

THERE'S A LOT TO PROCESS IN
MANAGING THE BUSINESS OF LAW

INOUTSOURCE

WE'RE HERE TO GUIDE YOU
THROUGH EVERY STEP



Legal Holds and Retention Policies....

Where to Start???

Objectives

- Identify challenges with managing unstructured data in law firm
- Be aware of the relevant ABA Professional Guidelines and other legal statutes that must be considered as part of compliant information governance policy
- Assess your firm's capabilities to manage and preserve information needed to comply with legal action

Legal Holds

Why is this a challenge?

Electronic Communication

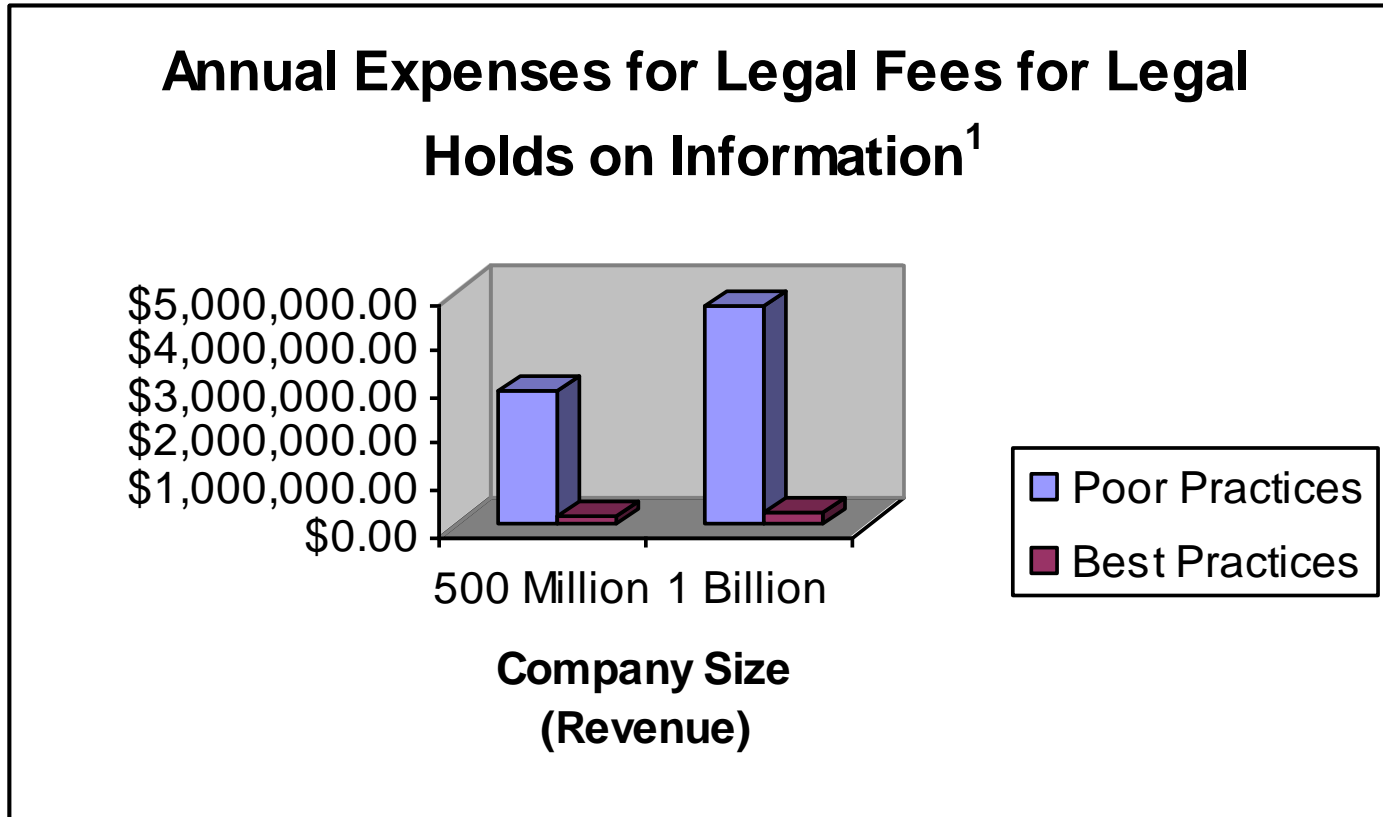
- *E-Mail*
- *Removable Storage Devices*
- *PDA's*
- *Home computers*

Legal Holds

How is firm notified of litigation hold?

