

Monday, October 1, 2012 9:00 AM - 10:30 AM

1000 – Response Required! Legal Holds for the Small and Large Enterprise

Murphy J. Burke III

Vice President & Assistant General Counsel - Litigation Zurich Corporate Law

Dean Gonsowski

eDiscovery Counsel Symantec Corporation

Daniel Lim

Vice President, Deputy General Counsel Guidance Software, Inc.

Raquel Tamez

Deputy General Counsel
Computer Sciences Corporation

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Faculty Biographies

Murphy J. Burke III

Murphy J. Burke III is vice president and assistant general counsel for Zurich American Insurance Company, where, in addition to other responsibilities, he manages corporate litigation.

Prior to joining Zurich corporate law, he was a trial attorney, most recently with Zurich Staff Legal, and his practice areas included insurance defense, construction litigation and products liability litigation.

He is actively involved in Zurich's pro bono program.

Mr. Burke received a BBA from Loyola University, New Orleans, and a JD from the Tulane University of Louisiana. He has also completed the National Institute of trial advocacy basic and advanced trial programs.

Dean Gonsowski

As a former general counsel and assistant general counsel, Dean Gonsowski brings over fifteen years of e-discovery consulting and legal practice experience to his position as senior e-discovery counsel for Clearwell, now a part of Symantec. He is a member of the Sedona Conference working group on electronic document retention and production (WG1), the electronic discovery reference model (EDRM) and the Association of Corporate Counsel (ACC). He has contributed articles to a number of leading industry publications including *Business Week*, *ACC Docket*, *ILTA Peer to Peer*, *Inside Counsel* and the *Legal Tech Newsletter*. He has also been quoted in a number of leading publications, including the *Financial Times*, *Forbes* and *MSNBC*.

Prior to joining Clearwell/Symantec, Mr. Gonsowski held a variety of leadership positions with Daticon, Navigant Consulting, Inc. and Fios, Inc. where he assisted law firms such as Fish & Richardson, Cooley Godward, and Gibson, Dunn & Crutcher, as well as corporations including Qwest Communications, Alcatel, and Ford Motor Company solve complex electronic discovery and records management issues.

Mr. Gonsowski received his JD from the University of San Diego School of Law and his BS from the University of California, Santa Barbara.

Daniel Lim

Daniel Lim is vice president and deputy general counsel for Guidance Software, Inc., a leading digital investigations software provider based on Pasadena, CA. Mr. Lim manages Guidance's AGC team, which consults with corporate and government clients

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on e-discovery, privacy, and digital investigations. He and the AGC team provide support to Guidance on corporate strategy, sales, product development, marketing, and legal issues relating to the company's software and services offerings. He speaks and publishes frequently on legal issues pertaining e-discovery, privacy, and security.

Mr. Lim joined Guidance Software as assistant general counsel. Prior to joining Guidance, he was an attorney in Jones Day's Trial Practice group and part of the firm's E-Discovery Committee. He also practiced litigation at McGlinchey Stafford, and Beck, Redden & Secrest. He served as a law clerk for the Honorable Vanessa Gilmore, U.S. District Court, Southern District of Texas, Houston Division.

Mr. Lim is chair of the ACC's Litigation Committee and a council member of the Texas Bar's computer and technology section. He participates in several industry thought-leadership forums, including the Sedona Conference Working Group 1, Georgetown Law Institute, and E-Discovery Institute. He serves on the executive leadership of New Life Fellowship Church of Houston.

Mr. Lim is a graduate of Columbia Law School (JD) and Southern Methodist University (BA English, BS in economics with finance applications). He has completed courses in computer forensics.

Raquel Tamez

Raquel Tamez is deputy general counsel of CSC, Inc., a Fortune 150, information technology, business process, and outsourcing services provider with 96,000 employees worldwide and \$16 billion in annual revenue. In this role, she is responsible for the management of all litigation matters. She also serves as the e-discovery counsel for the company managing all phases of the e-discovery process. Ms. Ramez is a frequent presenter on litigation management and e-discovery topics. Prior to joining CSC, Ms. Tamez was in private practice at a law firm in Dallas TX, where she represented CSC as a client.

