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# The New Federal Rules of Civil Procedure

## *E-discovery and Records Management*

Special Compliance Week Webcast  
Featuring

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Rick Wolf  
Founder  
Lexakos LLC  
[www.lexakos.com](http://www.lexakos.com)

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# Overview

- The New Federal Rules of Civil Procedure
- Duty to Preserve versus Duty to Produce
- Impact on Role of Outside Counsel
- State of Records Management Compliance
- A Few Practical Considerations
- Questions and Wrap-up

# Key Amendments to the Federal Rules of Civil Procedure

<b>Amendment</b>	<b>Summary</b>
Rule 26(a); 34(a) (Form 45)	<i>Initial disclosures include a copy or description by category and location of ESI in support of claims or defenses</i>
Rule 26(b)(2)	<i>Parties do not have to produce ESI from sources identified as not reasonably accessible due to undue burden or cost</i>
Rule 26(b)(5)	<i>Procedure for claw-back agreements to prevent subject-matter privilege waiver</i>
Rule 16(b); 26(f) (Form 35)	<i>“Meet and confer” before scheduling conference and develop discovery plan to facilitate discovery and stipulations for consideration by the court</i>
Rule 33(d)	<i>Interrogatory responses may provide adversary with access to ESI in lieu of answers</i>
Rule 45	Third-party subpoena rule subject to ESI discovery but may not have all protections afforded to parties under new rules

# Quick Poll #1

What are the 2 most urgent challenges for your company when considering e-discovery?

(select top 2)

- Drafting a formal e-discovery process
- Updating records management policies
- Creating a data map (for ESI)
- Ensuring consistency in discovery response
- Selecting and managing costs for outside vendors and outside counsel

# New Procedures for Privileged Information

**Rule 26(b)(5)(B)** Procedure for recovering privileged data inadvertently produced

- Subdivision (A) -- procedure for withholding it
  - Difficult with ESI unless you have a business process in place to segregate privileged data
  
- **Subdivision (B) – procedure for getting it back (new)**
  - Only can make this request if you know what you “inadvertently” disclosed (with ESI, not so obvious)

# Proposed New Federal Rule of Evidence 502(b)

- Advisory Committee on Evidence Rules Hearings (1/12 &29)
- Public Written Comments due by February 15, 2007
- Substantive not procedural, requiring congressional approval

*“Disclosure does not operate as a waiver if “the holder of the privilege . . . took **reasonable precautions** to prevent disclosure and took **reasonably prompt measures**,” once the holder knew or should have known of the disclosure, to rectify the error. . . .”*

- Targeted for final adoption December 2008, or later.

# Quick Poll #2

Do you currently take any measure to segregate privileged communications from general e-mail traffic as a standard operating procedure (i.e. before litigation)?

\_\_\_ Yes

\_\_\_ No

## “Reasonably Accessible” – *Factors to Consider*

- ❑ Specificity of the discovery request;
- ❑ Quantity available from *more easily accessed sources*;
- ❑ Failure to produce relevant ESI that likely existed but is no longer available on *more easily accessed sources*;
- ❑ Likelihood of finding relevant ESI that cannot be obtained from other, *more easily accessed sources*;
- ❑ Predictions as to the probative value of the ESI;
- ❑ Importance of the issues at stake in the litigation; and
- ❑ Parties’ relative resources.

***The Analysis:* Whether the good cause need for discovery outweighs the burden to the responding party.**

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# New Rule 37(f) – Implied Duty to Preserve

## *Think Twice before Seeking Protective Orders*

**Rule 37(f)** -- “Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good faith operation of an electronic information system.”

- ❑ To the extent Rule 37(f) protects a party from sanctions for the loss of ESI, does the rule apply to non-parties under Rule 45?
- ❑ To show you have “routines,” be ready to demonstrate you have an enforced and effective records and hold management program
- ❑ Subjective good faith -- every organization is different, so design enforceable and auditable rules that would suit you
- ❑ Court may use its inherent equitable powers remedies or others sanctions, no matter what you routine followed or state of mind

# Importance of Records Management Policy Compliance

## *Critical Interrelationships with New Federal Rules*

**Event Triggering  
Duty to Preserve**

**Complaint Served**

**Scheduling Conference  
Rule 16(b)**

*Search, Identify (Collect?)*

*Production*

***When Does Outside  
Counsel Get Involved?***

**Meet and Confer  
Rule 26(f)**

**Record Management Policy  
Compliance Program**

**Attack on search methods,  
accessibility and *good faith*,  
*routine operations***

# Quick Poll #3

How confident would you be defending your company's records management program in court?

