



# Building a Successful E-Discovery Strategy

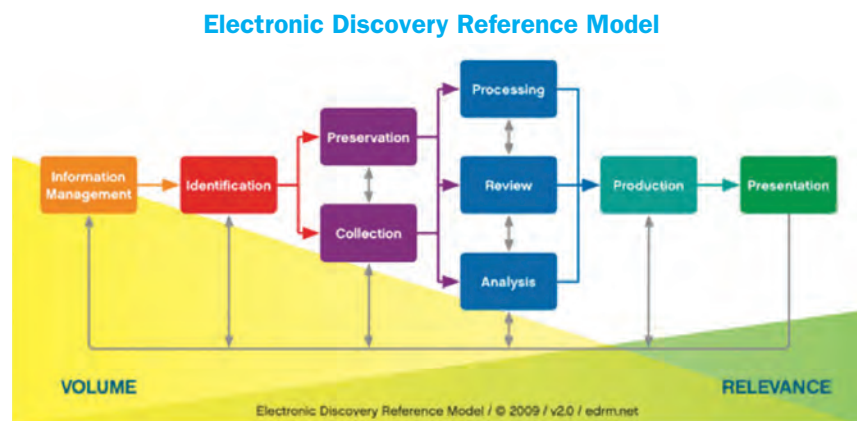
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Organizations that adhere to sound information governance policies through disciplined records and information management are positioned to find success in even the most complex e-discovery projects.

The best place to start building the strategy for a successful discovery project is at the beginning. Not at the beginning of the investigation or the litigation, but at the records and information management (RIM) stage – which, according to ARMA International, is the foundation for strong information governance (IG) and is built by “establishing and implementing policies, systems, and procedures to capture, create, access, distribute, use, store, secure, retrieve, and ensure disposition of” records and information.

Organizations that adhere to sound IG policies through disciplined RIM are positioned to find success in even the most complex e-discovery projects; this is because the e-discovery process is affected directly by how well information is managed.

In fact, as shown in Figure 1, information management (referred to in this article as RIM) is the beginning stage of the Electronic Discovery Reference Model (EDRM), which is widely recognized as the basis for establishing a meaningful approach to a successful e-discovery strategy.



**Figure 1:** The Electronic Discovery Reference Model **Source:** EDRM

## ILM: Critical for E-Discovery

A fundamental tenet of RIM is managing information throughout its life cycle – from creation to disposition; this is referred to as information lifecycle management (ILM). Those who developed the EDRM understood that properly managing information throughout its life cycle – not just when it is needed for litigation or investigation – is essential to e-discovery success.

E-discovery professionals that don't understand what is addressed in the first phase of the EDRM may

not be aware of the critical role ILM fundamentals play in the e-discovery process. They may believe they have the RIM piece covered because they have information technologists who manage their servers, applications, and the data that resides in them; but, it is not that simple.

As Table 1 on page 34 illustrates, ILM and the EDRM are very similar.

## RIM Reduces Financial Burden

In his “e-Discovery Team” blog about the Rand report “Where the Money Goes,” noted attorney and



e-discovery expert Ralph Losey discusses the growing complexities directly associated with the growth of data, and the burdensome cost of governing that data are made clear. Another reference to the increase in over-burdensome cost is from *Inside Counsel*, entitled “E-discovery: Potential cost shifting for document review.”

The courts continue to drive home the point that reducing the growing financial burden of the e-discovery process lies within that first phase of the EDRM. They have made it clear that organizations that fail to manage their information proactively and therefore overburden the legal process will be sanctioned accordingly.

Ignorance or lack of budget will not appease the court; both excuses have brought steep sanctions. For example, in the case of *United States v. Philip Morris USA, Inc.*, 327 F.Supp.2d 21, 25-26 (D.D.C. 2004), the court imposed a fine of \$2.75 million and barred testimony of witnesses who violated the court’s preservation order and company’s document retention policy.

In *MasterCard International, Inc. v. Moulton*, 2004 U.S. Dist. LEXIS 11376, \*14-16 (S.D.N.Y. June 22, 2004), the court allowed argument for negative inferences due to Moulton’s failure to cease normal document retention practices, despite the absence of bad faith.

Rule 26 of the Federal Rules of Civil Procedure (FRCP) requires opposing counsel to “meet and confer” to discuss and, to a great extent, agree upon the types of electronic information each party requires. A successful outcome depends on how well the organizations know what information they have, where it is located, how to cull it, and how to retrieve and produce it in a way that ensures its authenticity – in other words, it depends on how well they *govern* their information.