What actions are triggered by hold?

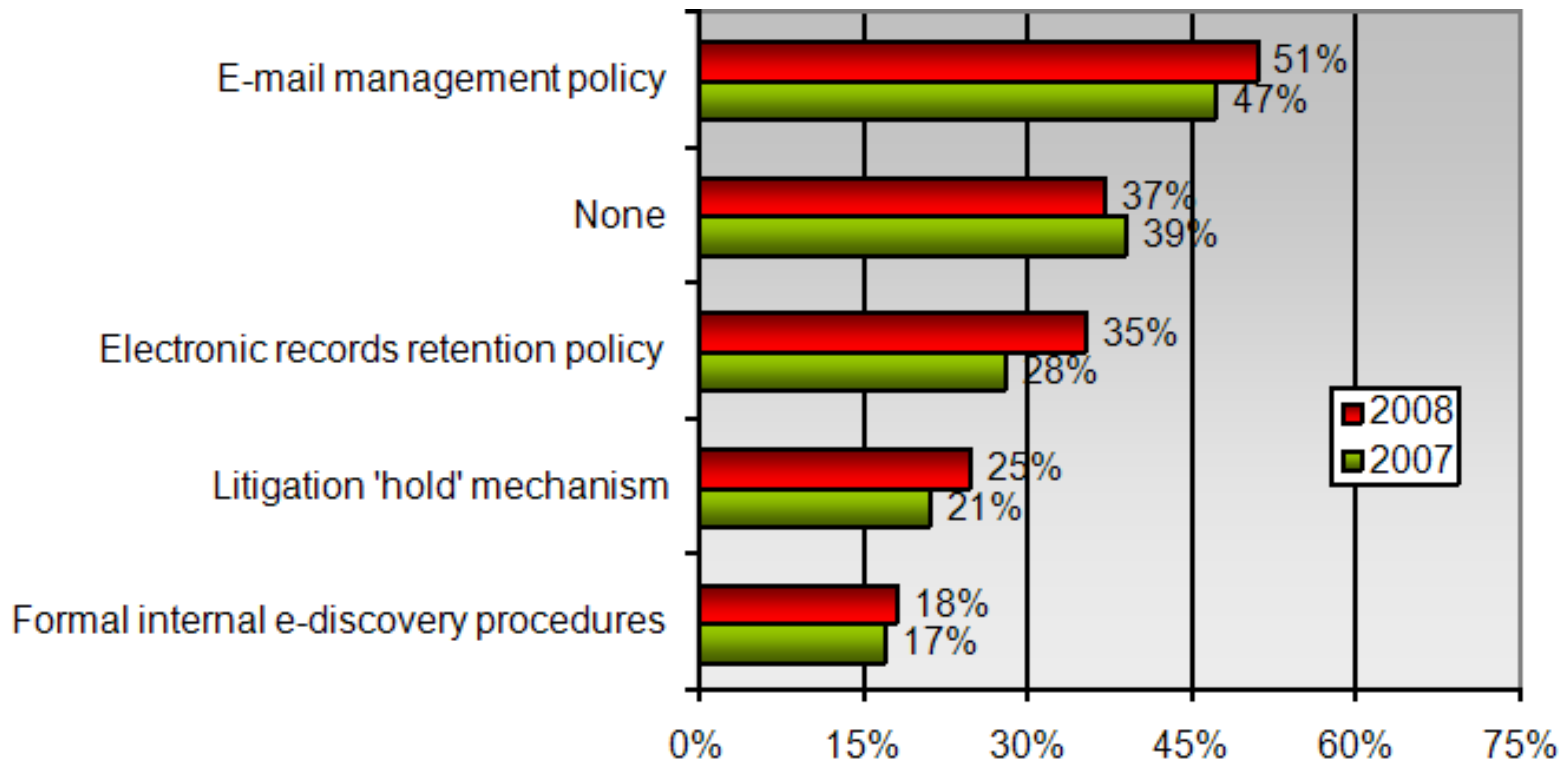
Interesting Statistics



¹ www.itpolicycompliance.com

Interesting Statistics

“What Do You Have In Place?” ²



²2008 ILTA Technology Survey

Observations

- Cannot have a compliant, cost effective legal hold policy in absence of a comprehensive, implemented records management policy.
- Attorneys are frequently counseling their clients on e-discovery, litigation hold and records retention policies but do not adhere to the same standards in their own firms.

