



Cut Costs, Risks with Proactive Litigation Plan

In the last few years, production of electronically stored information (ESI) for business and other purposes has increased exponentially. As the amount of information that organizations maintain grows, so do the costs and risks associated with effectively managing that data. To counter these effects, it is essential that organizations prepare themselves for potential litigation by creating a litigation readiness plan. By mapping their data types, locations, and custodians and establishing plans to respond to discovery, organizations can save money and reduce risk in litigation.

As a result of this complexity, discovery obligations necessarily involve not only legal counsel, but also records and information management (RIM) and information technology (IT) personnel. Operationally, these groups

Identify Proactive Solution Elements

Legal, RIM, and IT professionals have the ability to incrementally improve discovery response processes and save significant time and money by taking proactive steps to understand their organization and the litigation risks it faces. By focusing on the nexus between RIM, IT, and legal requirements, organizations can identify hurdles presented by existing processes and create a litigation response methodology that successfully uses existing infrastructure.

To identify the processes and systems required for an organization's litigation readiness plan, three factors should be considered: 1) litigation portfolio, 2) organizational structure, and 3) current discovery and records retention processes.

Litigation Portfolio

Perhaps the most important element of an effective, proactive litigation strategy is an understanding of past litigation. This generally may be achieved by studying three categories of information:

1. Information concerning cases with ongoing discovery or retention requirements per Rule 26 of the Federal Rules of Civil Procedure (FRCP).
2. General metrics for an organization's litigation portfolio, including the total number of cases and number of cases by practice area. This information is gathered for both active and historical litigation, usually for a period of five or 10 years.
3. Litigation budgets, including annual budget information for each practice area and average case expenditures overall and by practice area.

Such an analysis would bring to the organization's attention any responses that are immediately necessary and help predict future litigation. Additionally, each of the above plays a key role in performing cost/benefit analyses for changes to litigation response processes.

This article explains how to develop a litigation readiness plan that will help reduce costs and mitigate risks associated with e-discovery when the plan is implemented and adhered to by employees who deal with electronically stored information.

work independently. As such, solutions created solely to solve RIM or IT problems may create inefficiencies when applied to litigation.

However, as recognized by the EDRM in the 2011 publication "How the Information Governance Reference Model Complements ARMA International's Generally Accepted Recordkeeping Principles" (EDRM 2011), organizations can identify and mitigate these inefficiencies through careful planning.

Organizational Structure

Organizational data required for litigation planning includes organizational charts, data maps, and basic information concerning organizational structure. In broad terms, this information is necessary to identify the types and locations of paper documents, ESI, and potential witnesses relevant to litigation.

Organizational charts plot business structure and, ideally, the individuals working within defined groups. *Data maps* outline the physical or virtual location of information. Ideally, a data map will include locations of hard copy documents, e-mail documents, locally stored files, root information and access requirements for network drives, web-based storage such as SharePoint®, and any other storage location. Locating information and access points is particularly important for geographically distributed organizations.

In most instances, individual-level organizational charts and data maps must be supplemented through consultation with document custodians to mitigate obsolescence. Input from document custodians may also be necessary where organizational charts or data maps cannot accurately predict interactions between individuals or interactions between individuals and data.

This issue is particularly likely to arise in "matrix" or "lattice" type organizations. Now, however, that even in these types of organizations, organizational charts or similar diagrams will identify levels of decision-making authority.

Depending on the organization's size, structure, and budget constraints, consultation usually takes the form of interviews with key points of contact within the organization or surveys of a broader cross-section of employees. The level and method of consultation with custodians may vary by litigation type.

Discovery Processes

When approaching litigation proactively, it is imperative not only to recognize risks associated with organizational structure and future litigation, but also to identify the current methodologies used to reply to discovery requests.

While many organizations do not have formalized processes for meeting discovery obligations, legal departments and RIM professionals have experience executing litigation holds and collecting and tracking documents responsive to discovery requests.

Legal, RIM, and IT profession also may determine the effectiveness and scope of discovery processes by analyzing preservation notices, questionnaires for document identification, collection instructions, sample chain-of-custody logs, and sample documents.

Records Retention Processes

As illustrated by the existence of the Generally Accepted Recordkeeping Principles'® Principle of Disposition, as referenced in EDRM 2011, proactive efforts to reduce risk and save costs in a discovery context cannot ignore records retention.

