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# Drafting Document Retention Policies

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# Overview

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- ❖ **Information Governance**
- ❖ **Records Retention and Destruction**
- ❖ **Litigation Holds**
- ❖ **Drafting Mechanics**
- ❖ **Technology Options**



# Key Objectives for Effective Information Governance

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- ❖ Establish “Rules of the Road”
- ❖ Enhance Data/Information Security & Management Corporate-wide
- ❖ Understand your company’s “Bandwidth”
- ❖ Comply with Regulatory Requirements
- ❖ Proactive litigation preparedness/readiness
- ❖ Avoid Sanctions



# Family Feud

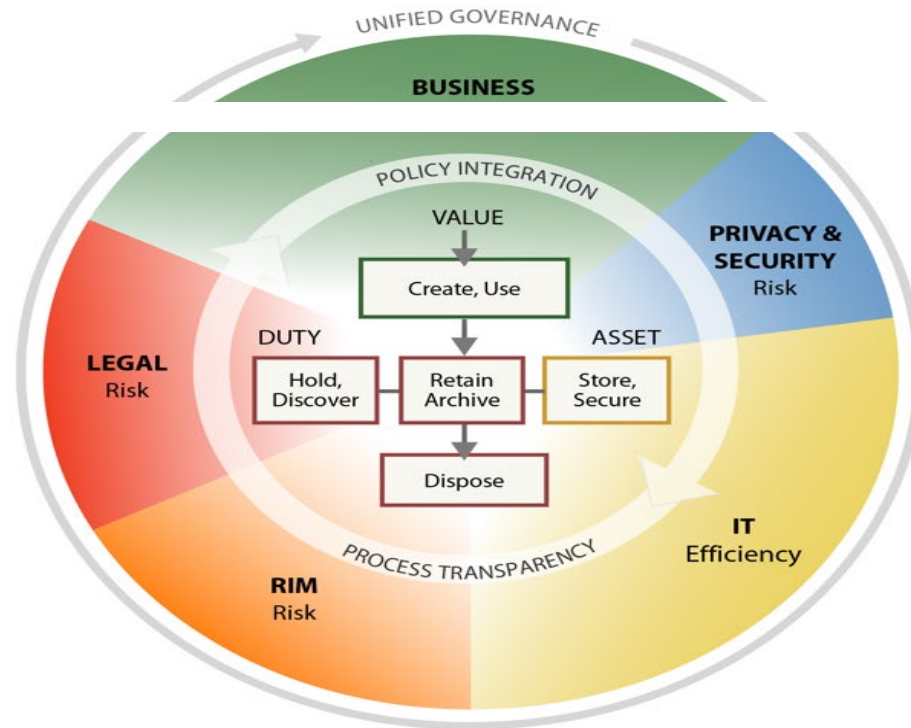
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- ❖ Who are the stakeholders?
  - ❖ Business
  - ❖ IT
  - ❖ Legal
  - ❖ Compliance
  - ❖ Records Management
  - ❖ Others?



# Information Governance Reference Model (IGRM)

Linking duty + value to information asset = efficient, effective management



**Duty:** Legal obligation for specific information

**Value:** Utility or business purpose of specific information

**Asset:** Specific container of information

# Developing Clear Information Governance Policy & Procedures

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## Goals:

- ❖ Establish a corporate standard for Data Management
- ❖ Define uniform retention/destruction guidelines that cross business divisions
- ❖ Manage data accessibility/disclosure

# Policy Development Overview

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Retain data/records as required to protect and maintain business operations, comply with regulatory requirements, and to manage actual, threatened or reasonably foreseeable litigation or dispute resolution.



# Establish a Written Policy on Data Management/Retention/Destruction

## Key Policy Considerations:

- ❖ Understand who are the Data Record Holders.
- ❖ Understand where records are maintained and in what format (Onsite, Offsite, Cloud).
- ❖ Understand when business or regulatory obligations may trigger destruction.



