



The eDiscovery  
Pain Reduction  
Handbook



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## THE PAINFUL REALITY

When in-house attorneys share their thoughts about eDiscovery, their remarks are almost always the same: pain. Though there are numerous challenges associated with establishing and maintaining effective eDiscovery practices, three specific areas cause the biggest headaches:

### 1 The High Cost of Responding to eDiscovery Requests

For many attorneys, the high cost of producing documents is the Number One eDiscovery pain. In fact, one GC interviewed by the authors of this handbook shared that discovery costs for just one of his current cases had reached \$1.4 million, and the case had yet to go to trial.

Electronic evidence is expensive to produce, particularly within the tight deadlines typically ordered by the court. Industry experts peg the cost of discovery searches at \$1000 to \$2500 per backup tape. Now, multiply that number by the hundreds, thousands or even tens of thousands of tapes in a typical archive. Factor in the number of cases a company juggles at one time, and the magnitude of the problem becomes crystal clear, as does the challenge lawyers face in trying to stay on budget.

#### ATTORNEYS ARE FEELING THE PAIN OF eDISCOVERY IN MANY WAYS:

“I’m a lawyer, not a technology guru.”

“I’m overwhelmed. I don’t know where to begin.”

“Costs are mounting for eDiscovery, and I’m feeling the pressure.”

“I feel like I am failing.”

“Why does it take so long for IT to find those files?”

“What should I be doing myself? What should I out-source?”

“I need direction to help me understand how to get started and what resources are required.”

### 2 The Complexity of the Entire eDiscovery Process

Data today is created in highly mobile, frequently changing IT infrastructures which can make it difficult for organizations to apply uniform data management and retention policies. As a result, electronic evidence can be exceedingly difficult to manage, expensive to locate and time-consuming to review. It commonly requires technical expertise and a significant resource investment to dig through millions of files stored on disparate systems across the enterprise and at off-site storage facilities. This makes the eDiscovery process all the more difficult, especially when a court-ordered deadline is looming near.

Understanding all the technical aspects of eDiscovery adds up to high levels of frustration. Add in a fast-approaching court-ordered deadline to produce evidence and the stress level soars.

### 3 The Time-consuming Nature of eDiscovery

The entire eDiscovery process is incredibly time-consuming for attorneys and their staffs, draining time away from other business priorities. In addition, attorneys don’t have enough time to focus on eDiscovery issues.

Fortunately, it is possible for legal organizations to reduce the pain of eDiscovery by guiding the organization as it shifts from a reactive mindset to a proactive one. This approach, known as “Litigation Readiness,” improves the efficiency with which an organization responds to an eDiscovery request with a systematic approach at every stage of the process. This improved efficiency reduces the costs, complexity, and frustration associated with eDiscovery, and allows lawyers to focus their attention on other critical aspects of litigation.

This handbook was created to provide legal professionals with insights into the ins and outs of eDiscovery and to offer recommendations on how to develop a proactive approach to litigation readiness that will lessen the pain of preparing for and responding to eDiscovery requests.

# The eDiscovery Pain Reduction Handbook

## **ARE YOU READY FOR THE NEW eDISCOVERY RULES?**

The newly adopted changes to the Federal Rules of Civil Procedure (FRCP), which took effect on December 1, 2006, will impact eDiscovery practices in every corporate legal department. The changes to the FRCP make the efficient management of corporate electronic records more important than ever. Failure to comply with the new electronic discovery rules can mean fines, sanctions, executive liability, and other risks.

Consider these highlights of the new regulations:

- Amended Rule 26(a) explicitly defines electronically-stored information (ESI) as a specific category of information to be disclosed. There is no longer any ambiguity about whether digital data constitutes a “document.” Businesses now have a clear responsibility to produce eRecords.
- Amended Rule 26(f) requires parties to meet within 120 days of the filing of litigation, and at least twenty-one days prior to the scheduling conference, specifically to discuss eDiscovery issues.
- Amended Rule 26(b)(2) sets up provisions to deal with ESI that is not “reasonably accessible.” It requires companies to know early on what ESI discovery may be difficult or expensive, and identify it to other parties, with reasonable specificity.

Crafted in response to the significant challenges associated with managing voluminous amounts of electronic evidence, these new eDiscovery rules are intended to make the process more efficient, effective and far less costly for everyone involved. At the same time, however, these amendments increase the pressure, and the consequences of failure, on companies. Failure to comply can mean fines, further litigation, stock price drops, or even legal sanctions for senior managers.