While the incremental cost of electronic storage is decreasing, the cost of managing that additional data is increasing. It is well recognized that the true cost of storage greatly exceeds the incremental cost of storage space. As noted in 2012 by the American Institute of Certified Public Accountants' Information Technology Section in "A Practice Aid for Records Retention," this figure includes costs associated with complying with litigation discovery requests for that data.

In 2005's *Arthur Andersen LLP v. United States*, the U.S. Supreme Court held that a records retention policy must consider not only how long an organization *wants* to keep information, but also how long the organization is *required* to keep information. The court further indicated that retention policies are valid even where "created in part to keep certain information from getting into the hands of others, including the government."

The limits of records retention expressly set out by the court in *Arthur Andersen* have, when applied to electronic

records, come to be known as "defensible deletion." *Defensible deletion* is what it purports to be - a policy that maximizes *reasonable* document preservation, i.e. keeping materials that have a business use or as required by law, while also allowing an organization to eliminate data that lacks business value and is not required to be retained.

By decreasing the volume of electronic records being retained, companies may reduce the amount of data retained and thereby limit the corresponding management costs. More importantly, reducing the universe of immaterial documents decreases risks associated with errors in large-scale document review and production.

In 2010, the Southern District of Texas concluded in *Rimkus Consulting Group, Inc. v. Cammarata* that what constitutes a "reasonable" document preservation policy is industry- and company-dependent and depends on the proportionality of the policy to the needs of the case and generally applicable standards.

Whatever the terms, adopting a defensible deletion strategy will decrease costs and risks associated with over-retention of ESI. As noted by Gibson Dunn's "2013 Year-End

Evaluate Risk factors

Once an organization's litigation portfolio, organizational structure, and current discovery and records retention processes have been sufficiently outlined, an analysis of strengths, weaknesses, opportunities, and threats (SWOT analysis) should be performed on any plan seeking to address these factors.

The SWOT analysis will compare the actions with respect to selected risk factors. The risk factors evaluated and the weight assigned to each risk factor may vary from organization to organization. However, litigation readiness plans can generally be evaluated based on four key factors: 1) extent of business disruption; 2) level of control over information; 3) effectiveness of operational processes and technology used during litigation; and 4) avoidance of discovery sanctions.

Extent of Business Disruption

Discovery obligations can have a profound effect on business operations, particularly when employees are required to search large quantities of data. Further, Charles Ragan noted in a 2013 *Richmond Journal of Law and Technology* article "Information Governance: It's a Duty and It's Smart Business" that absent investment in costly search technologies, large volumes of data create inefficiencies in data retrieval to the extent that strategic opportunities may be lost. The Principle of Availability, as discussed in EDRM 2011, anticipates processes that will reduce the employee search time and increase employee effectiveness when confronted by big data and discovery obligations.

Level of Control

E-discovery expert and attorney Ralph Losey indicates that there are good reasons to outsource litigation support in "Five Reasons to Outsource Litigation Support." However, releasing data to a third party always bears potential risks, including inadvertent release—particularly with respect to proprietary and controlled information.

As noted in EDRM/2011's overview of the Principle of Protection, organizations routinely maintain sensitive or classified information, information containing personally identifiable information or protected health information, and business confidential information which cannot or should not be released. Accordingly, organizations

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Electronic Discovery and Information Law Update," retaining "large volumes of uncontrolled and unorganized data can make e-discovery *extremely* costly...controlling and organizing a company's data allows [the] company to decrease its risk of spoliation, simply by having less data that could be overlooked when instituting a litigation hold or collecting documents to disclose."

would be wise to consider the threat of inadvertent dissemination, waiver of privilege, and other risks of release when evaluating their litigation readiness policies.

Effectiveness of Technology and Processes

Gibson Dunn's "2013 Year-End Electronic Discovery and Information Law Update" makes clear that despite cost control efforts, the cost of e-discovery continues to rise due to inconsistently applied requirements and expanding volumes of data.

Per Microsoft's "Global Enterprise Big Data Trends: 2013," approximately 89% of responding companies had a budget for a big data solution, and 72% indicated that they are actively planning a solution. As more organizations implement big data or information governance programs, pressure to piggyback e-discovery processes onto such solutions is expected to increase.