How Do You Protect Your Firm?

Educate

Audit

Policies and Procedures

Legal Hold and Retention Policy

Retention (Information Governance)
Policy should encompass policies & procedures to be *compliant* with:

- Legal hold/preservation order
- Protecting client confidentiality
- Protecting attorney-client privilege

Education - Compliance

- Client Expectations
 - Outside Counsel Guidelines
- Professional Responsibility Guidelines
 - ABA
- Legal
 - FRCP
- Regulatory
 - International
- Insurance/Liability Carrier Requirements

Client Expectations

- Competent Representation
- Confidentiality Protected
- Communication

Competent Representation and Records Management

ABCNY Formal Opinion 1986-4

- Guidelines on file ownership and retention

ABCNY Formal Opinion 2008-1

“organize e-mails to facilitate their later retrieval, for example by moving those e-mails to an electronic file devoted to a specific representation, or by coding those e-mails with specific identifying characteristics”

Communication

ABA Model Rule 1.4 - Communication

“promptly inform the client of any decision or circumstance with respect to which the client’s informed consent”

“keep the client reasonably informed.....comply with reasonable requests for information”

Confidentiality

ABA Model Rule 1.6 Confidentiality of Client Information

“(a) A lawyer shall not reveal information acquired during the professional relationship with a client unless the client gives informed consent”

E-Mail – Confidentiality Risks

Disclosure of Metadata

- Responsibilities of Sender

“Lawyer must use reasonable care to ensure he or she does not inadvertently disclose client confidential information”

NY State Bar Opinion 782

E-Mail – Confidentiality Risks

Mining of Metadata

“the use of computer technology to access client confidences and secrets revealed in metadata constitutes an impermissible intrusion on the attorney-client relationship”

NY State Bar Opinion 749

Metadata – Confidentiality Risks

Metadata Disclosure and Review

State Bar Associations Opinions Vary

- DC Bar Ethics Opinion 341
 - “prohibited from reviewing.....when he has actual knowledge that metadata was inadvertently sent”*
- Florida Ethics Opinion 06-02
 - Prohibits lawyers from reviewing
- Maryland Ethics Opinion 2007-09
 - Allows viewing and using metadata
- Pennsylvania Ethics Opinion 2007-500
 - Indecisive

Sources of Claims

- Client Relations Errors
 - Approximately 11% of Malpractice Claims³
 - Communication

*How has e-mail contributed to these errors?
What evidence would firm collect to defend
these types of claims?*

3. American Bar Association Standing Committee on Lawyers' Professional Liability, Profile of Legal Malpractice Claims 2004-2007

Audit

- Data Map
 - What do you have
 - Where is it stored
 - How is it identified
 - Can you document chain of custody

