

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*

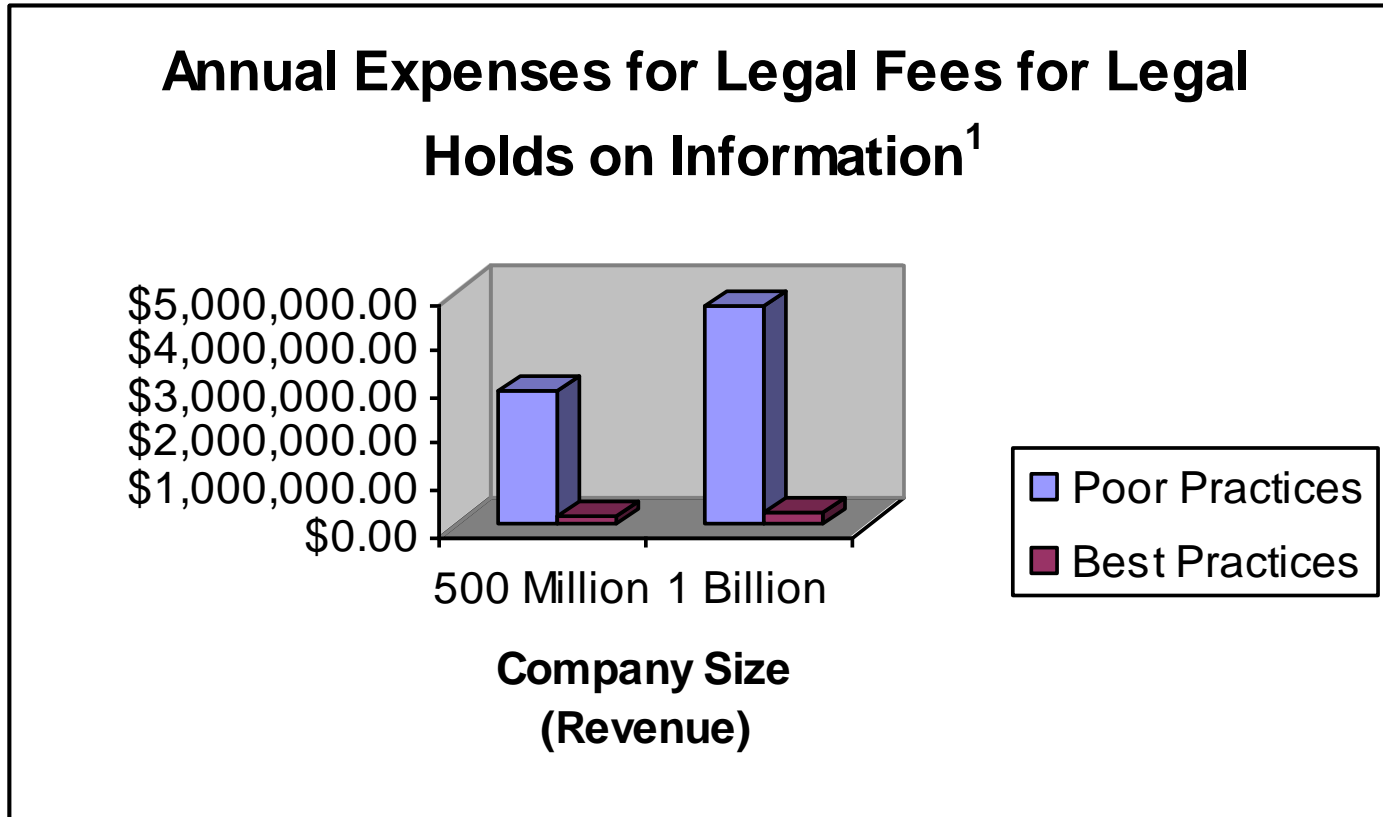
- *E-Mail*
- *Removable Storage Devices*
- *PDA's*
- *Home computers*

# Legal Holds

How is firm notified of litigation hold?

What actions are triggered by hold?

