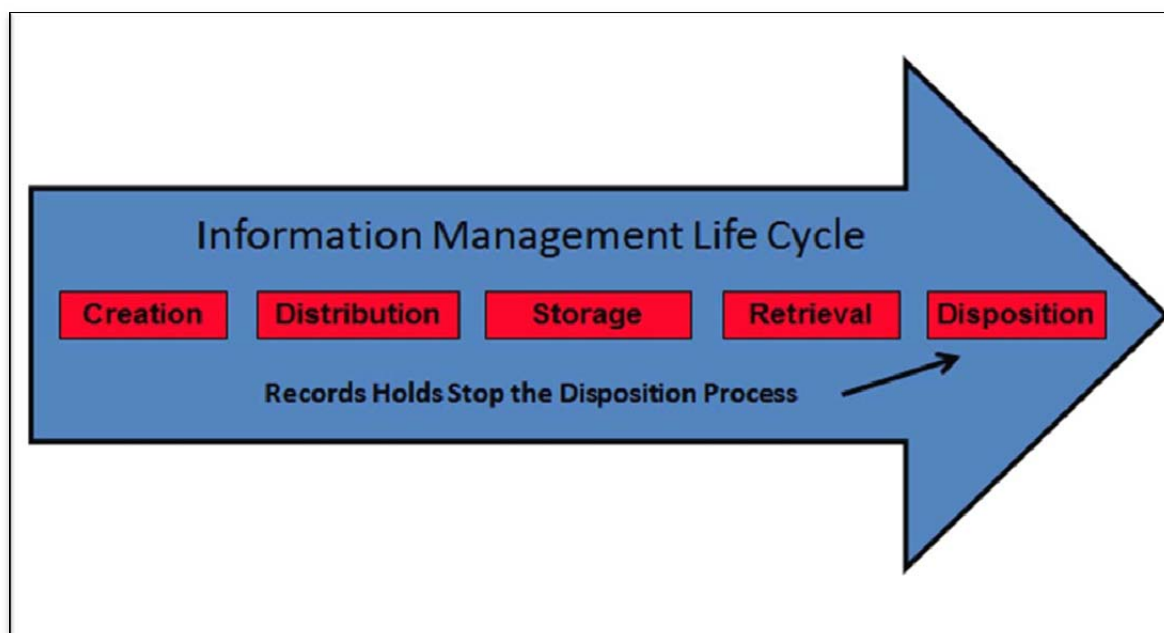


Figure 1. The Information Management Life Cycle vs. a Records Hold

GUIDELINES FOR RECORDS PRODUCTION

The importance of producing records responsibility and thoroughly during litigation is presented in United States federal and state laws, professional group sponsored methodologies, and legal services support organizations. The guidance and cautions from these stakeholders can have positive business and organizational impacts in supporting the reliable and accurate production of information. Together they illustrate how RIM programs and Information Governance initiatives in organizations foster high quality information management activities to improve the probability of success during litigation.

Federal Rules of Civil Procedure

Civil lawsuits in the United States are governed by the Federal Rules of Civil Procedure (FRCP) in United States District Courts. The FRCP “govern civil procedure (i.e., for civil lawsuits) in United States district (federal) courts. The FRCP are promulgated by the United States Supreme Court pursuant to the Rules Enabling Act, and then the United States Congress has 7 months to veto the rules promulgated or they become part of the FRCP. The Court’s modifications to the rules are usually based upon recommendations from the Judicial Conference of the United States, the federal judiciary’s internal policy-making body. Although federal courts are required to apply the substantive law of the states as rules of decision in cases where state law is in question, the federal courts almost always use the FRCP as their rules of procedure.”¹² State rules typically follow the federal rules.

The complex challenges of producing Electronically Stored Information (ESI) from technology based information systems have created changes in United States laws. In recent years Amendments to the Federal Rules of Civil Procedure have addressed “the routine, good-faith operation of an electronic information system” in Rule 37 (f); the identification of “storage media not reasonably accessible” in Rule 26 (b) 2(b), the need to specify “format of production of electronically stored information” in Rule 34 b, and the fact that “Parties must discuss (1) steps to preserve discoverable information.” in Rule 26 (f). These and many other new expectations in the legal system environment for capturing and preserving ESI have encouraged judges, attorneys, and records managers to become more aware of the impact of computer technology on the capture and management of records in electronic systems. They also create an added emphasis on the need for implementing litigation readiness procedures to assure compliance with FRCP mandates.

Even though professional records management principles and practices may be well-implemented in organizations, the potential activities and costs for producing records during

litigation have become of major concern in expecting to use the legal system to resolve civil disputes. The FRCP and state rules are not directive or prescriptive about methods for capturing and preserving information. So, how is this effort to be best accomplished? The larger the organization, the more daunting and costly are the effects of large scale efforts to capture and preserve an organization's electronic records. For these reason, the importance of searching for information and producing it for litigation from IT based information systems has generated an increasing interest in standard methods and best practices for dealing with ESI.

The Sedona Conference

The Sedona Conference (TSC)¹³ is a 501(c) (3) nonprofit research and educational institute founded in 1997 by Richard G. Braman, an attorney with experience in antitrust law, intellectual property, and complex litigation. TSC is supported with contributions of time by Working Group members, conference registrations, and sponsors. It is most concerned with the advanced study of law and policy, including the formation of working groups such as the Electronic Document Retention and Production Working Group 1. This group develops “principles and best practice recommendations for electronic document retention and production in civil litigation.” Civil litigation occurs when there is a legal dispute between parties that seek financial or other compensatory actions for alleged damages as opposed to seeking criminal law based actions.

TSC produces many references that assist overall with implementing litigation readiness. Specifically, the Sedona Principles for Electronic Document Production¹⁴ covers best practices ranging from the need to preserve ESI, document production processes, technology use, and the respective responsibilities of litigant parties to responsibly manage and produce information, in light of the Amendments to the Federal Rules of Civil Procedure. “The Sedona Principles, Second Edition: Best Practice Guidelines & Commentary for Managing Information and Records in the Electronic Age” covers questions concerning managing electronic information in organizations with respect to business, statutory, regulatory, and legal issues.¹⁵ More recently, The Sedona Conference Cooperation Guidance for Litigators & Inside Counsel¹⁶ has provided orientation in working with today's legal environment to assist in training support litigators and inside counsel on techniques in discovery, cooperation, and collaboration.

