Elements of the Modern, Executable Retention Schedule

How the Modern, Executable Retention Schedule Can Open a Channel for Routine Disposal to Stem the Rising Tide of Information

By Lorrie Luellig and Harry Pugh, with contributions from Tom Lahiff, Cathy Muir, and Bill Chulak

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I. The Impending Crisis – The Rising Tide of Information

A. Exponential Data Growth and Accumulation

Corporations face an impending information management crisis as the accumulated volume of data and information rises at exponential rates.[1] In 2002, the volume of data stored on computers reached 5 exabytes (5 billion gigabytes) – roughly the equivalent of every word spoken by human kind.[2] By 2009, that volume increased to about 988 exabytes – an amount of data that if printed would reach from the Sun to Pluto and back.[3] According to industry analysts, there has been a 50% year-over-year growth of data volume during the last 5 years, and volume is expected to grow by a factor of 44 over the next 10 years.[4] This accumulating rise of information is "so immense that it is incomprehensible."[5]

B. Acceleration in the Changing Form and Complexity of the Way Information is Created and Stored

This "rising tide" of information exists partly because of, and in the midst of, profound and transformational changes in the way information is created, used, and stored. In this new era, the amount of data created by just one person in one day is astounding.[6] Between email, instant messages, texts, posts, tweets, blogs, phone call records, voicemail, pictures, GPS-interactive application data, logins, downloads, server logs, and records of security systems, 'key card' swipes, ATM cards, credit cards, and automatic toll booth payment systems, just one person creates a "digital contrail" of information that is mostly electronically created and stored.[7]

This new ability to create vast amounts of information is happening alongside changes in technology that make it easier and cheaper to store information.[8] This means that for any large global company, vast amounts of information accumulate on thousands of computers and devices, and it is stored and backed up in thousands of repositories on network drives, databases, collaboration sites and the like. For example, Charles A. Beach from Exxon publicly testified before the Civil Rules Advisory Committee that:

> We operate in 200 countries in the world. We have 306 offices around the world, 70 of them in the U.S. We generate 5.2 million e-mails a day, about half of that in the U.S. We have 65,000 desktop computers around the world and 30,000 laptop computers. These are for our employees, about half of those in the U.S. We have, in addition to the 65,000 desktops and 30,000 laptops, we have between 15,000 and 20,000 Blackberries and PDAs around the world. We have 7,000 servers worldwide, 4,000 of them in the U.S. We have 1,000 to 2,000 networks worldwide, about half of those in the U.S. We have 3,750 e-collaboration rooms. ... About 3,000 of those are in the U.S. We have 3,000 databases; 2,000 of those in the U.S. Our total storage of information that we now have is 800 terabytes; 500 terabytes in the U.S. One terabyte equals 500 million pages. 500 terabytes equals 250 billion pages. 800 terabytes equals 400 billion pages.[9]

While technological advances lower the cost of storage devices, the cost to manage, retain, archive, preserve and maintain this amount of information is staggering and on the rise. "The most obvious driver of defensible disposal is the

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[1] George L. Paul & Jason R. Baron, *Information Inflation: Can the Legal System Adapt?*, 13 RICH. J.L. & TECH. 10, ¶¶ 10-13 (2007), http://jolt.richmond.edu/v13i3/article10.pdf.

[2] Jason R. Baron & Ralph C. *Losey, e-Discovery: Did You Know?*, YOUTUBE (Feb. 11, 2010), http://www.youtube.com/watch?v=bWbJWcsPp1M&feature=player_embedded; Bennett B. Borden, Monica McCarroll, Brian C. Vick & Lauren M. Wheeling, *Four Years Later: How the 2006 Amendments to the Federal Rules Have Reshaped the E-Discovery Landscape and are Revitalizing the Civil Justice System*, XVII RICH. L.J. & TECH. 10, ¶¶ 14-15 (2011), http://jolt.richmond.edu/v17i3/article10.pdf.

[3] *Id.*

[4] *A New Framework for Defensible Disposal*, by Lorrie Luellig and Deidre Paknad, CIO Update November 4, 2010, available at http://www.cioupdate.com/insights/article.php/3910271/A-New-Framework-for-Defensible-Disposal.htm (citing *The Digital Universe Decade-Are You Ready?* IDC iView, May 2010).

[5] Borden, McCarroll, Vick & Wheeling, *supra* note 2, ¶ 14.

[6] Borden, McCarroll, Vick & Wheeling, *supra* note 2, ¶ 15.

