

By Rick Wolf

Electronically stored information has no natural lifecycle and can exist on an IT system forever—which sounds ideal, right until a subpoena lands on your desk.

As email and other so-called electronically stored information accumulate worldwide at alarming rates, organizations might finally start to make records and information management a top priority and put management behind the same game plan. Recent surveys indicate that chief executives put litigation on the short list of top cost pressures and chief legal officers consistently rate compliance, e-discovery and RIM as the highest risk areas. While a top concern at the corner office, most organizations readily admit they lack adequate technologies or policies to manage a legal discovery order involving electronic information.

What's more, the new Federal Rules of Civil Procedure now require parties in every civil case to discuss and make early disclosure of all relevant ESI, keeping RIM compliance in a high-risk profile for years to come. The profound effect of these rules has increased the burden on corporate law departments to institute and sustain effective records management compliance systems and may forever change the way companies manage litigation.

Yet even without the imposition of the new federal rules, escalating risks alone should impel organizations to simplify information technology infrastructures and networks. Email, instant messaging and the Internet are the essential communication tools for business, but the vast content generated through these media seemingly lasts forever (or at least until technological obsolescence makes the data unreadable). So long as systems have worked smoothly for end-users and the cost of storage remained low, it has been hard to make a business case to invest in an enterprise content management system that users don't see, just to reduce volume and bring general order to the chaos.

Now, however, that flood of information has reached Biblical proportions, and it is gushing headlong towards the legal department—and almost overnight, the value proposition behind investment in RIM is becoming crystal clear. Since 2002, studies show the volume of email generated by businesses worldwide has tripled to more than 85 billion messages every day. The weight of this data explosion has created significant concern for organizations across all industries and governments. Email has been the principal evidentiary source for plea bargains, early settlements, and large sanctions over the last several years—yet nobody claims to have control over it. Indeed, a just-released survey shows that most organizations are merely at the “beginning stages” of determining records management compliance.

Why the slow pace? A confluence of forces has created “destruction phobic” cultures, dominated by fear that destroying information might lead to civil or criminal liabilities. For the many who never think about legal risk, the solution is to over-retain email and other ESI because of the anxiety of never being able to locate *that* file again. Executives know intuitively that “save everything” policies are not good practices, and would prefer balancing discovery compliance with information lifecycle management through enforced RIM policies. Will such trepidation and reluctance finally yield to *bona fide* investment in enterprise content management and lasting change? We shall find out soon enough.

Enter the Federal Rules

The drafters of the amended federal rules wanted to bring clarity around how parties disclose and produce ESI as evidence in court proceedings. For reasons unintended, however, the new rules are exposing a global information management crisis hardly conceivable when hearings on the new rules began a few years ago. It’s fair to say, then, that the movement to institute an effective RIM policy with information lifecycle enforcement will now take on great importance for all organizations, and we are only just beginning to feel the pain. More than two-thirds of companies never experienced e-discovery liability until now, so the apparent crisis might worsen before it improves.

Under the amended Federal Rules of Civil Procedure, in every case, parties must exchange a copy, or description by category and location, of all relevant ESI, as well as a description of “inaccessible” ESI a party will not search or produce. After making initial disclosures, but before the hearing at which the court enters the case scheduling order, the parties must meet and confer about the preservation, disclosure and ultimate production of ESI, including the form (or forms) of production, and negotiate an agreed discovery plan for approval by the court. District court judges are under considerable pressure to move cases on their docket. When parties are unable to agree on complex ESI discovery issues, and courts cannot efficiently resolve these disputes, we may see more use of mediators, special masters or even a new cadre of e-discovery dispute resolution specialists.

