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The Brave New World of e-Discovery Rules

By Richard Wolf, Compliance Week Guest Columnist—Aug. 29, 2006

Electronic data 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 computer information accumulate across the world at alarming rates, organizations are making the rationalization of records and information management (“RIM”) a top priority. According to a 2006 survey by the Business Roundtable, chief executives rank litigation as among a short list of top cost pressures, and a 2005 study by the Association of Corporate Counsel indicates that chief legal officers rate compliance, e-discovery and RIM as the highest risk areas for the next five years.

What’s more, when the new Federal Rules of Civil Procedure take effect in December, every court case will involve early disclosure of electronically stored information, keeping RIM a top priority for years to come. As discussed below, the ESI rules will increase the burden on corporate law departments and substantially change the traditional model of outsourced litigation management.

Yet even if the new federal rules were not looming, escalating litigation risks should still force organizations to deal with the sprawling and decentralized IT systems that span most large companies. Email, instant messaging and the Internet are 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 do not 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 seemingly overnight, the value proposition behind investment in RIM is becoming crystal clear. Since 2002, the volume of email generated by businesses worldwide is estimated to have increased to more than 60 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 professes to have control over email. Indeed, a just-released study shows that most organizations are at “the beginning stages” of determining records management compliance.

Why the slow pace? A confluence of forces has created “information retention phobic” cultures, dominated by fear that destroying information might lead to civil or criminal liabilities. For the many who don’t ever consider legal risk, email and other information is retained from the anxiety of never being able to locate *that* file again. But 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 trepidation finally yield to bona fide investment in enterprise content management and lasting change? We shall find out soon enough.

Enter the Federal Rules

The amended federal rules are meant to bring clarity to how parties disclose and produce ESI in court proceedings. For reasons unintended by the drafters, 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 will gain traction and accelerate as we move closer toward the effective date for the new rules later this year. Indeed, several district courts are already using the federal rules, and states like New Jersey have similar procedures going into effect on Sept. 1.

The new rules will require parties to meet and confer at the start of every case about the preservation, disclosure and discovery of electronically stored information with "a description by category and location of all documents ... and tangible things that are in the possession, custody and control of the party." The parties then must negotiate to develop an agreed discovery plan for approval by the federal district court. If the parties cannot agree, judges need to intervene or the parties might use mediation, special masters or other forms of dispute resolution. Outside counsel has a steep learning curve to understand the new problems that arise in these proceedings, such as:

- Locating ESI and determining the extent of its accessibility;
- Determining the effectiveness of RIM policies and procedures;
- Converting ESI into formats suitable for collection and production;
- Selecting forensic experts from a highly fragmented and rapidly maturing e-discovery industry; and
- Identifying reliable search methodologies to isolate responsive and non-privileged information, beyond the passé document review on an hourly basis approach

So while law departments continue to struggle with grasping their own information systems and developing defensible document preservation procedures, the new federal rules expect outside counsel to master these subjects too. Few organizations, if any, have begun educating their outside counsel on technology infrastructure and RIM policy compliance. This new frontier and its host of new legal issues will give headaches to federal judges and anyone else called upon to litigate or resolve discovery disputes. For law firms, these changes will have immediate consequences for litigation services, and could even erode revenue streams from document discovery review services.

For inside counsel, quite innocently, the new meet-and-confer obligations might forever change the way companies manage litigation. Once alerted to a situation giving rise to an actual or possible dispute, inside lawyers will need to rely on standardized procedures for sending preservation notices to employees with possible knowledge of (or information relating to) the issue—well before a law department decides to hire outside counsel. If the obstruction of justice law amendments in Sarbanes-Oxley did not stimulate improved RIM protocols in 2002, the Federal Rules of Civil Procedure of 2006 should do it.

Consider a scenario where the corporation is served with a summons and complaint, but inside

counsel delays assigning the case to outside counsel or neglects to send a preservation notice to employees. With a gap between notice and action taken to preserve ESI, opposing counsel will have little difficulty bringing into question the effectiveness of the corporation's RIM policies and procedures. An organization, therefore, needs to take a hard look at how its current RIM policies apply to ESI—if at all—and gain comfort around its ability to defend those policies in court. Even with good paper policies in place, gaps in compliance and control weaknesses will need to be minimized through periodic reviews or monitoring.

Perhaps to the chagrin of the general counsel, the law department has become directly involved in strategic discussions involving operations, IT and communication systems. Technology managers cannot be pleased to be thrust into meetings with the lawyers, either. With so few bilingual executives—that is, those able to speak and understand legal and IT—there is an immediate and growing demand to find these individuals or train rising stars to handle what might end up as a new corporate function. A new “content management” or “information management” function could emerge (or end up on graduate school curricula), producing professionals who blend the legal, compliance and technology expertise needed to harmonize IT systems with legal requirements and establish new standard operating procedures for ESI. Some companies are saddling these cross-functional duties on compliance officers, but no clear or consistent governance model for RIM exists yet. Law firms should consider adding a new practice area that blends litigation discovery, corporate compliance and technology expertise, and serve those organizations wanting RIM reform.

Until there is clear ownership for enterprise content management, corporate law and IT departments will continue to struggle with coordinating support for and handling of 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 resources, executive support and time. After all, Dec. 1 is not far away.

About The Author

Rick Wolf is the founder of Lexakos, a consulting firm that specializes in compliance, records management and e-discovery controls. Until he opened Lexakos, Wolf was in charge of global compliance at Cendant Corp., the \$18 billion hotel and travel services giant recently dismantled into Wyndham Hotels, Avis Budget Group and several other businesses. In his decade at Cendant and its predecessor, Wolf designed the company's first litigation management, records management and compliance programs. President of the Association of Corporate Counsel's Greater New York Chapter (through October 2006), and liaison to the American Bar Association Task Force on attorney-client privilege for the ABA's Administrative Law and Regulatory Practice Section, Wolf was a featured speaker at the Compliance Week 2006 Conference on governance, risk and compliance.

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