- Very confident
- Somewhat confident
- Neutral
- Somewhat unconfident
- Very unconfident

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# Preparing for a “Meet and Confer”

- Consult manager with knowledge of systems and policies (unless that’s you!)
- RM and Preservation Policy (bring your document)
- Update IT data map and archive inventories
- Understand ESI accessibility history
- Search Terms (automated or manual)
- Consider claw-back and confidentiality agreements
- Educate and train outside counsel; select your forensic experts
- Don’t let outside counsel attend this meeting alone!

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# A Steep Learning Curve

## *Impact on Outside Counsel*

- In the Dark:
  - Preservation obligations triggered before case assigned
  - How sound are your client's system and controls?
  - *The Mystery of the "New" Client*
- Translating the IT infrastructure maze into cogent legal arguments -- in corporate compliance terms
- Compliance counsel or litigation counsel?
- Outside Counsel's Exposure to Sanctions
  - Rule 26(g) (certifying completeness and good faith objections)
  - Rule 37(g) (participating in the "development and submission of a proposed discovery plan as required by Rule 26(f)")

# Quick Poll #4

What steps has your company taken to create a records management program? (select all that apply)

- Developed a record retention schedule
- Created a centralized, accessible records management information resource
- Trained employees on proper records creation and management
- Identified accountable function or department for records management
- Audited compliance with records management policy

# Is Records Management Important to the Staff?

- **82%** rank records management as important or very important
  - **80%** rank “Improving companywide records policies, tools, and compliance” as important or very important
  - **75%** rank “Improving electronic discovery policies and preparedness” as important or very important
  - **80%** rank “Improving employee awareness of appropriate email use and tone” as important or very important

Source: Compliance and Ethics Leadership Council and  
General Counsel Roundtable Research

# Is Records Management Important to the General Counsel?

- **85%** rank records management as important or very important (versus 82%)
  - **80%** rank “Improving companywide records policies, tools, and compliance” as important or very important (same)
  - **80%** rank “Improving electronic discovery policies and preparedness” as important or very important (versus 75%)
  - **75%** rank “Improving employee awareness of appropriate email use and tone” as important or very important (versus 80%)

