THE HUMAN RESOURCES PROFESSION CATALYZES CHANGE TO MITIGATE RISK ELECTRONIC DISCOVERY, INFORMATION MANAGEMENT, AND CORPORATE CULTURE ON THE LINE

Thomas Diamante and Paul J. Neale

CULTURE RESIDES IN ELECTRONICALLY STORED INFORMATION

Human Resource (HR) professionals are being summoned. Recent multi-million dollar court cases such as *Zubulake v. UBS Warburg*[1] (a gender discrimination case) and *Coleman v. Morgan Stanley*[2] (for falsifying financials) along with the new Federal Rules of Civil Procedure (FRCP) (enacted December 1, 2006) trumpet a call for integration between Human Resources, Legal, and Information Technology. Recent court cases, the implications of the new FRCP, and the need to integrate human resources, information technology, and legal departments bring to mind Ben Franklin's advice: "We must hang together or we most assuredly will hang separately."

Zubalake led to a $20 million award for punitive damages and $9.1 million in compensatory damages.[3] Fundamentally, this was triggered by the fact that the judge instructed jurors to assume that any missing e-mails (due to lost backup tapes) were probably damaging to Warburg's defense. Companies are expected to preserve data that might be relevant to future litigation. The judge advised that "guardians" within the organization be established to preserve data and prevent spoliation. As usual, the devil lies in the details.

Specifics regarding "how" exactly one predicts future litigation were not offered. The hiring, training, placement, and retention of "guardians" were not addressed either, though conceptually developing the organization's capability to predict future data needs (prevent litigation) and guard against potential loses of data (mitigate risk) is sound business practice. The point here, we believe, is that a cultural intervention was advised by the courts. The cultural undercurrent evident in the court's advice (and relevant, in our view) to the above cases, however, did not get the press it deserved.

In *Coleman*, "misplaced" or unrecoverable information proved costly yet again. Morgan's poor "organizational skills" (for want of a better term) led to a whopping verdict in the plaintiff's favor of $604.3M in compensatory damages and an additional $850M in punitive damages. Not many organizations can survive a $1.4B adverse judgment. The financials aside, the hit on a firm's integrity and corporate image can be even more staggering.

There is no doubt that the courts take information management seriously and that the failure to adequately preserve data or, for that matter, be forthcoming and accountable for one's business actions will meet the wrath of jurisprudence. Information management reflects corporate behavior. Information management *represents* what management is thinking, feeling, and intending to do or actually doing. Information management is a "window" into the corporate culture.

In the famous McDonald's case (*Liebeck v. McDonald's*[4]), jurors responded not to the hot coffee debacle but rather the fact that inter-

THOMAS DIAMANTE and PAUL NEALE are with DOAR Litigation Consulting, a consulting firm that advises corporations and their counsel on the valuation, management and resolution of complex civil and regulatory legal matters.

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nal e-mails—that is, information within the corporation—suggested a culture of "the hell with the consumer" if prevention is going to cost a dime. The uncaring attitude toward consumers, the weighting of dollars over consumer risk—these ingredients were rejected outright by consumers/jurors. Jurors, as consumers, responded angrily. Corporate attitudes leak into jury boxes. McDonald's spilled more than a cup of coffee that day, and jurors did not approve.

INFORMATION MANAGEMENT IS BEHAVIOR MANAGEMENT

Information management is behavior management. It is a mistake to assume that since communications are stored in ones and zeros, the business problem is merely a technology problem. It is not. The problem resides in corporate strategy, management development, hiring, training and development of human resources. Why do employees do what they do? Why do they destroy data? What compels the employee to falsify information? Why are employees so angry? What do the written and unwritten rules of corporate behavior say? Where is leadership?

Data-based litigation often leads directly to information technology for "blame." Focusing on information technology as the problem per se, since it captures communications and transactions, is, however, like blaming the umbrella for the rain. Human behavior captured by information technology is complex. The motivation of individuals inside the business is influenced by group and organizational dynamics, individual needs, values and interests, personal knowledge (skills), and overall firm leadership. We are still blaming the computer for misdeeds.

Technological aspects of the problem are, however, relevant in some respects. Apparently, behavior in cyberspace, the medium of communications via the Internet, lures humans into a false sense of security. Behavior in cyberspace might follow different rules than face-to-face communications. It appears as though cyberspace frees the soul to express itself in ways not available via earthbound communications and that human personality and Internet use interact in interesting ways.[5] For instance, research indicates that users may feel a sense of anonymity and even personal freedom when communicating online.[6] The curtain enabling this "protective psychological state," however, is quickly drawn when upon discovery all hell breaks loose.

So, technology is an enabler, if you will, of bad behavior or poor judgments or compliance with bad cultures or bad leadership. Technology enhances the likelihood that dirty laundry is revealed to all and/or that dissatisfied or concerned employees will find someone that will listen to them. That someone may be an investor, the Securities and Exchange Commission, the Department of Justice, the Equal Employment Opportunity Commission, or a potential customer.