# Establish a Written Policy on Data Management/Retention/Destruction

## Key Policy Considerations:

- ❖ Establish Data Classification/Identification system to facilitate ease of administration and to protect sensitive information.
- ❖ Understand litigation/dispute retention obligations.
- ❖ **Retain Records for the period required by applicable laws and regulations.**
- ❖ **Retain Records necessary for ongoing business operations and purposes**



# Data Management/Records Key Standards

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- ❖ Classify Data/Records in clearly definable data sets and protect them from unnecessary disclosure.
- ❖ Ensure safeguards are in place for the security and protection of sensitive company and Personally Identifiable Information.
- ❖ Retain Records as required by litigation or a government or internal investigation.
- ❖ Destroy records not necessary for legal or business reasons and not required by law or regulations.



# Policy Implementation Tie-ins

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- ❖ If Policy is:
  - ❖ New? Say so
  - ❖ A directive from Board of Directors or CEO? Say so
- ❖ If Policy:
  - ❖ Supersedes existing or multiple data management policies? Say so
  - ❖ Ducktails a parent company policy or is intended to extend to across business divisions? Say so
  - ❖ Flows in parallel to another policy? Say so



# Data Management

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- ❖ Philosophy of Data Management
- ❖ Centralize?
- ❖ Competing Interests
  - ❖ Business: Quickly find information
  - ❖ Legal: Preserve only what is required
  - ❖ IT: Minimize storage costs
  - ❖ Privacy: Secure or destroy private records



# Document Retention – The Basics

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- ⑩ Duty to preserve only arises when you reasonably anticipate litigation (e.g. discrimination claim, letter from attorney, etc).
- ⑩ Absent claim, business reasons and compliance laws dictate what is retained.



# 1000+ Federal Record-Keeping Requirements

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Privacy Act of 1974 (Public Law 93-579)

Economic Espionage Act of 1996

Gramm-Leach-Bliley Act of 1999

The Internal Revenue Code

Fair Employment Practice Laws

The Wage and Hour Laws

Hiring and Recruiting Records

The Family and Medical Leave Act of 1993

Federal OSHA

The Immigration Reform and Control Act of 1986

The Consumer Product Safety Act

Health Insurance Portability and Accountability Act of 1996 (HIPAA)

Federal Medical Records

Contracts as a Medicare Provider

The Federal Election Campaign Act of 1971

The Anti-boycott Regulations

The Magnuson-Moss Warranty Act

*and so on ...*



# How Long to Voluntarily Keep?

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- ❖ Reasonable business rule
  - ❖ E-mail: as short as 30 days
- ❖ Decision for other than “litigation” reasons:
  - ❖ *Hynix v. Rambus*, Case No. 2009-1299, 1347 (Fed. Cir. May 13, 2011)
- ❖ EEOC Retention Notice (St. Louis)



# E-Mail - Sample Language

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- ❖ Inbox and Sent Items: Email and Faxes in the Inbox and Sent Items folders older than 60 days are automatically moved to the Deleted Items folder.
- ❖ Deleted Items Folder: Email and Faxes in the Deleted Items folder older than 90 days are automatically removed from the Deleted Items folder.
- ❖ Mail Folders: Mail stored in personal folders is automatically archived and kept indefinitely.
- ❖ Quotas: Some companies limit inbox size to encourage deletion.





# Voicemail – Sample Language

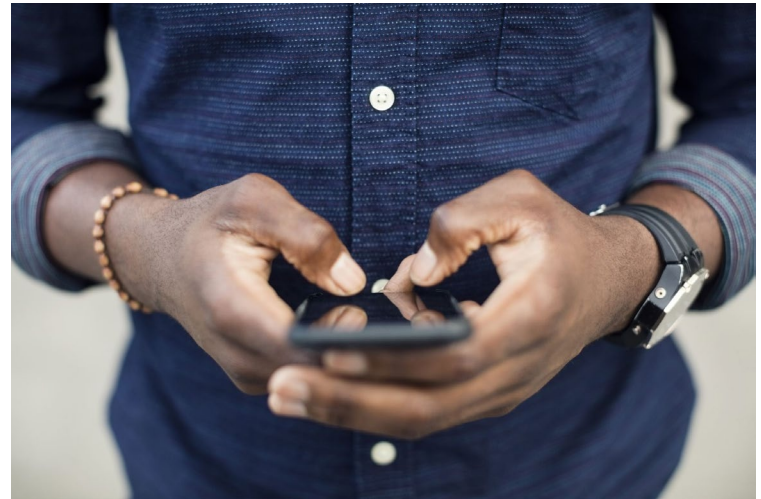
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- ❖ 15 days Retention: Deleted voicemail is sent to the Deleted Items folder and is recoverable for 15 days.
- ❖ 75 days Retention: Voicemail in the Outlook Inbox, whether its been listened to or not, remains there for 60 days before it is automatically moved to the Deleted Items folder where it is recoverable for 15 days.
- ❖ Retained Indefinitely: Voicemail moved to personal folders is archived and retained indefinitely.

