

# Guide to Discovery Readiness

## An Advanced, Unified Approach to eDiscovery and Records Management



Responding effectively to production requests in the age of electronically stored information requires having a comprehensive discovery response plan in place for use at the beginning of a case. Having and using such a plan facilitates overall response efforts and early case activity related to satisfying a party's preservation obligations.

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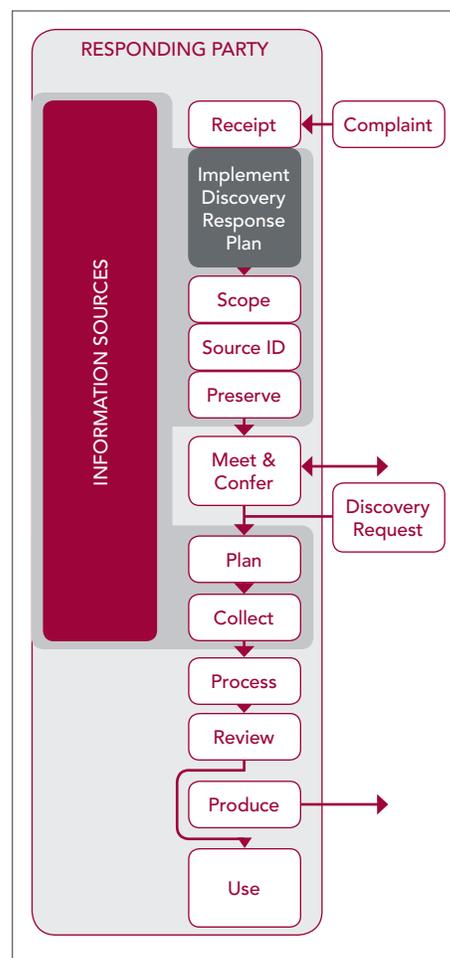
# Introduction

According to conventional wisdom, the document discovery process begins with the receipt of a request to produce. While this sounds logical, it is no longer true. While true in the days when responding to requests to produce meant dealing with physically stored information (PSI), the need today to deal with electronically stored information (ESI) has changed this. The volume, dynamic and volatile nature, complexity and diversity of ESI have rendered PSI-based mindsets and approaches risky and ineffective. The dominating presence and nature of ESI require new approaches. Consequently, the effort associated with responding to a production request begins no later than the filing of a complaint.<sup>1</sup> To be effective, however, the frameworks, plans, tools and resources necessary to perform this effort must in fact be in place before a case is

even filed. This situation dramatically shifts emphasis to what happens at the outset of a case and what a party needs to do in advance of a case to be ready.

Graphic 1 sets forth a contemporary document discovery process. As the graphic indicates, receiving a discovery request and initiating specific response activity do not occur until a responding party is well into the process. As indicated, the complete process begins with employing a discovery response plan, determining the scope of the matter, identifying sources of information and then implementing the duty to preserve. The activity conducted during these phases sets the stage for the meet-and-confer phase as well as for the work conducted in the remaining information handling phases portrayed in the graphic.

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Graphic 1

1

This is because of the duty to preserve, which is discussed beginning on page 14.

The production process consists of a series of interconnected phases where each phase depends on the outputs from the prior phases to ultimately meet the objectives of the responding party. The mandated objective of a responding party during document discovery is to produce documents responsive to production requests. A responding party also has additional, practical objectives during document discovery that include:

- + Establishing and learning the facts of the case
- + Gathering information about the materials that will facilitate further case work
- + Identifying privileged and confidential materials for protection
- + Ensuring production of materials that support affirmative case needs

Achieving these objectives requires a combination of knowledge, resources, processes, technologies and project management skills that need to be

merged and integrated to become a discovery response plan that can be put into motion at the start of a case. Use of such a discovery response plan will allow party objectives to be satisfied in a timely, accurate, consistent, reliable and cost-effective manner.

