

**PLAYING ABOVE THE “RIM”: A SEVEN-STEP PREVENTIVE GAME PLAN
TO EVALUATE AND UPDATE RETENTION PROGRAMS UNDER THE NEW
FEDERAL E-DISCOVERY RULES**

Recent amendments to the Federal Rules of Civil Procedure significantly changed the rules of the game for electronic discovery (“e-discovery”). These significant changes have prompted many businesses, large and small alike, to evaluate and update their records and information management (“RIM”) programs. In a predominantly electronic environment where federal courts have given clear guidance about what is discoverable, your business needs an effective, efficient, and defensible RIM program, one including the proper creation, management, and disposition of all records - in all media types - and at all business locations.

Indeed, courts have already subjected noncompliant parties to harsh sanctions for violating e-discovery demands. For example, in 2005, Morgan Stanley and their attorneys, Kirkland & Ellis, lost a \$1.4 billion verdict in large part due to the mishandling of backup tapes of electronic documents. Although this verdict was later overturned on appeal, it demonstrates the magnitude of the exposure that companies can face for noncompliance. Under the revised rules, the possibility of sanctions for e-discovery violations seems even more likely.

Evaluating and updating a RIM program can help your business eliminate the risk of discovery sanctions (avoiding great harm to your case) and decrease the potential for time-consuming litigation discovery demands (preventing disruption of your business operations). Achieving a fully compliant RIM program typically includes seven steps. Ruder Ware can guide your business through each of these seven preventive steps to ensure that both your program complies with the new federal e-discovery rules.

Step 1: Obtain Executive Level Support

For a RIM program evaluation and update to succeed, emphasize your upper-management’s commitment to your RIM program. To that end, get your team together and make your pitch for your game plan by not only stressing the risks of non-compliance, but emphasizing the advantages of a RIM program. As alluded to above, the risks of non-compliance include potential criminal and civil fines and sanctions, payment of an adversary’s discovery costs, award of attorneys’ fees to an adversary, and unfavorable jury instructions. Advantages of a fully compliant RIM program include improved operational efficiencies, better control of records management costs, and the ability to refute allegations of selective record destruction.

Step 2: Assemble the RIM Program Team to Conduct a Preliminary Analysis

Next, assemble the RIM program update team, undertake a preliminary analysis of available software, and develop a preliminary project budget and schedule. The RIM program update team should include members from across all functional areas of your company. The team should also be large enough to provide meaningful input from all your business' players, yet not so large that it becomes difficult to accomplish goals and hold all team members accountable. The team can then conduct a preliminary investigation of available record management software and develop a preliminary project budget and schedule.

Step 3: Determine Your Business' Current RIM Status

In Step 3, determine your business' current RIM status and establish a baseline so you can measure your progress. Evaluating your current RIM status means determining the "what, when, where, and how" of your company's records and information in three steps. The first part of Step 3 is to select and develop useful data gathering tools. Second, use those data gathering tools to identify current procedures and practices for creation, identification, retention, retrieval, and disposition of records, including your legal "hold" process (how your business responds to litigation, government investigations, subpoenas, or other special events), business continuity and disaster recovery plans, and RIM program staffing and training. To complete Step 3, assemble and distill the gathered information for the RIM program update team's meaningful interpretation.

Step 4: Determine Your RIM Program's Objectives

Next, establish objectives for your business' RIM program. While aiming for realistic and practical goals consistent with your overall business goals, you may want to strive for the following objectives: (a) preserving the right information for the right period of time; (b) providing an effective means of preserving records subject to an investigative or litigation "hold"; (c) controlling RIM program costs by, for example, using technology to improve access to information; and (d) providing for business continuity and disaster recovery.

Step 5: Develop and Implement a Workplan

To implement Step 5, develop and implement a workplan to design and institute the RIM program update. Review standards of general applicability, and then revisit the RIM program's budget and schedule, updating both if necessary. After that process is complete, identify your business' major records groups, and then develop an updated records classification scheme. Your business' record classification scheme will form the foundational basis for an updated record retention schedule. Because the workplan likely cannot be immediately implemented in its entirety, assess risk to identify and prioritize solutions. Only when you have prioritized solutions may you begin to develop updated RIM program's policies and procedures. Generally, policies and procedures should be consistent, clearly documented, and applicable across all functional areas of your business.

Your legal team can be particularly helpful in setting forth the various time periods for retaining records. The record retention schedule should be updated to reflect your business' current status and practices. To begin the update process, your legal team should research all local, state, and federal applicable laws, regulations, and rules and verify the correctness of current retention periods or to determine applicable retention periods for new types of records. In so doing, it is important to integrate your business' contractual obligations regarding records retention and audit rights. The RIM program's policies and procedures should also include policies and procedures for investigative or litigation "holds" (litigation, government investigations, subpoenas, or other special events such as internal or external audits). To accomplish that goal, your business needs a record request response plan and may also need a special event response team, comprised of both legal and information technology personnel, to implement a cross-functional and repeatable records request response process.

Part of any workplan must include development of record destruction and disposal methods. Base these methods on the general principle that absent a legal requirement to the contrary (such as when records are relevant to a government investigation or litigation), it is appropriate for an organization to destroy a record at the end of its life cycle.

Special issues arise when dealing with electronic records, including e-mail. Much of the data contained in e-mail is information that does not rise to the level of becoming a record. Therefore, before an e-mail becomes a business record, your business must determine if the e-mail's content possesses any legal, business, or referential value. The RIM program's policies and procedures for electronic records must also cover metadata (data describing context, content, and structure of electronic records), indexing of and access to electronic records, and destruction of electronic records.

Keep in mind that a good workplan (a) ensures that authorization, management, training, compliance, auditing, and accountability are integrated into the RIM program; (b) provides for business continuity and disaster recovery; and (c) ensures documentation of the RIM program update.

Step 6: Train Personnel

Step 6 may seem obvious, but it is crucial to any RIM program's success - communicate and train personnel regarding the updated RIM program. Include communication from the executive level sponsor of the RIM program update and use creative means for educating employees (e.g., a prize drawing based on entries demonstrating knowledge of the updated RIM program).

Step 7: Undertake Annual Audits and Continuously Improve the RIM Program

The final step in evaluating and updating an organization's RIM program is to undertake annual audits and continuous improvement of the RIM program. Annual audits should cover all

aspects of the RIM program, including assessing employee knowledge, program application, program compliance, and accuracy of the record retention schedule. Continuous improvement of the RIM program should include monitoring existing and new laws and regulations for potential impact on the RIM program, promoting the RIM program regularly, and actively monitoring for ways to improve the RIM program, including periodically soliciting user feedback.

Keep in mind that there is no “one size fits all” approach to evaluating and updating RIM programs. Some RIM policy language and requirements (e.g., tax related record handling and retention periods) will be applicable to almost every organization. However, to craft an effective, efficient, and defensible RIM program, each company must go through the RIM program update process and develop a program that is uniquely tailored to its specific circumstances.

For questions concerning the above, please feel free to contact Attorney Paul J. LaPlant at (715) 845-4336, who prepared this article, or your Ruder Ware attorney.

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