All of the deliberations that were invested in the Sedona Conferences and resultant publications provide an excellent resource for understanding many of the intellectual bases and legal principles underlying litigation readiness goals. Now, some of the more recent publications, such as the Cooperation Guide for Litigators & Inside Counsel provide more “practical toolkits designed for training and supporting lawyers in techniques of discovery cooperation, collaboration, and transparency”¹⁷. These tools and training are of most use to attorneys and the litigants they represent.

Electronic Discovery Reference Model

Another example of championing the importance of electronic records management issues prior to and during litigation are the activities of the creators of the Electronic Discovery Reference Model (EDRM)¹⁸. The EDRM goal is to foster commonly accepted standards with respect to the electronic discovery marketplace. It was founded in 2005 by two experts in electronic discovery, George Socha and Tom Gelbmann. The EDRM reference model “provides a common, flexible and extensible framework for the development, selection, evaluation and use of electronic discovery products and services. The completed model was placed in the public domain in May 2006.”¹⁹ About 900 e-discovery experts, vendors and end-users from 250 companies have worked on the goal of the EDRM projects, working groups, and meetings. That goal is to create guidelines for education on e-discovery challenges, vendors, and processes.

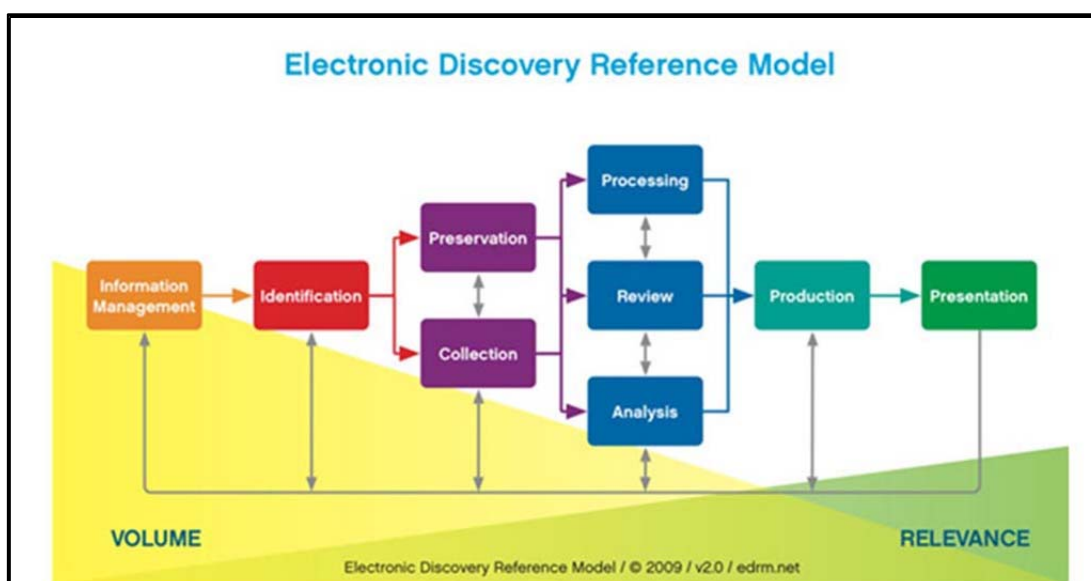


Figure 2. EDRM Reference Model - www.edrm.net/resources/edrm-stages-explained

By producing standards, research papers, webinars and other informational publications and services EDRM offers highly respected and valuable information. This information is important for attorneys, e-discovery vendors, legal services vendors, records managers and other interested professionals. There is now available a daunting variety of technology tools to initiate e-discovery activities. Because each of these tools and e-discovery practices can vary significantly between vendors and organizational environments, there is a need for a common understanding of e-discovery practices, and how they affect the litigation process overall.

The EDRM Reference model is available for viewing at www.edrm.net/resources/edrm-stages-

[explained](#). The primary stages of this e-discovery model are information management, identification, preservation, collection, processing, review, analysis, production, and presentation. Two examples of the utility of this model are 1) the realization that the major costs related to discovery are in the processing, review, and analysis stages of the model, and 2) the information management component of the model uses many of the traditional intellectual constructs of records management. Due to the rising costs of discovery overall, many vendors have offered software and hardware technology solutions that attempt to reduce the costs of document production. In addition, the interest in the information management component of the model (“... getting your electronic house in order to mitigate risk & expenses ...”) has spawned a new model– the Information Governance Reference Model Guide²⁰ - for EDRM participants that want a model to frame their discussions about Information Governance.

Unfortunately, there is no specific paper paradigm for identification, preservation, and collection components of the EDRM. However, many EDRM Information Management model components relate strongly to the traditional information life cycle model of records management. This reason, they also apply to paper documents.

Litigation Support Industry

Records are discoverable in both electronic and paper formats as is supported by considerable case law²¹. In fact, there is a growing industry of third party services providers offering educational and advisory services to attorneys and law firms. Many of these can be easily located with a simple Internet search for the term “litigation readiness” or “legal process outsourcing.” However the variety of their services varies dramatically. It ranges from legal counsel addressing document production while preparing evidence for court to service companies making available technology systems for the forensic reconstruction of data on a computer disk drive. In rare cases, some of these consulting firms will offer “Records Management Services.” However these services can range from consultation with a well-staffed RIM program development department to services of technical support in building data maps. Such data maps typically are graphical or tabular listings of information about records that identify electronically stored information (ESI) with respect to data types, locations, and owners.

Litigation support services organizations are attempting to take business advantage of the challenges law firms encounter regarding in-house staffing costs, a need for specialized expertise, or an opportunity to deliver technology based services. Law firms may not want to provide required capital investments, support, and maintenance staff. In addition, due to their hands on experience in the support of litigation related activities, litigation support companies generate informative white papers, research studies, or technology guides that are very useful to anyone involved in litigation. Of course, these guides generally reflect a position or perspective complementary to the services of the organization sponsoring the publication.