[7] Borden, McCarroll, Vick & Wheeling, *supra* note 2, ¶ 15; Baron & Losey, *supra* note 2 ("98% of all information is created electronically."); Paul & Baron, supra note 1, ¶ 21.

[8] Borden, McCarroll, Vick & Wheeling, *supra* note 2, ¶¶ 46-47; *Data, Data Everywhere: A Special Report on Managing Information*, ECONOMIST, Feb. 27, 2010, at 1, available at bistro.northwestern.edu/mmueller/datadeluge.pdf

[9] Comment: Preservation-Moving the Paradigm, Submitted to the Civil Rules Advisory Committee on behalf of the Lawyers for Civil Justice, Defense Research Institute, Federation on Defense & Corporate Counsel and International Associate of Defense Counsel November 10, 2010.

> **"... a company's ability to know the content of its information has not kept up with its ability to create and store it."**

rising cost of storing, backing up and managing increasing amounts of data every year…" [10] Further, Mr. Beach also testified that in 2005, his company generated 121,000 backup tapes in the United States alone. And, if they ever had to stop the recycling of those tapes, just the replacement costs alone would be $1.98 million each month. "That's … about 24 million dollars a year."[11]

Exxon is not the exception. According to a 2010 Metrics Report by IT analyst firm Gartner, IT costs average 3.5% of revenues in all industries and run as high as 11% of revenues in financial services and insurance industries.[12] IT spend is, in fact, increasing faster than revenue, despite IT expense reductions in response to economic conditions. [13]

While the IT cost to manage information is staggering, so too are the litigation risks associated with keeping and storing vast amounts of data in thousands of devices and other repositories across the globe. Violation of the duty to preserve potentially relevant electronically stored information is one of the most challenging legal issues facing corporations today and is the most fertile ground for large sanction awards.[14] As the volume of stored information rises and the variety and complexity of systems used to store that information continues on its path of revolutionary change, the costs and risks to global corporations will also exponentially rise. This is because a company's ability to know the content of that information has not kept up with its ability to create and store it.[15]

II. Avert Crisis and Stem the Rising Information Tide by Mandating Routine Disposal of Data and Information

At this time, it is clear that in order to prosper, companies must stem the tide of uncontrolled information accumulation. The way to stem this tide seems obvious – allow information to flow out as easily as it flows in by routinely disposing of it.

As obvious as that sounds, most companies are not able to routinely dispose of information. In fact, in a recent CGOC survey of Global 1000 companies, only 22% of companies said they routinely disposed of information, predominantly paper. This means that more than 75% of the companies surveyed are not able to routinely dispose.[16] The barriers to achieving what should be a rather straightforward goal of data disposition overwhelm many organizations.

III. Current Barriers to Achieving a Flow of Routine Disposal of Data and Information

Most companies that are unable to routinely dispose of information do not have unified governance processes in place that would allow information to flow out of the organization unobstructed. Unified governance is the collaboration across the primary stakeholders (namely Business, IT, RIM and Legal) for the management of a company's information.[17]

Before a company can confidently dispose of information, it must assure itself that the information need not be preserved for litigation purposes nor retained for legal or regulatory

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[10] Robert L. Scheier, *Defensible Disposal*, Computer World, pg. 8, June 6, 2011.

[11] *Id.*

[12] *IT Spending and Staffing Report*, Gartner IT Metrics, 2010.

[13] Compliance, Governance and Oversight Council (CGOC), *Benchmark Survey on Prevailing Practices for Legal Holds in Global 1000 Companies*, 16 (2008), available at http://www.cgoc.com/events/benchmarkwebinar.

[14] Borden, McCarroll, Vick & Wheeling, supra note 2, ¶ 46; Dan H. Willoughby, Jr. et al., *Sanctions for E-Discovery Violations: By the Numbers*, 60 DUKE L.J. 789, 803 (2010) ("In the 230 cases in which sanctions were awarded, the most common misconduct was failure to preserve ESI, which was the sole basis for sanctions in ninety cases.").