Managing in technology-drenched environments is unique. Research noticed that the leadership of successful technologically-driven enterprises differs from traditional firms. The competencies, structures, and cultures of technology enterprises are distinctive.[7]

To the extent that human resources accepts the mission of fusing legal and information technology together to thwart lawsuits, it is advised that human resources adhere to change practices tied to rigorous management practices.[8] Leadership must sponsor efforts to solidify the type of culture, the types of behaviors, and the types of communications that represent the firm. FRCP intent is compatible with professional integrity, organizational capability, and above all, human resource planning to keep all the dominoes aligned—business processes, human competencies, and organizational structure.

Corporate wrongdoing or the appearance of wrongdoing is caused by humans and fixed by behavior change. Technology is merely a tool for that change; it is the brawn. Legal is the brains of the outfit. If human resources can integrate these assets then the brains and the brawn can assure a level of security, or better said, a level of risk reduction as an integral part of corporate culture.

CONTROL OF EMPLOYEE BEHAVIOR, CULTURE AND INFORMATION MANAGEMENT

There is a strategic competitive advantage in viewing the new FRCP, as a litigation and organizational readiness litmus test. Is the organization ready to handle discovery? What systemic practices ensure that discovery can be conducted independent of key personnel (i.e., knowledge management if employee retention becomes troublesome)? Does HR have key personnel on tap? Can appropriate talent inside the organization be rapidly identified, if needed? Can this talent be deployed to gain the upper hand at the meet and confer?

The Federal Rules of Civil Procedure emphasize *control* or expect organizations to exercise control over their information. The proper information should be stored, retained, and readily accessed if

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and when it is needed (i.e., upon discovery). The rules are about control of information management for trial and also pre-trial. Failure to produce information leads to financial penalties or adverse verdicts. This emphasis, in the wrong corporate hands, can lead to unproductive, morale-killing practices—unless human resources gets involved. The current failure to address the control features of the FRCP, in terms of corporate behavior, is evident in the fact that consulting firms are running after the risk-assessment and records-retention markets that the FRCP opens up. For example, Deloitte Financial Advisor Partners, reported by www.byteandswitch.com, found that nearly 70% of Webinar participants (these being a total of 400 chief financial officers, tax and finance directors, attorneys, and controllers) needed additional training on the fundamentals of records retention.[9] Clearly the training needs regarding the FRCP are evident and require strategic dissemination organization-wide. There are additional, practical HR deliverables that will be addressed shortly. Before we drill down into the steps HR can take to heed the call from the FRCP, however, there is a larger HR business strategy issue that requires attention.

HR is, of course, often relied upon to design and deliver tools that support business objectives. Over the past ten years, we've seen a transformation in the profession as technology impacts not only how organizations work but how people work in organizations. The transformation of the workplace spawns new challenges for executives focused on sustaining competitive advantage and for operations-focused managers finding better, faster, cheaper ways to execute. How to manage in such an environment is a challenge.

The impact of globalization, emerging technology, newfound competition, customer demands, and legal and regulatory changes on human health and wellness, for instance, was recently reviewed with the goal of offering practical assessments and strategies for building "healthy" workplace cultures.[10] The literature clearly indicates that how people are managed in firms, including technology firms or firms focused on information management, can affect health care costs, morale, and productivity. The applicable requirements of the FRCP need to be integrated into corporate culture (i.e., HR policies, practices, and cross-functional initiatives) gingerly, strategically, wisely. This is not merely an issue of "showing force." The issue is one of business strategy, execution, morale, and productivity.

HR professionals bring value by understanding the context of the new regulations. Understanding the context enables HR to implement programs, practices and policies that will enhance organizational compliance while making certain that regulatory compliance doesn't hinder business execution. An impulsive, organizational reaction to the FRCP is to focus only on the "enforcement" (or writing of) policies that intend to "control" technology uses and misuses. Constructing a culture of compliance however is misguided. Competitive organizations require inquisitive cultures. Innovation is derived from openness, trust, experimentation, a sense of safety, and curiosity when playing with others. A hard compliance culture kills the cat.

Change often requires a realization that "status quo" is not good enough. These court cases, followed by the December 1, 2006 amendments to the FRCP, lay out a mission for altering behavior in organizations. It is important that HR professionals take the "change perspective" when designing and implementing programs and practices to face FRCP. Changing how an organization understands and complies with the FRCP will dictate the level of success achieved.

It is suggested that merely attending to technical matters or writing new e-mail policies or improving the technical savvy of the firm, will not reduce risk. Such improvements are necessary but not sufficient. The underlying behavioral thrust of the firm requires assessment and, if necessary, intervention to ensure "compliance" not with FRCP alone, but compliance with a business strategy and culture that makes legal, social, and financial success. That is the thrust of the FRCP and traveling in that wake will reduce risk to business growth.