## **eDISCOVERY PAIN REDUCTION STRATEGIES**

Fortunately, there are proven strategies that can help your organization get eDiscovery under control, comply with the new eDiscovery Rules, and successfully transition to a state of litigation readiness. They are:

1. Employ a company-wide retention program which proactively and consistently manages all forms of data.
2. Develop and implement a comprehensive Litigation Readiness Program to prepare for eDiscovery requests in advance.
3. Establish the ability to rapidly and cost-effectively restore high volumes of information from backup tapes.
4. Implement a digital archive to enable fast searching of e-mails and other electronic records.
5. Establish documented policies and procedures for managing litigation holds and data preservation.

Let's take a closer look at each of these strategies.

**STRATEGY 1:****Employ a company-wide retention program which proactively and consistently manages all forms of data.**

All forms of electronically-stored information (ESI) are now discoverable, which means a company-wide, legally-defensible retention program is critical. A retention program will eliminate the complexity of eDiscovery and potential litigation risks by making discoverable data more easily accessible.

Businesses, and their legal counsel, need to have a thorough understanding of where and how their data is stored, backed up and archived, as well as documented retention and disposal policies. Information about data formats, metadata and format conversion is also vital.

Maintaining and frequently updating a records retention schedule (as required by the regulations which govern many industries) makes a firm far more efficient in responding to eDiscovery requests, which translates into significant cost savings. Because creating and maintaining a retention schedule can be difficult, many firms choose to work with a third-party partner, such as Iron Mountain.

**Creating a Successful Records Management Program**

While every company's records management program should reflect its own unique requirements, there are several key steps you can take to ensure your program achieves its objectives.

**Step 1: Form a records management team**

Assemble a records management team that includes legal, IT, records management, HR, outside counsel, and your electronic discovery vendor. This team should be responsible for:

- Identifying what types of records have been or are likely to be requested
- Deciding what systems should be included in the discovery environment
- Defining the archiving system requirements
- Establishing the company's rapid response collection and review processes

**Step 2: Apply retention policies to e-mail**

Applying corporate retention policies to e-mail and other electronic records can significantly diminish litigation risk and lower e-mail storage costs. Establishing a consistent e-mail retention policy also ensures that the necessary e-mails are being retained and that the majority of e-mails, which are not official records, are purged on a regular basis.

**Step 3: Automate the retention process for new discovery data**

For collecting new discovery data, use enterprise records management software or services to collect e-mails and their attachments and archive them in a searchable, secure web-based repository that can be rapidly implemented for proactive eDiscovery.

## STRATEGY 2:

### Develop and Implement a Litigation Readiness Program

You can reduce litigation complexities and costs by being proactive rather than treating every eDiscovery request as a fire drill. Defining and executing a solid, legally defensible Litigation Readiness Program that proactively addresses records management and electronic discovery practices, policies and technologies will cut down on frantic responses to litigation and also improve compliance and reduce complexities. Equally important, a well-designed litigation readiness plan can ensure you meet legal obligations while minimizing expenses and business disruptions.

This customized plan, based on the current environment and situation, should include such areas as:

- Records Retention Policies
- Litigation Holds
- Data Collection and Accessibility
- Managing Multiple Records Repositories
- Exposure Eradication
- Technology Recommendations
- Policy Audit and Maintenance
- Employee Training

#### Key Points to Consider to Ensure Litigation Readiness:

Know exactly what formats your eRecords are stored in, what metadata is associated with them, what formats they can reasonably be converted into and the associated costs. This will help you manage costs and ensure that you can respond to requests in a timely manner.

Train an IT expert who can meet with opposing counsel as a subject matter expert to address questions about discoverable repositories, file types and locations, etc. Rule 26(f) requires parties to meet within 120 days of the filing of litigation specifically to discuss eDiscovery issues. Parties must make every effort to reach agreement on logistical issues, including relevant repositories and classes of information, production formats, and matters of privilege. Having an IT person who is knowledgeable about all the data and systems and is fully trained on eDiscovery issues can be a valuable advantage.

Have an up-to-date map of your entire eRecords landscape. Also as part of Rule 26(f), all parties must promptly identify all sources of electronically stored information in their initial disclosures, meaning not only e-mail servers and backup tapes, but also deleted data, data on systems no longer in use, and data in remote or third-party locations. Companies now need an up-to-date map of their entire eRecords landscape at their fingertips. Organizations that lack a comprehensive map of potentially relevant records will be playing catch-up just when they should be doing serious analysis of the case. Conversely, businesses that can produce accurate inventories of electronic data repositories can save themselves millions of dollars.