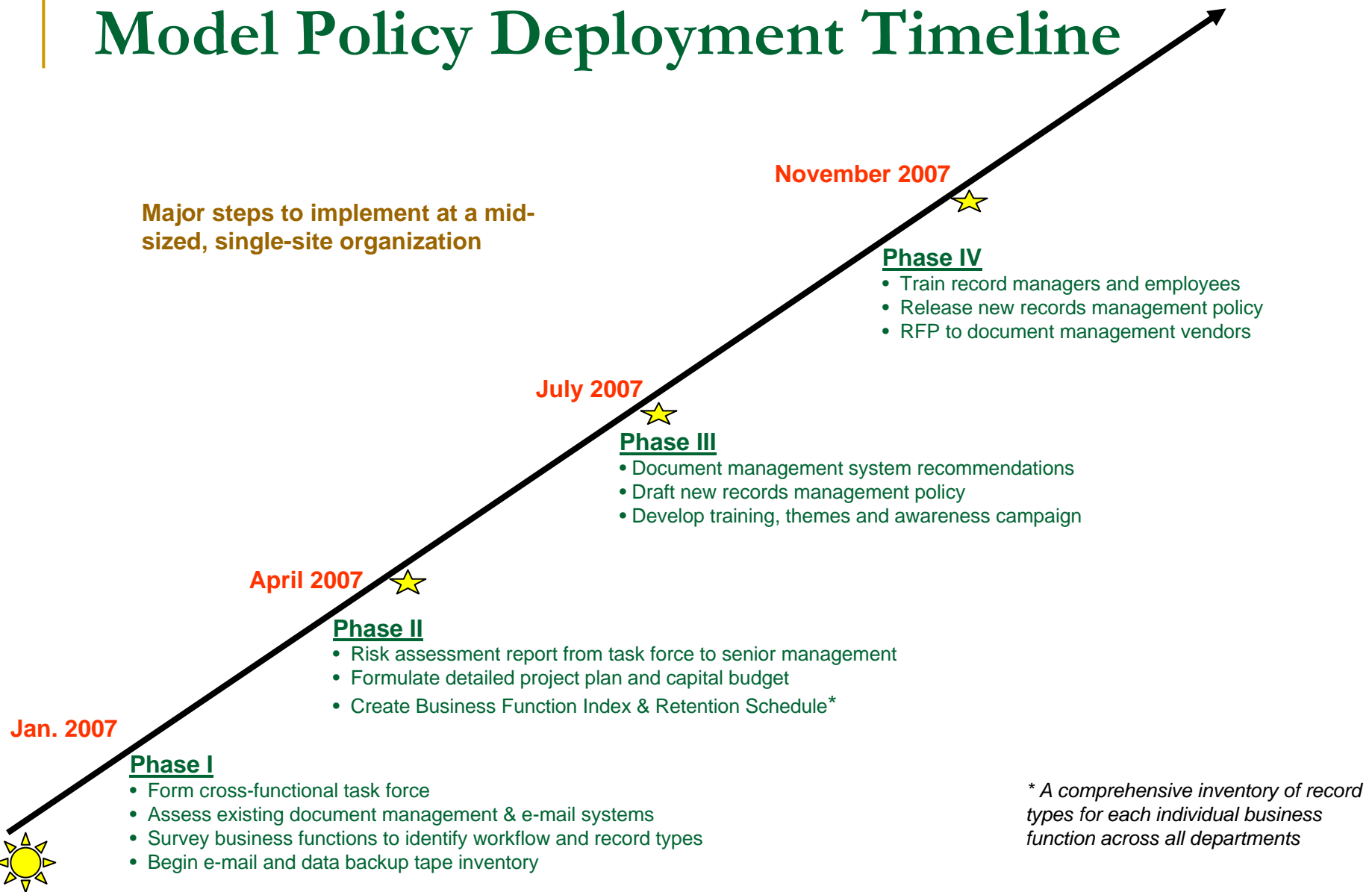
Source: Compliance and Ethics Leadership Council and  
General Counsel Roundtable Research

# A Road to E-discovery Management

- ✓ Make business case for support from a high-level officer and board committee
- ✓ Appoint an executive in charge (*legal, compliance, audit, risk management*)
- ✓ Form a standing task force with all corporate functions represented
- ✓ Establish records management policy with a training, awareness campaign and implementation plan (*you will need this for court*)
- ✓ Appoint e-discovery coordinator to maintain data map and cultivate IT department relations (*cultivate and promote a current employee*)
- ✓ Develop E-Document Request Process (*you will need this for court*)
- ✓ Use change management methods to gain and sustain buy-in and support from upper and middle management, and to develop ways to reduce email volume
- ✓ Develop matter management system to track disputes from inception, improve litigation hold documentation, and segregate privileged data from email traffic
- ✓ Reduce number of outside litigation firms (*consider dedicated e-discovery firm*)

# Model Policy Deployment Timeline

Major steps to implement at a mid-sized, single-site organization



\* A comprehensive inventory of record types for each individual business function across all departments

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# General Counsel Top Objectives for 2007

1. Revise and streamline preferred network of external law firms
2. Improve consistency of enterprise compliance with records management policies
3. Track BU progress toward specified risk management objectives
4. Optimize legal department's management of internal resources through technology and process improvements
5. Identify underlying components of external legal spend to better direct work sent to outside counsel
6. Improve partnership and communications with BU clients
7. Improve alignment with law firms to obtain best value for cost
8. Expand legal department training to improve key subject matter and cross-functional skills

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# Questions and Comments

**Rick Wolf**

**Lexakos LLC**

**[www.lexakos.com](http://www.lexakos.com)**

**[rwolf@lexakos.com](mailto:rwolf@lexakos.com)**

**973.324.0050**

**973.324.0052 (fax)**