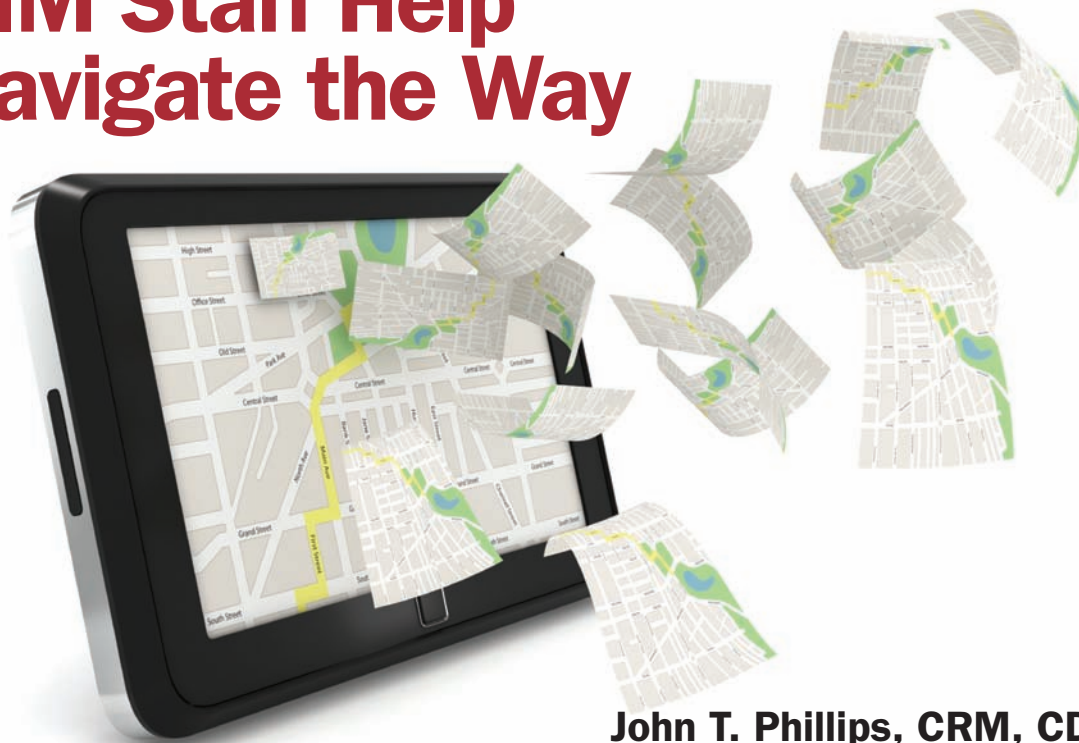


A Roadmap to Litigation Readiness: RIM Staff Help Navigate the Way



John T. Phillips, CRM, CDIA, FAI

Despite the complexities of challenges inherent in any dispute that is legally contentious, the fact that records will need to be produced from varied and potentially untrustworthy sources makes the litigation experience all the more dangerous. Records and information management professionals play an important role in making it less so.

Litigation is a fact of life for many organizations in today's complex business world. Increasing competitiveness in changing economies, fast moving corporate acquisitions, global marketing strategies, challenging product regulatory requirements, and rapidly evolving laws can create contentious legal hurdles for business, governments, and individuals.

Plotting the Course: Focus on Preparation

In this environment, there has been much discussion about the need

to apply records holds rigorously, the importance of planning for document discovery, and the recent implications of revisions to the *Federal Rules of Civil Procedure* (FRCP). However, while there is widespread respect for the Electronic Discovery Reference Model (EDRM) process rationales and the growing role of data forensics in evaluating evidence quality and relevance, there are no universally accepted professional expectations regarding litigation readiness best practices or goals.

Guidance on managing information varies drastically among profes-

sional organizations, and each litigation challenge differs due to varying parties, claims, and legal environments. So for many reasons, attorneys, litigants, corporate records managers, and legal industry consultants have varying approaches to best practices regarding litigation readiness and associated records and information management (RIM) issues.

In all legal system engagements, the need for document preservation and production is extremely important, while the respective information management and planning

responsibilities of the client and its legal counsel can get confusing. In many cases, clients may not have well-planned and comprehensive RIM programs with the usually expected policies, procedures, retention schedule, records inventory, file plan, or documented legal holds processes.

Each law firm and its attorneys will also have different approaches to preparing for litigation. Concepts, such as information governance (IG), records identification, data preservation, and e-discovery procedures, may be new to some attorneys or their clients.