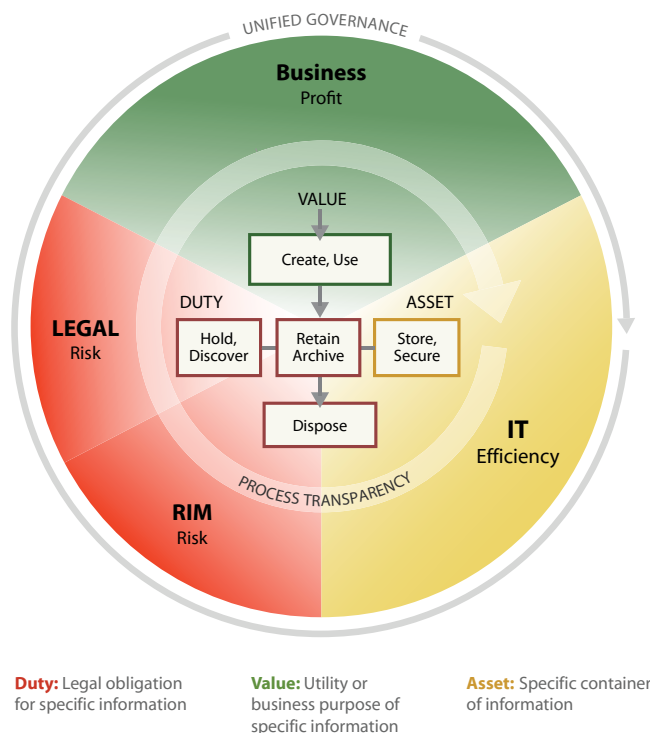[15] Borden, McCarroll, Vick & Wheeling, *supra* note 2, ¶ 46.

[16] *CGOC, Benchmark Survey on Prevailing Practices for Legal Holds in Global 1000 Companies*, 10.

[17] See *Using the IGRM Model* available at http://www.edrm.net/resources/guides/igrm/using-model.

requirements, and that the user no longer has a legitimate business need to keep it. In other words, the primary stakeholders who have an interest in the information are in agreement that it has reached the end of its useful life. Even with that initial requirement met, it is essential to know where that information is stored, how it is stored, and how to issue clear direction on its disposition requirements to the system or the person who manages the information. This is a daunting task for most companies.

In order to provide a resource for companies undertaking such a task, the EDRM.net has created a framework that depicts the unified governance approach to information management. The Information Governance Reference Model ("IGRM") illustrates the intersection and dependencies across stakeholders for legal compliance and defensible disposal. [18]

Information Governance Reference Model (IGRM)

Duty: Legal obligation for specific information

Value: Utility or business purpose of specific information

Asset: Specific container of information

The model identifies each stakeholder's responsibility for information and links the duty and value of that information to the information asset. "It puts actions on information at the center of the model and 'dispose' as the end state of information; the actions on information can also be viewed as 'information gates' where information accumulates unnecessarily…" [19] By identifying the shared responsibilities across stakeholders, a company's internal barriers between creation and use, hold and discovery, retain and archive, and store and secure can be intelligently modified to allow for the unobstructed flow of information to defensible disposal.

IV. Design an Executable Retention Schedule to Overcome Barriers to and Open a Channel for Routine and Defensible Disposal of Information

The problem is clear: the exponential growth of information within companies is an impending crisis of cost and legal risk. The solution is also clear: a strong information governance program provides the structure to enable defensible disposal.[20] Yet, achieving defensible disposal is elusive and the irony is that the tool to open the channel for routine and defensible disposal already exists, in some form, within most companies: a retention policy.

A relatively common component of a company information governance policy or "retention policy" is a retention schedule. A retention schedule should be seen as a business tool to organize the types of company business records and information and detail the length of time that such records and information must be retained for legal compliance and business needs.[21]

As information governance has moved to the forefront of the awareness of analysts, industry associations, and most importantly, companies, it has become evident that the retention schedule, as it exists today, is not effective because it is not executable.

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[18] CGOC, *Benchmark Survey on Prevailing Practices for Legal Holds in Global 1000 Companies, 19*

[19] *Id.*

[20] According to the CGOC, *Benchmark Survey on Prevailing Practices for Legal Holds in Global 1000 Companies*, there is a real consensus across industries that the objective of information governance is defensible disposal.

[21] The Supreme Court has expressly noted that a business has a legitimate right to destroy information pursuant to a valid retention policy and schedule: "[d]ocument retention policies, which are created in part to keep certain information from getting into the hands of others, including the Government, are common in business. …It is, of course, not wrongful for a manager to instruct his employees to comply with a valid document retention policy under ordinary circumstances."*Arthur Anderson LLP v. United States*, 544 U.S. 696, 704 (2005).