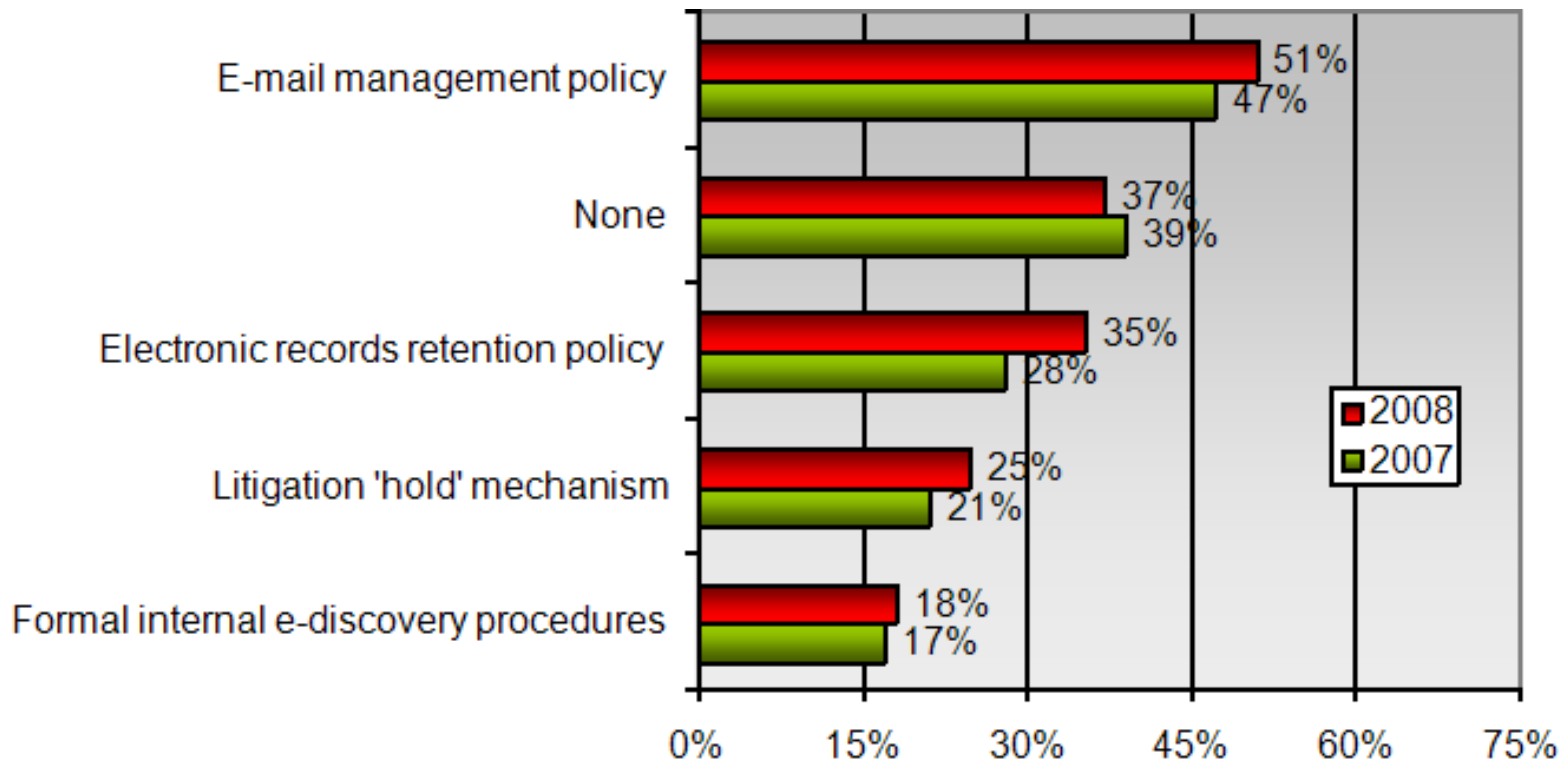
# Interesting Statistics



<sup>1</sup> [www.itpolicycompliance.com](http://www.itpolicycompliance.com)

# Interesting Statistics

## ***“What Do You Have In Place?”***<sup>2</sup>



*<sup>2</sup>2008 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 Claims<sup>3</sup>
    - 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

