

The 2017 Records Knowledge Conference



First Responders: The Role of RIM / IG in eDiscovery

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Introduction



Robin Athlyn Thompson
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- Certified eDiscovery Specialist; Information Governance Professional; Certified Information Professional; Information Governance Practitioner
- 20+ years hands on management of the discovery phase of complex litigation
- BS MKT Summa Cum Laude - Grand Canyon University; MBA Social Media/MKT expected 2017
- Certified eDiscovery Specialist; Information Governance Professional; Certified Information Professional
- Nationally recognized for creating the industry's first monthly webinar series entering its 10th year of production
- Nationally recognized as one of the industry's leading marketing strategist
- One of the top social media voices in RIM/IG/eDiscovery and one of LinkedIn's Top 1% social sellers
- Double Lifetime Achievement Award Winner from ACEDS and The Stevies in recognition of providing education and service to eDiscovery/RIM/IG industries
- Multiple awards from ARMA, Department of Justice and ACEDS for education and mentoring
- Finalist for Women of Influence in Risk Management / Women's Executive Forum celebrating Women Executives in Risk Management, Privacy & Information Security
- Frequent Speaker and Blogger
- Inaugural Advisory Board Member ACEDS
- Board of Director for ARMA International
- Honored as creator and producer of Best Webinar Series by Women of the World of Business SV US

Learning Objectives

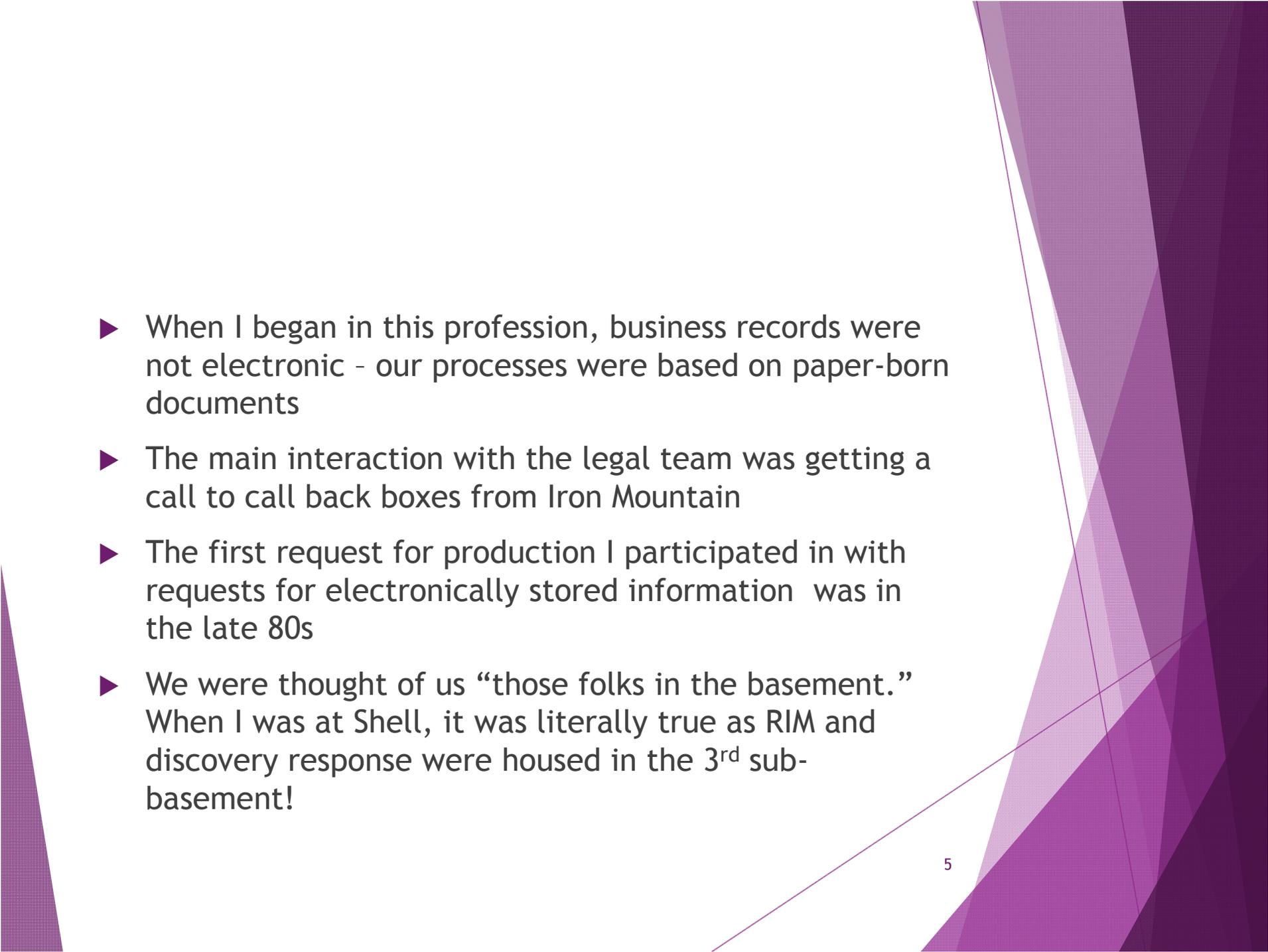
1. Participate in legal hold, preservation, and discovery requests through day-to-day duties
2. Develop and participate in effective discovery response teams
3. Analyze eDiscovery workflows and make recommendations for improvement

Just a little about the Discipline of Records and Information Management (RIM)

The creation of records began with the first clay tablets, hieroglyphics, cave paintings, and so on. You can bet there was someone in charge of managing those “records.”

However, it wasn't until the 1930s though that the recognition for the need of standardized records management began. Factoid: records management began with the establishment of the National Archives after World War II. Corporate America began to adopt RIM as a business discipline in the 1950s.

Throughout the years, we have associated records with the paper that maintains organizational memories of process, procedures, strategy, history. Records managers were usually thought of as those folks in windowless offices, or in sub-basements moving paper from one file cabinet to another

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- ▶ When I began in this profession, business records were not electronic - our processes were based on paper-born documents
 - ▶ The main interaction with the legal team was getting a call to call back boxes from Iron Mountain
 - ▶ The first request for production I participated in with requests for electronically stored information was in the late 80s
 - ▶ We were thought of us “those folks in the basement.” When I was at Shell, it was literally true as RIM and discovery response were housed in the 3rd sub-basement!