Typically, a retention schedule is a two dimensional chart that is posted on the company's intranet. This type of schedule falls short of achieving disposal because it doesn't account for the dynamic nature of electronic information and the shared responsibilities for the management of information across Business, IT, RIM and Legal. It is challenging for the business and IT alike to take action on it as the legal framework supporting retention recommendations is not transparent and the requirements are not translated into the language of the businesses or IT.

A modern retention schedule — one which could allow for the flow of information through a company from creation to disposition — would take into account the multidimensional processes of the IGRM model. This schedule would reflect that the business creates and uses the information, legal and RIM define its legal and regulatory requirements, and IT stores, secures and is ultimately responsible for the disposition of most of the information.

This modern retention schedule would include these 10 elements:

1. Manage information, not just records;
2. Provide relevant, transparent and meaningful legal retention obligations;
3. Incorporate the business value of information;
4. Include not only retention obligations, but also privacy, security and other governance requirements;
5. Identify where the information is located and provide clear direction to IT on how to manage the data;
6. Provide clear direction to data users and stewards about how they are required to manage their data;
7. Remain flexible to ensure local business, legal and technological applicability;

8. Facilitate not only the placement of legal holds and their execution, but also their termination;
9. Support the identification of repetitive and duplicative information storage to enable significant volume and cost reduction; and
10. Remain responsive to continuous change in business processes and legal obligations.

The retention schedule, in a modern form, has the capability to avert the impending crisis and stem the rising tide of information by removing obstructions that impede the routine disposition of information. These elements will be discussed in more detail below and a visual depiction of the modern retention schedule is attached in Appendix A.

V. Elements of the Modern, Executable Retention Schedule

1. Manage information, not just records.

Records and information have become systemically inseparable and costly to manage. Requiring the segregation and placement of all records in a single system is not operationally feasible for most large companies. The notion of mandating users to "declare" records when they are created is not an efficient use of employee resources, nor will it produce consistent or compliant results. The retention schedule must apply to all the information of the company.

2. Associate the specific, relevant legal retention obligations directly to the information.

The retention schedule must be supported by a legal framework that is transparent, with legal obligations that actually apply to the information and, more importantly, to the business. The retention obligations must define: (1) the actual record type being regulated, (2) who has the obligation to comply with regulations and (3) the retention and disposition trigger events.

The use of a retention policy and schedule to dispose of information was endorsed again in a more recent case, *Micron Technology, Inc. v Rambus, Inc.* "First, it is certainly true that most document retention policies are adopted with benign business purposes, reflecting the fact that litigation is an ever-present possibility in American life. In addition, there is the innocent purpose of simply limiting the volume of a party's files and retaining only that which is of continuing value. One might call it the 'good housekeeping' purpose. Thus, where a party has a long-standing policy of destruction of documents on a regular schedule, with that policy motivated by general business needs, which may include a general concern for the possibility of litigation, destruction that occurs in line with the policy is relatively unlikely to be seen as spoliation."*Micron Technology, Inc. v. Rambus, Inc.*, 2011 WL 1815975 (Fed. Cir. 2011) (emphasis added).

3. Incorporate the value of information to the stakeholders.

At the beginning of the process, when the retention periods are being determined, each stakeholder should be required to identify the business value of information. The schedule must incorporate this declared value into its retention periods to ensure the business objectives are achieved. Incorporating business value into the retention period encourages stakeholder buy-in and increases confidence in disposition decisions that are made based upon the retention schedule. Stakeholders must also identify the regulated record types for which they are responsible.

Include the legal privacy obligations that impact the security and handling of the information.

Many laws and regulations contain privacy requirements, such as specific disposition methods, breach notification, encryption, limitations and requirements related to access, storage containers, transport, use, etc. The retention schedule must include these obligations to ensure that the retention of information can be achieved in a manner that also complies with privacy obligations.

4. Identify where the information is located.

The retention schedule should reflect the information inventories, describing where information is stored, what record classes apply to specific repositories, who was/is responsible for its content and who manages it. IT must know where the information is located, where specific record classes are located, where to apply legal holds when required, and when to execute disposal at the end of the information lifecycle.

Where information is created and stored is also a key to understanding what legal retention obligations apply and is critical to compliance with both privacy and security requirements.

5. Publication, communication and training with clear direction to the data users and data stewards.

Data users must be able to understand what is required of them when creating and identifying information. Data stewards must be able to understand what is required of them with regard to the disposition of information.