Audit

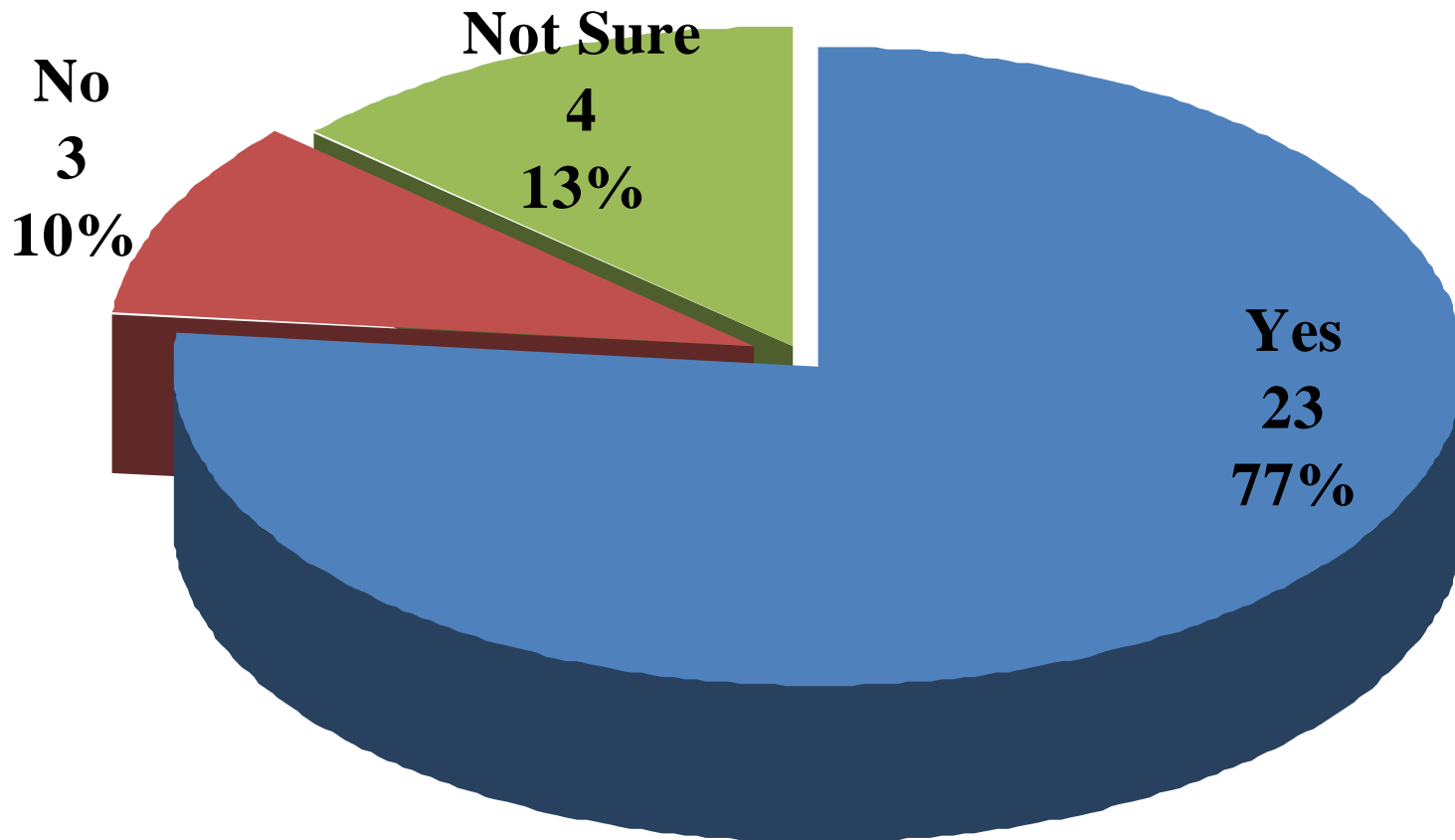
Common Law Firm Applications

- Document Management System (DMS)
- Litigation Support Database
- Calendaring/Docketing

Where is your Information?

- Shared network drives
- Work station hard drives
- E-Mail folders
- Back up tapes
- Extranets
- Physical Files
- Home computers, thumb drives

ARMA Survey Question # 14. Does your firm permit attorneys to work on client matters from a home/personal computer?



Managing Risk

“An effective records retention policy should ensure that documents are stored only in identifiable locations, appropriately backed up, and treated consistently wherever they are located and in whatever media they exist”⁴

Records Management Challenges

Laterals Attorneys

- Incoming
 - What information are they bringing to firm?
 - What is being loaded onto firm systems?
- Outgoing
 - What confidential information is leaving the firm with departing attorneys?
 - E-Mail