Records Production Summary

ESI best practice oriented consortiums and litigation support services vendors have been dispensing advice and guidance for a number of years. So why is there still a pressing need for more education and training in this area? For one reason, there is no complete agreement among attorneys, the legal services industry, and their clients regarding one set of best practices. In addition, the new marketplace in technologies creates a proliferation in information volume and data formats. This complexity of challenges and solutions can cause disagreements about business priorities and legal risks. In this environment many organizations facing litigation sometimes decide to settle legal affairs out of court through alternative dispute resolution (ADR), resulting in less reliance on the courts and litigation for resolving legal issues. The result may be a loss of confidence in the legal system and potentially fewer available billable hours for law firms. Clients of law firms and the public in general desire to have a legal system that is responsive, just, and cost effective for resolving legal disputes. For these reasons, law firms today need to consider how to most cost effectively assist clients with litigation readiness and preparation for the production of ESI.

PROFESSIONAL ORGANIZATIONS

A number of professional associations provide Litigation Readiness guidance including ARMA International, the American Bar Association, the Association of Legal Administrators, the Association of Certified E-Discovery Specialists, and AIIM International. The guidance provided by these organizations varies tremendously as the content of that guidance is often very focused in perspective toward the interests of the specific members of the organization. Each creates publications, seminars, and online courses to support their members in understanding the records management, document production, and legal issues relevant to their member's interests. The result is organizations needing to prepare for litigation have a variety of resources to consult, but no "one stop shop" where comprehensive information about litigation readiness best practices and issues can be obtained.

ARMA International

ARMA International (www.arma.org) is the premier organization for records and information management (RIM) professionals uniquely addressing records management and recordkeeping professional issues. Conferences, chapter activities, seminars, webinars and both paper and electronic publications strive to keep records managers, information technology (IT) professionals, attorneys, information users and executives informed about records and information management principles and practices. ARMA International has about 11,000 members composed primarily of individuals with some form of records management responsibilities.

Particularly focused on the issue of litigation readiness are the ARMA International publication entitled Records Management Responsibility in Litigation Support and a Webinar entitled "Litigation Preparedness for E-Discovery." These are highly developed and informational offerings accessible from the ARMA Bookstore²² that stress the records management issues surrounding litigation and complement the other publications offered by this association including basic and advanced Records and Information Management topics. In addition, ARMA International frequently co-sponsors webinars and conferences with other information management organizations.

Of special interest during litigation is the importance of records reliability and authenticity. The ARMA International Generally Accepted Recordkeeping Principles²³ support records management best practices during litigation by calling attention to the importance of records Accountability, Integrity, Compliance, Retention, and Disposition issues. The Principle of Accountability specifically calls attention to the need for auditability of a RIM Program thus

increasing the credibility of records process related claims during litigation. The Principle of Integrity directs attention to taking actions ensuring records authenticity and reliability. These actions assist during litigation as fewer claims can be made about the quality of evidence. The Principle of Compliance specifically outlines the need for compliance with applicable laws and binding authorities, thus assuring participation in the legal system processes will help an organization's legal standing and credibility. The Principle of Retention calls for maintaining information for time periods meeting legal requirements and expectations. Finally, the Principle of Disposition addresses the proper transfer or destruction of records, which may include documented deletion of ESI or the need to deliver unneeded records back to a law firm client at an appropriate time.

Many corporate records managers and other information management professionals involved in litigation rely on ARMA International for professional guidance with respect to RIM program development, retention schedule development, Information Governance, litigation holds, and records preservation. Collaborative conferences with e-discovery related organizations such as the Association of Certified E-Discovery Specialists also bring litigation readiness educational opportunities to wider audiences. RIM program development is a standard subject for ARMA International conferences and is also a significant portion of the educational testing programs sponsored by the Institute of Certified Records Managers. This organization provides testing for records managers in preparation for being awarded the designation of Certified Records Manager (CRM).

American Bar Association

The American Bar Association (ABA, www.americanbar.org) is the largest professional association for attorneys with 400,000 members. Its mission is to “serve equally our members, our profession and the public by defending liberty and delivering justice as the national representative of the legal profession.”²⁴ It focuses on the accreditation of law schools, continuing legal education, and information about the law for lawyers and judges. The ABA approaches educational support from the perspective of commonly accepted areas of law including criminal, business, family, health, and employment law, as well as law practice administration for firms. It publishes the ABA Journal and other publications that cover all aspects of law and the legal professions, including cutting edge case law, legal profession ethics, law firm management, changing laws, technology issues for lawyers and the social and political changes impacting the lives of lawyers. With this broad scope in mission of the ABA, focusing on litigation readiness and e-discovery topics can only be covered by most ABA publications at a subject overview level, rather than being able to address the details of litigation readiness. The ABA does sponsor the ABA Model Rule Concept for Continuing Legal Education (CLE), but leaves the actual delivery of CLE courses and certifications to the state and local bar associations.

The most fruitful subject area within the ABA for records and information management is the area of Litigation where some coverage is evident with respect to the management of evidence, ESI production, e-discovery, and the application of recent changes in laws. The ABA Web site provides access to some generalized online courses such as Strategic Litigation Planning and Case Assessment for the Newer Lawyer.²⁵ Of some interest is that an ABA web site search for the concept of “litigation readiness” yields few references. However there are many references to resources for electronic discovery topics and the practice of law with respect to the basics of evidence preparation for court. Considering the vast array of subjects regarding the legal profession, law firms, and their many areas of law, the information resources offered from the ABA will probably continue to be limited and focused with respect to implementing litigation readiness.

Association of Legal Administrators

The Association of Legal Administrators (ALA, www.alanet.org) supports professionals involved in law firm management, corporate legal departments and legal agencies supporting government organizations. Most legal administrators are employed by private or corporate law firms as they provide administrative, financial, and human resources management services to these organizations. They often oversee the Law Firm Records Management Department and participate in managing the Outsourced Legal Processing Services retained by law firm management. The actual job duties of legal administrators vary widely between law firms; though they are usually an important part of the litigation related business processes of most firms.

The ALA offers conferences and publications primarily for members, though some resources are available to the public through the web site Research Center.²⁶ Records Management topics are listed under the Facilities & Operations Management tab. The research reports cover basic records management, e-discovery, document digitation and other information regarding litigation preparation.

Association of Certified E-Discovery Specialists

The Association of Certified E-Discovery Specialists (ACEDS, www.aceds.org) established by The Intriago Group in 2010, is a member organization for professionals in the private and public sectors who work in the field of e-discovery. ACEDS is building a community of e-discovery specialists for the exchange of ideas, guidance, training and best practices. ACEDS sponsors conferences, briefings, seminars, workshops, publications, and other informational resources concerning e-discovery activities including processes and technologies related to litigation readiness. ACEDS is especially thorough in covering litigation readiness issues about the location, preparation, and production of ESI for legal system engagements.

