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The Digital Haystack: Challenges of Managing New Technologies to Meet Legal Requirements

November 3, 2009
Morning Break-Out

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Agenda: Sources of Challenges

- Part I: Factors that Pose Challenges
 - › Distributed Data
 - › The Current Regulatory Climate
- Part II: Impact on Businesses & Government Agencies
- Part III: Cornerstone Solutions
 - › The RIM Policy
 - › Data Mapping
 - › Legal Holds program discussed later at Keynote


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Challenges: Distributed Data

- They call them "Personal" Computers
- Unstructured data is largely unmanaged
- Records management is applied rigorously, but mostly to inactive paper
- Desire to retain information for reuse and Knowledge Management



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Distributed Data (cont'd.): The Electronic Data Explosion

- Storage capacity for same price doubling every nine months
- Humankind producing over two exabytes of information per year (two trillion megabytes)
- Over 90 % of all corporate communication is electronic; Less than 30 percent is ever printed ...

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Distributed Data (cont'd.): Potential Universe

Documents, Books, E-mail, Word, Reports, Presentations, Backup Tapes, Intranet, Instant Messenger, Web Sites, Mail, Faxes, Cell Phones, Blackberrys, Newspapers, Court Decisions, Palm Pilots, Databases, Pagers, Voice Mail, Blogs, Discussion Boards, Paper, Extranets, Directories, Wikis, Adobe PDFs, CD-ROMs, Conferences, Temporary Internet Files, Magazines, Floppy Disks, Schedulers, Laptops, Networks Storage, Lexis, Westlaw, Web, Seminars, Hard Drives, RAM, System Log Data, ISP's, PST files, Twitter, Second Life, Third Party Service Providers...

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Distributed Data (cont'd.): E-Records Subject to Litigation

➤ Growing Percentage

- 1996: Less than 5% electronic
- 2002 - 2007: 97% electronic

Record Type	Percentage
email	72%
efiles	22%
paper	6%


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**Challenges (cont'd.):
Sources of Accessible Data**

- Email (90 percent)
- Office Docs:
 - ✓ Word processing documents
 - ✓ spreadsheets
 - ✓ Presentations
 - ✓ stored on
 - ✓ hard drives
 - ✓ portable media
 - ✓ network file servers
- Instant messaging
- Blogs & Wikis
- Internet sites and Intranets
- Databases, ERP systems and reports



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Examples of Blog Legal Challenges

- Public statements by company may trigger 8K or other securities reportable events for publicly traded companies
- Exposure to liability by statements made about company or its products
- Consequences of links to other websites – implied endorsement?

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Examples of Blog RIM Challenges

- Records created? Yes.
- Filing system based on content of blog information not the medium
- Records will trigger varying retentions from 1 year to indefinite depending on content

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Hierarchy of Electronic Data

Useful

Active & Visible

Near-Line Data (automated)

Offline Storage (removable media)

Backup (enterprise backups)

Residual (deleted files)

Volume

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Challenges (cont'd.): The Regulatory Climate

- Revised Federal Rules of Civil Procedure for ESI
- States have own versions?
 - ✓ e.g., Texas Rule of Civil Procedure §§196.3 and 196.4 address electronic data.
 - ✓ e.g., California's CCP §§2016, et seq.
 - ✓ Oregon?
 - ✓ Washington?
- What about public records laws?

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Current Legal Environment: Key Statutes ...

- Broad standard of discovery
- All documents "reasonably calculated to lead to the discovery of admissible evidence" per Federal Rule of Civil Procedure, Section 26(b)(1).
- Federal Rules of Evidence, Rule 1001 includes "writings" such as "magnetic impulse, mechanical or electronic recording, or other form of data compilation."

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Part II

The Impact on Businesses & Government Agencies

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Law.Com Reported on 6/23/08

- The best way to cut costs on a document review is to have fewer documents to review.
- This implies that a litigation team has been prudent in properly collecting and processing the digital information in preparation for the review.
- The more data that can be culled and filtered out before the review (i.e. de-duplication, keyword searches, file filtering, etc.), the less data you'll have to load into your review platform.
- Less data requires less time to review.

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Per 2007 KPMG Study

- Document review is one of the most expensive tasks in preparing for litigation.
- For document intensive cases, the cost of **review represents 60% to 80% of the total cost of the litigation.**

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2008 Lawyer Survey

- Survey of leading trial lawyers concludes that the discovery system used in civil cases is "broken"
- Much of the blame going to the increased costs of producing electronically stored information.
- Over 75% of the lawyers surveyed agreed that discovery costs are disproportionately larger due to e-discovery costs.

