# ASSOCIATION OF CORPORATE COUNSEL

## Litigation Holds: Implications of the New Rules
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**Presented by ACC Litigation Committee, sponsored Ernest & Young**

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Richard Westling: Good morning. My name is Richard Westling and I'm here as the moderator this morning for American Corporate Counsel web cast entitled "Litigation Holds: Implications of the New Rules".

We have two distinguished speakers to present for us this morning. The first is Eric Schwarz. He's the Americas leader of Legal Technology Services at the firm of Ernst and Young in their Dallas office and he is a recognized leader and testifying expert in the fields of electronic discovery and computer forensics.

Along with Eric we have Robert Owen, a partner and head of the New York litigation practice at the firm of Fulbright and Jaworski, who has extensive experience in E discovery and litigation information management issues.

There are two housekeeping matters I'd like to discuss with the group today. The first is that you should know that you have the ability to ask questions during the course of the web cast using the box at the bottom left hand corner of your screen. If you type questions in there the panelists will do their best to answer those questions during the course of the presentation.

The other matter for your attention is that we obviously have an evaluation form. That's number one in the links box on the web cast site. And if at the end of the presentation you would do your best to get that evaluation filled in, the association of corporate counsel would appreciate it and it will be useful in formatting and providing information about future programs.

So with that I'd turn it over to Eric Schwarz, who will be our first speaker this morning.

Eric Schwarz: Thanks very much Richard. Good morning. What we were hoping to do today was to – three things, first we're going to spend a little bit of time, but not too much, talking about the new rules, new benchmarks and new standards in the emerging landscape of electronic discovery.

After that we're going to talk a little bit about navigating that landscape prior to litigation, how to know where your information is, how to prepare for litigation, regulatory inquiries, that type of thing, some of the common pitfalls and successful strategies we've seen in our

experience and basically talk a little bit about how to best prepare for litigation ahead of time.

Closing up the presentation we'll talk a little bit more about once litigation happens. From that, both Bob Owen and myself are leaders of the Sedona group's efforts towards producing some guidance on litigation holds. You'll hear a little bit more about that further on.

The Sedona guidance should be out probably within the next month. And we're going to talk to you a little bit about the content of that guidance, what it might look like, and that really centers in the area of reasonable anticipation of litigation and what to do to meet the reasonability standards once litigation is anticipated.

Bob –

Robert Owen: Thanks Eric. I think before we get started it's important to note that, you know, the new rules and the new technology of data processing and storage have changed the litigation landscape in the United States at both the federal and the state level and what we hope to be doing today for our listeners is to suggest some very practical advice on what you should be doing now to get ready.

Eric –

Eric Schwarz: Thanks. I think one of the most important observations or messages in the last one or two years is that records management and E Discovery are no longer in the closet within our organizations. They're moving front and center. They are becoming far more strategic to actually the operations and the success of our business.

I think successful organizations need to consider taking the coordinated approach to information risk management. This involves all aspects of information risk and discovery in records management is a significant component of that.

We've all spent a lot of time over the last while in the area of information security, of privacy. All of these sorts of things have become engrained in a lot of our operations, especially for global enterprises. But discovery and records management is something that is just starting to come to the forefront.

I think it's important to note that this is not just a legal issue. There's a lot of things that are driving this beyond sort of the large cases and the changes to the rules that we've all read about; things such as tremendous data growth. Stanford University does a study which predicts that every 18 months the total volume of information produce by businesses in the world doubles, which is a pretty staggering figure.

More interestingly, however, is that more than 80 percent of that is unstructured data. A lot of us have records management programs that do take into account electronic data but in most cases its structured data, those things that are in our databases, our customer relation management systems and things like that.

But that's leaving 80 to 85 percent according to the Stanford study of our information out of that; most significantly email but more and more recently things such as internet chat, web logs and all sorts of other information sources that are starting to come forward.