For this reason, it is very advantageous for legal counsel and their clients to communicate clearly about the need for records identification, preservation, and production during early case assessment, ongoing litigation, and post-litigation activities. These needs become extremely critical in serial litigation or when adverse court rulings indicate the possibility of appeals or continuing legal system engagement.

For these reasons, RIM professionals working for clients of law firms must ensure that litigation readiness activities are addressed thoroughly and professionally when facing litigation. And, there should be a clear understanding of the appropriate roles of attorneys, outsourced legal services, and the client, including the client's RIM staff or their counterparts. In addition, internal law firm RIM program personnel already have considerable expertise and insights that may be valuable during litigation readiness activities.

It is becoming apparent that a number of attitudinal and organizational changes may need to take place in both law firms and their clients before excellence in litigation readiness will be commonplace.

Getting on the Road: Determine Best Practices

Records for use as evidence are

critical to any legal system's dispute resolution processes. Strict adherence to records retention rules and consistent conformance with organizational information management policies allow organizations to discard records that are costly to maintain without the risk of discarding valuable evidence needed for resolving legal disputes, but this has always been challenging for organizations.

For example, the costs for not following the organization's records retention schedule is well-illustrated by the demise of the former well-known accounting firm Arthur Andersen, as noted in the blog post "Document Retention and Destruction Post-Arthur Andersen: What Can You Destroy?" by Perkins Coie. In this case, Andersen was convicted of obstructing justice after shredding documents related to audit client Enron after it knew Enron had been asked for information by the Securities and Exchange Commission.

And, the risks of failing to comply with a court's requests to rigorously locate and produce information emphasized by Suzanne Craig in her *Wall Street Journal Online* article "How Morgan Stanley Botched a Big Case by Fumbling Emails" are exceedingly evident.

In that case, according to the article, an executive for the financial services firm had signed a certification that the company had turned over all relevant e-mails – despite the fact that some 1,600 backup tapes had not been searched. Saying that Morgan Stanley had deliberately violated her orders to turn over documents in this and other instances, the judge told the jury to assume Morgan Stanley had helped defraud the plaintiff in the case. Even though the \$1.57 billion award to the plaintiff was later overturned, Morgan Stanley suffered significant reputational and financial damage.

So, although the importance of

placing well-executed information preservation holds on records is well known to RIM professional personnel, the actual practice of placing legal holds in a legally responsible manner requires significant professional insights into the best practices for doing so, according to the book *7 Steps for Legal Holds of ESI and Other Documents* by John J. Isaza, Esq., and John Jablonski, Esq.

In many cases, as shown in the January 2012 article “Third Circuit Holds that Failing to Produce Original Documents in Discovery Can Be Considered Spoliation” by Blank Rome LLP, litigation success can be the result of proper production of records as evidence. Ensuring that accurate records are produced as a part of a “normal course of business” from repeatable business processes with good operational integrity encourages their acceptance by courts in legal proceedings.

A number of professional associations provide litigation readiness-related guidance (see sidebar). Unfortunately, this guidance varies tremendously, as it is often very focused in perspective toward member interests. The result is that organizations needing to prepare for litigation have a variety of resources to consult, but no “one-stop-shop” where all information regarding all litigation readiness best practices and issues can be gained.

This overflowing cornucopia of educational information services and products can be difficult to navigate for attorneys and RIM professionals. It places extraordinary challenges on attorneys and their clients in attempting to ensure they are prepared for document discovery during litigation.

Going the Distance: Implement Legal Holds

Law firms’ responsibility to clients during litigation when considering the clients’ need to establish

their own retention schedules, filing systems, and overall IG activities is not clear from any current ethical guidelines for lawyers.

John J. Isaza, in “Legal Holds & Spoliation: Identifying a Checklist of Considerations that Trigger the Duty to Preserve,” says, “The primary in-

teraction of attorneys and their clients often begins when the possibility of litigation first arises. Notice of pending, potential or threatened litigation or agency investigations can take any of the following forms: 1) via a preservation letter or other written notice from opposing counsel;

Litigation Readiness Guidance

ARMA International (www.arma.org) is the premier organization for RIM professionals uniquely addressing RIM, records retention, and information governance (IG) professional issues. For instance, of special interest during litigation is the importance of records reliability and authenticity. The Generally Accepted Recordkeeping Principles® support RIM best practices during litigation by calling attention to the importance of records’ accountability, integrity, compliance, retention, and disposition issues. Many corporate records managers involved in responses to litigation rely on ARMA International for professional guidance with respect to RIM program development, retention schedule development, IG, and records preservation.