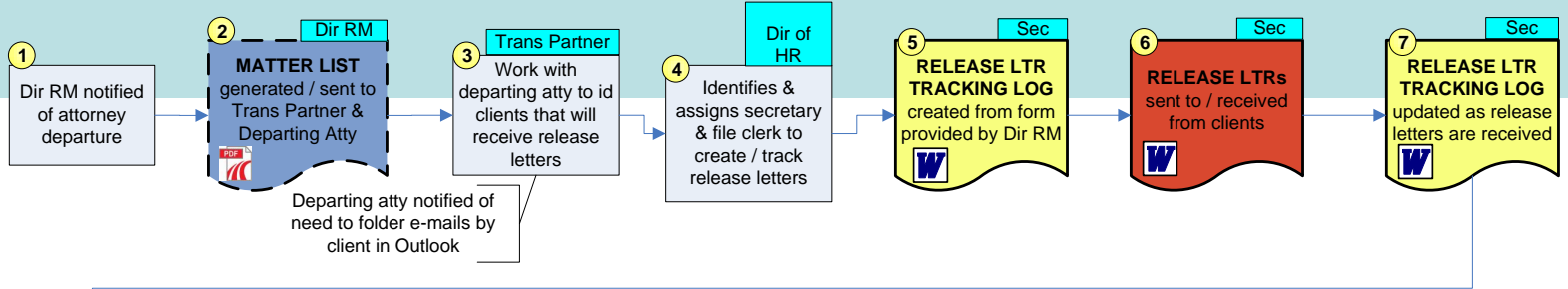
Laterals – Best Practices

Lateral Attorneys – Part of Retention Policy

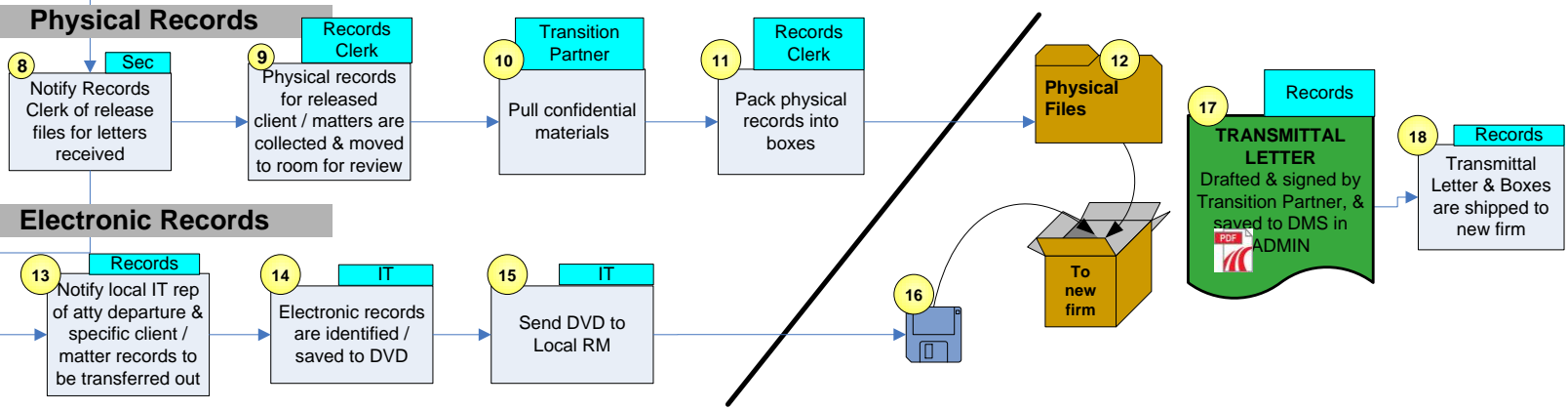
- Establish protocols for transferring information
 - File/document transfer
 - Docketing
- Establish roles and responsibilities
- Establish process to document chain of custody for releasing information and accepting information