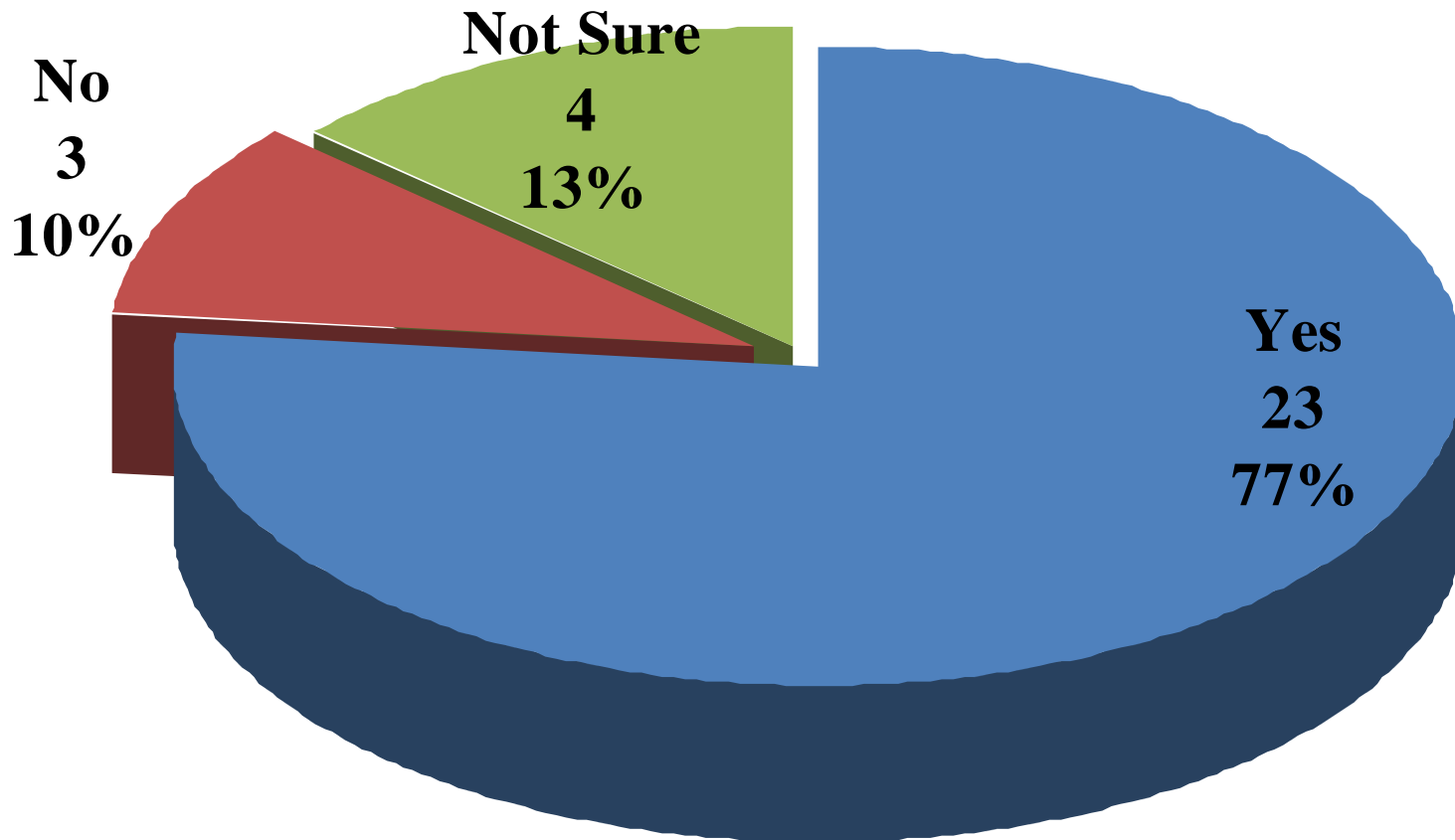
## Common Law Firm Applications

- 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”<sup>4</sup>*

# 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



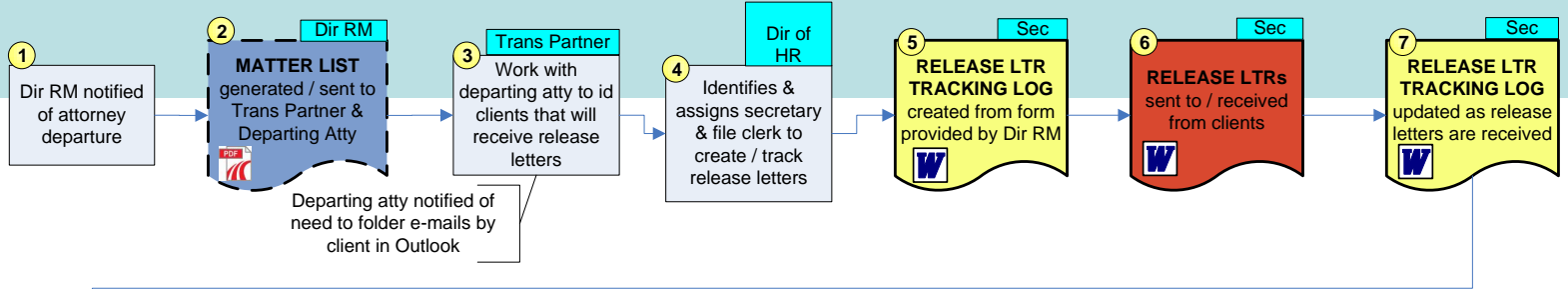
# Laterals – Best Practices

## Lateral Attorneys – Part of Retention Policy

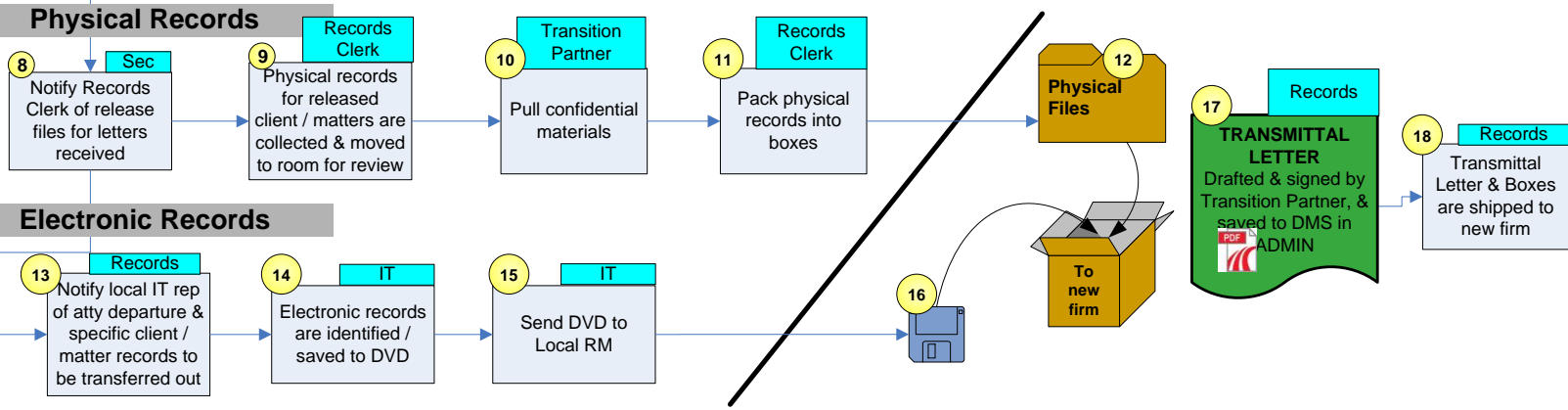
- Establish protocols for transferring information
  - File/document transfer
  - Docketing
- Establish roles and responsibilities
- Establish process to document chain of custody for releasing information and accepting information

