



## Taming the EDD Beast

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Recent surveys and polls indicate that the number of discovery requests law firms receive is on the rise — rapidly! Changes to the Federal Rules of Civil Procedure (“FRCP”) are accelerating the proportion of time and effort related to e-discovery compliance. The question is not “if,” but “how,” when it comes to e-discovery planning. While it seems imperative to design an information strategy that enables firms to be litigation ready, basic know-how of litigation readiness concepts and a well thought-out approach, especially when it comes to handling electronically stored information (“ESI”), is essential.

### How FRCP Changes Impact Litigation Readiness

There are several key changes in the FRCP and basic legal concepts that apply when designing litigation readiness strategy. Since litigation holds state that all potentially relevant content must be preserved against potential deletion, firms must be prepared for such scenarios. The impacts can range from tens of thousands to billions of dollars.

The new rules distinguish between two different types of ESI: accessible and not reasonably accessible. Accessible information, anything that exists on the firm’s networks or is available online, will be required to be produced in response to a discovery request, while not reasonably accessible information (*e.g.*, archived materials or back-up tapes), generally requires a court order in order to be produced.

Approximately 99 days from litigation start, each party must produce all ESI and documents that support its claims or defenses. Practically speaking, this means that IT needs to be able to hand all of the content over to their lawyers in a week or two after litigation begins.

In formulating a litigation readiness strategy, it is advisable to evaluate the following first:

- Most common types of potential litigation that may affect the firm (and what this means from a preparedness standpoint); and
- Electronically stored information:
  - What are the data sources?
  - If under litigation hold, how do you efficiently determine what to hold, and how do you hold it?
  - How do you enable easy access to your legal team?

### Strategic Approaches to ESI Control

Based on the relevance of ESI and the damaging effects ESI mismanagement can have, firms should focus on how to control those stores of electronic information as they relate to litigation readiness.

Typically, law firms can pursue three ESI control strategies including “do nothing”, “archiving”, and “organize information.”

The “Do Nothing” strategy is an approach where the firm chooses to take no steps to be litigation ready. This has been the default position of many law firms — and typically, represents a dangerous approach as subpoenas or discovery requests result in the firm bearing all of the costs. When speaking with firms who wish to pursue this model, a common response is that the firm is not willing to spend the money to invest in the appropriate process or infrastructure. Based on experience, firms that have chosen this path, when served with a litigation hold, suffer from a high burden and cost of review as they have no way to structure their electronically stored information. The advantage to this approach is that there is no upfront investment required for the firm. Pursue this approach only if the firm has and extremely low risk of a subpoena or being involved in litigation.

The “Archiving” strategy is an option to journal all e-mail that is sent or received across the firm. This strategy primarily focuses on e-mail and generally ignores other information sources. With an archive system in place, general counsel can search all firm-wide e-mail, place a hold and produce as needed. The challenge with this strategy is that attorneys are forced to search through a sea of information to find the relevant content. Costs can be high as a result. As e-mail may or may not include relevant attachments, it does not provide a holistic solution. As a result, firms that pursue this strategy find that they must take multiple steps to apply a hold and may have difficulty applying any retention policies. The advantages to this approach are no end-user involvement and it offers a more proactive solution than the Do Nothing approach. Pursue this approach if you are assured that e-mail will provide you with sufficient coverage in the event of litigation.

The “Organize Information” strategy focuses on creating an electronic matter file that contains e-mail, office documents and images. The burden of creating the electronic file is on end-users: attorneys, paralegals and secretaries. This approach is consistent with the paper world — lawyers, through their staff, maintain paper based documents in folder structures by matter. As such, it is intuitive and provides consistency with the way most matter teams work. The challenge with this strategy is the burden of capture and filing falls upon the end user. As a result, the software needs to make the filing process as painless as possible especially on attorneys. Although electronic filing work is required and is more time consuming than a Do Nothing approach, attorneys get a boost in productivity; it is easy to search and find matter-related content, it is faster to bring new matter team members on to a matter, it enables lawyers to work on the same matter in geographically disparate situations and it facilitates client access with appropriate security. With organized content stored by matter, it is much easier to place a litigation hold. Best of all, this organized approach reduces the amount of content to be reviewed in response to a discovery request, as it is possible to apply retention policies to the firm’s electronic information. The advantages to this approach include less cost, increased efficiency, the ability to find needed information and the ease of access for lawyers and clients regardless of location. Pursue this approach if possible.

However, depending on the firm risk profile, a hybrid of the above strategies may also be appropriate. If the firm chooses to pursue, say, both the Organizing and Archiving strategies, it will capture everything that was not categorized into an archive to permit easy searching of the uncategorized e-mail. The firm may wish to adopt hybrid strategies at the firm-wide level down to the individual end-user level. Some individuals within the firm may represent a lower risk to the organization than others. In this case, a nuanced approach may apply.

## **Beyond ESI**

Regardless of the selected ESI and litigation readiness strategy, it is important for the firm and IT to maintain good communication with the office of the firm’s general counsel. There needs to be a well-defined preservation process for litigation holds, for content review by lawyers in the event of litigation, and for the lifting of a litigation hold. When implementing the readiness plan, point persons and associated responsibilities need to be proactively defined for both general counsel and IT. The process and the associated responsibilities should be documented and discussed. When IT or an outside

forensics organization collects and preserves data, there will likely be a requirement to appear in court to explain the process that was followed, how data was collected, and preserved. A credible, well-documented and strongly articulated process greatly aids the firm.

## Conclusion

With law firms subject to more and more litigation and the changes in the FRCP, a law firm needs to define and implement a litigation readiness strategy. The best strategy is to organize the firm's electronic information through the use of electronic files. Only use back-up tapes for disaster recovery and have a well-documented and articulated process for preserving content.

### Litigation Readiness Strategies: What to do with ESI

	Do Nothing Strategy	Archiving Strategy	Organize Information Strategy
End user involvement	Low	Low	High
Cost to firm	Low upfront; potentially high later	Medium upfront; medium - high later	Medium up front; lower later
Productivity gains for end users	Low	Low	High
Easy access to relevant content	Non-existent	Medium	High
Ability to apply effective retention policies	No	No	Yes
Ability to apply hold	Hard	Medium (what about office documents)	Easy
Attorney review time/cost	High	Medium	Low
Overall strategy risk rating	High	Medium - High	Medium - Low

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