**Records
Managers are
NOT the Paper
People - the
most recent
statistics reveal
that 93% of
records are born
electronically**



RIM and IG are organized a little differently in the private sector

Despite the organization and reporting structure, those programs contain the basic elements of:

1. Creation, Management, and Enforcement of IG Policy
2. Records Retention and Disposition
3. Sunshine Law vs. Privacy Laws (the right to know vs. the right to privacy)
4. **Hold Order Management**
5. Document Management/Revision Control
6. Classification of Info and Risk Management
7. Long-term Digital Preservation

Proactive eDiscovery

Discovery is the term used for the initial phase of litigation where the parties in a dispute are required to provide each other relevant information and records, along with all other evidence related to the case.

The key to addressing eDiscovery is to be proactive in the management of information and records with control over the handling of potential eDiscovery requests.

eDiscovery is short for electronic discovery, which is defined as the process of discovery in civil litigation that is carried out in electronic formats. It encompasses what most often is referred to as electronically stored information, or ESI

RIM is Important to Proactive eDiscovery

- Good Records Management is Key to Good eDiscovery and Evidence Management
 - Records management is foundation upon which your eDiscovery house is built
 - Demonstrates good faith disposal of records in accordance with established retention schedules
 - Reduces volume of business records subject to discovery - lowering eDiscovery costs - while meeting legal and business requirements, in a consistent and uniform manner
- Allows for early case assessment
- Minimizes litigation and compliance risks
 - Sword and Shield

Goal: Move from a tactical, ad hoc and last minute eDiscovery response to strategic, uniform and proactive approach to records management to meet current and future regulatory and eDiscovery obligations.

RIM are the **“First Responders”** when litigation is anticipated

RIM and IG in are essential to effective, cost efficient eDiscovery

We are strategists with a seat at the table to help our organization's business units maximize the value of information while minimizing the risk.

We are also part of the tactical team who executes on the processes established to maintain good governance.

We are FIRST responders.

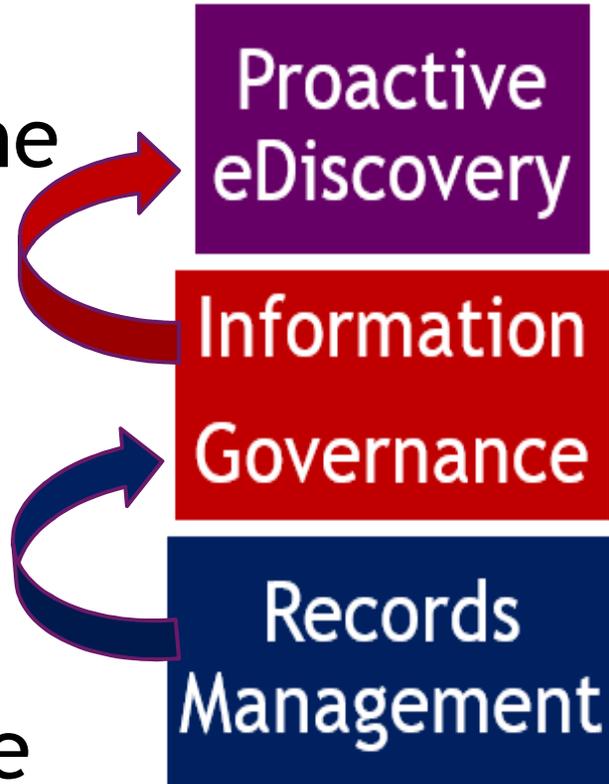
We ensure compliance.

Good RIM Practices Ensure Litigation Readiness

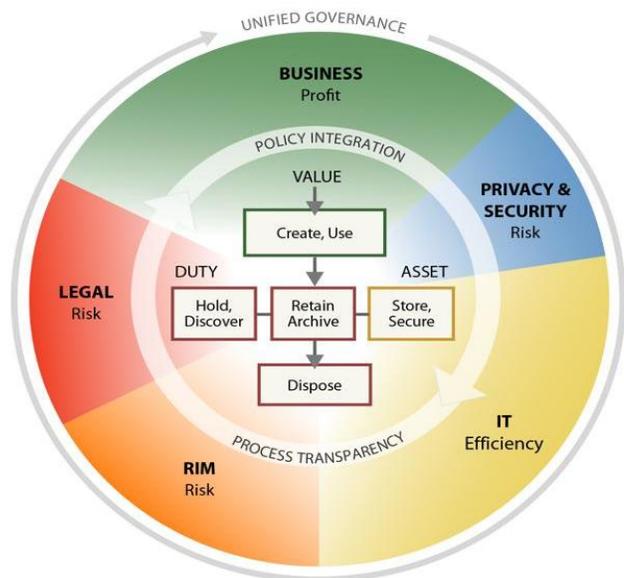
- ▶ Good RIM is being litigation ready
- ▶ There are many processes and controls you can build today
- ▶ Building a plan and these process will aid your company before it experiences discovery
- ▶ Once discovery begins the controls added will help legal event teams
- ▶ Good RIM is the cornerstone of good governance which by definition minimizes the risk associated with information as an asset (discovery)

Records Management is the cornerstone of **Information Governance**

Information Governance is the cornerstone of **Proactive eDiscovery**



Organization-Wide IG is a Merger of RIM & IG



- Integrated perspectives
- Strategic decisions
- RIM is the foundation
 - Defined policy
 - Transparent process
 - Predictable results
- Enhanced & new skills

Benefits of RIM Being Litigation Ready

- ▶ Eliminates obsolete information
- ▶ Ensures information ownership - avoiding abandoned data sets
- ▶ Minimizes duplicates and versions
- ▶ Communicates Litigation Hold requirements
- ▶ Provides a mechanism for preserving information from departing employees
- ▶ Promotes employee awareness

How does RIM Prepare for Litigation

- ▶ Identify gaps in the existing RIM program and overall governance policies
- ▶ Motivate corrective actions
- ▶ Avoid potential fines, penalties and sanctions from formal external audits
- ▶ Provide proof of a defensible disposition
- ▶ Ensure operational efficiency
- ▶ Identify and prevent unhealthy practices

In case you don't think we are a part of eDiscovery, here are some real life advertisements for RIM professionals to management eDiscovery

More Jobs require RIM to manage or participate in eDiscovery

Legal Ops & Technology Mgr/ Records & Information Mgr

Global Communications
Company seeks talented Legal Ops & Technology Manager/Records & Information Manager. Responsibilities include developing, implementing and monitoring compliance with policies and procedures related to company's discovery.