ACEDS offers e-discovery training and certification assistance for those individuals working to

pass their Certified E-Discovery Specialist exam. Topics for learning and testing include litigation readiness, information management, holds implementation, data collection planning, document review, project management, and technologies related to e-discovery, though use of many of the resources are limited to ACEDS members. The CEDS test was built by approximately “40 experts, guided by competency-testing experts, identified the job tasks performed by various disciplines. An ACEDS global field survey determined the importance and frequency of the tasks, deciding on 15 major e-discovery areas of emphasis.²⁷” The ACEDS exam does not test specific information management best practices based on information management standards but rather is oriented toward testing the functional competencies of e-discovery practitioners.

Association of Litigation Support Professionals

The Association of Litigation Support Professionals (ALSP, alsponline.site-ym.com) provides members with collaboration, education, and certification opportunities to foster global professional litigation support standards. Goals include the creation of generally acceptable professional standards, paths to certification, forums for information, and educational opportunities relating to litigation support for the legal community. There are chapters of ALSP nationwide. Seminars and webinars are offered online in such topics as forensic data collection, and introduction to the Sedona Conference.

Most of the resources and publications available from ALSP are limited in distribution to members. ALSP supports no openly available best principles and practices. It serves primarily as a communication and networking association.

AIIM International

AIIM International (www.aiim.org) is a global association that provides education, research, standards, conferences, and certification programs for information management professionals. A particular focus of AIIM educational programs and conferences is the impact of information management activities in the areas of mobile, social, cloud, and big data technology use in organizations, as well as, their more traditional coverage of document management practices and technologies used in the collaborative workplace. Business process management, email management, enterprise, search, document imaging, Web content management and the use of Microsoft SharePoint in organizations is also covered in numerous conferences, online course, and webinars.

Litigation readiness topics are occasionally discussed in AIIM publications, conferences, and seminars from the perspective of using technologies to improve information management practices, specifically in the areas of information retrieval, content collaboration, and automated

taxonomy development. AIIM conferences and webinars are often sponsored by technology vendors that support litigation readiness and e-discovery initiatives.

Professional Organizations Summary

It is obvious from this listing of associations that offer Information Governance and records management practices, the diversity of guidance on litigation readiness-related challenges and issues can be daunting. Attorneys, inside counsel, external counsel, law firm support personnel, litigation support personnel, records managers, IT professionals, e-discovery specialists, and technology vendors have multitudes of information resources available. This overflowing cornucopia of educational information services and products can be difficult to navigate. As can be seen from the preceding discussion of available organizational practices and principles, there are no universally accepted best practices. This variety of perspectives complicates selecting best practices solutions as many professionals strive to make all needed guidance available to law firm personnel and their clients that must become litigation ready.

THE LITIGATION PARTNERSHIP

With the start of litigation, legal counsel begins to advise and assist the client in strategies, case preparation, and designating responsibilities for gathering and preserving potential evidence. This business relationship will vary drastically in depth and breadth depending on the nature of the litigation matter. During this relationship, each participant will need to assume responsibilities for information management and production. It will become clear they are mutually dependent in obtaining a successful conclusion to the litigation experience.

Records Management Before Litigation

As a standard component of good management, any organization should strive for excellence in the management of their information resources, including information content in all electronic and physical formats. Regardless of the size of the organization or type of business in which it is engaged, managing information well must be a priority of the organization or it will experience losses of resources, as well as fail to meet organizational goals. Most organizations have some level of policies and procedures that direct employees regarding information retention, computer usage, Internet access, and information security, even if these are informally communicated and enforced. Well managed organizations have formally developed RIM programs with policies, procedures, and Information Governance rules. RIM programs are widely recognized as a best practice to assure preventive actions are taken well ahead of time thus making information available as needed during litigation

The major advantages of a RIM Program with respect to litigation include:

1. Following RIM policies and procedures in an organization creates a more organized information management environment fostering better access to needed evidence,
2. Having a retention schedule consistently and broadly implemented increases the organization's ability to discard information in a reliable and credible manner thus potentially decreasing claims of spoliation of evidence, and
3. Having a defined "normal course of business" in a RIM program illustrates that the organization was managing information even before litigation began.

Upon first indication of impending litigation, a record hold notice should be drafted by inside legal counsel and issued to the appropriate organizational components to which it applies. Once this occurs, inside counsel may begin to work with external counsel in a designated law firm selected to represent the organization involved in litigation.

Law Firm Records Management

Records management in law firms consists of managing differing types of firm business records and to some extent, managing client records held at the law firm. As with all businesses, law firms must utilize internal records that document administrative, human resources, financial, and other operational aspects of their business. Law firms today range in size from solo practitioners to large organizations with hundreds of lawyers and an equal number of support personnel. However, the goal of law firms is to serve their clients well with respect to addressing legal issues, while considering the financial aspects of their enterprise. As with any enterprise, they must create, store, retain and retrieve information. And often case relevant information is transmitted to them during a client's experience with litigation.

Managing the records within a law firm often encompasses both firm and client records. In a large law firm, a dedicated RIM program may exist with RIM professional staff to accept and manage internal administrative records and to perform other standard RIM tasks such as retention schedule development, operating internal records centers, and transferring records to off-site or off-line storage. Of particular importance is the initiation of matters for expected new clients and the associated document workflow. A conflict of interest search is typically conducted to assure the attorneys to be involved in supporting a client have not previously assisted the opposing side's client or otherwise been involved in legal matters possibly giving question to their objectivity, motivation, or other ethical issues. If this conflict of interest search has been conducted and does not identify conflict of interest issues to resolve, and any internal new business committee reviews are completed, a new client/matter number can be assigned and the intake of records begun.²⁸ Unfortunately, for most small law firms, many of these activities must be performed individually by the attorneys themselves.

In a traditional paper processing office model, attorneys very likely have had physical documents processed through a central records coordination center. Today, much communication is by email, text messaging, or collaborative Internet web sites. The concept of a physical "war room" where all significant matter files are housed is being replaced by "virtual data rooms" or other collaborative software systems thus enabling attorneys to receive information directly from clients and file it in a controlled manner into a central software repository. Law firms not taking advantage of some form of electronic records management software are probably raising the cost of litigation and may be reducing the comprehensiveness of their services for clients. It is usually more difficult to manage complex and expensive paper-bound business processes than those conducted and monitored using computers.