Ideally, the retention schedule should enable IT to manage data for the company by communicating clear instructions in IT terms. For example: the regulatory obligation for a certain human resource record is 6 years, while the business requires the information for 10 years after the termination of the employee. The retention schedule should communicate the disposition rule to IT: permanently delete the relevant data 10 years after the termination of the employee. Rather than telling IT to comply with record class "HUM100," the retention schedule should identify user information, department information, repository information and data content of the record type. For example: job applications created by the Human Resources Department users and stored in the HR shared drive must be permanently deleted 10 years after the termination of the employee.

6. Flexibility to ensure compliance and to adapt to local laws, obligations or technological capabilities and limitations: a local feedback loop within the retention schedule.

The data users at the ground level in each line of business and jurisdiction are the most knowledgeable about what information is created, its purpose and its value. The data stewards at the ground level are most knowledgeable about what can and cannot be done with regard to the storage, archiving, migration and disposition of information and the true cost of managing and discovering information. This knowledge needs to be captured and incorporated into the retention schedule: a local feedback loop.

7. Enables the placement and termination of legal holds by assisting in the determination of what information to put on hold and provides the connection for the Legal and IT Department to execute the legal holds.

No retention schedule can achieve the goal of disposal without a clear understanding of what specific information is on legal hold, when such a hold is released, and when the information pertaining to that matter may also be subject to another legal hold, in which case it cannot be released for disposal. The retention schedule must identify the information content by identifying what record classes apply to what repositories and what key personnel use what repositories. The intersections between the retention schedule record classes, the location of information and the association of information with both key personnel and with specific legal holds are critical to support the objective of defensible disposal.

8. Support the identification of repetitive and duplicative information storage to enable significant volume and cost reduction.

Understanding the classes of information contained in each repository, and in or across each geography, as well as the local business value of each instance of information, allows the company to find duplication and, more importantly, to enable an understanding of why such repetitive stores of information arise. Many times it is done in "an abundance of caution" or "just in case," notions that are rendered meaningless when transparency is brought into the governance process. If the company can feel confident that it has the information it needs, that it has it secured in a compliant way and has the responsibility for that information assigned and publicized, duplication can be safely eliminated and a significant cost savings achieved.

9. The retention schedule must be updated continually as business lines come and go, cost implications change, businesses move from one location to another, laws and obligations change, information is moved in and out of systems, and new systems are brought online: a unified organizational feedback loop.

The retention schedule must be responsive to dynamic updates in real time, as different elements simultaneously change. A change to one element should not break the others and must be communicated to stakeholders and throughout the company: an organizational feedback loop. Furthermore, the company must have a published change process to ensure updates are completed in a consistent manner across operations.
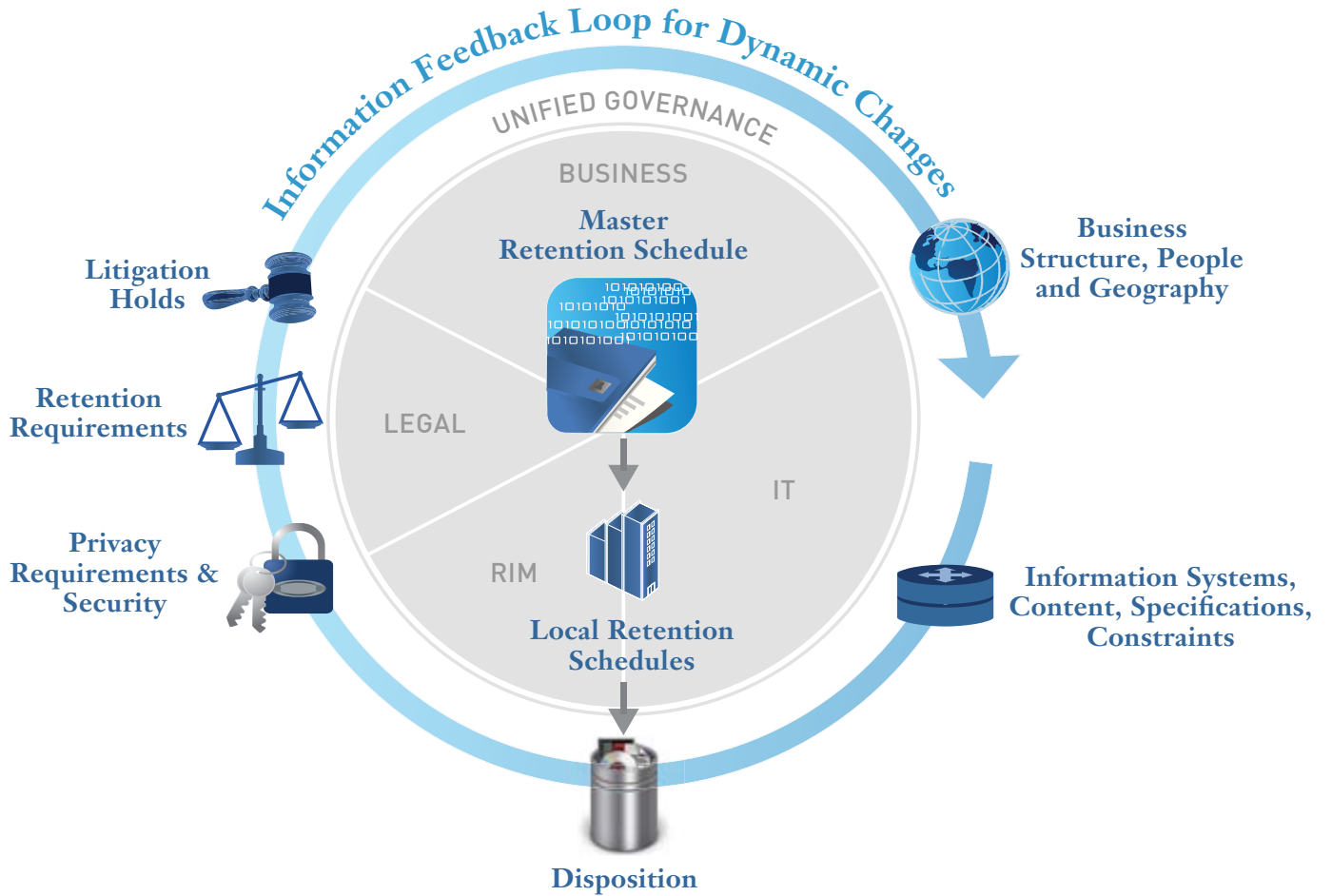
VI. Conclusion – Unifying Business, IT, RIM, and Legal