#### KEY RECOMMENDATIONS FOR IMPROVING eDISCOVERY RESPONSE AND ACCURACY:

- Verify proper identification and classification of discoverable electronic and hardcopy assets.
- Reduce the amount of “stale” and duplicate records located within the company’s network.
- Implement consistency across the enterprise by converting all older data to the current format ahead of time.
- Logically catalog all media and data to help IT swiftly and accurately identify and organize media, determine what data it contains, and upload it to fast-access drives.
- Migrate irreplaceable data from older, unsupported media formats to one used in the current infrastructure to protect vital records, conserve tape library space and ensure that data is accessible.
- Migrate records from backup tapes to a searchable archive repository.



**Make sure data is accessible.** To help you respond efficiently and cost effectively to eDiscovery requests, a key strategy is to make sure that all potential discoverable data is on up-to-date technologies (systems, applications, and formats). If it isn't, you will have to restore to current platforms during the throes of eDiscovery, which is risky, expensive and difficult.

**Reduce data volume with de-duplication.** In every business, the potential for record duplication can be enormous, especially with e-mail. Multiple levels of de-duplication are available, and IT can choose the method that is most appropriate to the task at hand. De-duplication can take place within a single mailbox, a server or across the enterprise. Effective de-duplication can reduce data volume by up to 90%, which will significantly reduce the amount of time attorneys need to spend searching through digital assets.

**Have a plan for responding to eDiscovery requests.** To ensure eDiscovery requests are handled quickly, effectively and consistently, it is important that you have a response plan in place. Here are recommendations for restoring requested data quickly and effectively:

**Understand the scope of data requirements.**

Define the parameters of the data gathering required to meet the discovery request. Determine:

- Are specific employees affected?
- Are specific e-mails or documents requested?
- What are the date boundaries?
- In what form does the data have to be produced?
- What systems did the affected employees use (such as e-mail servers and file servers)?
- Do the resources exist (hardware, software and staff) to rapidly restore the requested data from your backup tapes?

**Establish a formal process to handle privileged information.**

New Rule 26(b) has specific implications for how companies handle privileged information. Ideally, privileged information should be stored in separate repositories or otherwise classified as privileged upon storage, in order to meaningfully protect it during eDiscovery. This could save a great deal of time, money, and embarrassment in the course of litigation, and will be vastly preferable to the false sense of security that clawback agreements might engender.

**Locate the specific backup media you need to restore.**

The requested data may be located on a variety of backup media. Work with involved departments to create a master list that includes an itemization of the backup media that is required, where that media is presently located, and how it will be consolidated.

If time is limited or the IT staff can't execute this complex restoration and still manage their normal tasks, consider outsourcing the data restoration process to a qualified firm with extensive experience executing both small, straightforward data restoration projects as well as large, complex ones.

**Ensure metadata is not modified in any way.**

Make sure none of the metadata is modified during the gathering process. Simply copying information for the purpose of creating data sets may inadvertently change file metadata for the files. Opposing counsel may attempt to prove that the original attributes of the files have been changed, so it is critical that the original attributes remain intact.

## Organize the data for easy review.

Many requests require the legal team to be able to search through the contents of the data, including attachments, to find specific names or other information. In order to be able to do this quickly and cost effectively all the restored data needs to be de-duplicated and indexed. Large production requests can involve thousands of backup tapes, so make sure IT has the tools for efficient extraction and de-duplication of hundreds of thousands of records. Again, this is an area where outsourcing is extremely beneficial.

## Make sure the review environment is secure.

Reviewers can unknowingly change or delete information. Simply opening a file for review can change the metadata. If data is stored in a hosted Digital Archives, such as that provided by Iron Mountain, internal teams and outside counsel can view data without modifying it in any way. This service even tracks and logs every interaction to provide a complete audit trail.

## Document everything.

Document every step you take in building a more proactive discovery environment. When litigation events occur, log, tag and document everything to guarantee Chain of Custody. You should also have a formal e-mail policy so that employees understand the proper use of e-mail. This policy needs to be well documented and clearly communicated to all employees.

## **STRATEGY 3:**

### **Establish the ability to quickly restore high volumes of information from backup tapes.**

The ability to restore high volumes of backup tapes quickly is more critical than ever when responding to eDiscovery requests, but even the most sophisticated organizations can become overwhelmed when asked to restore large amounts of data. It's even more difficult when backup media is outdated.