These things – this has implications across all of our business. It affects strategy, operations, there's obviously finance implications and it's a serious compliance issue. There's a lot of global privacy issues that come in to place that really need to be taken into account when looking at discovery response as well as records management as to what you can save and what you don't.

Bob I'll turn it over to you.

Robert Owen: All right before I pick up this slide I will add to what Eric just said, which is that, you know E-Discovery and records management touch a lot of different departments and corporations and business entities these days and the thing that all of us in this field have observed in the last several years is how much more involved we as lawyers are with the technologists within the companies and the technology advisors outside the companies and of course experts like Eric at Ernst and Young.

Now what have the new rules done? We're not going to redo all of the seminars that have already taken place on the details and the new onset of the new rules. But to get everybody on the same page I think it's useful for us just to review the major changes that the rules, which of course were affective on December 1st, have brought into the process at the federal level.

26-F – and we will talk in detail about strategies for handling the 26-F later in our broadcast. What 26-F is, is one of the biggest changes that was intended to be one of the biggest changes that the civil rules advisory committee wanted to force litigators to have these discussions before their first encounter with the court and 26-F brings that about.

26-F requires that the parties discuss all manner of subjects. It is a much more comprehensive encounter with your adversary then have been such conferences in the past and primarily this is driven by the challenges of the electronic--((inaudible)) electronic world. So more on 26-F later.

26-B2B is described by the Civil Rules Advisory committee and the notes as a modest change but to those of us who have been working in this area and advising entities on how to prepare for compliance within their roles.

I think the view is wide spread that 26-B2B is one of the more revolutionary rules in the last several decades because what it does is it ends the practice of don't ask don't tell between large litigants. In the past it had been my experience that when similar sized companies are litigating with each other one side was loathed to press the other side on E-Discovery compliance because they knew that they had skeletons in their closet like for example hundreds or thousands of backup tapes with in-acceptable data.

26-B2B shines a light on all of that in-acceptable data if, as the notes say – and it's important to read the notes because there's a lot of subtenant content in the notes to these rules – if those backup tapes contain potentially responsive – and that's the key term –

electronically stored information – the sources of that in-accessible information need to be disclosed with your interrogatory answers, with your rule 34 response and so forth.

So this is a major challenge and it is requiring that global entities and large data producing entities get ready now by taking a census of their in-accessible information, by writing their templates on how their litigators across the country should respond because an inconsistent posture under this rule could be very, very dangerous to entities that face litigation in many jurisdictions.

Eric Schwarz: Hey Bob...

Robert Owen: 26 – yes, Eric.

Eric Schwarz: I think it's also worth mentioning on this point that it's not necessarily – and the rules don't actually even mention the physical form of the information and it could be very important as to how you use your backup tapes as to whether or not they'll be deemed in-accessible.

Robert Owen: That's an –

((Inaudible))

Robert Owen: That's an excellent point. And I think the cases to date have made a distinction between disaster recovery backup tapes, which more and more frequently now we're seeing a recycle by companies on 28 or 35 day cycles and tapes that are just used to store information for the corporations later years. Those are called archival tapes.

And there is a debate as to whether those are properly considered to be, you know, beyond the pale of E-Discovery.

Eric Schwarz: Yes. I think that becomes especially important when you look at in the initial phases how a lot of people will implement a litigation hold. And it's very, very common until you find out more information to simply say hold the tapes and when that happens – and one of the first hearings that I took part in since the rules took affect in December – this was actually about the 15th of December, a client had actually – in just about a two month period acquired about 14 thousand tapes in the early stages of a litigation hold and they were attempting to claim them as in-accessible and the court decided that since the information was accessible when the duty attached to preserve the information and that they chose an in-accessible method of tapes to preserve that information that they couldn't later claim that the data was in-accessible and that they had to proceed.

Robert Owen: That's an excellent point and it's a perfect illustration of how the presumption that backup tapes must be saved and it's a drastically incorrect presumption, can get a company into trouble. It can cost them a lot in terms of technology fees, not to mention legal fees and put it in a defensive posture in that litigation.