The new metrics for business success combine legal, social,l and financial values. Human Resources, as a profession can catalyze this transformation. The FRCP informs business that status quo is no longer good enough and that legal penalties will follow bad cultures. Bad cultures are electronically stored. Bad cultures are not honest and do not retain vital information. Bad cultures place numbers ahead of any and all other considerations including risk to consumers/customers or investors.

FRCP compliance is not merely a matter of getting e-mails under control (although it is not a terrible place to start!). A simple policy statement won't do it nor will a log-in page advising employees

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that they are being "watched" at all times. Indeed, it is not a stretch to imagine that very capable, autonomous, high-value employees might feel the "pinch" of those chains. From a business maturity cycle standpoint, turning a firm into a "compliance" culture, when in a competitive environment, is a fatal mistake.[11] At the very least, HR must ensure that the corporation does not throw out the baby with the bathwater. Destroy your business culture for the sake of a simpleton's understanding of what FRCP is trying to accomplish?

CONNECT ORGANIZATIONAL BEHAVIOR TO LEGAL IMPROVEMENTS

The issue of electronic message control is an issue of human communication, integrity, and respect for fellow employees, customers/consumers, and investors. The FRCP awakening is an enormous opportunity to re-visit HR programs and overall corporate strategy, making certain that the organization does what it says it will do—meeting both the spirit and letter of the law. It is a bonus that the federal rules of information management can be deployed in a context of organizational change.

The larger context of organizational change is the proper framework for compliance with FRCP. FRCP is not about merely managing e-mails, building better data repositories or ensuring that electronic discovery tools can acquire, authenticate and analyze information rapidly. Of course, it is all of that but what the FRCP really did—perhaps what it intended to do—is get Federal Rules in line with business models.

Interestingly, the need to "upgrade" the Federal Rules of Civil Procedure was addressed by Michael Saks, the recipient of the 1987 award for Distinguished Contributions to Psychology in the Public Interest at the 96th Annual Meeting of the American Psychological Association. The work of Saks reminds us that the schism between social sciences or in this case, organizational behavior, and the law is real. That is, unlike other scientific disciplines, the law moves forward in non-empirical steps rather than progressing through a series of improvements guided by programmatic evaluation research.

A historical commentary on the FRCP is noteworthy. In 1989, Saks wrote in an article for the *American Psychologist* that the FRCP in effect at that time required alteration but that modifications unfortunately do not benefit from knowledge of social sciences (or organizational behavior/industrial psychology) and that change was needed almost fifty years ago. He wrote:

> A far more profound example of the law's failure to empirically evaluate the effects of its inventions is provided by the Federal Rules of Civil Procedure. These rules were an important and in some ways dramatic innovation in how the process of civil litigation was to be carried out. These rules govern the conditions under which people have access to the courts, the party structure of cases, the pretrial process and the conduct of trials. Last year marked the 50th anniversary of the adoption of these rules. At the same time that their anniversary was being celebrated, there was controversy and pressure for change [emphasis mine]. (p.1113)[12]

Saks continued to report that a survey conducted by Yale University in 1988 uncovered that state and federal trial judges in the U.S. were nearly unanimous in "blaming the discovery process for undesirable expense and delay in litigation." (Saks relied upon the Poll of Judges Released, 1988, a Yale Law Report, to draw his conclusions.)

Upon close inspection of how the FRCP came to be what they were in 1988, Saks informs us that there is a paucity of research or empirical investigation of any sort to guide or influence policy. He wrote:

> Consider these questions: What sorts of data do these judges have on which to base their conclusions concerning what problems exist and what features of the rules cause the problems? If the problems do indeed exist, as is widely believed, why weren't these shortcomings (or developing trends) recognized decades ago? Although several answers are possible, one that is certainly true is that no one was watching in any systematic way. Appreciating the benefits of the federal rules was largely a matter of faith, and detecting their negative effects was something that occurred, if at all, by observation. (pp.1113–1114)[13]

Legal policy scholars inform us of the pitfalls involved with "improvements" in law being not savvy about or perhaps not linked to social and behavioral sciences. The new FRCP are not the outcomes of years of programmatic evaluation research. They are a practical attempt to stay in step with organizational behavior.

Consequently, HR professionals should not blindly strive to "police" employee behavior. The FRCP could easily lead the HR profession to be focused on writing policies and enforcing them. This would be a waste. The HR profession is situated to integrate information technology and legal while also calibrating impact on consumer, customers, and investors. Unlike the legal profession, the HR profession is

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poised to incorporate social and behavioral sciences into its practices and it should.