# Ephemeral Data – A Constant Challenge

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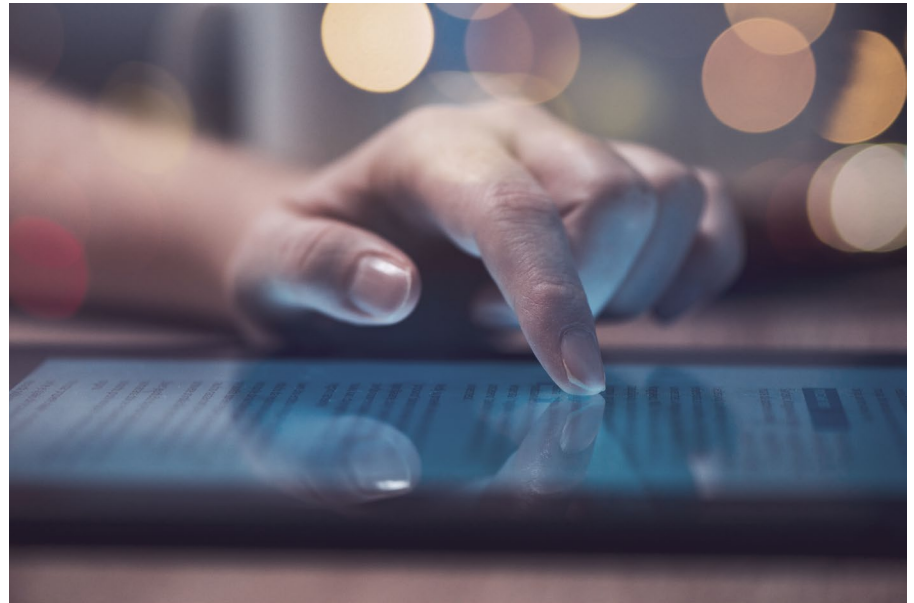
- Text Messages
  - Company or Personal Devices?
- Chat Messages
  - Slack, Jabber
- Location information; swipes
- Considerations:
  - Regulatory Requirement?
  - Do you really want to see later?
  - Suggestion: Require affirmative action to preserve



# What About the Cloud?

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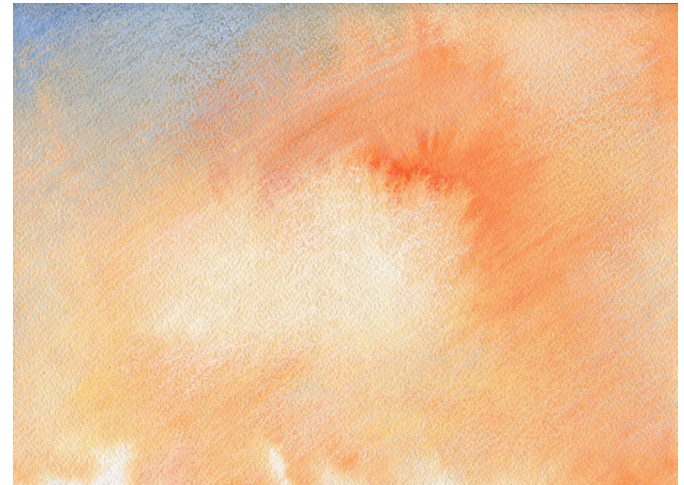
- ❖ Best Practices for Cloud Contracts
- ❖ Review Cloud SLAs
- ❖ Integrity of the Cloud
- ❖ Deletion Concerns
- ❖ Many Cloud providers now offer integrated solutions.



# Document Destruction

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- ❖ Disposal is not a bad thing
- ❖ Both physical and electronic information needs to be address
- ❖ *Timely* – Governed by retention schedule
- ❖ *Consistent* – Similar documents treated the same
- ❖ *Effective* – Really deleted. Not on backup tapes.