The tide of information is continuing to rise and most companies are ill-prepared to meet the challenge. This lack of preparation is attributable primarily to the absence of any unified governance process within the organization and across the primary stakeholders (or obstructionists, so to speak) — Business, IT, RIM and Legal. The modern retention schedule can be used as the first effective tool that attempts to unify the process by incorporating and making transparent legal duties, regulatory duties, technological capabilities and constraints and many other information-related concerns.

The modern retention schedule attempts to use "the very technology that created the information age and the consequent challenges it presents… [as] the key to its solution."[22] Its elements address the dynamic nature of electronic information and demonstrate the shared responsibilities for the management of information across Business, IT, RIM and Legal. The modern retention schedule is the first step into the unchartered waters of the grander objective to facilitate a new era in how organizations manage their information.

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[22] Borden, McCarroll, Vick & Wheeling, *supra* note 2, fn. 251.

Appendix A - Visualizing the Modern, Executable Retention Schedule

Information Feedback Loop for Dynamic Changes

UNIFIED GOVERNANCE

BUSINESS

Master Retention Schedule

LEGAL

IT

RIM

Local Retention Schedules

Disposition

Litigation Holds

Retention Requirements

Privacy Requirements & Security

Business Structure, People and Geography

Information Systems, Content, Specifications, Constraints

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About CGOC

CGOC (Compliance, Governance and Oversight Council) is a forum of over 900 corporate legal, IT, records and information management professionals. CGOC conducts primary research, has dedicated working groups on challenging topics, and hosts meetings throughout the U.S. and Europe where practice leaders convene to discuss discovery, retention, privacy and governance. Established in 2004, it fills the critical practitioners' gap between EDRM and The Sedona Conference.

The CGOC RIM Working group is co-chaired by Lorrie Luellig and Harry Pugh. Its membership is active in discussion and publication of practice guidelines and recommendations focused on corporate records and information management.

About the Authors

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Lorrie is a member of the Ryley Carlock & Applewhite Information Governance Practice. Lorrie has extensive experience counseling clients about retention policies and procedures for both litigation related matters and overall company operations. She has helped to create and implement global strategies for many companies in the areas of legal and regulatory compliance, litigation holds, privacy and security issues as well as information handling and disposition. Lorrie currently leads the EDRM IGRM Corporations Subgroup and the CGOC RIM Working Group. She has also provided expert testimony relating to disposition of records in a multimillion-dollar product liability dispute. Lorrie received her LL.M. from Harvard Law School in Cambridge, Massachusetts.

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