Saks again reminds us that the law, unlike HR, is not equipped to integrate behavioral and social sciences research into practice. He wrote:

> The law and its practitioners are careful, thoughtful, and rigorous about many things, but those things do not include the nature of social and behavioral phenomena, cause and effect relationships, or the effects of the interventions made by law. In those areas, the law lacks rigor. Legislative acts usually will withstand judicial review if they are not flagrantly irrational and if the legislators had some minimal basis for believing that their solution to a problem would work.

Saks went on to explain:

> The substantive rules that make up the law and the procedural rules that specifyhow the law will carry out its work have been developed, for the most part, by rigorless examination of evidence, by intuition, and by guesswork. Sometimes this is excused by saying that the law's principal concern is symbolic: The law announces what it seeks to accomplish. Whether it in fact accomplishes those things is secondary. The primary issue is that for which the law stands. (p. 1111)[14]

This historic commentary is offered here, not as an exposé on legal developments but rather as a warning to human resource professionals and as an advisory note. HR cannot simply afford to "comply" with FRCP by acting as an enforcement agency. It won't work for a multiplicity of reasons. Business strategy issues, human behavioral/motivational issues, and organizational issues are, at the very least, a few of the elements that complicate the enforcement approach. Organizational change never had a magic bullet and FRCP compliance is organizational change.

Electronically stored information (ESI) is the life-blood of organizations. ESI is the life-blood of the amendments to the FRCP. ESI transcends the trade cycle being relevant pre-trade, during trade, and post-trade. ESI is without boundaries residing in servers, desktops, laptops, personal digital assistants (PDAs), cell phones, portable storage devices, and voice mail systems. Coalescing electronic evidence is more challenging than working with paper (hard) documents. Unlike paper, electronic evidence can be enormously voluminous and can be edited or altered by many users. ESI can also become hard to decipher when separated from a computer operating system that created it (e.g., try opening a document when you don't have the appropriate program loaded on your computer). These special "qualities" of ESI compel law, litigants, and businesses to break a sweat when ESI becomes relevant.

ESI mirrors the boundary-less organization as extranets blur the lines between employees and customers and digitized communications operate 24 hours per day on a global basis.[15] ESI needs to be managed as closely and as dearly as one manages a high-value employee. ESI reflects how the "company" (i.e., people employed by the company) treats investors, the public consumers/customer, and even each other. ESI, as a collective sample of behavior, can be used to infer corporate culture.

WHAT HR CAN DO TO MITIGATE RISK

Coordinate IT and Legal To Muster the Best Defense as a Strong Offense

Conducting discovery requires the involvement, compliance and effort of people in an organization. Therefore, there is a human-organizational element to effective discovery.

Discovery, especially when sparked by allegations of corporate malfeasance, can shake the organization hard. Public trust can be eroded (e.g., securities fraud allegations) and the organization can face immediate and long-term corporate image and brand equity issues. Internally, morale can suffer and productivity can follow.

To ensure that discovery is managed well, plan its conduct with the organization and its people in mind. To do this, early planning is essential. As a starting point, when discovery is on the horizon make certain the organization: 1) establishes sponsorship for the effort, and 2) plans organizational communications.

Organizations coming under the microscope require leadership focused on this event. *Establish sponsorship for the discovery effort.* It is important that leadership is visible and "projects confidence" in the organization's ability to comply with discovery. It is not enough to put a technical representative or legal liaison in the lead—the lead must have organizational gravitas and must be able to get things done. This will enhance internal cooperation among relevant parties and will reduce friction between all parties involved.

Plan organizational communications to reduce the risk of panic or brand erosion. Fear and panic threatens the discovery process and it paralyzes the business. Messages inside the organization leak outside the orga-

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nization and often, when the case is visible, media will be trying to drill holes into the company to obtain something juicy for public digestion. The best way to gain control over messages outside the organization is to first get a hold on what is going on inside the organization.

To control external messages, control internal messages. Take a measured internal, corporate response to avoid panic and align messages across the company. Corporate counsel, business leaders and litigators should focus not only on the technical and legal aspects of moving forward with discovery but also the operational, interpersonal, and cultural issues that will no doubt surface as well. The entire organization is under-going the inspection, not isolated pieces.

Tactically, *align resources based upon the expected path of discovery.* For instance, assign a point person as the "go-to" person for senior management. If media calls, senior management needs to know how to handle the call. Train them on this. Provide an internal resource that will take media calls. Educate senior management on next steps in discovery before they happen after providing a thorough understanding of what is happening (and what is not happening). Clarity is a weapon.

If senior management plays a role in the discovery effort, inform them of their responsibilities and include not only managerial issues but legal counsel as well. Establish a discovery management team to plan, chart, and otherwise navigate the discovery event. On this team consider the general counsel's office, chief information officer, and experts in change management and risk reduction. Third-party objectivity will add value to this team so consider partnering with suitable consulting professionals.