Departing Attorney Transition

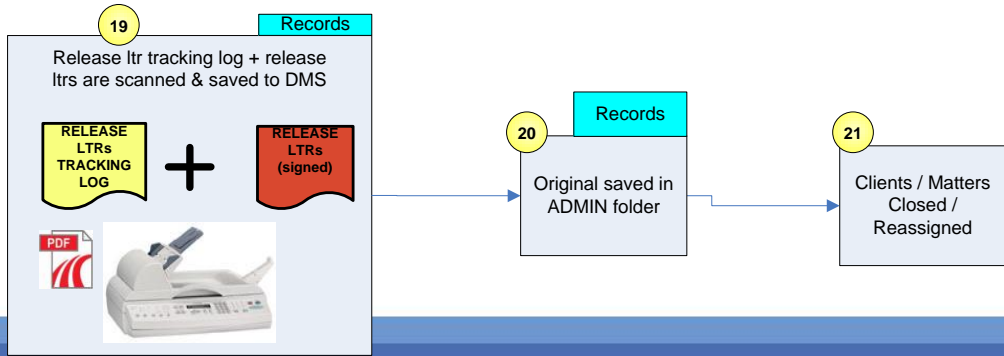
Notification /
Release Letter Prep



Id / Prep / Collection of
Records

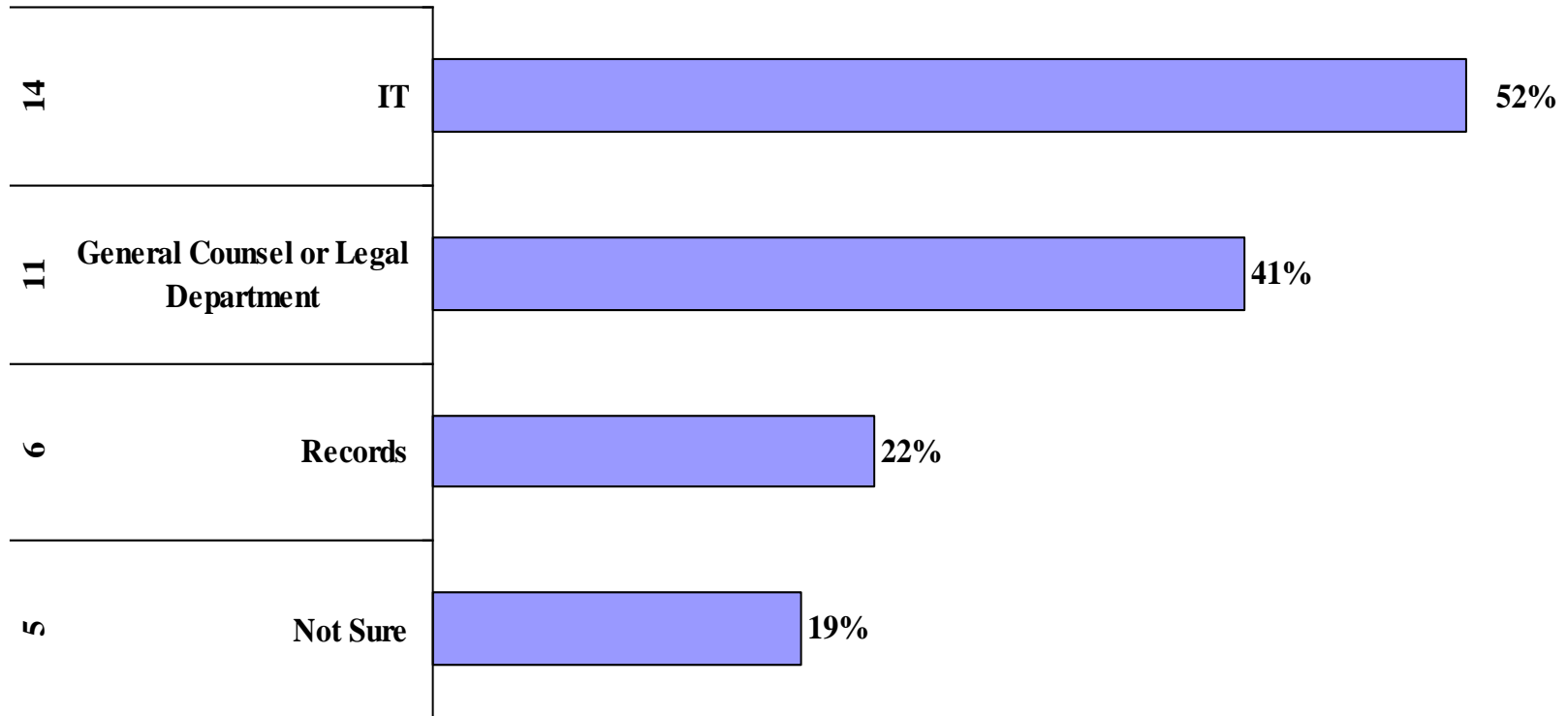


Closing / Re-assignment
of Clients/ Matters



Legal Holds

ARMA Survey Question # 21. Who has responsibility for identifying and preserving electronic information in response to potential legal action?