While not primarily intended for e-discovery, if repurposed correctly, big data solutions can be used to effectuate document retention, defensible deletion, and discovery collection efforts. If concerns of discovery can be met by repurposed big data or other RIM or IT strategies (such as off-the-shelf e-mail storage solutions), significant cost savings may be achieved. This approach is also supportive of the Principles of Integrity and Compliance.

Avoidance of Sanctions

The Advisory Committee to the FRCP accounted for emerging technologies in discovery as early as 1970. Fed. R. Civ. P. 34(a) (*Notes of Advisory Committee on Rules - 1970 Amendment*). In 2006, the committee formally codified in Rule 34(a)(1) the generally accepted interpretation that discoverable information includes both tangible information and ESI. The amendments specifically cautioned against limiting the definition of ESI, thereby creating uncertainties regarding proper preservation of large volumes of data.

As indicated by Barbara Rothstein's 2007 *Managing Discovery of Electronic Information: A Pocket Guide for Judges*, both courts and judges have recognized hurdles inherent in ESI discovery, and courts have made clear their view that retention policies do not have to be perfect to be defensible.

As an example, Rothstein cited *2012's Monique Da Silva Moore, et al. v. Publicis Group e & MSL Group*, in which

the court held that ESI computer-assisted review need not be perfect, but it must instead produce accurate and complete results at a proportional cost.

Further, as discussed by U.S. Magistrate Judge Craig B. Shaffer (District of Colorado) in his article "'Defensible' By What Standard?," published by The Sedona Conference® in 2012, "a technology-assisted e-discovery process should not be held to a standard of perfection, but it should

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produce discovery results that are defensible in terms of the producing party's discovery obligations and reasonable from the standpoint of cost and efficiency." Nevertheless, as indicated by Rothstein, electronic data that is difficult to access and/or produce often falls within the normal discovery parameters. Per *The Sedona Principles* editor Thomas Allman in his analysis of *West v. Goodyear Tire & Rubber Co.* in 2010's "Preservation and Spoliation Revisited: Is it Time for Additional Rule making?" and Fed. R. Civ. P. 37(e), parties must have the capability to comply with procedural rules governing production of ESI or risk sanctions for non-compliance or "spoliation." Because of this, it is advisable for companies to adopt litigation readiness measures well before litigation. Both *The Sedona Conference's® 2010 Commentary on Legal Holds: The Trigger & The Process* and the 2010 opinion of U.S. District Court Judge Shira Scheindlin (Southern District of New York) in *Pension Committee of the University of Montreal Pension Plan v. Bank of America Securities*, Federal Rule 37(e) provide that an organization's duty to preserve potentially relevant documents and ESI is triggered once litigation is reasonably anticipated.

Moreover, in the 2011 report to the Judicial Conference Advisory Committee on Civil Rules entitled "Motions for Sanctions Based on Spoliation of Evidence in Civil

Cases," Emery G. Lee III reported that, per a study of spoliation motions in 19 test districts, 15% of civil cases filed in 2007—2008 involved spoliation issues, and ESI was among the evidence at issue in 93% of those cases. Motions for sanctions were granted in 23% of cases.

Recent proposals will increase organizations' ability to proactively prepare for litigation by reducing uncertainty in e-discovery. In his presentation at Duke Law School, Allman, suggested that the FRCP address the issue of spoliation by codifying preservation obligations and sanctions for preservation violations.

Proposed amendments to Rules 26 and 37 would further reduce sanctions related to ESI. Although the 2006 addition of the "Safe Harbor Clause" in Rule 37(e) partially addressed problems with preservation of ESI by limiting the extent to which parties maybe liable for unintended destruction of ESI, the rule did not eliminate sanctions for routine or inadvertent non-compliance.

The proposed amendments to Rule 37(e) offer additional curative measures to allow organizations to avoid sanctions. By further identifying curative measures, the proposed rules would ensure that organizations have more leeway to develop reasonable, focused litigation readiness policies.

Authors' Disclaimer: *"While the information in this article may deal with legal issues, it does not constitute legal advice. If you have specific questions related to information discussed in this article, you are encouraged to consult an attorney who can advise you regarding the particular circumstances of your situation."*

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