Legal departments in most organizations are not set up to handle litigation without significant support from outside counsel. So considering the nature of the new federal rules, outside counsel has a steep learning curve to grasp the new problems that now invariably will arise in most discovery proceedings. Law firms face many challenges, such as:

- 1) understanding IT architecture to map the organization’s ESI;
- 2) determining current and recent accessibility to relevant ESI;
- 3) measuring effectiveness of RIM policies and procedures;
- 4) converting ESI into formats suitable for collection and production;

- 5) selecting forensic experts and information processing firms from a highly fragmented and slowly maturing e-discovery industry;
- 6) identifying reliable search methods to isolate responsive and non-privileged information, beyond the document review on an hourly basis approach; and
- 7) identifying corporate representatives with relevant knowledge.

So while corporate law departments grapple with their own information systems and develop defensible RIM policies and document preservation procedures, the new federal rules expect judges and outside counsel to master these subjects seamlessly. This new frontier—and its host of new hybrid IT/legal issues—will give headaches to federal judges and affect all those involved in the adversary system. As courts, lawyers, and organizations ramp up to speed, we might start to notice a dramatic, concomitant effect on litigation services and defense costs. Insurers, too, should take notice of the ripple effect from these new Federal Rules of Civil Procedure, as the cost of inefficiency will be too high to dismiss as a “cost of doing business.”

The spotlight on ESI will generate new litigation overhead costs to corporations and likely increase headcount. When an organization has notice of a dispute, the company will need qualified internal staff to act and preserve ESI, often well before involving outside counsel is even a remote consideration. The new breed of corporate witnesses will be those who oversee RIM policies and carry out document and ESI preservation instructions. If a gap exists between issuance of hold notices and action to preserve ESI, adversaries surely will test the effectiveness of RIM policies and put these new corporate managers on the hot seat.

In lieu of traditional attorney review, organizations are starting to use hardly tested concept search technologies for culling through massive quantities of ESI. The confluence of these developments for the law department will affect budgets, outsourcing, staffing decisions and capital investment in new systems.

Law firms stand to lose revenue from billable hours on document discovery, and will need to develop closer alignment with corporate clients in the overall management of litigation. Perhaps to hedge against potential lost revenue, or driven by sheer opportunism, law firms now are offering new bundles of services for preventative compliance, records management and litigation readiness; however, there are limitations to consider before pursuing this approach further. Law firms offering existing litigation clients compliance counseling on policies and processes that may come under scrutiny in discovery proceedings run the risk of conflicts of interest, extraneous depositions and encumbering a firm’s litigation practice. Something has to give, and law firms are going to have trouble easing the pain for corporate clients in the near term.

RIM, new for law department portfolios, has put most lawyers out of their comfort zone. Records and information management affects the daily activity of every employee who creates or receives email, spreadsheets, presentations, memos, and even instant messages and voice mail. If leading the RIM charge, general counsel will have to initiate strategic discussions with finance, operations, IT, telecommunications, procurement, audit and human resources, and rally corporate leaders with different priorities, budgets, and reporting lines behind the business case for establishing an effective RIM policy. Bringing about meaningful change in a corporate environment is difficult, and an effective RIM compliance program could take up to two years to roll out across a large enterprise.

Compounding the complexity is the fact that RIM involves several corporate functions but traditionally has belonged to none. With so few executives well acquainted with the legal, IT and operational issues involved in RIM, there is an immediate and growing demand for individuals to lead a new corporate function responsible for "content management," blending professionals with the legal, compliance and technology expertise needed to harmonize IT systems and operations with legal requirements. Some companies are saddling these cross-functional duties on the corporate compliance officer, in addition to the general counsel, but no consistent governance model for RIM has emerged at this point.

Until there is clear ownership for enterprise content management, corporate law and IT departments will continue to struggle with coordinating support around and handling ESI initiatives. If chief executives are truly concerned about spiraling legal costs, reputation damage and compliance risks, now is the time to provide the leadership necessary to spawn meaningful change. Stemming the tide of email and establishing effective RIM will take dedicated resources, executive support, and time. Meanwhile, the cost will continue to mount, as organizations struggle to find what they need when they need it.

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