Primary Responsibilities:

- Manage day-to-day litigation support services, including discovery and technology consulting to in-house attorneys, paralegals and outside counsel.
- Interface with various depts to facilitate preservation, collection and retention of electronic and/or paper information as it pertains to litigation

Responsibilities Cont..

- Develop and maintain discovery-related documentation
- Plan, develop and administer RIM policies designed to facilitate the effective and efficient handling of business records and other information
- Work with discovery team and litigators on identifying and implementing solutions for complex case needs
- Evaluate discovery vendors and cost-saving opportunities

Skills & Experience:

- Bachelor of Science or equiv.
- Extensive knowledge and exp in eDiscovery
- Project Management skills
- Familiarity with computer hardware, software and networks
- Strong organization skills

Records Mgr - Global Engineering Co

Responsibilities:

- Develop/Manage maintenance and operation of company's records management program
- Assist with development and operations of a Records Management Information System (RMIS)
- Develop file taxonomy and retention structure
- Ensure RM program is in compliance
- Resolve problems with records management and eDiscovery

Requirements:

- College Degree
- 10yrs exp and/or training in Lifecycle Governance program in large data environment
- Knowledge of archival and records management principles
- Certified Records Manager preferred

WANTED:

Records Information Manager - Nationwide Financial Institution

Job Description

Plan, develop, organize and direct all aspects of our Record's Management program, including but not limited to the governance of our Retention Policy & Schedule, efficient handling of records and coordination of all eDiscovery Requests. Works closely with all lines of business addressing any records related items and ensure colleague compliance with our policies.

Key Result Areas

- RIM Program Management
- RIM Policy and Schedule
- Compliance, Regulatory and Risk Management

Job Specs

- Preferred BS w/emphasis in records management
- 8yrs RIM exp in a large corporate environment, preferably banking

**RIM ENSURES
COMPLIANCE -
WE ARE FIRST
RESPONDERS**

We're going to talk about preservation, let's talk about a real life example of how governance relates to preservation and production

ESI Governance

There's pink cake in the breakroom

As records managers and governance professionals, I know you are thinking how many iterations of that email are generated when someone replies to all “Oh boy, can’t wait” or forwards it “I hate pink cake” and all of these duplicate and near-duplicate documents are proliferated in your organization. When I was at Shell, I remember having to pay contractors hundreds of thousands of dollars to sift through cartons of documents that contained these types of emails as they looked for relevant documents.

ESI Governance

We keep too much ESI. AIIIM and Iron Mountain did a study showing only 42% of ESI was useful to the organization.

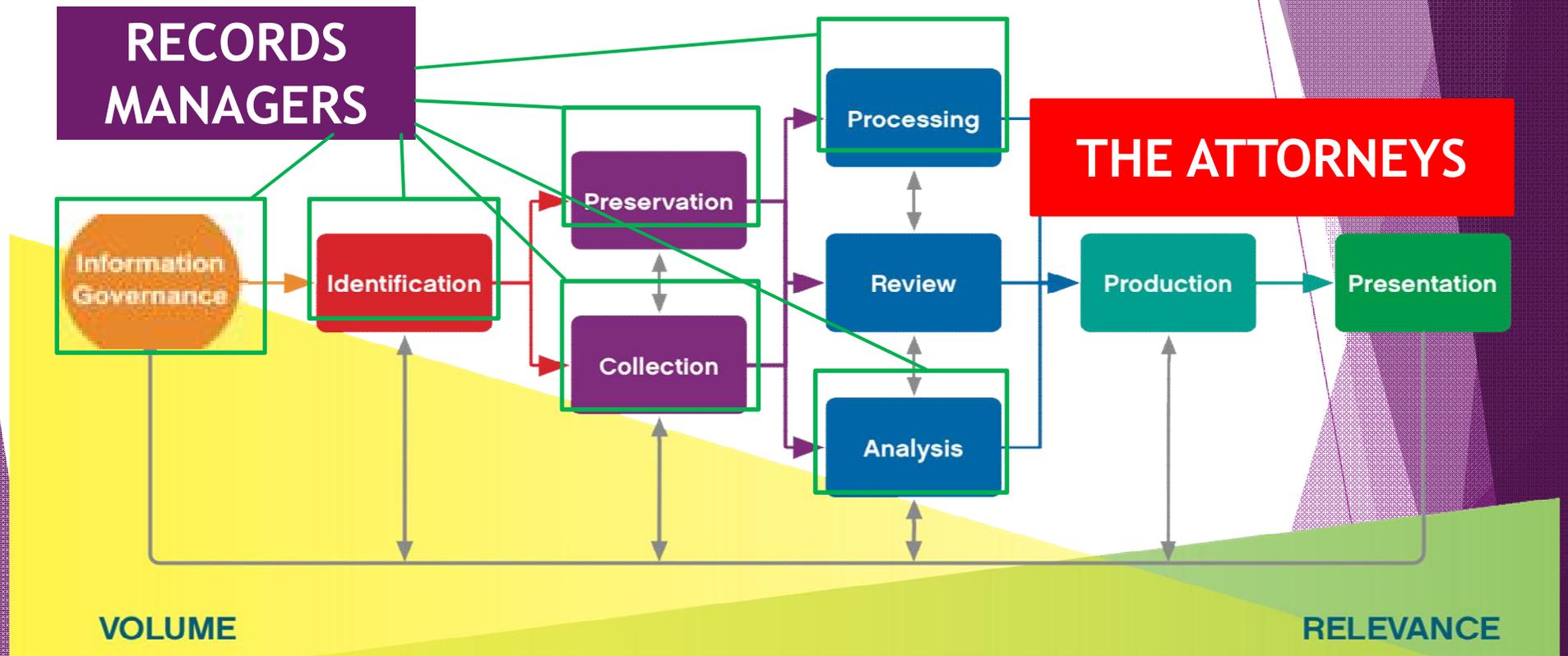
Implementation and enforcement of good governance can save resources and money in litigation. First and second pass review costs of 1 GB of data can run over \$200,000!

Good information governance also spares companies and their employees from embarrassment in the document collection, document review and/or deposition process.

Information governance policies are good business, cut litigation costs, protect employees, and allow companies the ability to purge useless information without fear of litigation sanctions.

IG policies protect litigants from spoliation and other sanctions.

So we're all on the same page...



www.edrm.net

So we're all on the same page...