Outsourcing data restoration is a desirable option for organizations that want to reduce costs, augment already stretched IT resources, and ensure that the legal department quickly gets the information it needs. Iron Mountain, for instance, has securely and rapidly recovered critical e-mails, documents and other records in thousands of backup media and is able to produce the data in less than half the typical time and with dramatic savings — as much as 65%.

Specific benefits to attorneys include:

- Improve search capability
- Ensure information gets to the right users, at the right time, in the right format
- Increase time spent analyzing records; reduce time spent finding them
- Improve defensibility through third-party verification

Specific benefits to IT include:

- Minimize drain on resources
- Reduce costs
- Ensure a secure, auditable environment
- Provide resource augmentation on a project basis
- Leverage a range of recovery capabilities

**STRATEGY 4:****Implement a digital archive to enable fast searching of e-mails and other electronic records.**

Digital archives can be a tremendous boon to both IT and legal organizations by serving as a secure, searchable and cost-effective repository for large volumes of electronic records. They provide fast access to vital data and robust search capabilities on information, including e-mail messages, text, images, and and more. In addition, potential discovery records that are virtually inaccessible on backup tape can be accessed quickly and efficiently by the response team and assessed for legal exposure at the first sign of pending litigation.

Implementing an in-house digital archive is a difficult, complex undertaking, although with enough resources and senior management backing, it can be done. Many businesses instead choose to work with a third-party provider. The end result can be huge savings, potentially reaching into the millions, in settlement costs and electronic evidence fees.

**STRATEGY 5:****Establish documented policies and procedures for managing litigation holds and data preservation.**

Two new rules in the amended FRCP make it critical for every business to develop, document, institute, and verifiably enforce formal litigation hold and data preservation procedures. This is particularly true of e-mail systems, which are subpoenaed in a rapidly rising percentage of cases.

Amended Rule 26(f) reinforces the existing requirement that parties give early attention to data preservation. While the requirement to preserve evidence is certainly not new, the all encompassing definition of ESI means that organizations should be prepared to consistently implement hold procedures across their various distributed recordkeeping systems. Respondents risk claims of spoliation of evidence if litigation holds are not instituted quickly and efficiently since production requirements will be known up-front.

In recognition of the fact that companies cannot preserve all the data they generate, Rule 37 provides limited protection against sanctions for parties that have disposed of potentially discoverable ESI in the normal course of “Good Faith” operation of an electronic information system. While its intent is to prevent the sanctioning of innocent parties, it does not provide a loophole for organizations that purposefully destroy relevant data outside the bounds of documented procedures. If you cannot produce data that your policy says you should have available, you risk sanctions. If you have no retention policy, you risk sanctions.

Nor does Rule 37(f) help companies that fail to preserve records via appropriate litigation holds—even before a suit is actually filed. Your company is on notice and must cease the destruction of relevant records anytime litigation is reasonably foreseeable.

Even when a company fails despite good-faith efforts to enforce a litigation hold and inadvertently disposes of records, it can still face sanctions for willful destruction of documents. In worst-case scenarios, businesses struggling to avoid sanctions have frozen all data disposal activities during litigation because they cannot identify pertinent records.

It is critical for your business to develop, document, institute, and verifiably enforce formal litigation hold and data preservation procedures. This is particularly true of email systems, which are subject to discovery in a growing number of cases.

Minimally recommended policies and procedures provide for formal distribution list management, communication audit trails, good faith follow-up, and specifically worded communications. Hold practices should also include a systematic way to apply, monitor and release hold orders.

# The eDiscovery Pain Reduction Handbook

## **IRON MOUNTAIN CAN HELP REDUCE YOUR eDISCOVERY PAIN**

The clear leader in data restoration and electronic discovery, Iron Mountain is helping more than 200,000 customer accounts worldwide minimize business risk with fast, accurate and cost-effective data retrieval and discovery services. Iron Mountain offers a range of products and services designed to help your organization reduce the costs and complexities of eDiscovery:

### **Data Restoration Services**

Iron Mountain's Data Restoration Services efficiently and cost-effectively gather, restore, search, organize, and deliver email and other records in response to eDiscovery requests and regulatory compliance inquiries.

Iron Mountain's Data Restoration Services can help you:

- Complete restoration requests on time, securely and accurately
- Reduce restoration costs, new infrastructure investments and ramp-up expenses for developing critical skill sets
- Efficiently process millions of records on multiple media formats from a variety of backup environments

And because your company already protects its backup tapes with Iron Mountain, you're positioned to reduce your eDiscovery costs and risks when you partner with the company that already has your tapes.