The American Bar Association (www.americanbar.org) is the largest professional association for attorneys with its 400,000 members. Its mission is to “serve equally our members, our profession and the public by defending liberty and delivering justice as the national representative of the legal profession.” It focuses on the accreditation of law schools, continuing legal education, and information about the law for lawyers and judges.

The Association of Certified E-Discovery Specialists (ACEDS)

(www.aceds.org) established by The Intrigo Group in 2010, is a member organization for professionals in the private and public sectors who work in the field of e-discovery. ACEDS is building a community of e-discovery specialists for the exchange of ideas, guidance, training, and best practices. It offers e-discovery certification for those individuals passing the certified e-discovery specialist exam. In addition, the Association of Litigation Support Professionals (alsponline.site-ym.com) provides members with collaboration, education, and certification opportunities to foster global professional litigation support standards.

2) via pre-litigation discussions, demands and agreements; and 3) via facts or circumstances that would otherwise put a reasonable person on notice.”

These initial actions and activities require attorneys to work with their clients to ensure they are ready for litigation and can place a hold on the destruction of any records or information needed during litigation. However, in most cases, law firms leave the actual implementation of litigation readiness activities up to the client.

Law firms often outsource e-discovery activities to other organizations for a variety of reasons. First, the ongoing revisions to federal and state laws demand an attorney’s primary attention. In addition, like individuals in other professions, attorneys have difficulty keeping informed regarding the information management impact on their profession of changing computer technologies. This is a typical reason they often feel ill-equipped to become involved directly in e-discovery activities, such as evaluating disk drives, websites, or computer applications to locate evidence.

Some broad-spectrum consulting firms have multiple consulting business areas, including legal and RM consulting services. This adds significant value for clients because they don’t have to search elsewhere to get integrated guidance on litigation readiness. However, clients still must assume the responsibility for document identification and production within their own organizations. Ensuring that the RIM program’s IG policies and retention schedules are followed rigorously is often critical to success during litigation.

Avoiding Roadblocks: Get Ready for Litigation

Once the appearance of litigation or actual litigation begins, a number of actions must be taken to preserve

and prepare records for use in litigation-related processes. During early case assessment, attorneys will begin evaluating the triggering event for the litigation, the primary relevant facts, a value estimate of the case, potential for outside counsel consultation, key information custodians, document hold requirements, and the overall strategy of the case.

At approximately this same time, the need for a data assessment will become apparent, and actions to identify and preserve evidence will begin. At this point, the client’s RIM professional services staff must begin to take action.

A data blueprint or data map – an inventory of information types and locations – must be created to establish the focus of records holds and the appropriate custodians to assist in implementing those holds. Of special importance are high-risk data stores, such as those found in e-mail systems, social media sites, and remote mobile computing repositories, where the nature and volume of the information can pose special risks.

This initial effort assists in both compliance with FRCP rules and in potentially identifying early in the litigation information not deemed readily accessible and costly to produce. Actions to be taken by RIM personnel include:

1. Establish the litigation readiness team and responsibilities while gaining executive support.
2. Quantify records managers’ and custodians’ relative responsibilities in data assessment.
3. Establish IT ownership and responsibilities in data assessment support.
4. Conduct an assessment of current policies, retention schedules, and document status.
5. Identify locations, types, and volumes of data and records in all formats.

A sample abbreviated checklist for inventorying and characterizing

data stores can be found on the EDRM website at www.edrm.net/resources/standards/identification.

Arriving at Destination: Leverage RIM Resources

The document custodians in many organizations are fertile ground for building communicative alliances with attorneys and any external e-discovery team. RIM and IG programs are based on policy communication and validation of participation.

When there is an existing RIM program resource available to a client, attorneys are increasingly teaming with those personnel to implement legal holds and e-discovery-related business processes. These individuals internal to the client organization are an excellent foundation for basing a litigation readiness and response program.

The balance between using law firm-retained support and client-side support in litigation readiness will vary between firms and specific clients. However, it is clear that utilization of in-house RIM expertise has many benefits for both law firms and their clients. Considering there are many very qualified RIM personnel within client organizations to assist in the e-discovery process, it behooves both clients and their legal counsel to consider leveraging internal RIM expertise and resources to the maximum extent feasible.

Editor’s note: The full research report on which this article is based, “Implementing Litigation Readiness,” is downloadable free from the ARMA International Educational Foundation website at www.armaedfoundation.org.

*Learn more from ARMA International’s guideline Records Management Responsibility in Litigation Support, which is available at www.arma.org/bookstore. **END***

John T. Phillips, CRM, CDIA, FAI, can be contacted at john@infotechdecisions.com. See his bio on page 47.