# Departing Attorney Transition

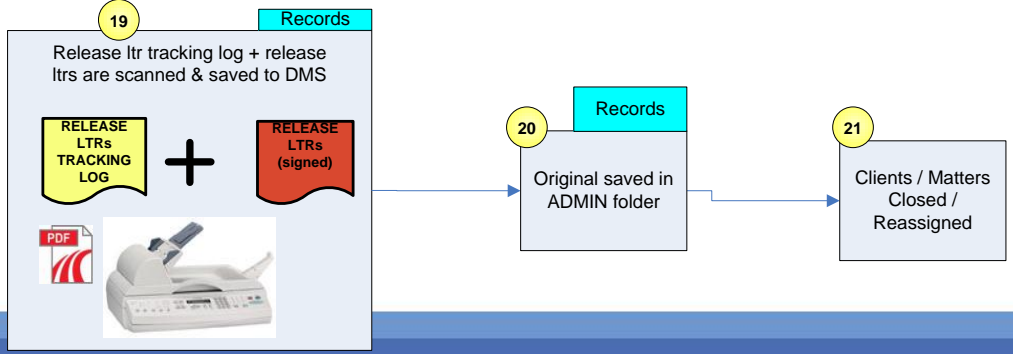
Notification /  
Release Letter Prep



Id / Prep / Collection of  
Records

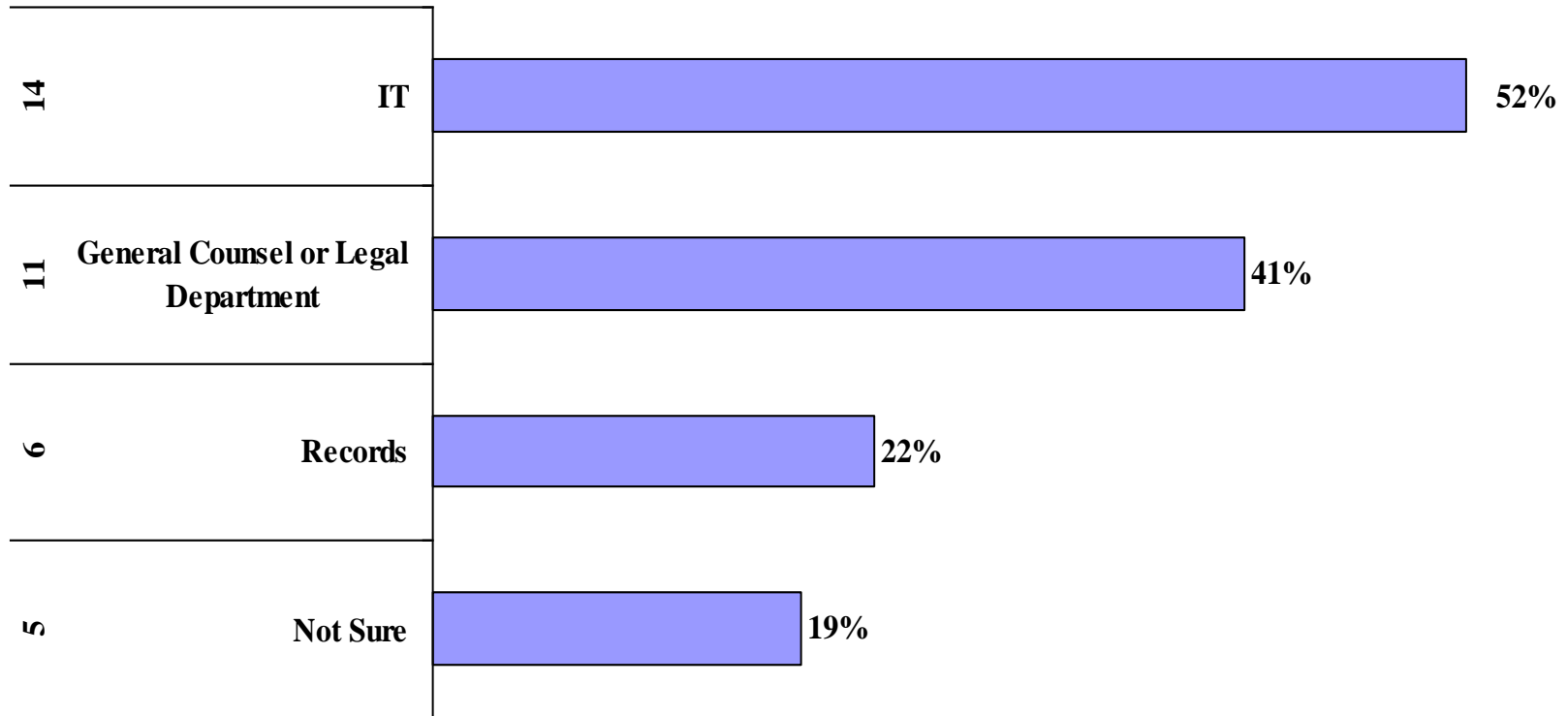


Closing / Re-assignment  
of Clients/ Matters



# 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”<sup>5</sup>*

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



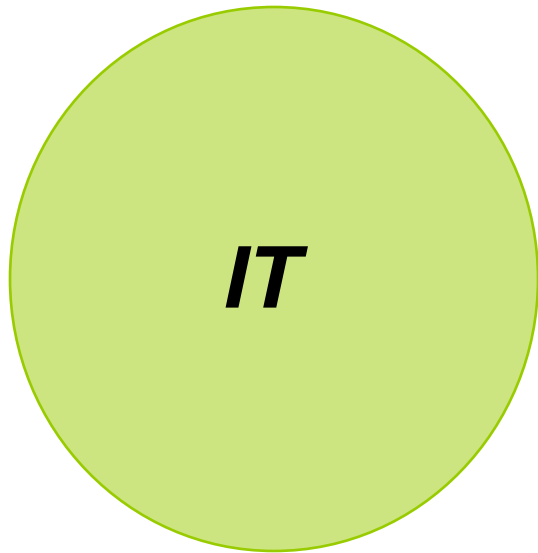
# Recommendations

- 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

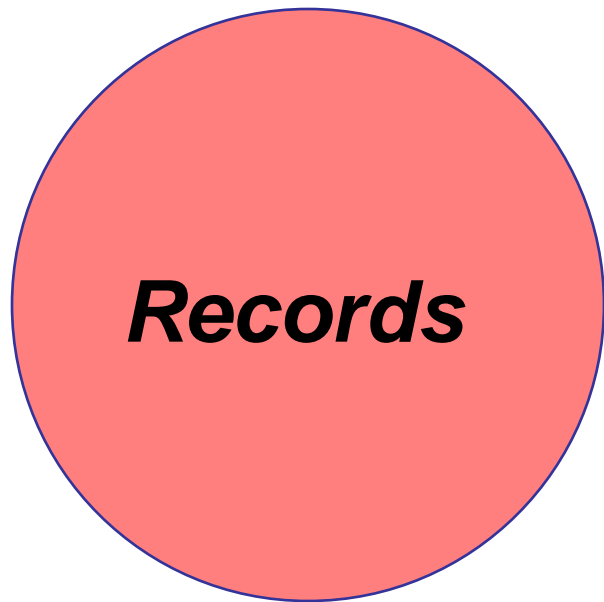
- Educate yourself and colleagues
  - FRCP
  - ABA Guidelines and Ethics Opinions