This is important because receiving a production request triggers a process that is fundamentally the most consuming and costly part of the defense effort, and one that carries substantial risks and costs beyond the defense effort.<sup>2</sup> While this was recognized when only PSI was at issue, it is absolutely true today because of the volume, complexity and diversity result in the need for coherent and orderly approaches that recognize both the dominating presence of ESI and the continuing presence of PSI in the discovery process. These realities require unified discovery approaches that address PSI and ESI across all of the phases of discovery from beginning to end.

<sup>2</sup>

Litigation risks come in four flavors: defense, liability, business disruption and damage to reputation. Analysis of the nature and connectivity of these risks reveals they all stem from or are directly influenced by how well the defense risk is managed. As a practical matter, this means that how well document discovery is conducted is a significant factor in the management of all litigation risks.

## Discovery Response Plans

A well-prepared discovery response plan will provide a party with the information it needs to effectively conduct PSI and ESI discovery within its organization. The benefits of developing and using a response plan include:

- + Making the collection effort the result of considered thinking, not a “fire drill”
- + Knowing where to look to gather potentially responsive ESI
- + Defining what activities need to be done
- + Defining when and in what sequence activities need to be done
- + Defining who will do what during the effort
- + Defining how the work needs to be accomplished
- + Defining procedures for implementing and enforcing the duty to preserve
- + Avoiding pitfalls such as starting too late and not adequately defining matter scope

These benefits produce significant value by minimizing disruptions to ongoing

operations and allowing the work to be done right the first time. Functions within organizations do not typically staff to address discovery demands. This means with every new case, the affected functions must divert staff from their normal assignments to assist a case team’s discovery efforts. Having and utilizing a response plan minimize this disruption and promote not having to revisit areas due to a lack of upfront planning and forethought. Do it once, do it right.

Having and using response plans also provides ancillary benefits to a case team by providing documentation of reasonable and good faith efforts, thereby supporting the defensibility of case team efforts. Response plans promote accuracy, reliability and cost-effective performance by establishing consistent and predictable ways of doing things. Response plans also serve to implement an organization’s overall discovery response strategy by addressing such issues as where discovery databases will be located, who will operate and maintain the databases, what the

design and performance requirements for discovery activity are to be, the standards database repositories must satisfy and so on.

However, the core value obtained from using a discovery response plan is the knowledge, structure and guidance it provides in conducting the response effort. It is axiomatic that one’s ability to manage something is a function of how well that something is understood. It is a hard reality that ESI discovery is difficult and daunting because of the nature and complexity of ESI and ESI systems. The new ESI paradigm requires a party to understand the nature of ESI and ESI systems, to learn new approaches that are needed to conduct discovery successfully and to do so before the need arises. These are subjects that cannot be mastered in the time a case normally allows. Discovery response plans facilitate this by orienting a case team to:

- + Locate and access ESI
- + The nature of ESI and ESI systems
- + The role of records management in discovery

## ORGANIZATION STRUCTURE, PRACTICES AND CULTURE

The ability to quickly locate and access ESI is a function of knowing one's way around the organization involved. This means understanding the unique context of the organization. A response plan must acknowledge the unique nature of an organization's structure, practices and culture if it is to be implemented effectively. Knowing where to find the various kinds of information that may be at issue, knowing who "owns" the information as opposed to who "owns" the systems, as opposed to who knows how to access the information on the systems using the right protocols, are all functions of an organization's structure, practices and culture. Knowing this information about an organization allows discovery to be conducted effectively by knowing where to look and, equally as important, knowing where not to look. The former is vital in locating responsive information. The latter is vital because it avoids wasting time and effort.

All of this requires establishing lines of communication and relationships within and across the organization's necessary functions, so response efforts can be mobilized promptly and without wasted motion. This requires top-down management support and the creation of a cross-functional team that is tasked to work together to ensure an organization's needs are met in

the litigation discovery process. This team must own the response plan and must include qualified staff from information systems, records management and legal functions. Working together the team can identify enabling technologies and resource needs and establish workflows that enable timely, accurate and reliable performance of a response throughout the discovery process and across the organization.

