

## E-Discovery Compels

# A Seat for RIM at the Counsel Table

The revised Federal Rules of Civil Procedure (FRCP) regarding electronic discovery that went into effect Dec. 1, 2006, make it more imperative than ever for companies to have a sound, legally defensible electronic records and information management (RIM) program. No longer will courts accept general claims of undue burden as a defense to producing electronic records and information.

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In litigation, all information – not just records, which are evidence of an organization’s operations that have value requiring their retention for a specific period of time – is arguably and potentially discoverable. This is because parties do not simply seek records. They are interested in all information that may lead to the discovery of admissible evidence in court. In the absence of a retention policy, a party would have to produce all information in its systems that may be relevant to a case, irre-

spective of its age, format, medium, or location of storage. A sound records retention policy helps minimize this burden.

**Note:** For an in-depth discussion about litigation holds, see “Legal Holds & Spoliation: Identifying a Checklist of Considerations that Trigger the Duty to Preserve,” which Isaza authored in 2003 for the ARMA Educational Foundation. It is available for free download at [www.ARMAEdFoundation.org](http://www.ARMAEdFoundation.org).

### Importance of Records Retention Policies

If systematically followed, a retention policy preserves only official records of the company while eliminating all other non-records

within days of creation. When litigation looms, if a retention policy is in place, the amount of potentially responsive information is limited to the records preserved pursuant to the policy. If the company has systematically and uniformly followed its retention policy, it can explain the absence of all other non-records from its electronic systems.

The one caveat is that once litigation is pending or contemplated, companies must override the retention policy in favor of preservation of all information potentially responsive to the subject matter of the case, irrespective of whether they are company records under the policy. The process of preserving all potentially responsive information is commonly known as a litigation hold or legal hold. Ultimately, the responsive information in discovery would include only those records that have been preserved pursuant to the retention policy, plus all other information placed on legal hold since learning of the pending or contemplated litigation.

### Key Provisions of the Revised FRCP

The following provisions of the December 2006 amendments to the FRCP are relevant to the RIM professional’s role in electronic discovery.

#### “Electronically Stored Information” Addressed

Under the amendment to Rule 33(d), the definition of a “business record” is now broad enough to specifically include “electronically stored information.” Similarly, the amendment to Rule 34(a) adds “electronically stored information” as a category that is subject to production in discovery. This includes information stored in any medium.

Prior to this amendment, parties had to rely on a contrived definition of “business records” to get at electronic documents. Depending on the court and the judge’s expertise with electronic information, the court had ample leeway in determining

how much access to allow. Now, once and for all, the rules definitively include electronically stored information in the definition of business records. Thus, the courts may not have as much discretion to forbid requests for production of electronically stored information, regardless of the medium.

Furthermore, under revised Rule 16(b), the court is to issue a scheduling order within 90 days of a defendant’s appearance in a case or 120 days after service of the complaint on a defendant. This order must address “provisions for disclosure or discovery of electronically stored information.” In conjunction with this requirement, under Rule 26(f), the parties must “...as soon as practicable and in any event at least 21 days before a scheduling conference is held or a scheduling order is due under Rule 16(b), confer to... make or arrange for the disclosures required by Rule 26(a)(1), discuss any issues relating to preserving discoverable information, and to develop a proposed discovery plan that indicates the parties’ views and proposals concerning:

[Editor’s note: Paragraphs (1) and (2) omitted from this article are available at [www.law.cornell.edu/rules/frcp/Rule26.htm](http://www.law.cornell.edu/rules/frcp/Rule26.htm).]

(3) Any issues relating to disclosure or discovery of electronically stored information, including the form or forms in which it should be produced;

(4) Any issues relating to claims of privilege or protection as trial preparation material, including – if the parties agree on a procedure to assert such claims after production – whether to ask the court to include their agreement in an order.”

### Consequences of the FRCP Amendments

These amendments bring consequences, of course. For instance, under Rule 34(a), a requesting party can simply test and sample for electronic information. The requesting party may seek to examine and copy all or some of the electronic business records that lead to the discovery of admissible evidence. This presents a host of new challenges regarding how these records will be made available for examination and how they will be copied. To that end, a responding party may need to face two options – to either provide to opponents technical support in reading and opening electronically produced information or to give opponents direct but restricted access to the company’s

## At the Core

### This article

- ▶ Provides a high-level overview of the legal importance of a retention policy
- ▶ Focuses on key provisions of the revised FRCP that illustrate the importance of RIM
- ▶ Describes nine opportunities for RIM professionals to play a key role in e-discovery

electronic information systems. The possibility of direct access to hundreds of thousands of electronic records raises serious privacy, confidentiality, and privilege concerns that will need to be addressed before the opposing side is granted access to an organization's records.