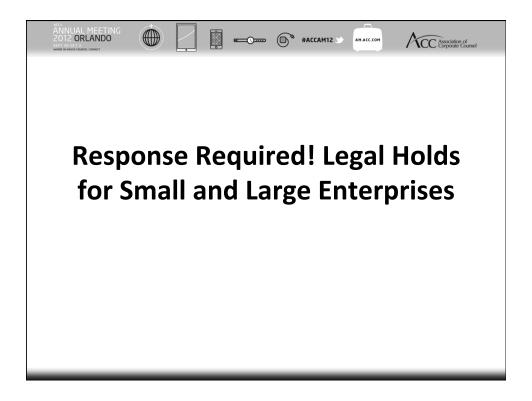
Ms. Tamez has substantial experience advising senior executives and managers in large corporations on complex litigation matters. After starting her legal career as trial attorney in the U.S. Department of Labor Solicitor's Office, she joined Mary Kay, Inc., an international cosmetics company. She then served as vice president and corporate counsel for Affiliated Computer Services, Inc.

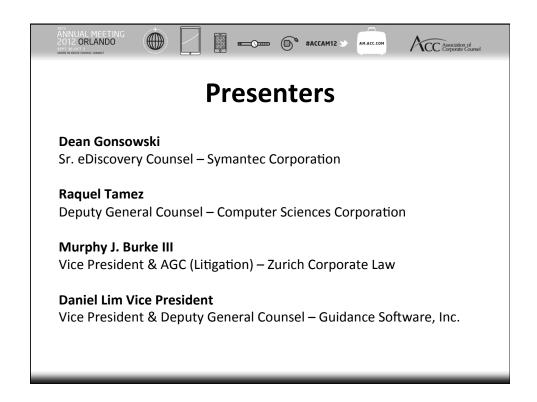
Ms. Tamez is an active member of several professional organizations, including D.C.'s Hispanic Bar Association. She has received national recognition as a recipient of the Hispanic Corporate Achiever Award bestowed by the HBA on corporate responsibility. Currently, Ms. Tamez is a Fellow in the Leadership Council on Legal Diversity (LCLD) talent development program.

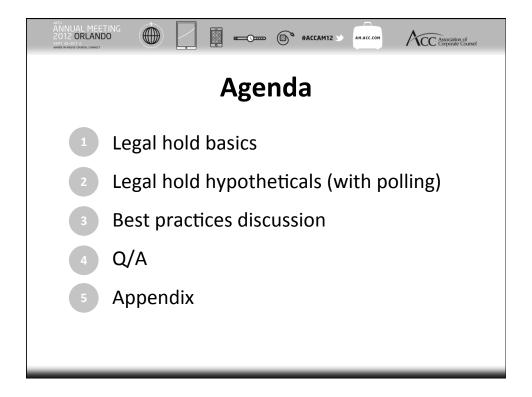
Ms. Tamez dedicates significant time to pro bono matters, and is a regular participant in the Corporate Legal Diversity pipeline program.

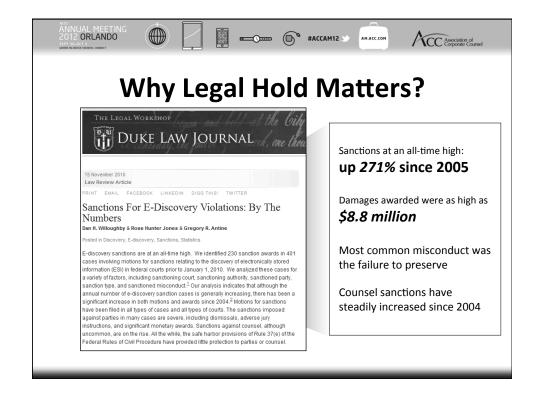
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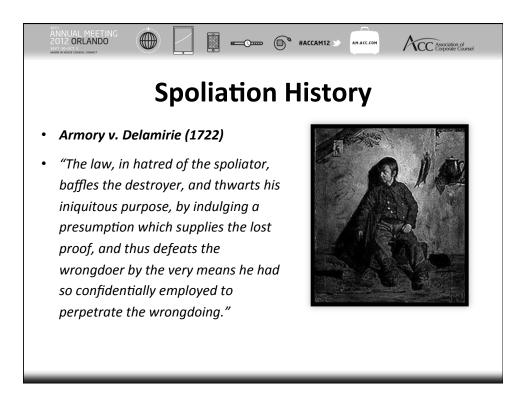
Ms. Tamez received her JD from St. Mary's University School of Law in San Antonio, TX, and her BA from The University of Texas at Austin.