# Legal Hold: Final Family Feud

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- ❖ Legal hold protocol is typically addressed as part of a Document Retention Program
- ❖ Who implements a legal hold?
  1. In-House Counsel
  2. Outside Counsel
  3. Vendor
- ❖ When does the hold need to be implemented?

# When is Litigation “Reasonably Foreseeable?”

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- ⑩ Formal Complaint is made or filed.
- ⑩ Incident or Dispute arises.
- ⑩ Regulatory or governmental Agency Investigates/Audits entity.
- ⑩ Discovery Request sent by third party.
- ⑩ Legal Hold/Document Preservation Request initiated.

# How is The Hold Implemented?

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# Litigation Off Switch

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# Identify the **KEY PLAYERS**...

## **We're meeting with them on Day 1!**

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**The Litigation Hold begins with their e-mail, documents  
and data.**



# Custodian Interviews

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- ❖ Ask what relevant documents they have?
- ❖ How are the documents maintained?
- ❖ Who is IT representative that can describe system security and processes?
- ❖ Where are the documents stored? – Go over possible storage locations (If have completed a document flow chart with IT use it)
- ❖ Any other custodians? (Who else has data?)

# Legal Hold Notice

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- ❖ Should come from senior official (General Counsel is a good choice).
- ❖ Define document broadly – Make sure everyone understands include electronic documents.
- ❖ List what categories of documents should be retained.
- ❖ Include time frame of documents to be retained.
- ❖ Include who to call with questions.



# Legal Hold – Administrative Issues

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- ❖ Often good to ask each person who else in the company might have responsive documents (and then add them to your hold).
- ❖ Good practice to have each person sign hold to acknowledge received and have complied (of course you must follow up to get all back).
- ❖ Send periodic Hold *reminders* to custodians.
- ❖ Track Holds electronically, if possible.



# Legal Hold - IT Issues

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- ❖ Establish identity of possible 30(b)(6) - IT staff member.
- ❖ Consult with IT staff (preferable in advance of needing/issuing litigation hold).
- ❖ Establish technical parameters of hold, i.e.:
  - ❖ Stop auto deletion
  - ❖ Secure files
  - ❖ Notify IT of all custodians and supplement as more custodians are identified



# Where Does Your Data Reside?

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# Sources of Electronically Stored Information

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- ❖ Servers
- ❖ Laptops
- ❖ Desktops
- ❖ Back up systems and tapes
- ❖ Storage devices (Smartphones, iPad; Thumb Drives, etc.)



# What about Personal Devices

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- ❖ Almost everyone has some BYOD issues.
- ❖ Litigation increasingly involves these devices:
- ❖ Fulbright's 9<sup>th</sup> Annual Litigation Trends Survey shows that percentage of companies who had to preserve/collect data from an employee's mobile device had increased from 32% in 2011 to 41% in 2012.
- ❖ Best practice to include BYOD/Data on Mobile Device in Litigation Hold Notice.





# Managing E-Mail in Litigation Holds

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- ❖ Decide how to handle email – Best solution is often to have IT handle rather than individual user. If your company uses automatic deletion, dangerous to have custodians have responsibility to keep.
- ❖ If individuals users, need to be sure keep in native format (e.g. not print out).
- ❖ Another solution is to have users put emails in a certain spot to retain.



# Ephemeral Data is BACK

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- ❖ Need to consider Texts.
- ❖ Does your company use IM/OM?
- ❖ What about calendar entries?
- ❖ What about to do lists/task lists?
- ❖ What about voicemails?– Some voicemails in text or data file.
- ❖ What about social media?– Do you need to preserve company Facebook page, etc.?

# Managing Litigation Holds

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- ❖ Must be documented
- ❖ Need a tracking tool
- ❖ Outside counsel can help manage / maintain privilege / advise on hold
- ❖ Send Reminders – Every 6-12 months so employees do not forget about hold
- ❖ Have a process to address documents when an employee leaves

# When Litigation Resolved

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- ❖ Be sure to lift hold when litigation resolved.
- ❖ Can be tricky if multiple litigation holds (with possibly overlapping information) in place.
- ❖ Some eDiscovery platforms address this issue with multiple, overlapping ESI folder systems.