FRCP & Records Management

- Electronically Stored Information (ESI) is discoverable
- Opposing parties must meet early on and determine how ESI will be produced
- ESI – Accessible or Inaccessible?
 - How are back up tapes used?

Risk in Failing to Manage ESI

- Unfavorable Outcome for Client
- Discovery errors
 - Spoliation
 - Court Sanctions
 - Adverse inference
- Financial loss
- Damaged Reputation
- Malpractice claim

Attorney Client Privilege

Attorney-Client Privilege may be invoked with respect to:

- (1) Communication
- (2) Made between privileged persons
- (3) In confidence
- (4) for the purpose of obtaining or providing legal assistance for the client

Attorney Client Privilege

What aspects of case are considered privileged?

“Communications through a public mode may suggest the absence of a reasonable expectation of confidentiality”

The Law Governing Lawyers

Failing to Protect Privilege

“Perkins Coie settled malpractice suit for 19 million dollars”⁵

- Claim asserted that Perkins Coie was negligent when they handed over privileged document to defendant.

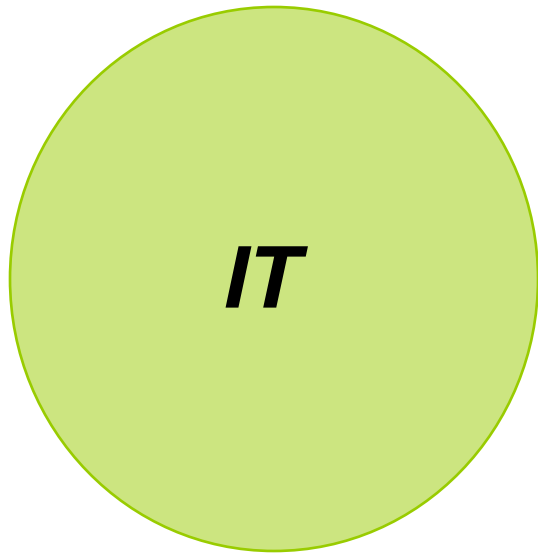
Recommendations

- Audit
 - Systems
 - Is electronic matter information following same life-cycle as physical matter information?
- Educate Attorneys
 - Life-cycle of Electronically Stored Information
 - Firm's ability to support their ethical responsibilities

Recommendations

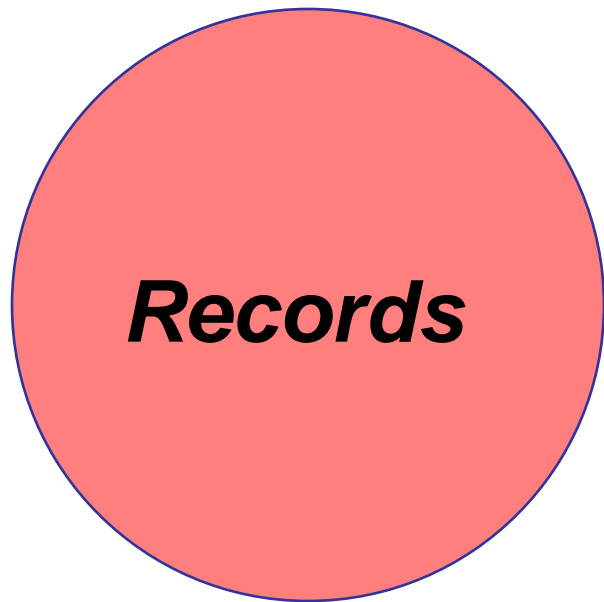
- Educate yourself and colleagues
 - FRCP
 - ABA Guidelines and Ethics Opinions
 - Relevant Court Cases
 - Law firm trends that support need for RIM
 - Lateral movement