LEGAL to RIM Language Translation (VOCABULARY LIST)

“CUSTODIAN” = “USER” = “EMPLOYEE”

“LEGAL HOLD” = “NOTIFY USERS & PRESERVE DATA”

“DOCUMENTS” OR “ESI” AND “RECORDS” = “DATA”

“DATA COLLECTIONS” = “SECURING THE DATA”

Preservation

This is what occurs in the organization
behind the firewall

- ▶ Identify and gather documents
- ▶ Notify people of the legal hold and their responsibilities
- ▶ Suspend automatic deletion
- ▶ Ensure day to day activities do not conflict with legal hold responsibilities

PRESERVATION

The Broader Definition

Preservation is a REQUIRED LEGAL DUTY for parties involved in litigation, regulatory examinations and other legal matters. Broadly defined, “Preservation” includes those activities that occur early-on in a matter’s life by a party involved in a legal situation - that is, with *the employees, the Legal department, IT, and the RIM department, all playing key roles.*

PRESERVATION

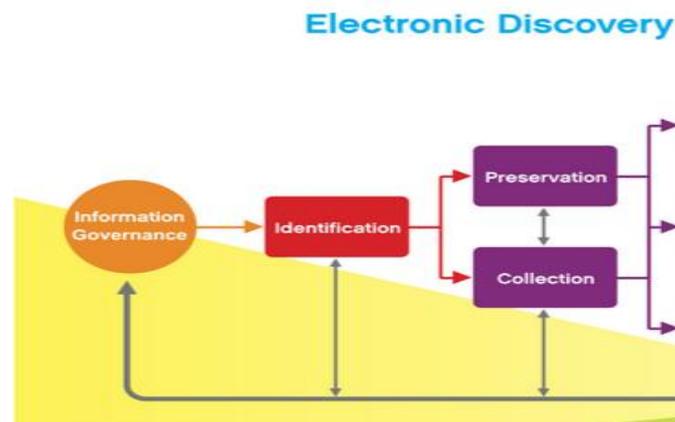
The Broader Definition (cont.)

*Preservation Notice (Legal Hold Memo)
Recipients and possible Custodians are
identified.*

The Legal and RIM Departments are involved in the management of the legal hold process, including notification of employees, ensuring certain RIM tasks are suspended and the gathering of relevant data is performed.

Broadly Defined, Preservation Means:

- ▶ Legal Hold Notification and Acknowledgment Management
- ▶ Data Identification and Tracking (Data Mapping)
- ▶ RIM Task Management - Task Suspension where necessary
- ▶ Defensible and Secure Data Collection



- ▶ Preservation (broadly defined) = Left Side of EDRM

PRESERVATION = Legal Obligations to:

- ▶ TELL EMPLOYEES NOT TO DELETE/ALTER DOCUMENTS, EMAIL AND OTHER DATA
- ▶ IDENTIFY CUSTODIANS, IMPLICATED SYSTEMS AND DATA TYPES
- ▶ ENSURE AUTOMATED IT TASKS ARE MANAGED APPROPRIATELY FOR PRESERVATION NEEDS
- ▶ GATHER (COLLECT) ELECTRONIC DOCUMENTS, EMAIL AND OTHER DATA

Ensure that RIM is Included in Each of these Tasks

- ✓ **Create a Legal Event Team**
 - ▶ As essential as disaster recovery team
 - ▶ Inside Resources: Legal, IT, HR, Executive
 - ▶ Outside Resources: Counsel, Vendor, Consultant
- ✓ **Educate The Legal Event Team**
 - ▶ Discuss Triggering Events
 - ▶ Attend CLE Presentations!
- ✓ **Create / Select a Solution**
 - ▶ Manual Processes or Software Solution?
 - ▶ How will process work? In Writing?
- ✓ **Assign Responsibilities**
 - ▶ Who will identify custodians?
 - ▶ Who will issue/track holds?
 - ▶ Automatic Processes Suspension
- ✓ **Know Potential ESI Resources**
 - ▶ Identify ESI systems
 - ▶ Identify ESI locations
 - ▶ Know what processes and procedures need to be altered



Legal Event Teams

RIM should be a part of the organization's legal event teams or litigation readiness teams along with legal, risk, privacy, security, audit and compliance.

RIM as “first responders,” are the professionals who have the most knowledge about items relating to the organization's duty to preserve such as retention, deletion, data maps, custodians.

Legal Event Teams: Roles & Responsibilities



RIM Considerations on Legal Event Teams Include

- ▶ Ensuring there is a data preservation plan is developed and audited for compliance
- ▶ Developing and Maintaining Preservation / Destruction Plans to prevent spoliation or excessive data reviews
- ▶ Communicating the RIM plan to the organization and monitoring RIM tasks to ensure coordination of effort and consistency of process
 - ▶ Preservation plan
 - ▶ How will you collect and review ESI
 - ▶ Define production protocol
- ▶ Ensuring a uniform approach for records management and ensuring someone is responsible for RIM
- ▶ Leverage RIM information to aid in litigation readiness: where custodian data resides (data maps)

Working with the Entire Team

How to Start Off Right

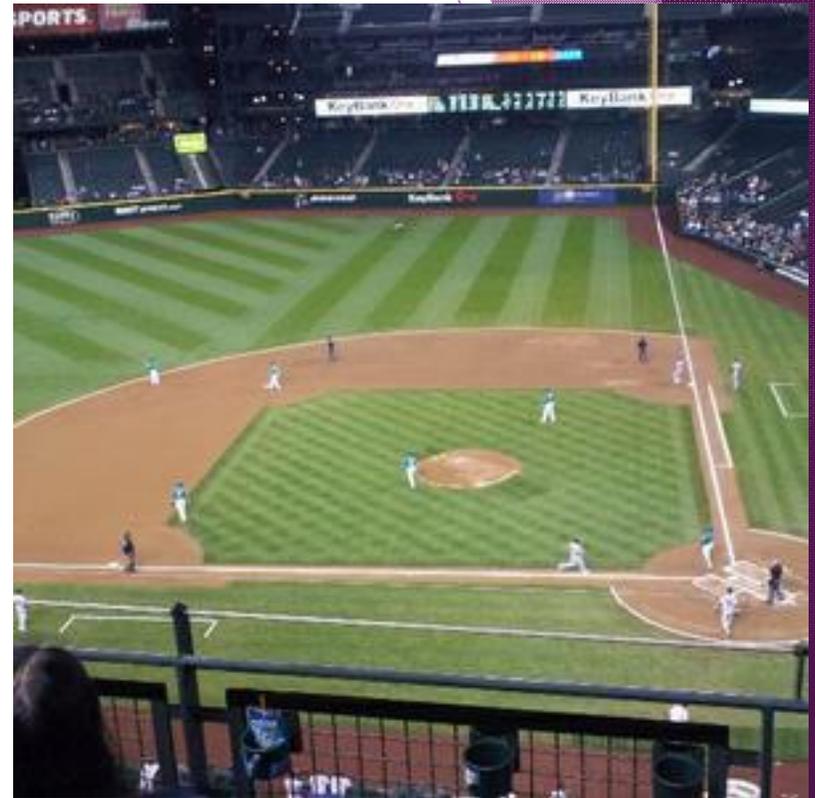
- ▶ Establish & Follow a Written Plan
 - ▶ Create a Discovery Protocol
 - ▶ Answer the Who, What, Where, Why and How
- ▶ Involve All Key Players in Planning - *Communities of Practice*
 - ▶ Client, Attorneys, Litigation Support, RIM, IT, Experts & Vendor



Working with the Entire Team (cont.)