A second tactic is to *activate an internal communications campaign for all employees.* Craft a multi-faceted campaign and make certain it cascades down into employee ranks. Although e-mail is fine initially, this requires "town hall" type interfaces and continuity of messaging throughout the discovery period.

A third tactic is to *ensure that policies & procedures are in place.* Everyone involved directly, indirectly, or not at all needs to know their situation. Human resources should be present when conveying information to employees and business units that require interface. Issues regarding discovery, information sharing and perhaps, under Sarbanes-Oxley (2002), whistle-blowing practices and protections must be conveyed. In particular, Human Resources needs to make certain that employees are fully indoctrinated into relevant law and practice on matters that could touch upon discovery (e.g., corporate counsel conducting an internal investigation does not represent the individual—they focus on corporate interests; false statements conceivably can be used against the individual should corporate waive attorney-client privilege; an employee's history should not be taken into consideration should a Sarbanes violation be reported).

Finally, *everyone speaks from the same page.* The business outcome of management control during discovery is that the corporation secures message consistency both within the company and in terms of its messages to the media. This is a result of senior management being educated, the company supplying a resource for senior management (likely the target of media attack) and the fact that employees are versed in what is going on (and what is not going on). No one is left out in the cold.

Internal communication reduces fear and anxiety by establishing resources for select personnel. In addition to managing the message internally, the external message is also tackled by ensuring alignment and on-going consistency. The importance of communications management is clear for not only compliance reasons but also to maintain the integrity of brand, protect morale, and avoid organizational paralysis.

Incorporate ESI and FRCP rules into Leadership Development Programs

HR and senior management can sponsor an educational initiative focused on consumer/customer/investor/stakeholder integrity. A multi-faceted learning approach with education accomplished through seminars, direct communications and training that incorporates ethical/legal scenarios would prove wise. Simulations could be developed to test managements' handling of or ability to detect potential problems captured by (not caused by) ESI. The underlying notion here of course, is that managerial judgment creates problems, not the ESI per se. Educational and training programs that address ESI, which captures management actions/thoughts/communications, should be part of leadership development programs.

Change is one of the few constants in business. This is a business fundamental that frames leadership development. Typically, issues of alignment from an organizational and individual context do in fact, comprise executive development programs. HR is offered the opportunity to bring FRCP to the table so that leaders understand the

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impact of ESI, as a representation of their behavior, on the business.

Organizations re-establish their capabilities all the time to meet consumer demands and/or improve business execution in response to (or in anticipation of) challenges. The new FRCP is one of those challenges and so from a standpoint of change management requires attention. It is noteworthy, that internal "ethics in leadership" programs would likely be discoverable and would bode well for the integrity of the business.

Tackle the Cost of Production

Although the FRCP do not specifically focus on organizational change or business operations issues per se, FRCP states that a party can argue that undue burden exists making production unreasonable. Of course, the mechanism by which the undue burden reveals itself is left open for interpretation.

Operational and managerial issues might be highly relevant in terms of showing burden or calculating costs or arguing that ESI which is otherwise subject to a discovery request (for production) is (or is not) accessible. Business execution and organizational realities are fair game in making your case for (or against) an undue burden standard. HR can facilitate the making of this case. HR understands the complexities of coordinating people, skills, or competencies. Global obstacles might reveal themselves and cross-cultural issues could complicate matters (sharing information in the Americas with information for Pac-Asia, for instance, or relying on competencies in Pac-Asia to access requested information in New York).

If, at the meet and confer, bureaucratic impediments or organizational burdens need to be on the table to make a case of an "undue burden" in terms of production of ESI, HR information that validates this argument would be of enormous value. First, the issue of what is reasonably accessible requires definition. From whom will this come? Is this a technical question, a legal question or is it an organizational question? If the task is organizationally cumbersome, does that make it reasonably inaccessible, despite the work not being necessarily a technically complex endeavor? Will HR need to make a case for the organizationally unreasonable nature of the request?

On the business side, are human resource competencies able to make an opinion stand up? How is cost calculated? Is cost a factor of the work or the way you choose to work? Is there an advantage to ensuring that complying with discovery is (or is not) costly and burdensome? Will Rule 26(b)(2)(B) trigger executive thoughts as to how they should be managing information?

What expertise will be relied upon to dissect the technological, business, and human resource elements that contribute to total "cost"? HR could play the role of organizational expert in securing an estimate of burden. Did your organization establish "guardians" of data? Is that to be a person, a team, or a policy? Should there be a spirit of "guardianship" rather than a single guardian? How will HR deal with Sarbanes issues governing whistleblower protections—should someone reveal a less than acceptable appraisal of data management? How will HR have the technical savvy to understand and discover the legitimacy of the complaint? Are whistleblower complaints discoverable and relevant and do they also retain a duty to preserve, by HR itself?