Obviously, a law firm, like any enterprise, needs policies and procedures with respect to the use of technologies in client communications and records transfers. These must be practiced and the technology infrastructure to do this must be available. However, without good information concerning information management by both parties, there are likely to be

problems. Law firms having outstanding RIM programs may be at an advantage in working with their clients in terms of guiding them toward improved RIM programs and better litigation readiness. Law firms must be ready to demonstrate to clients how they manage their own records and follow their own policies. They need to be in full communication with clients regarding their expectation of retaining client submitted files and their eventual disposition. Otherwise, they may not be projecting a vision of professionalism in the operation of their own services, and cannot expect clients to follow records retention and other information compliance practices themselves.

In fact, law firms are occasionally the subject of discovery requests through subpoenas (a court order for the production of evidence) during litigation. “The hard truth is that the Enron bankruptcy case resulted in the subpoenaing of records from nearly fifty law firms by the special master. With increasing frequency, firms find themselves in the awkward position of having to turn over to third parties copies of documents in the client files that formed part of the discovery in past representations. If the client actually has and implements a records retention schedule and has appropriately destroyed their copies of records, a law firm creates risk for those clients if they have no retention and disposition policy in place and documents are disposed of – an awkward and embarrassing situation of the firm’s own making.”²⁹

Allegations of client ownership of these files are not uncommon. In “...these cases, the lawyer’s ownership (if ownership it is) of the file, and the client’s assertion of some right creates a conflict.”³⁰ For this reason, at the end of representing a client in a legal matter, a law firm should take action to determine with the client who will maintain the legal files related to the case. In many if not most cases, the law firm will retain the files for a period of time to assure future access to the materials is available for related litigation or appeals. However, in order to be clear about who has what access to these matter files and documents over time, the law firm should specify the terms of their storage, access and maintenance.

“Traditionally, the justification given for a law firm records retention program was cost savings. Perpetual storage of old files eventually leads to over-crowding and massive storage bills, which the records retention program seeks to mitigate.”³¹ However, even though the American Bar Association may have historically supported this idea, their perspective has changed over time. In the ABA Informal Opinion 1384 (1977), they observe that clients of law firms “...reasonably expect from their lawyers that valuable and useful information in the lawyers’ files, and not otherwise readily available to the clients, will not be prematurely and carelessly destroyed, to the clients’ detriment.” In fact this opinion is still widely cited today with respect to “considerations to keep in mind when considering whether to keep or discard a client file.”³² Generally, admonitions include that a lawyer should not destroy or discard items that 1) clearly or probably belong to the client, 2) may be useful in the assertion or defense of the client's position, 3) which the client may reasonably expect will be preserved by the lawyer, 4) that may be needed by the client over a long period of time, 5) are related to the lawyer's receipt and disbursement of trust

funds, 6) have confidentiality issues regarding their contents, 7) have not been properly reviewed, and 8) have not been indexed in a destruction log for future reference.³³ So, attorneys need to be communicative with clients regarding respective responsibilities.

Client Records Processing

Law firms work with client information which may be handled uniquely depending on the practice area of the firm, such as real estate, tax, or regulatory compliance. For firms working in the practice area of litigation, client contact files and matter files must be managed. These may consist of correspondence, pleadings, or documents received during the discovery phase of litigation. Pleadings are especially important as they are the formal written statements filed with the court by each party stating the claims and defenses at issue and thus the issues to be decided by the court during the litigation. These records are critical to the case and the well-being of the client and therefore they must be managed with exceptional care. Many documents must be preserved as evidence, by separating them either physically or electronically from the firm's administrative records in order to adhere to applicable professional ethical issues that may arise. Some information will be protected by attorney/client privilege, and some information will be subject to disclosure during the litigation processes. For this reason, attorneys must often separate records received from the client into differing document repositories in both physical and electronic formats to assure protection of client confidentiality and evidence.

“In complex litigation matters, the largest collection of discovery materials generally consists of documents received by counsel in response to either a subpoena or request to produce records.”³⁴ Due to the volume of these records and the need to retain them for the duration of litigation, separate filing systems in a “trial room” are often employed possibly using separate software for indexing. Records Management (RM) personnel in the firm may be involved in these processes although “In many law firms, the RM department only sees fully developed litigation files after a matter closes and files are prepared for off-site storage.”³⁵ The roles of information management support in law firms will vary tremendously depending on the size of the firm, the number of matters being managed, and the information sharing culture of the employees. In any case, a volume of records in both electronic and paper formats will be created internally and captured from external information sources. These must be preserved responsibly over time.

Typical litigation files are categorized as correspondence, parties, pleadings, and discovery files. These classifications and records types will depend on the nature of the litigation matter. They may be stored in a central file room or if electronic might be stored on a central server or electronic records management (ERM) application. Depending on the technologies available within the law firm, these may or may not be retained in the same application. For instance, due to the metadata and file formats involved, emails could be saved into the ERM application or saved on a separate email server with designated filing areas for client files. To further complicate matters, if some of the litigation support services are outsourced, the outsourced

services vendor often maintains its own ERM or email system to house and retain records. In some cases, bulk transfers of records will occur between the outsourced services vendor and the law firms own technology systems.

The responsibility of law firms in advising clients during litigation is not always easy to define with respect to the clients' own retention schedules, filing systems, and overall Information Governance activities. "The primary interaction of attorneys and their clients often begins when the possibility of litigation first arises. "Notice of pending, potential or threatened litigation or agency investigations can take any of the following forms: 1) via a preservation letter or other written notice from opposing counsel, 2) via pre-litigation discussions, demands and agreements, and 3) via facts or circumstances that would otherwise put a reasonable person on notice."³⁶ These initial actions and activities require attorneys to clearly communicate and work with their clients to assure the client is ready for litigation and can place a hold on the destruction of any records or information needed during litigation. However, there are no universally accepted best practices regarding the duration and extent of general information management guidance that should be delivered from attorneys to their clients, or about how the clients' submitted records will be managed.

Work of this nature can be performed by records management personnel or paralegals, or according to the business model of the law firm. However, there is usually a difference in the personnel used to manage files once they are brought in-house. The document discovery and production activities are often conducted by more specialized and specifically trained litigation support personnel, who may also have some expertise in records management. The most important aspect of this work is to have clients and the appropriate personnel ready to work together and communicate regarding the location, management, and processing of litigation related records.