The discovery process described above is a series of interconnected phases where the outputs of one phase become the inputs for the next phase, and so on. But what are the "raw materials" that become the initial inputs to the discovery process? They are PSI and ESI. Locating and accessing these inputs are functions of knowing the organization that creates them. Regarding their nature, PSI inputs are typically paper documents: familiar, tangible items. Not so, however, with ESI.

### ESI AND ESI SYSTEMS

While PSI is static and tangible, ESI is not. ESI is not tied to the physical realities that are associated with PSI and as such cannot be seen or touched and frequently is not located where one might expect. While ESI is dynamic and readily changeable, it is also persistent and can multiply dramatically during its existence. Most importantly, it has an added dimension that PSI does not have: metadata. While the most com-

mon PSI, a paper document, is literally two dimensional and flat, ESI has what is essentially a third dimension in the form of metadata, which is information about the information contained in the electronic file. Because it is part of an ESI file, its integrity as part of that file must be addressed in the discovery process.

ESI is stored in information technology environments that can grow to enormous size and complexity because of the forms ESI can take. ESI can be in the form of structured data that is stored in well-defined electronic environments, or take the form of unstructured data that is highly varied in nature. Examples of unstructured data are emails, digital voice mails, word files, spreadsheets and other files created by software typically used in office environments. ESI systems themselves can impact the nature and even the existence of ESI through their normal operations and the presence of janitorial and auto-delete functions.

ESI and ESI systems are dynamic. What is state of the art today may become a legacy system in just a few years. ESI volumes grow dramatically as existing users generate new data and new users come online and do the same. The hardware to support this activity increases in quantity and sophistication. So does the software involved. The result is a situation where the volumes, diversity

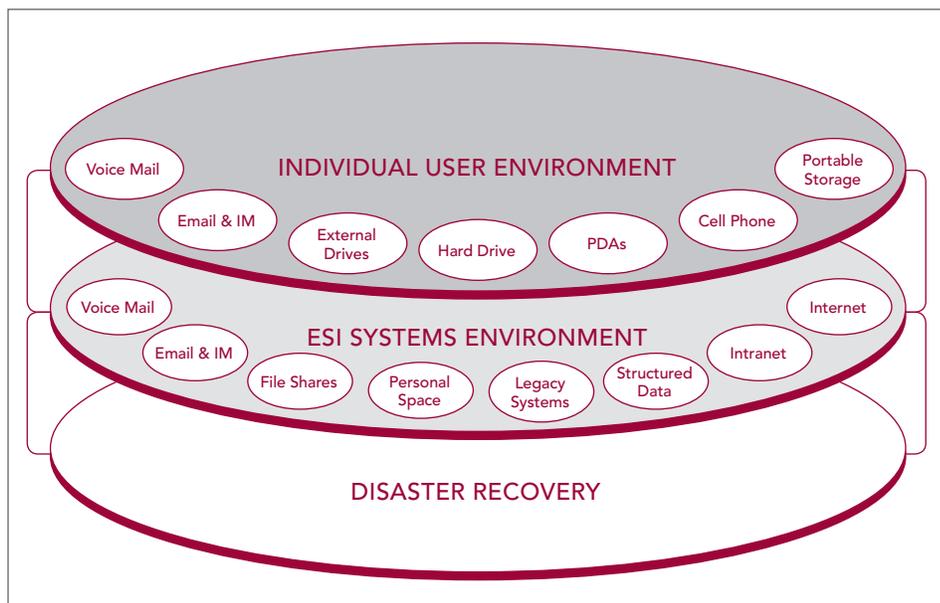
and complexity of ESI and its systems make the discovery of ESI so complex and intricate that it requires advance planning and preparation to be carried out successfully. This is not surprising when one considers the components of a typical information management structure within an organization today. Such a structure, for example, will include:

- + User computers
- + Voice mail or VoIP systems
- + File shares
- + Cell phones and personal digital assistants
- + Personal network space
- + Removable and portable storage devices
- + Email systems
- + Enterprise-level structured data systems
- + Intranet systems
- + Unstructured database systems
- + Internet systems
- + Disaster recovery systems
- + Instant messaging systems
- + Legacy systems

The structure will reside on hundreds (or thousands) of various pieces of information technology hardware ranging from personal computers to servers to printers and use hundreds (or thousands) of software applications. The hardware and applications will be spread across numerous locations and will vary in age and type. The quantities of ESI on such a system will be measured in terabytes. Such an environment could look like the one in Graphic 2.