How to Start Off Right

- ▶ Involve Custodians
 - ▶ Legal Hold
 - ▶ Custodian Questionnaires
 - ▶ ESI Identification Process
- ▶ Attorney Guidance & Supervision
 - ▶ Protocol Development
 - ▶ Collection Strategy
 - ▶ Custodian Interviews
 - ▶ Reasonable Scheduling/Don't Rush Process



First Response

RIM Must Be Part of This

- ▶ Identify Custodians and Groups
 - ▶ Memo Drafting and Finalization
 - ▶ Notification & Acknowledgement
- ▶ Identify Data Sources and Systems
 - ▶ Implicated Systems Analysis
 - ▶ Retention Related Issues



First Response (cont.)

RIM Must Be Part of This

- ▶ Manage Automated RIM Activities
 - ▶ Ensure Auto-housekeeping mechanisms are suspended
 - ▶ Data Retention/Deletion Issues
- ▶ Data Gathering (Preservation)
 - ▶ Data Collection Protocol
 - ▶ Chain-of-custody
 - ▶ Data Gathering Tasks/Mechanics
 - ▶ Defensible Reporting and Audit Trails



LEGAL HOLD Defined

The process by which an organization notifies potential custodians to preserve information, in electric, paper or other form, in anticipation of litigation.

Legal Hold Memo: Related RIM Process

- ▶ NOTIFY EMPLOYEES ABOUT THEIR OBLIGATION TO RETAIN DOCUMENTS RELATED TO THE MATTER - GET THEM TO ACKNOWLEDGE!
- ▶ TRACK ALL LEGAL HOLDS - INCLUDING CUSTODIAN LISTS, NOTICES SENT, ACKNOWLEDGEMENTS RECEIVED, AND EXCEPTIONS
- ▶ COORDINATE WITH IT TO SUSPEND CERTAIN ACTIVITIES AS REQUIRED (AND IS REASONABLE)
 - ▶ Utilize IT Ticketing System
 - ▶ Follow a Written Protocol

Balancing Custodian Involvement & Attorney Supervision *What this means to RIM...*

Roffe v. Eagle Rock Energy GP, et al., C.A. No. 5258-VCL (Del. Ch. Apr. 8, 2010)

“[Y]ou do not rely on a defendant to search their own email system...There needs to be a lawyer who goes and makes sure the collection is done properly...we don't rely on people who are defendants to decide what documents are responsive...”.

WHAT THIS MEANS TO RIM: SINCE THE LAWYERS MUST SUPERVISE THE LEGAL DESIGNATIONS OF DOCS/DATA, USERS SHOULD NOT BE ALLOWED TO SEARCH USING NATIVE TOOLS ON LIVE DATA AND THEN MAKE A COPY TO PRESERVE.

Balancing Custodian Involvement & Attorney Supervision *What this means to RIM (cont.)*

Wachtel v. Health Net, Inc., 2006 W L 3538935 (D.N.J., Dec. 6, 2006)

“[E]mployee-conducted searches managed to exclude inculpatory documents that were highly germane to Plaintiffs’ requests.”

WHAT THIS MEANS TO RIM: IN SENSITIVE CASES (THE INVESTIGATION INVOLVES A SPECIFIC USER) ABOVE IS EVEN MORE CRUCIAL - ALSO, FULL DRIVE IMAGING MAY BE MOST APPROPROATE COLLECTION METHOD.

Balancing Custodian Involvement & Attorney Supervision *What this means to RIM (cont.)*

Cache La Poudre Feeds, LLC v. Land O'Lakes, Inc.,
244 F.R.D. 614 (D.Colo. 2007)

Court faulted the defendant for directing employees to produce relevant information and relying on their discretion to determine what ESI was relevant

WHAT THIS MEANS TO RIM : ALLOWING USERS TO SELF-DESIGNATE IS IMPORTANT BUT CANNOT BE SOLE METHOD FOR IDENTIFYING AND GATHERING DOCUMENTS.

Balancing Custodian Involvement & Attorney Supervision *What this means to RIM (cont.)*

*In re A & M Florida Properties II LLC, 2010
WI.1418861 (Bankr. S.D.N.Y. Apr. 7, 2010)*

Court found it was not enough for counsel to request documents from a client; counsel must affirmatively act to communicate with the client to identify all sources of information.

WHAT THIS MEANS TO RIM : LAWYERS MUST UNDERSTAND (AT SOME LEVEL) WHAT DATA SOURCES ARE AVAILABLE TO USERS AND THOSE ARE USED AND ADMINISTERED (RE: POSSIBLE PRESERVATION ISSUES).

**IDENTIFYING AND GATHERING
DATA MUST BE DONE RIGHT
TO ENSURE COMPLIANCE AND
DEFENSIBILITY**

Balancing Custodian Involvement & Attorney Supervision

GUIDING PRINCIPLE

“...the single most effective cost reduction method is the focused collection of records most likely to contain relevant information... Ideally, knowledgeable client personnel are available to identify and segregate relevant information with their attorney’s assistance and instruction. This type of targeted collection is the most effective method for containing e-discovery costs because it limits the volume of ESI that is processed.” (Emphasis Added)

Judges’ Guide to Cost-Effective E-Discovery
Electronic Discovery Institute

What is a hold policy?

Sample definition recommended to a client:

- ▶ “Suspends routine destruction of records and other documents upon a finding that such suspension is necessary under applicable law due to actual or reasonably anticipated litigation or governmental investigation (or audit, for any documents not otherwise appropriately retained under a Tax Audit Record Series).
- ▶ To be reasonably anticipated, particular litigation or investigative proceedings related to specific facts and circumstances must be anticipated, and not the mere fact that litigation regarding a particular topic is a general possibility. The Legal Department shall wholly or partially release a Legal Hold and issue instructions to return to routine retention those released Records and other documents immediately after the matter has been wholly or partially resolved.”