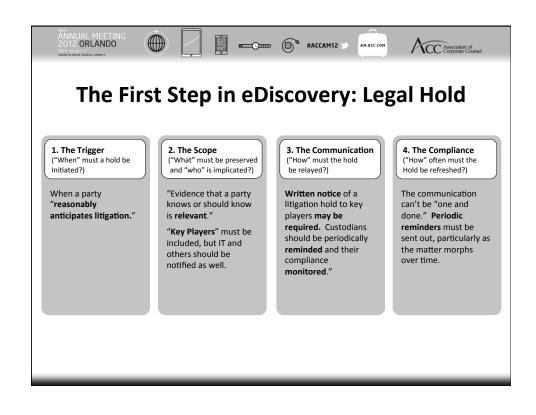






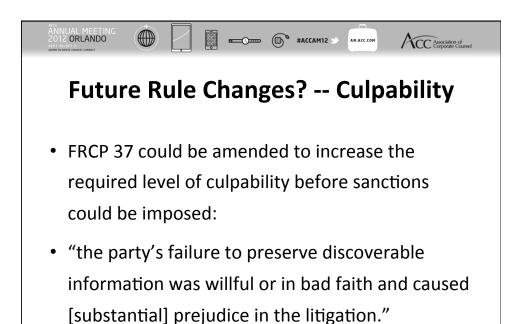


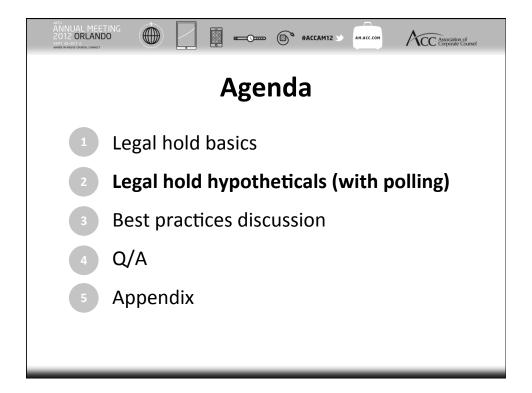


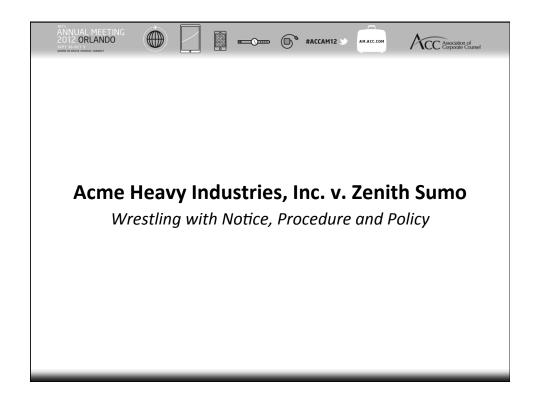


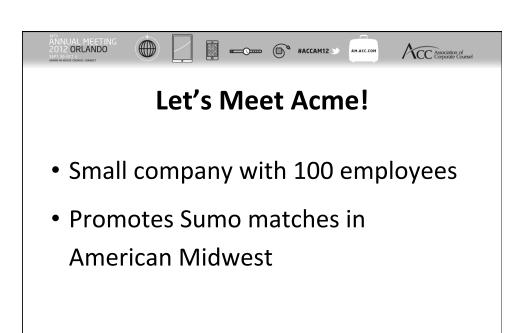


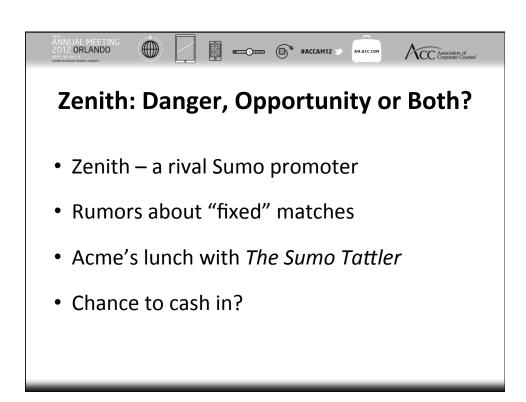
- The duty to preserve can be triggered when litigation is initiated, "reasonably anticipated," or "reasonably foreseeable."
- "For the purposes of a preservation rule, however, we suggest that the Committee might want to consider more of a bright line standard such as litigation that is 'reasonably certain'."