So one of the things that I try to dispel when I'm talking to clients and to others is it is – it is easy advice to give and in many, many cases, if not all cases, it's wrong advice to just say reflectively save the backup tapes.

The next bullet point on this slide refers to 26-B5 which is an amendment concerning the waiver of the attorney client privilege and the work product protection and it basically – the notes emphasis that this does not affect the ((inaudible)) law privilege. It simply sets up a procedure that I think most federal litigators would already be familiar with if a producing party discovers that there has been inadvertent production, that party gives notice to the receiving party, the receiving party is obligated to sequester or destroy the document or the data that has been inadvertently produced and the parties then take it up with the court if there's a disagreement as to whether there's been a waiver or whether the document or data is in fact covered by some privilege or protection.

Proposed rule of evidence 502 is a very interesting proposal that is working its way through the approval process right now. 502, as it affects civil litigators, would make claw back and quick peek agreements finding on third parties if those agreements had been so ordered by a court or included in a protective order or included in some other case management order.

That's important because in certain jurisdictions today an inadvertent waiver might result in a subject matter waiver which is of course a result much to be feared and avoided. 502 would fix that. 502 however will have to be enacted as legislation by the congress because of limitations and the Rules Enabling act and because it does purport to region, to state court proceedings. So they would have to invoke the interstate commerce clause to exercise this authority. It can't be done by rule making.

All of us who live in a field are hopeful that 502 will be enacted and that it might lead to some good results in terms of parties being able to avoid the page by page document review that occupies so many young lawyers sitting in cubicles these days.

Production in the proper form, rule 34-B, simply provides a procedure for the parties to discuss at the – at some stage in the case, it could be at the 26-F conference ideally but if not it can be in the rule 34 response served by a producing party or it can be in the demand itself.

It's basically a procedure for, you know what form do you want, do you want ((inaudible)), do you want it in PDF, TIFF and are those formats going to be searchable or not. The presumption these days is that data produced needs to be in a searchable format.

I'm going to skip ahead. And the limited safe harbor, that's – that is the so called safe harbor but I think most of us feel that it is a very limited utility. On new expectations and benchmarks, needless to say there is a strong expectation now because this issue has been made front and center by the new rules that parties will be prepared to fulfill their preservation obligation when litigation or the receipt of a subpoena or the receipt of governmental investigation inquires is reasonably anticipated.

If your company doesn't have a procedure for deciding when this triggering event has occurred and the duty has ripened it needs to get it. The – as Judge Shindlen said in one of the ((inaudible)) opinions, the day of sending out preservation notices and forgetting about them – that is on monitoring them – those days are over.

((Inaudible)) four or five makes clear that counsel and the client both share this duty of monitoring preservation efforts. Sending reminder notices every six months or a year or whatever is reasonable under the circumstances is not required. Getting acknowledgements from the recipients of the preservation notice is important these days; following up when people don't acknowledge receipt of the preservation notice.

Unless you have some kind of centralized archiving for emails – and that has a whole host of difficulties that attend it – these processes are very important. And as you'll hear from us later in this show, process and defensive process is key.

The duty to preserve isn't limited to the office. If your employees are using home computers, if they have data from your business on their computers it may extend to their computers. It may extend to their private email accounts unless your company has a policy saying don't use your private email accounts for business purposes.

Information held by third parties is a tremendously difficult issue. Many clients have contracts with third parties for the – for example the doing of research or the conducting of trials in the farming industry, and those contracts typically give the contracting party the ownership of the data that's produced. Well that's controlled under rule 34 and you probably have a preservation obligation with respect to the data that's in the hands of those parties.

Eric Schwarz: There's now –

((Inaudible))

Eric Schwarz: Bob, there's also a very – if I can interject for a second –

Robert Owen: Sure.

Eric Schwarz: --a very – a practical aspect of this as well is to think about when you're contracting with your third parties, especially around hardware, things like that.