Consequences of Non-Compliance (Spoliation/Adverse Inference)

State Natl. Ins. Co v. County of Camden

CIV. No. 08-5128 (2012)

- ▶ Imposed attorneys' fees and costs due to failure to preserve

YCB Intl., Inc. v. UCF Trading Co.

No. 1:09-cv-07221 (2012)

- ▶ Imposed a fine for failure to issue litigation hold with resulting spoliation.

Apple Inc. v. Samsung Electronics Co.

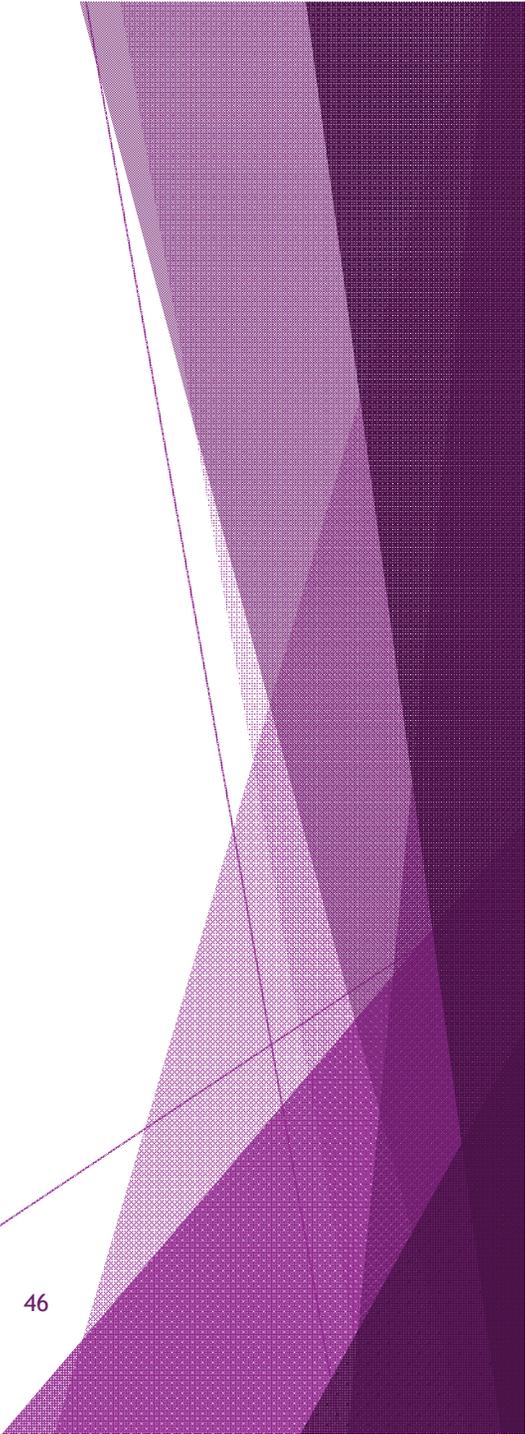
Case No.: C 11-1846 (2012)

- ▶ Court imposed an Adverse Interest sanction for failure to preserve even after Litigation Hold in place.

Day v. LSI Corp.

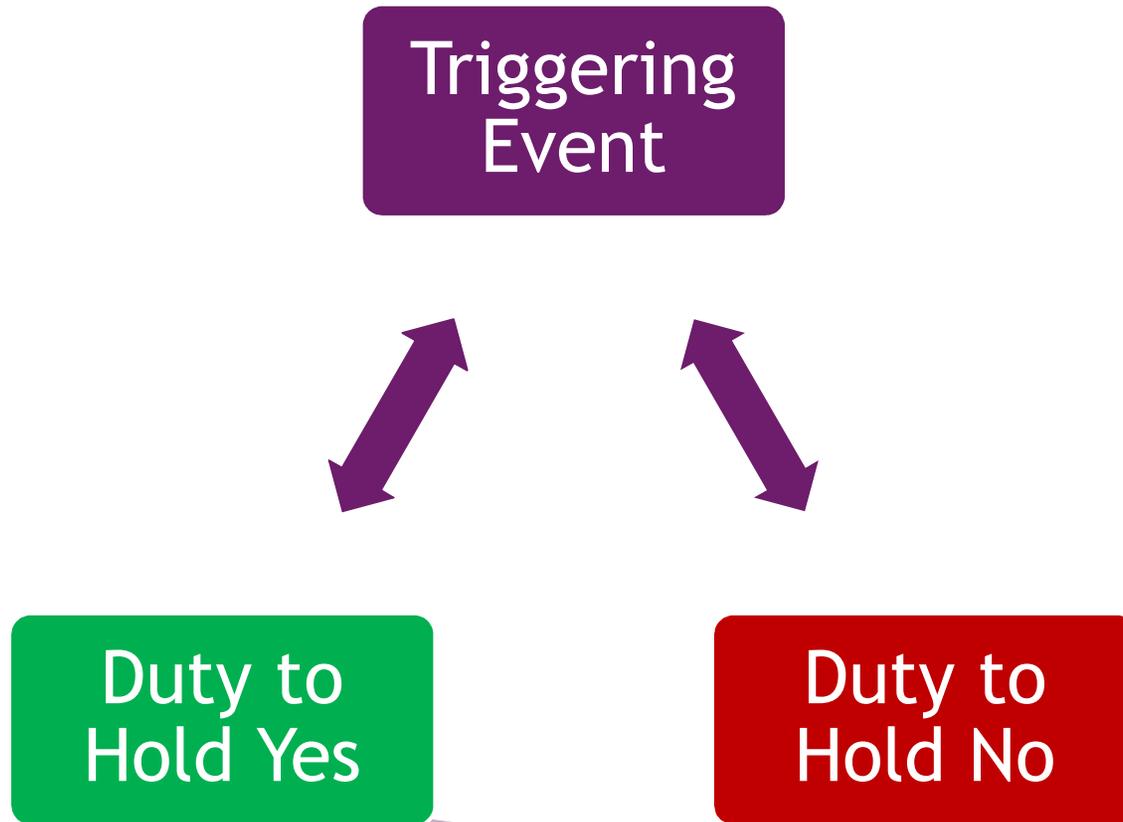
CIV 11-186-TUC-CKJ

- ▶ Court granted in part plaintiff's motion for entry of a default judgment due to spoliation.