Consequently, knowing where to look and who to go to are fundamental aspects of any discovery response plan. The result is the need for a map, inventory and operational understanding of an organization's ESI systems environment so a case team can, working with relevant subject matter experts, un-

derstand and determine where responsive information may be located and the nature and magnitude of the effort that will be associated with managing that information through the response process. This means the relevant information needed to understand the components of an organization's ESI architecture, the hardware and software involved, the security systems, the operational protocols that exist for data file management, voice mail, email, disaster recovery and the like must be compiled, maintained and be readily available when needed. Without this information, a case team will be in the predicament of trying to manage an enormous amount of work without the necessary information and knowledge, all in a time frame that will not allow the needed knowledge to be acquired.



Graphic 2

## Records Management

It has long been said that defense costs are driven by the number of documents involved in a case and that liability costs are a function of what is in the documents. This has never been truer than with ESI because of the enormous volumes typically involved. It therefore stands to reason that benefit can be derived from managing the volume of information potentially subject to litigation. The reality is that there is only one legal way to control the volume of PSI and ESI that can become subject to discovery in litigation: the use of a records management program.

By definition, a records management program manages records. A business record can be defined as recorded information, regardless of medium or characteristics, made or received by an organization that is evidence of its operations, and has value requiring its retention for a specific period of time. The attributes of an appropriate records program are:

- + Retention periods based on record importance
- + Consistency and manner of program application
- + Monitoring and auditing of the program

- + Effective protection and preservation of records
- + Consistency of archiving and destruction practices

In addition, a records management program ensures that the records have the attributes of a record: authenticity, reliability, integrity and usability.

Typical business reasons that cause organizations to implement a records management program include:

- + Improved operational efficiencies and controls in managing information
- + Consistency in handling the retention and disposition of records
- + Compliance with statutory, regulatory and other legal requirements
- + Reduced information storage demand and costs
- + Duty-to-preserve mechanisms
- + Contingency management

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It goes without saying that a records management plan cannot be adopted or used to “legitimize” the spoliation of evidence.

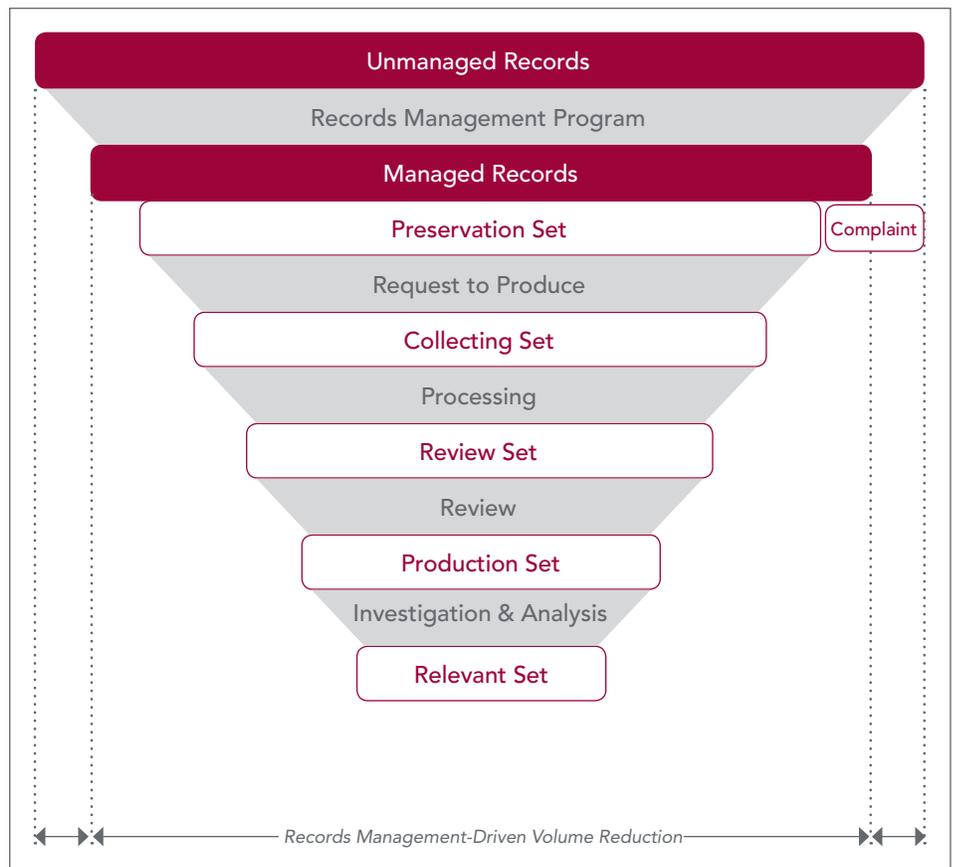
One benefit a records management program provides related to discovery is that records no longer of use or value to the organization can be disposed of through the ongoing and routine operation of the program. Through the program’s operation, such records are disposed of when their retention period expires. Once destroyed, a record cannot be discovered. The nature of the impact of this activity on information volumes potentially subject to discovery is presented in Graphic 3. The extent of the benefit is a function of the volumes, nature and retention periods of the records.