Other changes in Federal Rules bring similar concerns for example Federal Rule 45(d)(1)(D):

> A person responding to a subpoena need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden of cost. On motion to compel discovery or to quash, the person from whom discovery is sought must show that the information is not reasonably accessible because of undue burden of cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(c). The court may specify conditions of discovery.

The idea behind these new rules of course, is sparing parties unreasonable expenses. What is unreasonable? What is an expense? Is there a sliding scale based upon the balance sheet of the firm? To what extent will the courts consider organizational or non-technical elements in calibrating the costliness and reasonableness of the discovery request?

Can HR coordinate the organization to reduce costs of discovery? For example, projects are often executed deploying virtual global teams, data is everywhere. Should HR be accountable for ensuring that data access is recoverable, that is, are human resources available to recover needed data? Should the organization simply outsource this capability? These are all issues regarding which senior management will reach to HR for assistance.

Value (and Manage) the Large (Unmanageable) Communications Business Landscape

The impact of technology on business, communications, and client/

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consumer experiences comes in many flavors. Whereas the obvious technology issues, such as e-mail and information capture, storage and dissemination are not news to most professionals, technology has also altered the "landscape" of what *is* business relevant and what perhaps is not.

For instance, Web sites grow through Internet cracks and sometimes the purpose of these sites is to target companies and evaluate their behavior. Online communities gestate and in time can grow into formidable cause for corporate image concern (e.g., "ihateblank.com," blogs, bulletin boards). These communities share information about experiences with companies. These sites are intended as a mechanism to enable "honest" conversations between employees and customers. As a result, such communications "blur" boundaries between the company and its customer. A customer in the morning can be chatting with an employee of the same firm that evening online. The employee may be sharing information they should not, is inaccurate, or both (yes, the information might also be very correct).

Technology therefore complicates management control. Clearly, organizational boundaries and information management is not what it used to be. What is accessible, what is discoverable, what is burdensome—all these questions exist in the context of information flowing in-to and out-of businesses. HR must come to the rescue.

Conduct Crisis Management Scenario Training

Business practices are implicated by the new FRCP. For instance, fundamental business operations regarding information control now require thoughtful analysis as these practices could stand to protect you from unnecessary exposure (e.g., New Rule 37(f) regarding "safe harbor" against sanctions for loss or destruction of ESI implicating routine or automated computer deletions). Business planning on even the fundamentals of data retention and production can bring large returns should discovery go live.

Planning for discovery today sustains competitive advantage in the marketplace and in court. HR can play the lead in ensuring that the right players are at the table early to define, implement, and enforce policy compliant with FRCP. HR, in a facilitative sense, can bring information technology, legal, and senior management together to ensure that the right people are focused on the right issues to do the right thing. Simulation-based training is ripe for preparation. Designed with high fidelity, HR can reflect the complex nature of unwanted discovery.

For example, the management team can learn from each other in terms of how they handled the scenario. It is wise to run programs such as these as realistically as possible and include both hard (was the data accessible, rate of production, levels of risk) and soft measures (levels of participation, organizational blockades or impediments, interpersonal problems) from participants. There is nothing like experience and better to get some before you need some.

Get Proactive about Discovery

Preparation as always is a distinct advantage. HR can help the organization gain the upper hand during the meet and confer or other pretrial discovery meetings. Essentially, these meetings "set the rules" for discovery. Federal Rules 16(b) and 26(b) now require parties to discuss electronic evidence pre-trial. It is business wise to have a heavy hand in setting the rules of discovery before you play the game.

FRCP changes focus on electronically stored information (ESI) and their preservation and production. There will likely be more discourse among parties before the meet and confer and discussions about what is reasonably accessible and what is not may get heated. Entry into these conversations requires planning. Wisdom argues that technical expertise to overcome opposing counsel's position is warranted. In-house counsel needs to learn the technical and functional capabilities of client information management systems well in advance of discovery or risk being unprepared for initial discovery conferences. HR can make certain that this education oozes into the halls of the general counsel. Forewarned is forearmed.

For instance, Federal Rule 26(b)(2)(B) addresses the extent of production of evidence. This rule is critical to a strategic, early approach to discovery.

> A party need not provide discovery of electronically stored information sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of rule 26(b)(2)(C). The court may specify conditions for the discovery. (See, for instance, *Zubalake v. UBS Warburg LLC*, 217 F.R.D. 309 (S.D.N.Y., 2003).)

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According to Federal Rule 26(b)(2)(B) if one party can evidence, to the court's liking, that the burden of discovery is too high—opposing counsel is offered the opportunity to counter the argument. What arguments are viable? What is adequate preparation for the counter-argument? Clearly, preparation for entering this discussion is crucial for successful discovery management. To the extent that HR can advise business units on internal capabilities both, hard and soft, HR will bring tremendous business value. To the extent that HR made certain that the general counsel's office is intelligent about computer systems in the workplace, tremendous value is added.