Communicate



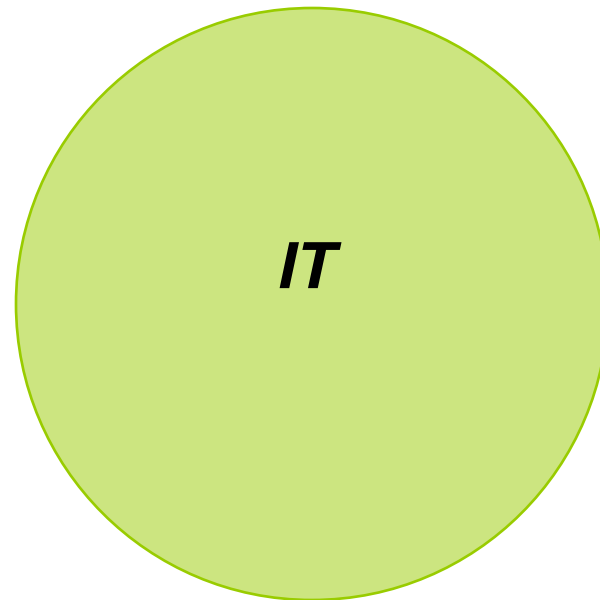
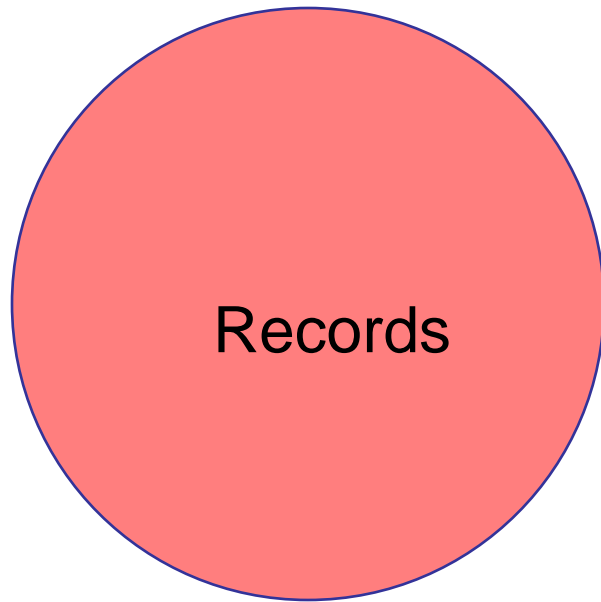
- What security protocols are in place to protect client information?
 - Access
 - Ethical and confidentiality screens
 - Metadata scrubbing
- Priorities
 - Retention defines how data is backed up

Communicate



- Efficient retrieval of information
- Control of records and non-records
 - Litigation hold
 - Response to legal action
- Retention defines how information is managed in accordance with matter life-cycle
- Protect chain of custody

Balance



Summary

- Have you been told what the most important risk issues are that your firm or company is trying to manage through your Records program?
- Do you regularly communicate with GC/Risk Management attorney?
- How can Records help?

Question

Is it reasonable to expect attorneys will understand enough about their technology applications to ensure that they are managing information in accordance with their professional responsibilities to clients?

Questions

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Endnotes

1. Improving Results for Legal Custody of Information“
www.itpolicycompliance.com. Accessed November 10, 2008
2. ILTA 2008 Technology Survey. www.iltanet.org
3. "A Lawyers Guide to Managing E-Lawyering Risks." 2006. Chubb & Son, a division of Federal Insurance Company. 11 Sept. 2008
<<http://www.chubb.com/businesses/csi/chubb5904.pdf>>.
4. "A Lawyer's Guide to Records Management Issues - Important Considerations When Establishing a Workable File Retention and Destruction Policy." 2005. Chubb & Son, a division of Federal Insurance Company. 11Sept. 2008 <<http://www.chubb.com/businesses/csi/chubb4629.pdf>>.
5. "Perkins Coie Agrees to Pay \$19 Million in Malpractice Suit." [Www.law.com](http://www.law.com). 18 Sept. 2007. 08 Sept. 2008 <<http://www.law.com>>.