Of particular interest is that document discovery, when viewed from the standpoint of records management, is a side trip in the life of a record. This view is presented in Graphic 4, which portrays the interface of document discovery with the records management lifecycle and how a discovery response plan addresses the connections between the two. As Graphic 4 shows, records that become subject to discovery exist before litigation and if their retention period is long enough, will continue to exist after the litigation is over and the duty to preserve ends. From this perspective it becomes apparent that how well an organization manages its records has a direct impact on the burdens and risks associated with document discovery and litigation as a whole. For example, as a result of a records management program:

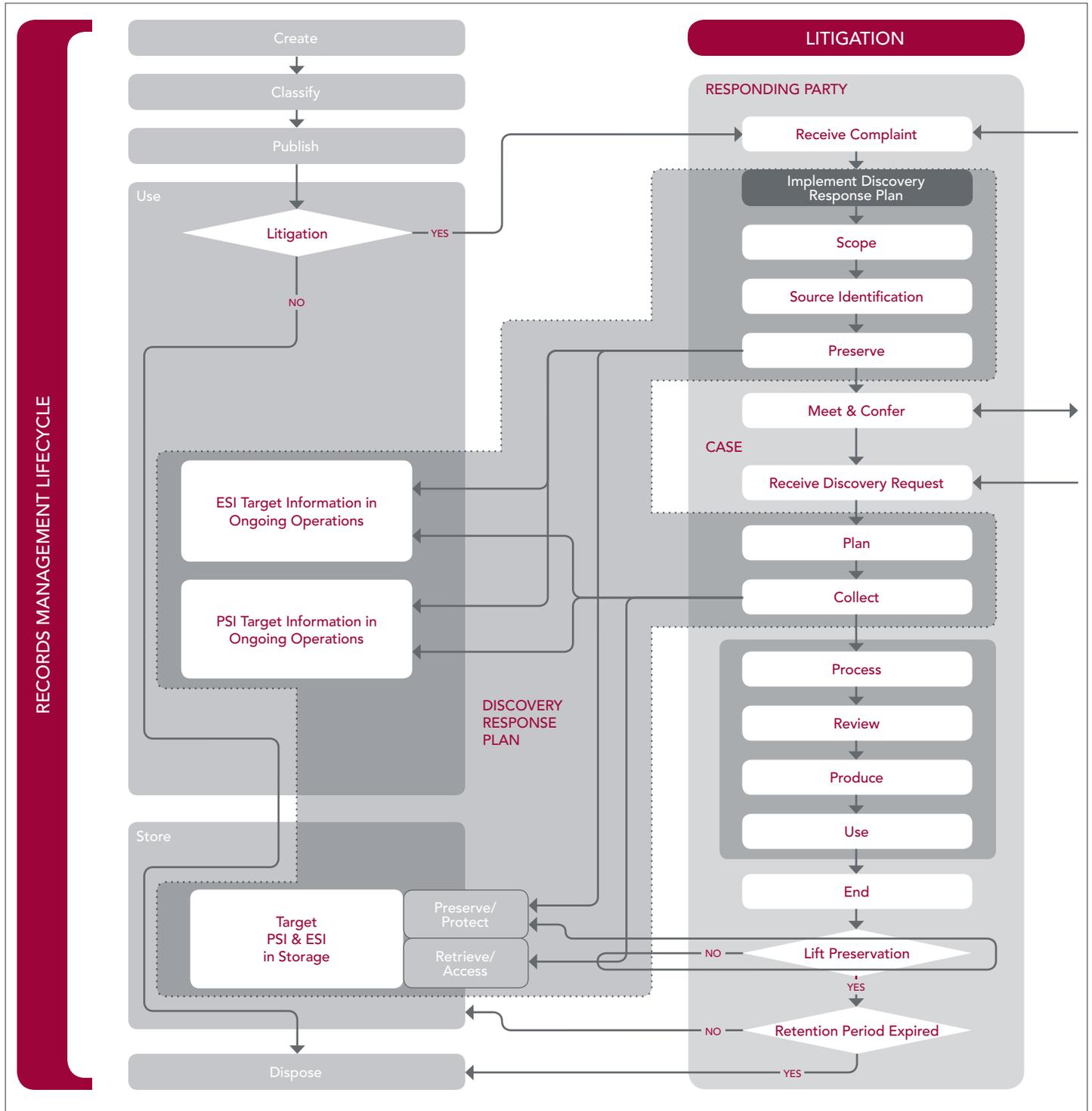
- + Records volumes subject to discovery are reduced, resulting in fewer documents that must be preserved, collected, processed, reviewed and produced.
- + Records that are classified and maintained are easier to identify and locate, minimizing business disruption when they need to be collected.

- + Hold systems integrated with records management programs ensure accurate and consistent implementation of preservation obligations.

These examples point to the significant benefits that can be gained by implementing and maintaining a records management program.



Graphic 3



Graphic 4

## Receipt of the Complaint

A response plan is put into effect upon the receipt of a complaint. This is when the advance effort spent developing the response plan begins to pay off. The response plan guides the response team's efforts through the discovery process, beginning with the first three phases:

- + Determining matter scope
- + Identifying potentially responsive sources
- + Implementing the duty to preserve evidence

These three phases have substantial significance in how a case is developed and in how the risks associated with the case are managed.

Determining matter scope defines the parameters of what is at issue. Identifying potentially responsive sources locates individuals with information and other sources that may have potentially responsive information within the scope of the matter. Implementing the duty to preserve satisfies the obligation of the party to take reasonable steps to ensure relevant evidence is not destroyed once the party has notice of the action. How well each of these steps is implemented is a function of the response plan and the process and disciplines employed by the responding party to achieve its objectives.

## Determining Matter Scope

The objective of this phase is to put parameters around the reach of the matter as set forth in the complaint on two levels: the substantive and the practical. The substantive level goes to what the case is about and identifying responsive information related to the matter. The practical level goes to the “what” and “how” of locating and addressing that information. While presented in a linear fashion here, determining matter scope and the next phase, source identification, routinely happen concurrently as they are highly interconnected. It is through iterative dialog and investigation with custodians, information technology, records management and business functions that the case team’s understanding of both the substantive and practical aspects of the scope of a matter takes shape.