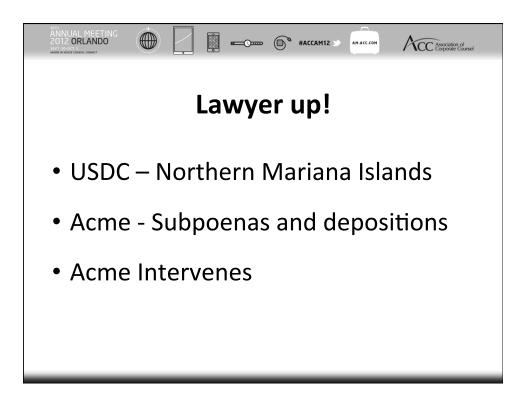


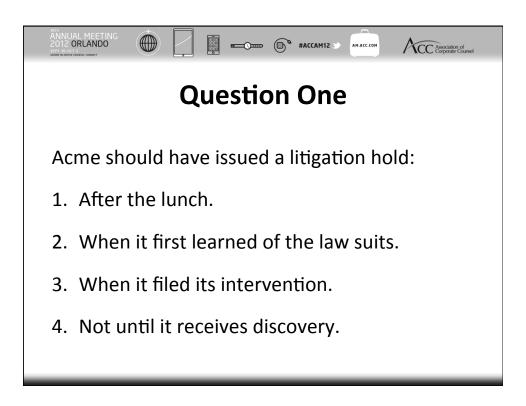


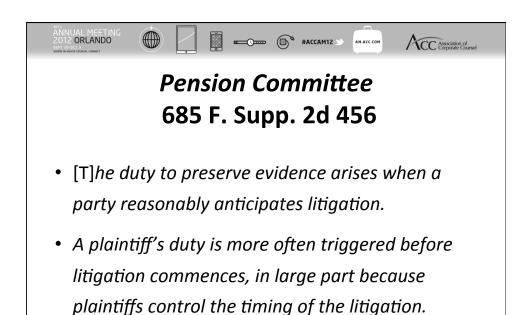


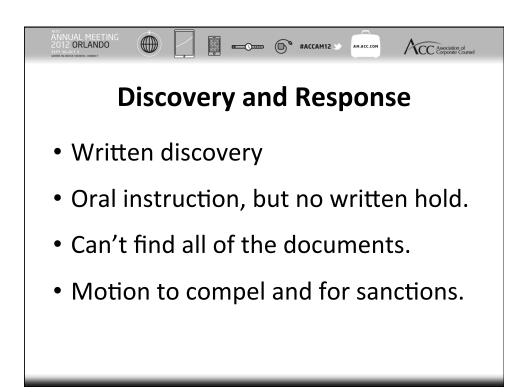


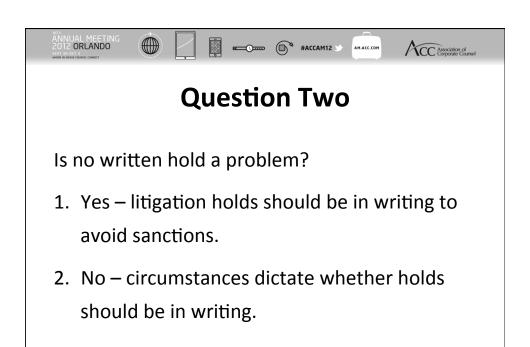


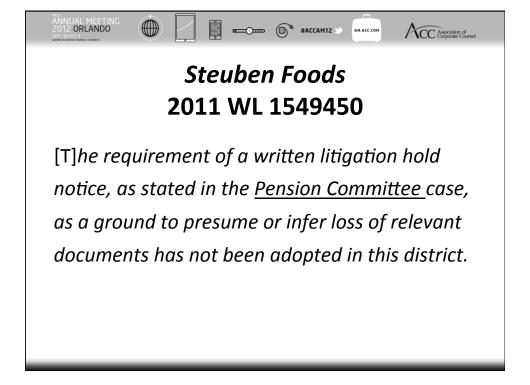


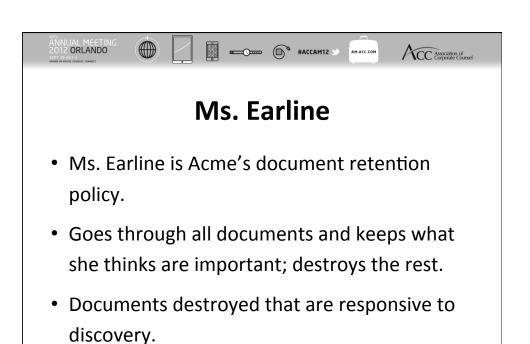


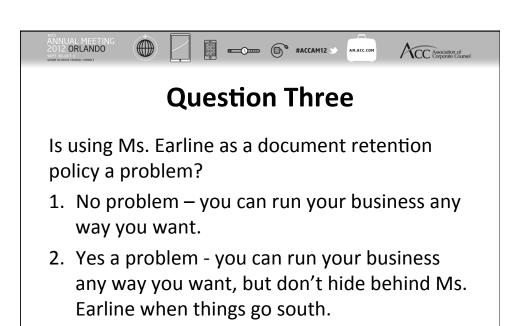






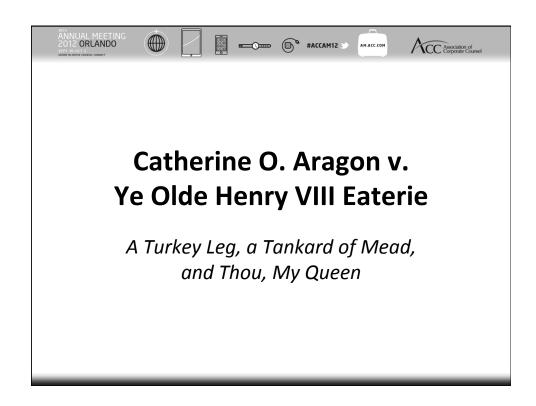








- [A] litigant is not required to simply accept whatever information management practices a party may have.
- The absence of a coherent document retention policy is a pertinent factor to consider when evaluating sanctions.





A Faire Feast Gone Much Awry

- Renaissance-themed buffet.
- COA struck in the head by a turkey leg that another diner hurled at her.
- "Simmer down" to no avail.
- COA struck in the head a second time, but with a pewter tankard of mead.
- Assistant manager, first aid, incident report



Revenge should have no bounds. --Hamlet

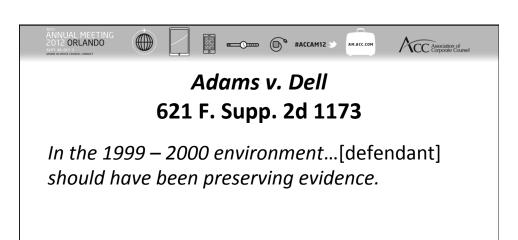
- Catherine lawyers up.
- Her lawyer writes a letter to Ye Olde making a claim and document preservation notice.
- Suit discovery no hold.



Question One

When should Ye Olde have realized that it was under an obligation to preserve documents relative to Catherine's claim?