  - Relevant Court Cases
  - Law firm trends that support need for RIM
    - Lateral movement

# Communicate



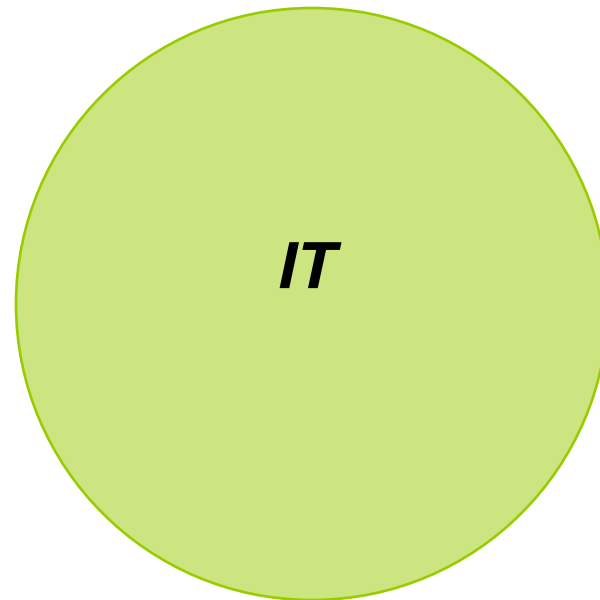
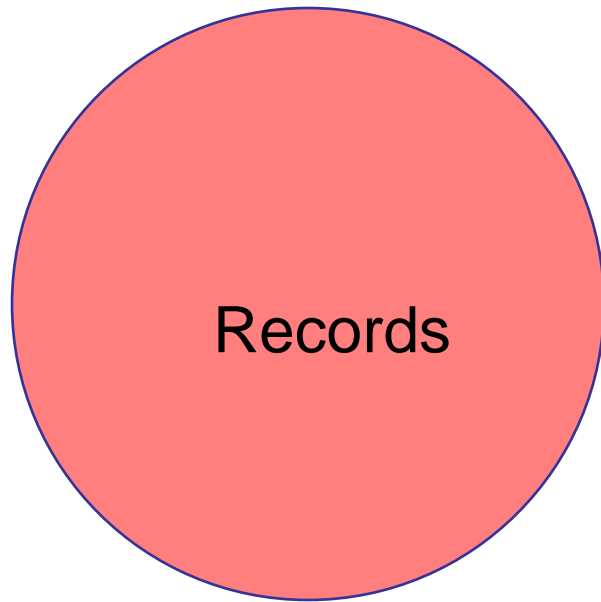
- What security protocols are in place to protect client information?
  - Access
  - Ethical and confidentiality screens
  - Metadata scrubbing
- Priorities
  - Retention defines how data is backed up

# 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](http://www.itpolicycompliance.com). Accessed November 10, 2008
2. ILTA 2008 Technology Survey. [www.iltanet.org](http://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>>.