On the substantive level, this phase defines who, why, what, when and where for the action. This information becomes a set of filters that isolates the information related to the matter from the rest of the information the party

possesses. As such, it is the first step taken once the case has commenced to establish the information at issue. It also initiates the effort to determine what information needs to be preserved. The responding party therefore needs to determine:

**Who:** the potential target pool of custodians

**Why:** the issues involved

**What:** the subject matter and the types of related information

**When:** the time frame of the action

**Where:** the event, custodian and responsive PSI subject matter location(s)

The responding party should also be sure to determine the locations of information needed for its affirmative case at the same time.

The information acquired by answering who, why, what, when and where helps focus the discovery effort. Determining the “why” of a case and then establishing what information is reasonably at issue quickly focuses efforts. For

example, a case related to a sales contract for product X does not need effort spent collecting irrelevant subject matter that is also related to product X, such as environmental records, because they have no relevance to the substance of the case. Further, if the case’s subject matter relates to events that occurred during a finite time period at only one location, it does not make sense to pursue sources of information related to other locations or other time periods.

On the practical level, the scoping phase is where the gathering of information needed to assess and plan for the magnitude and nature of the required effort begins. While substantive information is being gathered, the case team should also be gathering information regarding the nature and types of PSI and ESI involved. Initial data quantity estimates should be calculated. Information about the character and accessibility of the data should be gathered. The locations of both the PSI and ESI should be identified.

This last activity is highly important because the locations of potentially responsive information may not be the same as the geographic locations where the events took place. ESI has a high probability of residing in a location other than the geographic location where it is used because the nature of ESI allows it to be managed without regard to proximity to users. While obvious when stated, this fact is frequently overlooked in practice. ESI operates in its own geography and that geography is rarely the same as the physical. PSI, on the other hand, may also not be located where one might expect it to be if the organization has a records management program that uses centralized storage locations. In instances where potentially responsive PSI is maintained in records management centers, it will invariably be easier and more effective to locate the information through the records management system than through the geographic location.

Another key aspect of the scoping phase, derivative of the practical level work, is gathering meaningful quantitative information about the effort. Doing so provides the basis for making arguments, when appropriate, that the burden and cost of the effort will be unreasonable. Being able to say, for example, that a discovery effort will require (a) collecting, processing and reviewing approximately 100,000 gigabytes of potentially responsive ESI related to 100 custodians from 50 file shares on 23 servers at 18 locations, (b) PSI related to those custodians at an additional six locations (because the ESI systems that service the custodians are not located where the custodians are located) and (c) will take six months using X resources at a cost of Y sounds much better than simply saying the effort will be burdensome and costly.

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## Identifying Potentially Responsive Sources

The primary effort in locating sources of potentially responsive information is identifying and locating the individuals with knowledge and information related to the events set forth in the complaint. This invariably means more people than the individuals named in a complaint. The effort starts with identifying the relevant subject matter experts within an organization based upon the information a complaint provides. Working with the information gained from these experts, the search for relevant individuals reaches out through an organization. At the same time, information gathered determining the scope of the matter establishes functions and locations where relevant individuals could be expected to be located. Working the effort from both ends expedites identifying potential sources. Effort then taken to verify connectivity with the matters set forth in the complaint allows the tuning of the list.

Because virtually all ESI systems key in on individuals as the basis for gathering unstructured ESI, having a target list of individuals allows the source locations of ESI to be identified and the magnitude of the discovery effort established. Knowing the individuals involved means being able to identify the servers where their ESI is stored, whether it be emails, instant messaging, personal network work space, .PSTs, project files, voice mail systems or something else. Similarly, knowing individuals, functions and locations allows common information environments with poten-

tially responsive information such as file shares to be identified. Identifying structured information systems, enterprise level or otherwise, containing potentially responsive ESI is also facilitated by the information acquired during scoping and source identification efforts.

The outcome of the combined efforts of the scoping and source identification phases is twofold: knowledge of matter parameters in fairly substantial detail and a distribution list to be used to implement the duty to preserve.