LITIGATION PREPAREDNESS OUTSOURCING

ESI Outsourcing Grows

The need to prepare for litigation may demand the production of vast quantities of documents. This is a major fear on the part of the companies and their attorneys today. Subsequent to the precedents set in *Zubulake v. UBS Warburg, LLC*, 229 F.R.D. 422, 440 (S.D.N.Y. 2004) the public had to embrace new concepts. “Now that the key issues have been addressed and national standards are developing, parties and their counsel are fully on notice of their responsibility to preserve and produce electronically stored information.” Subsequently, there has been a slow but sure acceptance by the legal profession and their clients that ESI must be captured, preserved, and produced responsibly and credibly for successful engagements in litigation.

Unfortunately, as we have seen in the previous discussions regarding best practices suggested by professional associations and consortia, the precise skills, processes, and means of producing physical documents or ESI is not always clear or simple. For this reason, a litigation readiness “industry” of consulting firms and software vendors is growing and offering services to legal counsel and clients in an attempt to make information preservation and processing minimally costly and most effective. There is concern within some law firms and in the minds of many attorneys they may not be adequately prepared to address ESI collection issues themselves.

Preservation of information does not require locating all records because the relevance concerns apply to admissibility of ESI just as they apply to paper documents. Reasonableness and good faith are important considerations and proportionality of costs is still a primary standard. But courts are increasingly expecting an attorney’s clients to be able to demonstrate and defend any ESI collection methods used. There is some sense of a generalized concept of a best practice because the EDRM model says information “should be collected in a manner that is legally defensible, proportionate, efficient, auditable, and targeted.”³⁷ The problem is simply most law firms and attorneys are not sufficiently professionally competent in ESI collection to ascertain the quality of this effort.

This situation can pose challenges during litigation. In-house collection of ESI and other documents can be vulnerable to claims the effort lacked comprehensiveness, scope, or proper IT skill sets and may also be subject to claims of collection bias. For this effort to be legally defensible it must be done with extreme care and professionalism. Openly sharing information between parties is a major intent of many revisions to discovery rules in order to promote a minimizing of costs and contention between litigants. “If counsel fails in this responsibility – willfully or not – these principles of open discovery process are undermined, coextensively inhibiting the courts’ ability to objectively resolve their clients’

disputes and the credibility of its resolution.”³⁸

Corporate counsel must keep in mind the various realities of the environment in which they are employed. Weighing the cost containment needs of an organization and the risks posed by litigation are a constant balancing act. Inside counsels are also aware of the negative reaction to invasive searching for information most organizations feel and that most organizations do not have sophisticated powerful tools for enterprise level information management. In contrast, outside counsel is often most concerned with risk reduction and is wary of getting involved in data collection responsibilities within organizations they cannot directly influence, while they may need to certify to a court that the collection was done well. This could call for them to interview personnel to determine the level of comprehensiveness of the ESI collection activity.

Of course, no legal counsel would want to find themselves in the situation that plagued Qualcomm’s lawyers. They were accused of intentionally hiding or ignoring documents relevant to the case.³⁹ In a different case, counsel was held directly responsible for failing to undertake a methodological assessment of their client’s sources of information.⁴⁰ Experiences like these can drive corporate legal counsel to strongly consider the use of outside expertise in executing ESI discovery and avoiding confrontational interactions with the IT staff and departmental computer application users. In any case, both counsels, inside and outside, must be comfortably assured that the data collection effort to locate and preserve ESI are undertaken in a manner to assure legal system credibility and success. This would seem to be a logical assumption as an extension of the American Bar Association’s Client-Lawyer Relationship Rule 1.1 Competence – “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”⁴¹

Considering that e-discovery and the need to capture and manage ESI will increase over time, the use of outsourcing of some ESI activities is expected to increase.

Legal Process Outsourcing

As another example of the pressure on law firms to reduce cost and streamline their services, legal process outsourcing (LPO) has become a commonplace part of the business models of many law firms for years. Areas of legal process outsourcing include initial reviews of documents, writing standard legal documents, creating drafts of pleadings and research services such as those often required in patent application processing. Much of the legal process outsourcing market is an outgrowth of the pressure on corporations to reduce legal services costs in general, and as they do so, they expect internal and external legal counsel to do the same. By having less costly paralegals, research assistants, and contract writers perform some work formerly done by higher cost attorneys, overall costs can be reduced and

attorneys are able to concentrate their legal services on direct value-added interactions with clients.

The nature of this business relationship varies greatly between the law firm and the LPO services vendors. In some cases, there is a simple contract for basic services, and in other cases, the law firm directly oversees and manages the work process and work products. Particularly sensitive issues can arise with respect to client confidentiality, especially if the LPO is accomplishing the work overseas in foreign countries. India is well known as a provider of LPO services to the U.S. legal marketplace, due to a commonality in the English language skills of its citizens, laws (also based on British Common Law), and a democracy based political environment which imparts similar attitudes toward a legal system. However, this does not preclude the importance of preserving the attorney/client relationship, attorney/client privilege, and adherence to U.S. laws and regulations in legal affairs. A further concern is adherence to common ethical standards.

All of these issues affect in some way the decision to outsource legal services to any company; including e-discovery services vendors, technology systems vendors, and consultants. Despite these concerns, outsourcing legal services to LPOs and other services vendors is increasing due to the cost impacts of large scale litigation and the benefits derived from taking advantage of specialized services.

RIM Outsourcing?

RIM practices and principles are directly relevant to many information discovery, capture, and retention processes, so it is interesting to consider why one seldom sees the RIM aspects of litigation readiness directly outsourced. The reason appears to be that RIM skills are thought to be embedded as components of the overall litigation processes and generally employed in a teaming manner with other professionals. In fact, the nature of records management is one of service to employees, general counsel, and organizations as a whole, and therefore RIM practices often contribute their value by enhancing the Information Governance roles of other professions and their activities.