- 1. At the time of the personal injury, since a claim was reasonably foreseeable even then.
- 2. When it received the letter from Catherine's lawyer.
- 3. When Catherine sued it.
- 4. When it received discovery.





Why, may not that be the skull of a lawyer? Where be his quiddities now, his quillities, his cases, his tenures, and his tricks? --Hamlet

- Electronically stored synopsis of the accident report, but not the original hand-written report.
- Catherine claims: handwritten report the manager saw the patron throw the turkey leg and tankard at Catherine, details not in synopsis.



Question Two

Catherine files a motion for sanctions (adverse presumption). At the hearing:

- 1. Ye Olde has the burden of proving exactly what the handwritten report contained and that its loss would not prejudice Catherine's case
- Despite Ye Olde's negligence in destroying the document, Catherine nonetheless has to prove that her case was prejudiced by the loss of the document.



Question Three

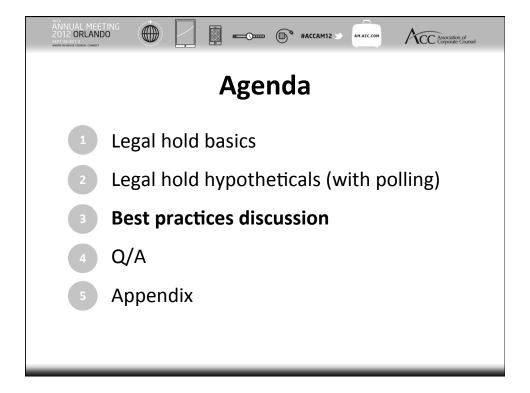
What factors could Ye Olde rely on in opposing Catherine's motion?

- 1. The failure of Ye Olde to issue a litigation hold is immaterial.
- 2. Catherine has no evidence at all that the hand written report states what she claims it states.
- 3. Since Ye Olde had the computer synopsis, the hand written report was not relevant.

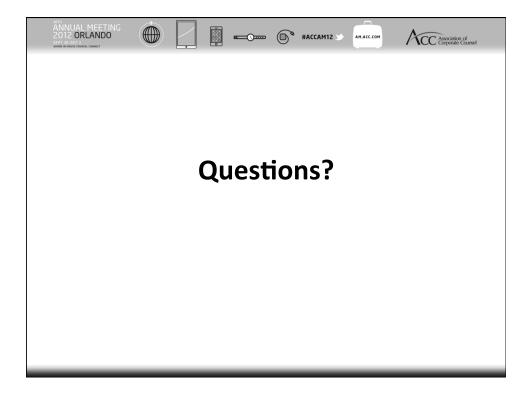


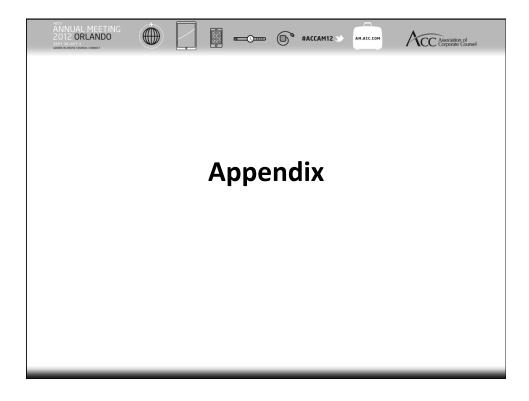
Whitney v. JetBlue 2008 WL 2156324

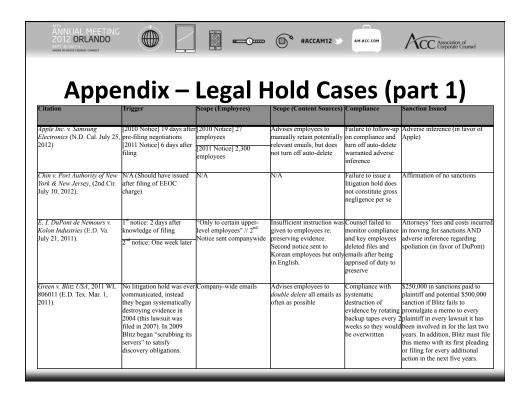
Here, although there was a disturbing amount of carelessness on defendant's part in the retention and production of the IIRs, plaintiff has not demonstrated that the information in the handwritten IIR would be favorable to her case, or that she has been prejudiced by its absence.