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## Implementing the Duty to Preserve Evidence

The duty to preserve is a long-established legal obligation that, simply stated, requires parties to litigation to retain evidence that may be relevant to the litigation. The duty begins when a party reasonably knows or should know that a claim is imminent, which may in fact be before a case is filed. When triggered, the duty applies regardless of whether the evidence is found in PSI or ESI. While the duty has always triggered no later than when a claim is filed, the need for immediate action when dealing with PSI was not typically a necessity because the evidence existed in the relatively stable environment PSI provided. This allowed for preservation obligations to be satisfied in a timely, but not necessarily immediate, manner.

The advent of ESI discovery has changed all that. ESI demands a promptness of action that was rarely necessary in the age of PSI. This need for immediate action stems from the need to avoid or counter threats of discovery abuse or spoliation claims that can arise because of the volumes and dynamic nature of ESI that can be at issue in a claim. Failure to satisfy the duty can result in sanctions that range from monetary to adverse presumptions to default judgments. As a consequence, implementing the duty to preserve is best handled if the necessary measures are built into a party's discovery response plan so they can be implemented as soon as possible after the receipt of a new claim.

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Further, this new context mandates preservation approaches that are more developed and defensible in their implementation. In today's climate, a preservation approach must:

- + Identify the scope of information involved
- + Be published to those known to be involved
- + Be reissued periodically
- + Be actively managed and implemented

The preservation approach typically used today is a legal hold, a communication that is issued when the duty to preserve is triggered and a prompt collection cannot reasonably guarantee the preservation of responsive materials. Ideally implemented, a legal hold is a comprehensive, official notice issued within an organization stating the need to preserve materials related to the matter at issue.<sup>3</sup> A well-drafted legal hold is more than a communication stating the need to preserve "any and all materials" related to a case. It is a statement that provides meaningful information that

clearly indicates the nature and types of information to be preserved so as to allow records management operations to continue in unaffected areas. As such, the content of a hold letter should include the following information:

**Why:** the need for the hold

**Who:** the parts of the organization involved

**When:** the relevant time frame involved

**Where:** the geographic locations involved

**What:** the business, functions, product, records and other information involved

The formats and media where the information can be found should also be defined so there is no misunderstanding regarding the nature of the PSI and ESI included within the coverage of the communication.

A legal hold's distribution list is as important as the content of the hold itself. The distribution list should not only include the individuals identified as

potentially having information related to the litigation, it should also include key functional positions and contacts within organizational units affected by the litigation to ensure widespread dissemination of the hold. This not only means contacts within business and related functions, but records management and information systems functions as well. If possible, hold letters should be posted on an organization's intranet so they are available for review by all employees.

While a distribution list establishes the reach of the communication through an organization, it also documents the effort taken to implement the duty and, when maintained in an information management structure, facilitates ongoing hold management including periodic reminders to those affected regarding the status of the hold. It also identifies the list of individuals from whom information may need to be collected when a request to produce is received.

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As mentioned, a legal hold may not be necessary as a practical matter when the events at issue are so discrete and factually contained that all the materials related to the matter can be identified and then collected and stored for potential future use. The use of a notice letter, however, would nonetheless be a good idea to document the timing, recipients and scope of the preservation activity undertaken.

## Conclusion

The initial phases of the discovery process set the stage for all that follows in conducting PSI and ESI discovery. The results of the work conducted during these phases first prepares a party for the meet-and-confer phase of discovery and then allows the ongoing response effort to be planned and appropriately staffed and managed all the way through collection, processing, review, production and ongoing use of the information at issue. How well all of this occurs, however, is a function of the initial readiness of a party to deal with litigation. This means, fundamentally, how well a party knows its own information environments and whether the party has a discovery response plan and the necessary resources in place to guide and efficiently implement dis-

covery efforts. This, in turn, requires knowledge of the structure and culture of an organization, the nature of an organization's information technology and records management systems and, finally, an understanding of how to perform discovery within an organization's environment in a coherent, efficient, cost-effective and defensible manner.

Contextual awareness, proper planning and staffing, and efficient execution will drive a case team's ability to perform. It is only by embracing a planned, unified, systematic approach to records management and discovery that a party will be able to achieve its discovery objectives in a way that also meets its needs for timeliness, quality and reasonable cost of performance.



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