Let's Look at Implementing a Legal Hold

It usually begins with a triggering event



Identify Trigger Events - What Triggers a Hold?

- ▶ *It Depends...*
 - ▶ If in doubt - issue a legal hold!
- ▶ *Common Law*
 - ▶ At the outset of litigation.
 - ▶ When litigation is “reasonably anticipated”.
 - ▶ *Kronisch v. United States*, 150 F.3d 112, 126 (2d Cir. 1998)
 - ▶ Sedona is suggesting: “credibly probable”
 - ▶ *There is no Federal Rule for litigation holds*
- ▶ *Triggering Event Examples*
 - ▶ Product Complaints
 - ▶ Product Malfunctions
 - ▶ Harassment Complaints
 - ▶ Other H.R. Issues



- IP Infringement
- Accidents
- Claim Letters
- Regulatory Investigations

Filing Claims with Admin Agency

Zubulake IV (SDNY 2003) 220 F.R.D. 212.

- ▶ “In this case, the duty to preserve evidence arose, at the latest, on August 16, 2001, when Zubulake filed her EEOC charge...But the duty to preserve may have arisen even before the EEOC complaint was filed.”

Water Cooler Discussions

Zubulake IV -

- ▶ “Merely because one or two employees contemplate the possibility that a fellow employee might sue does not generally impose a firm-wide duty to preserve. But in this case, it appears that almost everyone associated with Zubulake recognized the possibility that she might sue.”

Retainer of Counsel & Experts

- ▶ **Silvestri v. GM (4th Cir. 2001) 271 F.3d 583 -**
 - Airbag failed to deploy
 - Plaintiff failed to give GM notice that vehicle at issue was to be destroyed
 - While Silvestri was in hospital, his parents retained an attorney
 - Attorney retained two accident experts “in anticipation of filing a lawsuit”

Steps to Successful Legal Holds

- ✓ **Step 1: Identify Potential Custodians**
 - ▶ Cast a wide net, but not too wide
 - ▶ Interview key personnel to identify additional
 - ▶ Do not just blanket entire organization
 - ▶ Don't forget FRCP Rule 34(a)(1) "*possession, control, custody, or possession*"
 - ▶ **Haskins v. First American Title Insurance Co.** (D.N.J. 2012) (Court held that defendant's duty to preserve evidence extends to its present and former independent contractors)
- ✓ **Step 2: Compose the Legal Hold**
 - ▶ Create a clear, written legal hold document
 - ▶ Must it be in writing? *More about that in a minute...*
- ✓ **Step 3: Distribute the Legal Hold**
 - ▶ Reliable
 - ▶ Verifiable (acknowledgements are preferred)
 - ▶ Defensible (Audit Trail)



Steps to Successful Legal Holds

- ✓ **Step 4: Maintain the Legal Hold**
 - ▶ Send custodians routine reminders
 - ▶ Properly track & release custodians
- ✓ **Step 5: The Audit Trail**
 - ▶ Maintain detailed & complete records of each notice & process
 - ▶ Who received, when they received it, when they acknowledged it, when they were reminded, when they were released, etc.



Step 1: Who is the Subject of the Legal Hold (Distribution)



Identifying Custodians

- ✓ *Start with the complaint*
- ✓ *Ask Managers & Primary Actors*
- ✓ *Don't forget third parties!*
- ✓ *Ask as part of Custodian Questionnaire*
- ✓ *Don't be afraid! Get it done now.*
- ✓ *Don't be a perfectionist! Change is OK...*

Don't forget about Exiting Employees!

- ✓ Both at initial Legal Hold & throughout
- ✓ H.R. / I.T. Responsibilities
 - H.R. should tell I.T. when employee exits
 - I.T. should include legal hold considerations in exit plan
- ✓ Take steps to preserve ESI upon exit

Step 2: Composing the Legal Hold (To Be or Not to Be ... in writing)



“Generally not deleting documents, and orally requesting certain employees to preserve relevant documents concurrently with filing a lawsuit, is completely inadequate... It is very risky—to such an extent that it borders on recklessness.”

Scentsy Inc. v. B.R. Chase LLC
D. Idaho No. 1:11-cv-00249-BLW October 2, 2012

“The failure to issue a **written** litigation hold constitutes gross negligence because that failure is likely to result in the destruction of relevant information.”

The often criticized...
Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Secs., LLC,
685 F.Supp.2d 456, 464-65 (S.D.N.Y.2010)

Step 2: Composing the Legal Hold (To Be or Not to Be ... in writing)



“We *reject the notion* that a failure to institute a “litigation hold” constitutes gross negligence per se. *Contra Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Secs., LLC*, 685 F.Supp.2d 456, 464-65 (S.D.N.Y.2010). Rather, we agree that “the better approach is to consider [the failure to adopt good preservation practices] as one factor” in the determination of whether discovery sanctions should issue.”

Chin v. Port Authority of New York & New Jersey
685 F. 3d 135 - Court of Appeals, 2nd Circuit, 2012

Step 2: Composing the Legal Hold: Clear & Concise Notice



DO NOT include:

- ✓ Legalese like “heretofore” and “herewith”
- ✓ Your legal analysis of the claims
- ✓ Management’s comments on the claims

DO answer the following:

- ✓ Why was the Legal Hold issued?
- ✓ Who is subject to the Legal Hold?
- ✓ What should be preserved?
- ✓ How should it be preserved?
- ✓ Where should it be preserved?
- ✓ When is the Legal Hold effective?
- ✓ Provide a contact person



Step 2: Composing the Legal Hold: Communicating “What”

- ▶ *When telling custodians what should be preserved... **resist this classic:***
- ▶ **“Document”** is used in the broadest sense possible and includes, without limitation, non-identical copies (whether different from the original because of underlining, editing marks, notes made on or attached to such copy, or otherwise), and drafts, whether printed or recorded (through a sound, video or other electronic, magnetic or digital recording system) or reproduced by hand, including but not limited to writings, recordings, photographs, letters, correspondence, purchase orders, invoices, facsimiles, telegrams, telexes, memoranda, records, summaries, minutes, records or notes of personal conversations, interviews, meetings and/or conferences, note pads, notebooks, postcards, “Post-It” notes, stenographic or other notes, opinions or reports of consultants, opinions or reports of experts, projections, financial or statistical statements or compilations, checks (front and back), contracts, agreements, appraisals, analyses, confirmations, publications, articles, books, pamphlets, circulars, microfilms, microfiche, reports, studies, logs, surveys, diaries, calendars, appointment books, maps, charts, graphs, bulletins, tape recordings, videotapes, disks, diskettes, compact discs (CDs), data tapes or readable computer-produced interpretations or transcriptions thereof, electronically-transmitted messages (email), voicemail messages, inter-office communications, advertising, packaging and promotional materials, and any other writings, papers and tangible things of whatever description whatsoever.