### RIM vs. IG: Not the Same

While the EDRM describes the first e-discovery stage as *informa-*

Information Lifecycle Management Stages	Electronic Discovery Reference Model Phases
1. Receive/Create	1. Locate certain and specific records.
2. Use/Activity: modify, edit, transfer or move	2. Gather or collect records.
3. Inactivity: transfer to storage, store, retrieve, return.	3. Review records against criteria to validate that the collection is accurate and complete.
4. Disposition: final review, destruction, documentation	4. Organize the collection properly.
5. Archive: review, use, and return	5. Prepare the collection for proper production.
	6. Present the collection.

**Table 1:** Similarities Between ILM and EDRM

*tion management*, the more encompassing term would be *information governance*. There are important distinctions.

Information *governance* is *strategic* in nature. It determines how information is to be created/received, if it is to be used and for what purposes, and how it will be stored and then archived or destroyed. Governance also establishes, dictates, monitors, and audits compliance with policies and procedures related to all of these stages of the information lifecycle.

Information *management* is *reactive* in nature. It plays a custodial role, facilitating the organization of information that has been created/received, is being used, and eventually will be stored and then archived or destroyed. Essentially, it is responsible for the implementation and continued execution of information *governance* guidelines, policies, and processes.

The sooner organizations can expand their idea of the EDRM’s information management stage to encompass information governance, the better prepared they are going to be for all business processes, not just for litigation.

### The EDRM’s Six Phases

The EDRM is a six-phase formula for handling the e-discovery process, beginning with information management, as discussed above.

### Phase 1 – Information Management

As already noted, this would be better described as IG. Until an organization commits to righting its RIM and IG programs, complete with policies and processes, it cannot believe that it will fare well through e-discovery.

Managing information is simply not enough. Organizations will be better prepared to initiate and negotiate each phase of the EDRM when they have shifted from merely *managing* their information to *governing* their information. It is a paradigm shift that will require significant changes in organizational resources.

Many organizations have vice presidents or chief officers whose sole responsibility is to oversee IG. These individuals and their teams are tasked with overseeing the organization’s governance of the information life cycle. From custodian, to supervisor, manager, and vice president, this evolution continues; and to a great extent, it has a direct correlation to the e-discovery process.

### Phase 2 – Identification

Judge Shira Scheindlin from the Southern District of the State of New York was instrumental in the development that resulted in FRCP Rule 26 mentioned above that requires opposing counsel to agree to what electroni-

cally stored information (ESI) is to be produced.

This discussion includes identifying not only the types of ESI required, but also the repositories in which it is stored and from which it must be retrieved. It may also include identifying the hardware and software necessary to read the gathered ESI. Whether the ESI is reasonably accessible also may be a part of the discussion.

### **Phase 3 – Preservation and Collection**

Data, records, and information that meet the criteria set forth above by counsel and then approved by the court must be first preserved under a *legal hold*, a process described by ARMA International as “A hold placed on the scheduled destruction of records due to foreseeable or pending litigation, governmental investigation, audit, or special organizational requirements.” Organizations that do not have such formal processes in place as a part of their IG program are at great risk.

The legal hold process aligns perfectly with the concept of formal IG, and at the very center of ILM are preservation and collection. The elements of systematic compliance and trust permeate throughout.

### **Phase 4 – Review and Analysis**

In the realm of ILM, review and analysis are never ending. For an organization to ensure that its ESI is current and reliable for all business purposes, review and analysis must be constant priorities.

The most time-consuming and costly phase, review and analysis requires that great lengths be taken to ensure beyond a reasonable doubt (often beyond *any* doubt) that the information moved into production and finally to presentation is *exactly* what is required.

It takes hours upon hours to review hundreds of thousands – often millions – of documents to make these determinations. The monetary investment in these human reviewers can reach up to several hundred dollars per hour and the total can soar into the millions of dollars.

This phase of the EDRM is definitive RIM (or ILM).

### **Phase 5 – Production**

Now that the required data has been agreed upon, identified, preserved (locked down), collected, reviewed, and analyzed to ensure accuracy and validity, production is readied for the court. For the RIM ILM purist, this is exciting stuff because it’s about the governance of the

information life cycle.

### **Phase 6 – Presentation**

This final step places the information into the hands of no return. This final phase is a relief; following and adhering to the tenets that support the process result in a confidence that can be achieved by no other means.

### **The Evolution: RIM to IG**

E-discovery is not easy. It can be enormously expensive and a painful burden on any organization negotiating its way through it. There are those wise prognosticators who say that it is no longer *if* one gets sued, but rather *when* one gets sued. The United States is the most litigious society ever, and the legal industry is big business. The courts are flooded, and the expenses run to unbelievable heights.

The EDRM is a helpful tool that should prompt prudent organizations to start with a strong foundation of RIM and its concept of ILM, then evolve to encompass IG tenets to ensure compliance with policies and processes that will be the key to successful e-discovery. **END**

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