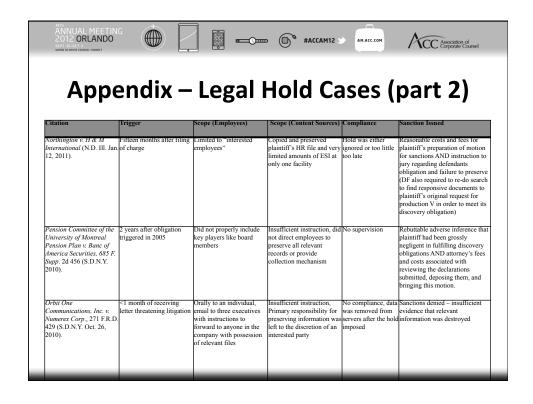


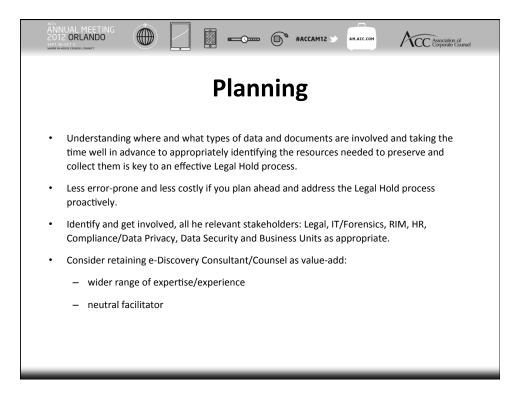


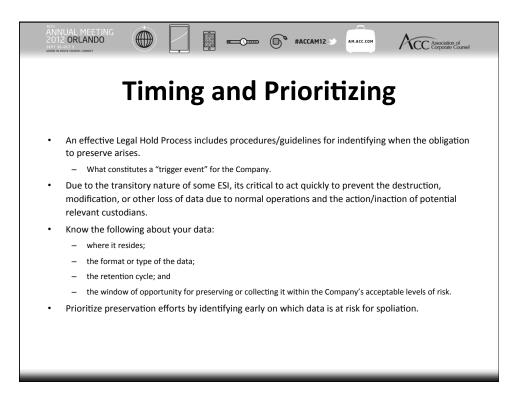


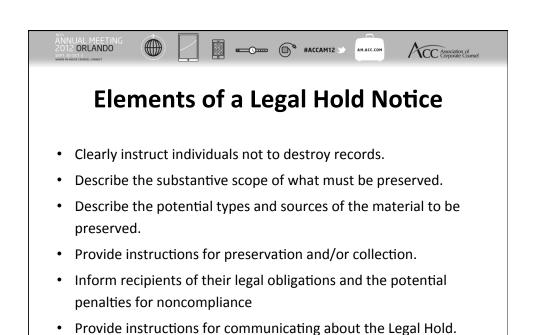


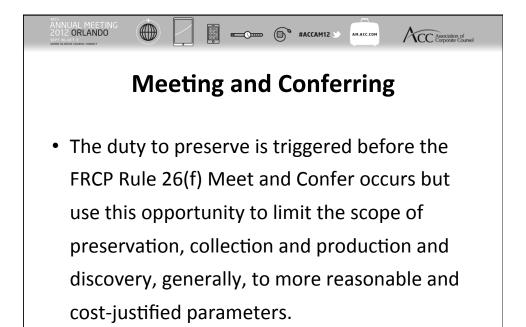


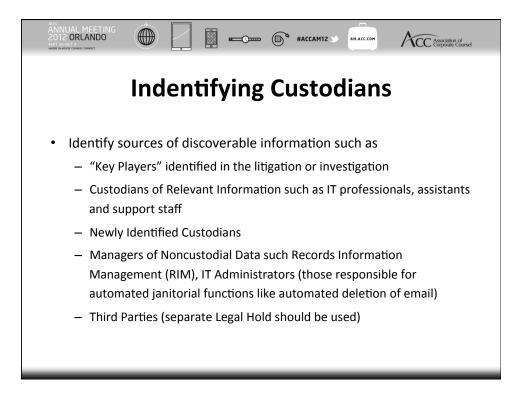


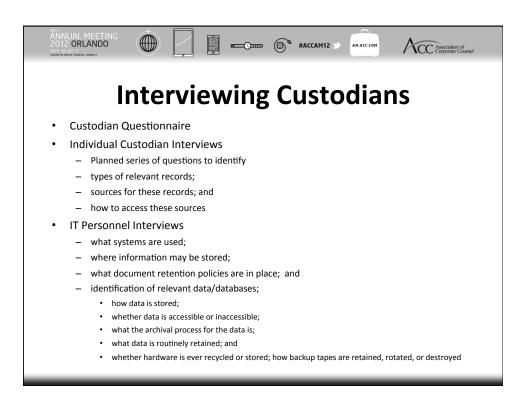


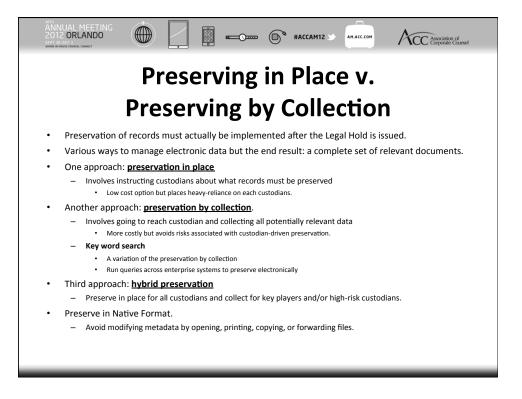


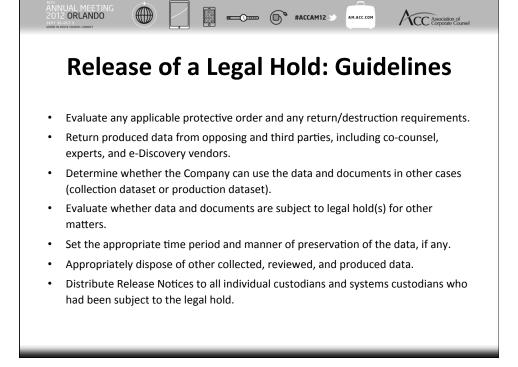














Communicating, Documenting, Auditing

- Effective data preservation is a team effort.
- Clear lines of communications across the Company and with outside service providers relating to roles, responsibilities, specific tasks, deadlines is critical.
- Document actions taken during the Legal Hold Process:
 - the forms and timing of legal holds notices; and
 - follow-up steps taken, by whom, when and why; and
 - reasons for not preserving/collecting certain data.
- Create an audit trail to keep track of completed and outstanding tasks and provide sufficient evidence to rebut allegations of spoliation, negligence or other discovery failures.



Holding Relevant Stakeholders Accountability

- The Legal Hold Process is only as strong as the weakest link in the chain.
- Clearly identify each person/stakeholder's role, responsibilities, and the procedures to follow.
- Set up various checks and balances.



Consistency + Repeatability = Defensibility

- An effective Legal Hold Process is one that is built upon defined processes and policies and appropriate and timely implementation, communication, training, enforcement, and monitoring for compliance.
- The defined processes and policies must be followed consistently and repeatedly in order to be effective and ultimately defensible.
- Create a "playbook" that memorializes in detail the Company's overall ediscovery process/operations including the Legal Hold Process.
- Develop and bake into the Legal Hold Process a feedback mechanism and continuous improvement program.



Planning for Transparency

- At some point in time, the Company's internal processes and actions may be placed under scrutiny and the Company may be asked to produce the records of identification, preservation, collection, and production processes and activities.
- Be careful not to include potentially-privileged information like attorney notes and legal impressions in the same lists/reports that may need be to produced to the Court or opposing counsel.