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Impact Formula

Distributed Data + Huge Volumes + Judicial Scrutiny = Increased Risk

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In other words:

- The cost to review **100 GB of data is \$2.5M to \$5M**
- It is not uncommon for a major corporation to **review 2 to 3 TBs** of data in a busy litigation year, meaning that the corporation spends on the order of **\$100M** for document review alone.
- This is because 97% of information may be contained within ESI

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Other Metrics of Interest

- **Stats of Interest**
 - ✓ 1 GB = ~75,000 pages
 - ✓ 1 TB = ~75M pages
 - ✓ The average user generates 1 GB of email/year
- **Growing Data**
 - ✓ A large corporation (like any Fortune 500) reviews on various matters:
 - ✓ **100 GB per month, or 1.2 terabytes (TB) per year**
 - ✓ **12M to 24M documents per year**

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Part III

Some Proposed Solutions:

- RIM Policies and Procedures
- Data Maps
- Enlist technology
- Legal Holds – Discussed later at KeyNote

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First Line of Defense: The Records Management Policy

- Policy and procedures needed, with RRS
- Result in proactive records management
- Targeted suspension/restart of records destruction when needed
- Ability to retrieve subpoenaed records
- Efficient document review & production
- Management of documents across cases

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The Records Retention Schedule

- List of company records by series & function, with retention dates
- Need to research retention requirements:
 - ✓ HR – 3 yrs to TE+X
 - ✓ Finance – TA + X
 - ✓ Industry specific – 1 yr to Indefinite





The RRS (cont'd.)

Sources for research & templates include:

- Off the shelf regulatory research software (e.g., <http://www.irch.com/products.htm>)
- Websites such as www.arma.org library for templates & books or <http://www.archives.gov/records-mgmt/initiatives/erm-guidance.html>
- Country specific public law cites (e.g., FindLaw.com)






Define a "Record"

- The definition of a record might be "information on any media recorded with the intent to preserve the position, rights or obligations of the Company."
- Conversely, a "non-record" might be defined as "Documents not meeting the definition of a Record."
- Examples of non-records might include duplicates, published reference materials, transmittal memos and routing slips, Memos and postings that do not relate to the functional responsibility of a department or individual (i.e., announcements of meetings, agendas, reservations, confirmations), and drafts.




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Record Management Technology Tip

- Store “records” in a dedicated server that manages lifecycle
- Consider all others non-records or copies with a shorter retention
- Must still rely on end-users to determine records
- Technology is there for enterprise documents
 - ✓ See, Dionne/Carboni case study in April 2009 *IMJ*

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Data Maps

- Organizations must have a knowledge of:
 - ✓ their data storage centers
 - ✓ what lies in these storage centers
 - ✓ retention policies are that guide these storage centers.
- Unlike the typical IT data map
- Must be more granular in order to provide use for legal department in e-discovery.

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10 Things to do for Data Map*

- 1) Assemble team of IT personnel, legal personnel and records management personnel.
- 2) Review the current IT data map.
 - May list data repositories within the company, but not much more.

* Based in part on an article by Etch Tabor, last downloaded 3/27/09 from www.ehow.com/how_2362745_create-ediscovery-data-map.html

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10 Things for Data Map (cont'd.)

- 3) Have legal team share their obligations under the Federal Rules with the IT and records management staff (*see* earlier presentation on 7 Steps for Legal Holds)
- 4) Analyze record retention policies. Make sure these policies are up-to-date.





10 Things for Data Map (cont'd.)

- 5) Designate member of IT to lead the data map project from the IT side.
 - Provides legal and RIM staff with the most up-to-date information regarding where certain data is stored, including back up tapes, e-mail repositories and applications.
- 6) Identify and interview DRC's and other custodians in charge of the various repositories to create inventory.
 - These interviews should shed light on what kind of information is stored within each repository as well as how to access each repository.






10 Things for Data Map (cont'd.)

- 7) Record all of findings from these interviews and create master spreadsheet or database that combines inventory with the pre-existing information contained within IT's current data map.
- 8) Prioritize server data from primary to tertiary
- 9) Test the data map either on a real piece of litigation or a test litigation.
 - This will allow you to judge whether the data map you have created is applicable to a real-world e-discovery request.



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10 Things for Data Map (cont'd.)

10) Designate RIM to continue to interface with IT

- Ensures Data Map stays current.
- If a new storage unit is added or new litigation arises, all members across these teams must be informed in order to alter the data map accordingly.




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Legal Holds Policy & Procedures

➤ Discussed in next session at KeyNote Presentation 1:30 P.M.



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Thank You

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