Step 2: Composing the Legal Hold: Communicating How

Do ...

Read & Acknowledge Notice

Suspend any deletion strategies

Identify data locations

Don't ...

Delete Files

Copy Files

Move Files

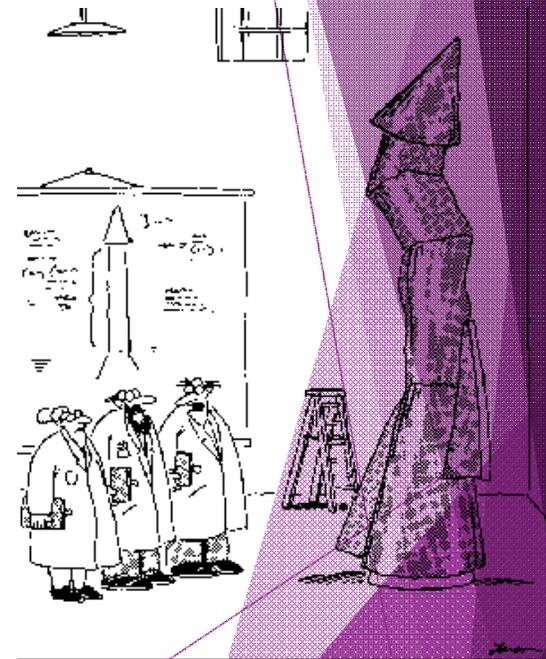
*Unless specifically advised by appropriate personnel. Doing so may alter or destroy crucial metadata.

Steps 3 - 5: Legal Hold Management How to issue & maintain legal holds

- ✓ **Step 3: Distribute the Legal Hold**
 - ▶ Reliable
 - ▶ Verifiable (acknowledgements are preferred)
 - ▶ Defensible (Audit Trail)
- ✓ **Step 4: Maintain the Legal Hold**
 - ▶ Send custodians routine reminders
 - ▶ Properly track & release custodians
- ✓ **Step 5: The Audit Trail**
 - ▶ Maintain detailed & complete records of each notice & process
 - ▶ Who received, when they received it, when they acknowledged it, when they were reminded, when they were released, etc...

Simple as...

1. *Send It (+)*
2. *Remind 'Em*
3. *Track It*



"It's time we face reality, my friends... We're not exactly rocket scientists."

When Can Legal Holds Be Released?

Continuing Legal Hold Obligations of a Notice Recipient



- ✓ Event is concluded
 - Settlement or final disposition
- ✓ Non-Responsive Custodians
- ✓ By Agreement

Thus, Importance of Routine Reminders

- Routinely remind Custodians that the Legal Hold remains in force until notified otherwise.
- Remind Custodians that newly created or received documents are also covered.
- Prompt Custodians that, if in doubt, ask!



How Does this Square with The Principles?

Accountability

Critical: Executive Sponsorship, Legal Event Team & Assigned Roles

Integrity

Consideration: Authenticity & Reliability of program

Protection

Consideration: Data Protection (private, protected, etc.)

Compliance

The Law: Legal & regulatory compliance



ARMA INTERNATIONAL'S



How Does this Square with The Principles?



Availability

Retention & Reporting: Timely, efficient & accurate

Retention

The Action: appropriate retention for legal & regulatory requirements

Disposition

The Aftermath: Releasing Custodians, Exiting Employees

Transparency

Process, Clarity & Training



Applying this to the Real World



Best Defense - A Good Offense

Prepare for Eventuality of a Hold

- ✓ **Create a Legal Event Team**
 - ▶ As essential as disaster recovery team
 - ▶ Inside Resources: Legal, IT, HR, Executive
 - ▶ Outside Resources: Counsel, Vendor, Consultant
- ✓ **Educate The Legal Event Team**
 - ▶ Discuss Triggering Events
 - ▶ Attend CLE Presentations!
- ✓ **Create / Select a Solution**
 - ▶ Manual Processes or Software Solution?
 - ▶ How will process work? In Writing?



Best Defense - A Good Offense

Prepare for Eventuality of a Hold

- ✓ **Assign Responsibilities**
 - ▶ Who will identify custodians?
 - ▶ Who will issue/track holds?
 - ▶ Automatic Processes Suspension
- ✓ **Know Potential ESI Resources**
 - ▶ Identify ESI systems
 - ▶ Identify ESI locations
 - ▶ Know what processes and procedures need to be altered



Identifying Data Locations: Considerations Old and New



Custodian Questionnaires: The next step in the legal hold process

Question / Comment

Please identify all locations where you keep electronic documents.

- Email (current email box) x
- Email (archived email stored on computer) x
- Office desktop computer (hard drive, My C x
- Office laptop computer (hard drive, My Coi x
- Home computer (hard drive, My Computer x
- External hard drives, jump drives, thumb c x
- Smartphone/Tablet (iPhone, Android, Black x
- CDs x

+ Add Selection

Add

- Simple text box
- Multiline text box
- Dropdown menu
- Multi-choice select
- Single-choice select

Cancel Save Draft Send Questionnaire

Question / Comment

Please identify all locations where you keep electronic documents.

- Email (current email box) x
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- Office desktop computer (hard drive, My C x
- Office laptop computer (hard drive, My Coi x
- Home computer (hard drive, My Computer x
- External hard drives, jump drives, thumb c x
- Smartphone/Tablet (iPhone, Android, Black x
- CDs x

+ Add Selection

Question / Comment

Do you have any documents, laboratory notebooks, development records, invention disclosures, notes or other similar doc

Add

- Simple text box
- Multiline text box
- Dropdown menu
- Multi-choice select
- Single-choice select

Cancel Save Draft Send Questionnaire

Final Thoughts: What RIM Can Do

- ▶ Whenever you're talking to ANYONE (including lawyers), you should do your best to put your agenda into their value structure. Why is what you're talking about important to THEM, not just why it's important to you. •
- ▶ Lawyers are constantly in a battle between trying to be efficient in a business sense with their professional ethical requirements which often slow them down or make things more complicated than it may seem they need to be. Appreciating that there just are some things lawyers can't do or have to do a certain way is important. •
- ▶ What RIM does is create an environment in which litigation response should be simpler, easier, less costly and time consuming. The lawyers are your customers - treat them that way

Questions?

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