For instance, the ARMA International developed Principles (The Principles) of Accountability, Integrity, Protection, Compliance, Availability, Retention, Disposition and Transparency are utilized in other works championing best practices. A good example of the embedded supportive teaming nature of the Principles and their support of overall Information Governance is demonstrated in the manner in which the Information Governance Reference Model of EDRM.net and the ARMA International Principles are mutually complementary.⁴²

As can be noted from the Unified Governance model, RIM activities share a Risk perspective with Legal concepts:

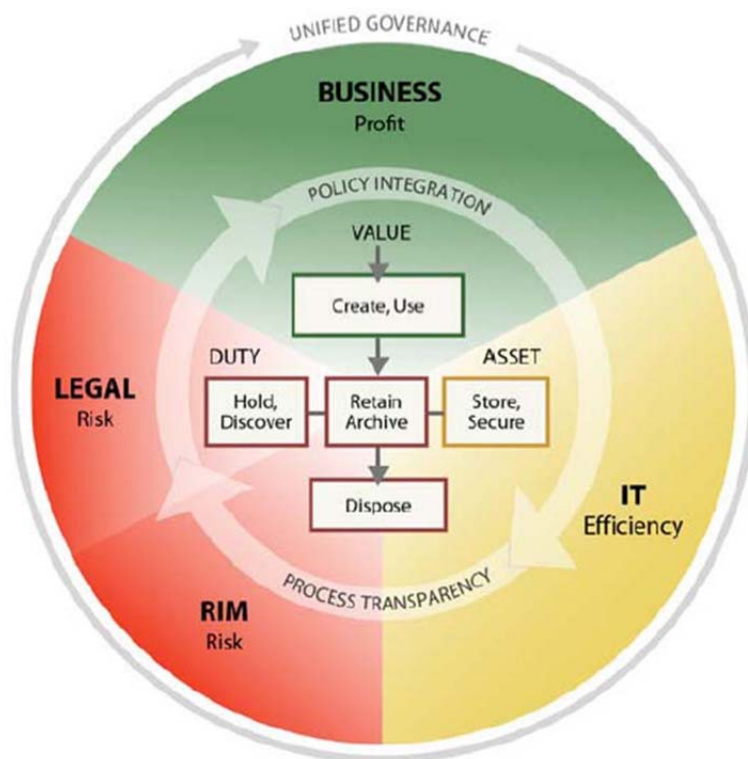


Figure 3. Information Governance Reference Model - www.edrm.net/resources/guides/igrm

It is also apparent that when e-Discovery efforts are conducted one of the most important components of executing legal holds and gathering ESI is the selection of document custodians. Unfortunately, where organizations do not have a well-developed RIM program with an existing network of “records custodians” who already provide a liaison function with information producers and users, the ESI gathering effort may be reduced to working directly with department managers or IT systems operators. In cases where RIM programs and coordinators already exist, they are typically a primary method of instigating legal holds and starting information capture. “The records manager will understand, more than anyone else in the organization, how ‘records’ have been historically defined and retained throughout the organization.”⁴³

For these reasons, RIM outsourcing as a focused function is not as commonly seen as is the use of RIM skills embedded in the efforts of e-discovery services vendors and general consulting services firms who provide litigation readiness services. However, this may change as the various participants in the litigation process all have a common interest in assuring litigants are properly prepared for court.



Figure 4. Parties with Expectations Regarding Litigation Readiness

GETTING ORGANIZATIONS READY

Litigation Readiness Combines Concepts

Many organizations today will experience litigation either as a plaintiff or a defendant and must undertake a series of steps to become litigation ready. Upon the first notice of litigation, an organization will be expected by courts to be vigilant in placing holds on information and the “duty to preserve records” will commence. This state of affairs has been extensively documented in the legal professional literature, as well as guides to initiating and placing holds on records and information.⁴⁴ Unfortunately, as we have seen, there is a lack of clarity with respect to widely accepted best practices in this arena. There is still much debate about how litigants and their support personnel should specifically proceed to capture and preserve potential evidence.

Typical triggering events indicating the need or duty to preserve information include personal judgment regarding pre-litigation correspondence that stating or implying the potential for legal actions, filing of claims with government agencies, conversations between supervisors and employees, or the retention of legal counsel and experts. Once an actual lawsuit begins and court orders have been received, an organization must assure it has placed a preservation hold on all relevant accessible information. This process should have begun as soon as it was possible to foresee the prospect of litigation. For obvious reasons, qualified and experienced legal counsel should be sought to assure the scope of the preservation hold is thorough, complete and adequate to meet the needs of the litigation at hand.

Further complicating discovery issues and client preparation, law firms often outsource e-discovery activities to other organizations, due to a variety of factors. First, staying abreast of developments in one’s own profession requires commitment for everyone, and the ongoing revisions to Federal and State laws demands an attorney’s primary attention. In addition, individuals in all professions have difficulty keeping informed regarding the changing computer technologies impacting information management in their own professional arena. This is one reason some attorneys often feel ill-equipped to become directly involved in electronic discovery activities, because they are commonly poorly prepared to evaluate disk drives, websites, or computer applications to locate evidence. It is actually a wise decision in many cases for law firms to outsource these activities, despite the probability doing so may increase the cost of litigation for the client. And there is an extensive variety of e-discovery services vendors ready to help both law firms and their clients in properly locating and preparing information for presentation at trial.

Every professional organization, best practices consortium, and industry consulting firm has a slightly different “litigation readiness cookbook” based on their own professional perspectives. Some approaches excel at answering potential legal issues related to information gathering, some excel at ESI data gathering, and some approaches are sufficiently broad and generic to also include the role of paper-based documents in creating litigation files. However, this overlapping and redundant guidance places a different emphasis on the roles of various participants, technology use, comprehensiveness in information gathering, and relative responsibilities. There is confusion as to the best approach to litigation readiness causing courts, attorneys, e-discovery experts, document custodians, and records management professionals to consider many alternative educational paths and curricula when attempting to become more informed. Even a cursory examination of the Continuing Legal Education courses approved by state bar associations reveals an extremely wide range of content and intent with the courses offered. So, if attorneys are often intimidated and confused about the best path for litigation readiness for their clients, what are support professionals to do?

Need for Business Model Changes

During interviews by this author with attorneys, law firm professionals, records managers and records management consultants, several reasons were cited informally indicating why law firms are slow to adopt addressing RIM and IG guidance as a significant component of their business model. There are many differing professional organizations with differing best practices guidance impacting records management issues for respective members and the public. Without prescriptive information management standards and a consensus on applicable professional best practices, law firms must make the decision themselves as to what is really the best practice when advising clients on these issues. This places them in the uncomfortable situation of delivering guidance in many matters where the best practice may not be clear. And, to do so in a manner that might result in public scrutiny makes them even more uncomfortable. So, a well-defined business value must accrue to law firms for them to risk providing additional services in advising their clients, especially when those services are not strictly legal advice.