# What Happens If We Mess Up?

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# Sanctions

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## Most Commonly Sanctioned Behavior:

- ❖ Destruction of evidence (84%)
- ❖ Delayed production (16%)

## Most Common Sanction:

- ❖ Attorney's fees and costs are the most commonly granted sanction (60%)
- ❖ Evidentiary preclusion (30%)
- ❖ Adverse inference instructions (23%)
- ❖ Dismissal or default (23%)

# Mechanics of Drafting: The Policy

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- ❖ Involve the key stakeholders
- ❖ Typically a Policy and a separate “Schedule”
- ❖ The policy typically covers:
  - ❖ General procedures
  - ❖ Handling emails
  - ❖ Handling mobile devices
  - ❖ Litigation holds
  - ❖ Auditing / compliance



# Mechanics of Drafting: The Schedule

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- ❖ The Schedule lists document times and retention periods.
- ❖ Typical categories include:
  - ❖ Accounting
  - ❖ Corporate Records
  - ❖ Sales / Marketing
  - ❖ Environmental
  - ❖ Human Resources
  - ❖ Real Estate
  - ❖ Legal





# Tips for drafting the Schedule

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- ❖ A master schedule or one for each facility?
- ❖ Decide what law(s) applies
  - ❖ National
  - ❖ State
  - ❖ International / EU (GDPR?)
- ❖ Determine level of detail
- ❖ Involve subject matter experts (i.e. SEC lawyers, environmental lawyers, employment lawyers, litigation lawyers)



# Cost of Outside Counsel

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❖ Good candidate for an AFA. Sample Prices:

❖ **\$5000**

❖ Review and update existing policy

❖ Litigation Hold Policy

❖ **\$10,000**

❖ Draft simple policy

❖ Overhaul existing policy

❖ **\$20,000**

❖ Attend all committee meetings

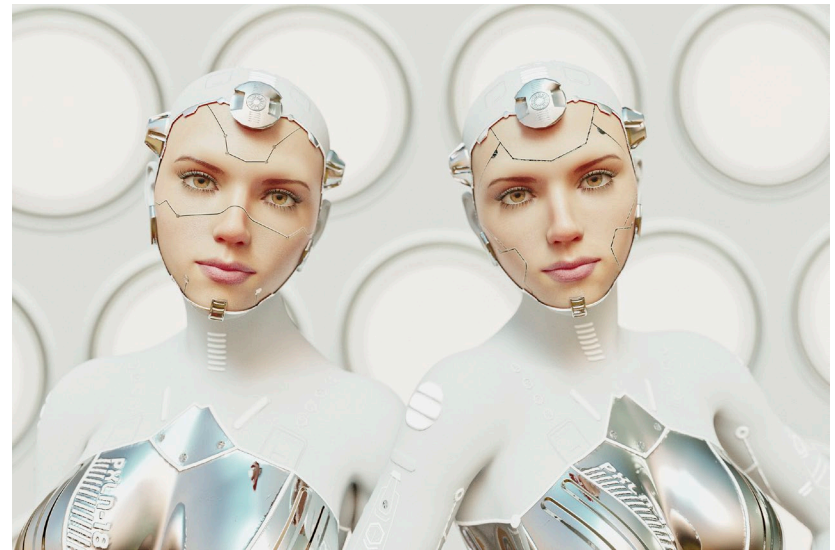
❖ Annotate detailed preservations schedules



# What's Next – AI Management of Records

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- Vendors are marketing AI Tools
  - Iron Mountain's Insight “classifies” documents
  - Many other vendors advertise options
  - May sync with your company's other IT initiatives around data analytics



# CONCLUSION

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- ❖ Retention Policies need to fit into larger Information Governance strategy
- ❖ Involve the key stakeholders
- ❖ Customize policy and schedule to meet your company needs
- ❖ Consider how technology can assist



# RESOURCES

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- ❖ Sample Retention Policies
- ❖ Sample Litigation Hold Notice
- ❖ Purging the Cloud: Data Destruction in the Age of Cloud Computing (Henriques, 2014)
- ❖ Sedona Commentary on Information Governance (2019); on Defensible Disposition (); Email Management (2007); BYOD (May 2018). All available at:
  - <https://thesedonaconference.org>
- ❖ American Records Management Association, <http://www.arma.org>
- ❖ Data Management at Harvard, <http://isites.Harvard.edu>



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