If you're under a time constraint to restore high volumes of data, Iron Mountain's Data Restoration Services can scale to your needs, while providing rapid and accurate turnaround. Iron Mountain has securely and rapidly recovered critical e-mails, documents and other records in thousands of backup media in less than half the typical time and with dramatic savings.

In addition, Iron Mountain can help you better manage existing data to reduce costs and speed response to eDiscovery requests. Services include:

- **Data Conversion.** To ensure that your older data is accessible, Iron Mountain can convert data from older, unsupported media formats to those used in your current infrastructure.
- **Data Cataloging.** Iron Mountain can properly catalog all media and data to improve efficiency and make all data (legacy included) more accessible. Cataloging helps reduce turnaround time and eliminates the tedious, often frustrating task of pouring through thousands of tapes in search of a particular file.
- **Data Inventory.** Iron Mountain can also help you inventory all data repositories, identify all records types and define associated accessibility, production and cost implications of making that data available.
- **De-duplication.** Iron Mountain can help you reduce data volume significantly with multiple levels of de-duplication—within a single mailbox, a server or across the enterprise.



### Digital Archives

Iron Mountain's Digital Archives is a web-based service that allows you to search and view digital assets within a secure, hosted environment. This controlled environment makes it easy for the legal team to search through large volumes of data, but never sacrifices security or compliance. Data can be viewed but never modified in any way.

Records can be migrated to Iron Mountain's secure Digital Archives in a matter of weeks, providing lawyers and IT with the ability to search, retrieve, and manage data from any web browser.

### Records Management Program

Iron Mountain can help you formalize document preservation and retention policies and procedures in a consistent, compliant, "good faith" Compliant Records Management program that proactively manages all forms of data—electronic and physical—enterprise wide. The program enables you to enact and enforce litigation holds, document a compliant chain of custody, prevent spoliation claims, avoid turning over privileged information, support claims of reasonable inaccessibility, and provide a safe harbor in the event that potential evidence has been destroyed.

### Litigation Readiness Services

Iron Mountain can help you reduce litigation costs by helping you develop and execute a comprehensive litigation readiness plan that proactively addresses records management and electronic discovery practices, policies and technologies. An array of customized solutions based on proven best practice approaches can transform eventual litigation from a reactive, complex and costly process, to one that is more manageable and cost effective. This unique program analyzes a company's litigation readiness position, identifies its strengths and weaknesses, and delivers an actionable plan for defensible records management, eDiscovery and litigation response practices, with a focus on the new Federal Rules of Civil Procedure.

### Litigation Holds and Data Preservation

Iron Mountain can help you establish a proactive litigation hold process that can ensure that the right records are kept while non-relevant data is processed routinely, thus reducing both litigation threats and preservation costs. Iron Mountain can help you develop strategies for improving your litigation hold and data preservation practices, implement actions to eliminate exposures, and opportunities to reduce costs and complexities.

#### IRON MOUNTAIN'S COMPREHENSIVE SERVICES CAN HELP YOU:

- Reduce the cost, effort and time associated with managing electronic evidence.
- Easily to search through volumes of information and locate specific files.
- Achieve further savings by reducing the volume of data by up to 90%.
- Eliminate many time-consuming tasks associated with eDiscovery.
- Enable IT to quickly locate and retrieve data.
- Facilitate the creation of an enterprise-wide information retention and management program—a crucial component of any litigation readiness plan—with Records Management services.
- Ensure an independent, auditable Chain of Custody so all digital assets are authenticated and cannot be altered, which testifies to data integrity and evidentiary quality of each record's context, content, and structure.

# The eDiscovery Pain Reduction Handbook

## SUMMARY

Iron Mountain is uniquely positioned to offer assistance with every aspect of the eDiscovery process. Our comprehensive services are based on proven best practices, comply with state and federal regulations, and are delivered by experts with hands-on experience. With litigation a virtual certainty for every business, and with courts requiring the implementation of solid eDiscovery practices, Iron Mountain can help you develop a proactive approach to litigation readiness that will lessen the pain of preparing for and responding to eDiscovery requests.

**For more information visit [www.ironmountain.com/digital](http://www.ironmountain.com/digital).**

**To speak with an Iron Mountain representative about improving your eDiscovery practices, please e-mail us at [ediscovery@ironmountain.com](mailto:ediscovery@ironmountain.com). Or call (800) 899-IRON.**

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