Another issue is the growing competition in the legal marketplace for obtaining and retaining clients. Understandably, the billable hour business model generally drives law firms, many of which employ new attorneys seeking work. However, clients are increasingly focused on attorney’s fees and the value derived. Of equal concern is the growing amount of litigation settled out of court. When the client gets an estimate for legal services including electronic discovery, they may also realize there will be a serious impact on their budgets and personnel resources. In addition, there is a growing sentiment on the part of the public that just being involved in litigation can create negative public perceptions. These perceptions can impact the marketability of client’s products and financial valuations, so many law firms must take special

precautions to assure a positive litigation experience can be communicated to potential clients. In these cases, more intensive involvement with clients in preparation for litigation may be required to assist in reducing their concerns about the costs and business risks inherent in litigation.

Some consulting firms offering a variety of services are now seeing records management services are valuable to their enterprise and their clients. These broad spectrum consulting firms will often have multiple consulting business areas, including both legal and records management consulting services. There can be significant value added to clients by having both legal and records management services available without their having to search elsewhere to get integrated guidance on litigation readiness. However, addition of records management guidance to legal advice offered by law firms is still seldom seen and serves to distinguish those firms offering this guidance as thinking more broadly with respect to their clients' needs. Unfortunately, it is very rare for law firms to offer continuing guidance in RIM and IG Program development with a goal of preparing the client for better management of their information resources after litigation.

Until law firms see delivering RIM and IG guidance as a cost center within their suite of business services, they will continue to outsource much of the e-discovery and litigation preparation activities to third party companies. This approach creates less professional and business risk for the law firm and is understandable considering the overlapping guidance from professional associations, the still growing case law with respect to e-discovery and the variety of readily available services expanding in the legal marketplace. Unfortunately this situation also means clients may commonly find their choice is either to agree to high costs for litigation or simply decide to settle their affairs out of court. Many attorneys and judges are concerned today about this state of affairs regarding litigation.

Of particular interest to law firms is cost and risk containment with respect to the storage and retention of client records. This may be an opportune area for beginning some discussions with clients regarding respective recordkeeping responsibilities where law firms have some expertise with which to advise clients regarding records retention issues. In addition, law firms can be very clear with clients about how long client records will be maintained and the means of accessing those records. This expertise and additional counsel could be the starting point for continuing advice and counsel on client recordkeeping programs related to litigation readiness.

Considering there are many very qualified RIM personnel within organizations to assist in the e-discovery process, it behooves both clients and legal counsel to consider leveraging this resource to the maximum extent feasible. The document custodians that already exist in many organizations are a solid foundation for building alliances with an e-discovery team. RIM and IG programs are based on policy communication and validation of participation. When there is an existing RIM program resource available to a client, attorneys should consider teaming with those personnel to implement legal holds and e-discovery related business processes.

However, until attorneys can better visualize litigation readiness activities for their clients as a mutually beneficial component of their legal counsel options for clients, their preparations for discovery may be focused primarily on the placement of legal holds on information. Opportunities may be missed to advise clients about litigation readiness today and in the future. It may take cooperative action among several professional associations and industry advisory firms to collaborate on a common understanding of needed best practices in this professional arena. Their goal should be to achieve a closer working relationship between attorneys and their clients in implementing litigation readiness practices.

RIM Educational Assistance Opportunities

The need to advise clients regarding RIM issues will be an ongoing challenge for everyone, including law firms, internal RIM staff, corporate RIM staff and the litigation support community. Although many of the information identification and management processes needed to implement a thorough legal hold on records are known to lawyers and RIM professionals, the corporate client community does not always have a fully staffed RIM program and may not be ready to embrace new information management requirements and concepts. For this reason many RIM professionals can be of assistance to those clients regardless of whether or not they are employed within a law firm, a litigation support team, or the client's RIM personnel, if they understand legal holds and how to make them defensible.

Typical of the areas where RIM professional assistance can help organizations facing litigation are:

1. Understanding RIM professional concepts and the issues they will be facing during litigation, such as records holds, retention mandates, and policy adherence,
2. Successful formation of records custodian teams to identify information accurately, including the need for IT, subject matter expert, and end users participation,
3. Defining the scope and extent of a hold order on information repositories,
4. The creation of data maps or information inventories locate and describe records in all formats,
5. Monitoring compliance with the records hold notice, and
6. Documenting information compliance requirements.

Each of these activities could be performed by an attorney at great cost to the organization or less effectively by the organization itself. However, if an individual with RIM expertise leads these efforts, under the direction of inside and outside legal counsel, the discovery and document production effort should be more effective and less costly.

Post Litigation Records Management Opportunities

The current industry of “litigation readiness” guidance associations, consortia, and vendors stresses the importance of e-discovery and document production during on-going litigation. Very rarely does one find instances of advice and counsel to the clients of law firms regarding the need to create and manage a complete and continuing Records and Information Management (RIM) or Information Governance (IG) Program that includes retention schedules, file plans, policies, and records inventories. Due to the increasing volume of litigation today, much of it serial in nature and the increasingly regulated business environments evident in challenging economies, the need for RIM and/or IG activities will only increase. And attorneys must remain knowledgeable about the changing technologies used by businesses. Why is this opportunity to provide RIM or IG guidance to clients not perceived as a potential value-added service from law firms for their clients? Maybe this will change as increasing competition between law firms and their need to provide a full spectrum of services to clients creates more of a demand for traditional RIM and IG Program development.

It is hoped this opportunity will be realized and there is increasing cooperative development of best practices between professional associations and companies offering litigation readiness education and training services. It is also hoped law firms and their clients will cultivate a partnership relationship regarding getting prepared for litigation.

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SUGGESTED REFERENCES

Association Web Sites

ARMA International - www.armacorp.org

American Bar Association - www.americanbar.org

Association of Legal Administrators, - www.alanet.org

Association of Certified E-Discovery Specialists - www.aceds.org

Association of Litigation Support Professionals – alsponline.site-ym.com

AIIM International - www.aiim.org

Best Practices Information Sites

ARMA International - Generally Accepted Recordkeeping Practices - www.armacorp.org/GARP

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