In addition, under Rule 16(b), the court will issue an order early in the case regarding provisions for disclosure of electronic information. At least 21 days beforehand, the parties are to meet under Rule 26(f) to discuss preservation of discoverable electronic information. At this meeting, the parties should discuss their RIM policies and procedures. The RIM policies form the cornerstone for all discussions regarding production. This is because companies should be able to identify the records that have been systematically preserved.

### **Opportunities for RIM Professionals**

Specifically regarding Rules 16(b) and 26(f), critical RIM expertise must be brought to counsel's attention. The end goal is for the RIM professional to be prepared to explain retention policies to counsel and, of course, to the opposing side and the court. The RIM professional's ability to do the following is critical to defending the RIM program:

1. Bring to counsel the latest versions of all relevant policies and procedures, including the electronic communications policy, records management policy, records management procedures, records retention schedule, and legal holds policy with procedures. Be prepared to thoroughly explain the history of each policy and procedure, including implementation history and a candid discussion of implementation weaknesses, if any.
2. Discuss the likelihood of electronic information being critical in the discovery process of the case at hand, as not all cases will hinge on electronic discovery. In fact, the majority of cases may not hinge on electronic records, but a discussion with counsel is still necessary.
3. If the above discussion yields the likely need to produce electronic records, discuss an inventory of all the possible sources where responsive electronic information could be found (e.g., e-mail, instant messages, databases, enterprise systems, backup tapes, archives, laptops, desktops, and PDAs). Information technology (IT) staff will need to participate as well, especially to discuss the "form or forms in which it [discoverable information] should be produced" per Rule 26(f)(3). Be prepared to discuss and educate counsel and IT on what has been considered a record



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for retention schedule purposes versus all other information stored in the electronic systems.

4. Per Rule 26(b), discussions also must focus on the accessibility of the identified sources of information. Be prepared to address what it would take to access potentially responsive information, including cost estimates and tools needed. Both IT and the records management department may bring different perspectives on this latter issue. For instance, do not expect IT to be familiar with the latest records management applications and discovery solutions.
5. Give counsel the tools to defend the company's records retention program. Show a systematic and consistent approach to the records management program. If the electronic records have been in disarray, explain the steps that have been taken to address the problem or the interim system that has been applied. Though most companies think their e-records are in disarray, a methodology has likely arisen over time. Talk with IT beforehand about archiving and back-up systems to see if patterns of retention can be identified.
6. Help counsel identify the persons or departments that are likely to have responsive information. It helps to be thoroughly familiar with the company's organization chart and have the latest employee contact information readily available.
7. Help counsel identify the likely sources of records, including electronic information, to obtain from the opposing side. Help counsel see where the skeletons of the opposing side could be buried, in addition to pointing out potential flaws in the opposing side's RIM system.
8. Help counsel identify confidential, privileged, and privacy protected records. Keep a list of the company's most critical confidential and privileged records. Companies must know exactly where and how such confidential information is stored and protected.
9. Keep a master list of all media within the company where information could be found (e.g., e-mail, instant messages, databases, enterprise systems, backup tapes, archives, laptops, thumb drives, desktops, and PDAs). Once that list is compiled, identify which sources will house the official records. This exercise will allow companies to assign shorter retention to all the information contained in secondary media. Note, however, that secondary

media records may not be destroyed during a litigation hold. However, if designated as containing duplicates, it is possible the information will not need to be produced in discovery.

Do not underestimate the value of apparently ministerial tasks such as procurement of the latest organization charts, policies, procedures, and employee contact lists. A busy counsel will always appreciate being relieved of the need to track these documents down.

Although responding to the opportunities above will require a fair amount of planning, providing this expertise is essential to an organization's ability to respond to discovery and to defend the company's retention program.

### **An Opportunity to Establish Credibility**

Ultimately, having a sound electronic records retention program that is systematically followed and has become a part of the company's corporate culture is the key to the ability of an

organization to respond to discovery. RIM professionals who educate themselves about and understand the Federal Rules of Civil Procedure as they apply to e-discovery, are articulate about the organization's RIM program, and are equipped to respond to the opportunities described above will not only raise their professional credibility, they will validate the contribution of RIM to their organizations' success. ■

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