It is clear that there is an epidemic of regulatory-based lawsuits. These are not going away. Proactive approaches to discovery—integrated proactive approaches—attend to the organizational, technological, and legal nuances of the new rules of FRCP. Planning discovery requires consideration of not only the new rules but their organizational application, as well. Discovery doesn't run itself—organizational compliance is required. The coordination of such compliance is best facilitated by HR professionals.

Manage the Wake of Discovery

Living through discovery is a sobering experience. Brand can be tarnished. The entire corporate image might require some fine-tuning. Even coming out of discovery "clean" can leave behind a trail that produces concerns about the company, its products, or services and the credibility of the professionals that work there. Consumers (and clients) value socially responsible organizations.

While legally, discovery may have a beginning and end, organizationally or culturally, discovery is an event in a business life-cycle. What will the event mean? Who will it impact? How will it affect brand? What will it do the organization's capability to attract, retain, and develop world-class talent? HR needs to begin these conversations, perhaps at the board level so that senior management can plan communications.

As evidence is dissected by discovery practices, forensic examiners, and attorneys, care must be taken to keep the organization intact. Are employees left with the notion that their privacy is forever gone? Will the employer be over-zealous in its monitoring making employees uncomfortable because someone is always watching their behavior online of off-line? Such residue hurts morale and productivity.

Businesses are encouraged to integrate human resource, change management and organization development professionals as proactive discovery is planned, executed and extinguished. This will ensure corporate compliance and organizational commitment to discovery. Human resources staff professionals can manage the use and quality of delivery of consulting professionals if not provide services directly themselves.

Reduce Risk Within Human Resources

Like the rest of the organization, HR retains data of all sorts. Some of this is employment data and benefits-related data, yet other data is managerial—for instance sophisticated 360-degree feedback data on key executives (likely to be deposed) and/or other evaluative morsels of information. HR needs to clarify and guard its own data repositories. Specifically, privacy laws, employment laws and other regulations require review in terms of FRCP needs (e.g., Health Insurance Portability and Accountability Act, 1996; Family Medical Leave Act, 1993; Civil Rights Acts, 1964, 1991 (Title VII); Americans with Disabilities Act, 1990; and other EEOC-related federal, state, and local employment laws and regulations).

For example, allegations of sexual harassment, discrimination, and other wrong-doings that were investigated and discarded require retention and proper, legal guardianship. Clearly, IT, HR, and Legal must fall on this grenade together. Title VII violations, class action lawsuits, and their defense require sophisticated analysis and retention of data. Who is minding that shop? Are adverse impact analyses being conducted? Where does that data reside? Is it accessible?

Programs and practices used to make personnel decisions all require review to ensure compliance with FRCP. For example, employment practices used for selection likely (hopefully) were validated in respect to the Uniform Federal Guidelines[16] and other relevant professional standards.[17] The validation of employment hiring tools and other assessment devices typically require data-heavy research or validation studies. The management of the research for HR and its retention is under the scrutiny of FRCP. Furthermore, any and all electronic communications that are material to tools or practices used to make personnel decisions are discoverable.

An e-mail from a key executive that states that although he understands that HR professionals "validated" the method, he does not buy it and "if this test is used in my business unit, the hiring manager better

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damn well find a way to bypass it" would be providing opposing counsel a means to negate the statistical "validity coefficient" or other validity evidence painfully collected by HR experts. In short, many months of sophisticated personnel research could be rapidly neutralized at trial. (Incidentally, validation efforts are very costly in terms of time and labor inside the organization, not to mention compensation for the professional expertise. Statistical and other forms of validity data are typically the best corporate defense for Title VII class action discrimination cases. All this can quickly become unraveled as a result of a few keystrokes, such as an impromptu e-mail suggesting that field managers circumvent corporate policy; such an e-mail would be on the table rapidly in compliance with FRCP.

Again, we come around to the fact that culture resides in electronically stored information. A key executive or anyone in management "should know better" than to bypass corporate policy in such an irreverent style. An e-mail to HR asking for an explanation of the selection system would of course, never make it to court as it does nothing for opposing counsel. Uncovering a culture of subterfuge engages jurors. How the organization is run impacts how managers respond to corporate policies and procedures and these HR programs or management tools.

Block and Tackle ESI Before it Gets the Better of You

A collaborative educational effort between HR, IT, and Legal should become an ongoing part of corporate culture. Beginning with newcomer orientation and ending in the boardroom, everyone needs to understand the issues of discovery residing in electronic communications.

1. Scrutinize HR-Enhancing Technology Tools.

HR needs to know where data resides relevant to employment issues and in what manner it is indexed or retrievable (this is especially important for research and evidence used to validate employment or personnel decision-making practices; that is, data on internal HR research that might be critical at trial as such data is reasonably imminent for a Title VII action). Confidentiality of data is paramount and HR needs to assure that information is properly safeguarded. For instance, the use of encryption and/or removal of certain files from network access (so that only select personnel can access the database) are worth considering.

Utilize intelligent technologies wisely. Background checks are streamlined today through subscription services and other sources. What information will be retained, stored, and preserved? Why? Ensure compliance with EEO law while also being sensitive to FRCP duty to preserve.

As technological capabilities emerge and become vast, HR will be stretched and judgment will be required. What background information will be used or not used to make employment decisions? Whereas job-related, relevant information is clearly within the scope of EEO laws, where does the organization take knowledge of a nicotine patch, AZT usage, or perhaps a history of civil litigation? Are these facts relevant—should such information be used? Is this a business question? An ethical question? An organizational values/culture question? The information used to make such decisions are all FRCP relevant.

Data mining has come a long way. Enhanced technological capabilities bring complex organizational, legal and ethical issues to the HR professional. Business leaders will require HR to assume leadership on such matters.

HR needs to ensure that the organization is focused on data preservation and destruction and that the rationale for all actions is agreeable to legal, information technology, and makes sound business sense. Data retention policies and "acceptable use" policies require close attention (codified and enforced) to ensure "safe harbor" rights. (HR can benefit from counsel in deciphering what it needs to preserve; third-party objectivity often enhances a sense of what is "reasonably likely" to become relevant to future litigation; see for instance, Federal Rules of Evidence, 401; Federal Rules of Civil Procedure, Rule 37.) The decisions regarding what data to preserve, what data should be destroyed, and when, require careful analytics by weighing business, legal, and human resource considerations.

This issue is not easily resolved as information (text), voice mail, instant messages—all these are digitized and open to interpretation. It is not always easy to decipher a message; for instance, "let's conquer the competitor" could be translated into anti-trust motivation (or just be good hype in a motivational training session). It will be important to know when the communication was written, what the proper context is or was, and perhaps the location of the information. (What is the nature of the file that houses it? For instance, was the text stored in a file on competitive business strategy or in HR files on motivation training? The architecture of data management can assist with data interpretation and so, too, requires close scrutiny by HR, IT, and Legal.)

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2. Know Where the Ball Lies.

Collect enterprise-wide information about work-related computer communications (this may enable accessing information from home computer links and BlackBerrys when, for some reason, the information was irretrievable from the work-based communications device). Knowledge of what employees use various devices to communicate brings the capability to investigate communications on those devices (for whatever reason or allegation).

Information sent to clients and those external to the organizations requires management. For instance, Word document attachments are easily "picked" for metadata that can reveal edits or commentary (i.e., track changes)—or other anecdotes that the sender would not want the receiver to view. Simply converting documents to a portable digital format (PDF) would protect the metadata contained within a document, but this requires users (employees) to adhere to policy—behavioral compliance being an HR issue.

It is possible to implement technology that will screen all outgoing firm e-mail document attachments and instantly remove metadata to PDF. Should that be implemented? What is the immediate and long-term cost of bringing this into the infrastructure? Are the business benefits undeniable and justified? Again, to manage behavior of people that use technology, you need to know what these people are doing, how they do it, and where they store it. You can't hit the ball if you don't see it.

3. Run the Enterprise Knowing That Consumers, Investors, and Stakeholders Might Sit in Judgment.

HR needs to make certain that business executives take culture seriously. Not to overstate the point, but people drive business. Employees, customers, investors, and the public at large are to be valued. It is hard to find a company that doesn't say it is customer-centric and that it values its employees. Talk is cheap.

When employees feel mistreated it shows. When customers feel unwanted they respond. When investors believe the organization is going "astray" they cut and run. All of this speaks of course, to articulating a sound business mission and running a firm in a way that appeals to consumers, investors, and high-caliber employees. Today's consumer is tomorrow's juror.

ORGANIZATIONAL CAPABILITY & RISK MITIGATION: THE HR AGENDA

As far as HR is concerned, we've been arguing that a firm that is well managed is less likely to experience litigious problems. Customers are valued. Investors meet with integrity. The public appreciates some level of social responsibility.

Tactically, the FRCP certainly implicates readiness for the meet and confer (i.e., it is wise to be proactive toward discovery) and information technologists no doubt will be able to tinker with gadgets so that forensic technologists can acquire, authenticate, and analyze. FRCP streamlines due process, attempts to reduce red tape, and places evidence in the right hands as soon as possible.

Legal tactics aside, human resources, as the profession that focuses on human behavior in organizations, must step up to the fact neither legal, information technology, or human resources alone can assure that risk is mitigated. Together, however a corporate culture can be managed, legal wisdom can prevail, and the technological capabilities can reside in an enterprise that places employees, customers, investors, and the public first. With HR as the catalyst for change, most assuredly information technology, legal, and human resources can hang together, so they need not hang separately. ■

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