I recently had a matter where a global litigation hold had to be in place. The company outsourced the – all of their laptops and desktop computers to a third party provider. They had to put certain data preservation procedures in to place and this was not in the contract. Negotiations with the third party provider led to some pretty tense negotiations because the timeframes were so short, had to be done immediately and the price tag was very high.

There's very specific procedures for example when laptops are turned in and to change those and to modify them such that certain directories, for example, could be copied was very expensive but probably on the front end a very minor fix to the contract.

Robert Owen: Right. That's an excellent point because if you send a preservation notice to a third party and there is no such clause in your contract the typical response will be well who's going to pay the cost that you're asking me to incur. It's a great point.

Cost burden and cost shifting under the rules, cost shifting – and we'll get into this a little bit more later but cost shifting is possible under two of the rules, 26-B2 and 26-C. And

preservation efforts must be defensible to the court and the opposing parties. That goes to the process which we'll discuss a little bit more later.

Eric, do you want to take over?

Eric Schwarz: Great. Thanks Bob. One of the – one of the most interesting things, if we look at the E-Discovery and records management life cycle, starting at the far left that is actually where the largest opportunities for cost management and for risk management occur but we find ourselves, because of the nature of litigation and sort of the need to deal with it immediately spending a lot more time further to the right where the actual opportunity for cost reduction and for risk management are much lower.

For example, a lot of effort and time is spent on reducing the per page cost far on to the production side and to the review side; the per page cost of processing gigabytes of email, producing those to TIFF. And while that will can have sort of impact – actually it had a significant impact on the total cost, if you look a little bit further to the left the biggest things that we've heard about in the news, the cases that have caught our attention that have represented the highest risk in the way of sanctions et cetera to clients has been in the identification of preservation side of the E-Discovery life cycle and that's actually where preparation can really have, you know, some of the largest impact.

If we move even further beyond the litigation holds and if we think of litigation hold as properly identifying, preserving or viewing and processing the stuff that we have, another step to the left in the records management life cycle, and then we're talking about actually reducing the stuff that we have on hand.

And this is where we start to manage the unstructured data and those other types of data that actually cause a lot of the costs to the – to the right hand side. One of – Lori Wise, one of Bob's partners is very fond of saying that volume drives cost and I think that's just a fundamental equation throughout the entire process, from the identification, the preservation, to the review and through the production and the only place that we're really going to have a significant impact on value is in the records life cycle and actually managing that information so that we have – we have less of it on hand.

Eric Schwarz: We're seeing a lot of interest in that. Eric, you're point is excellent. Many, many companies are coming to us now to get our advice and our help in setting up defensible records management programs. The Supreme Court in the Arthur Anderson case expressly endorsed records retention policies even where a purpose of the records policy is to keep information and documents out of the hands of the government or out of the hands of adversaries because it has already been destroyed pursuant to a policy.

So in order to keep the volume down, well advised and well counseled entities these days are reviewing their records management policies, reviewing their retention schedules. It's a very complex process but in our experience it pays tremendous dividends because it acquaints the employees of the – of the retention periods that are legally required and required by the business.

But conversely it encourages them to discard information that is no longer required and is no longer useable because so much of the cost these days is driven by volume. So much of

the cost is driven by those attorneys in the cubicles reviewing page by page data sets that had they been properly managed at the offset would be 50 percent or less of what they're having to work with.

The arrows at the bottom are the lawyer's piece of this; the meet and confer process is – as you will hear later is a way for a well prepared litigator to significantly reduce the volume of the litigation relevant data sets specifically around the scope of preservation – and I'll give you some tips on that later.

Motion practice, if you have failed to agree with your adversary about the scope of preservation and if they're making unreasonable demands for example to stop the recycling of backup tapes or what have you it's essential to be ready and for your counsel across the country to be ready to engage in motion practice to protect your company's interest.

Lastly we believe that it's important for the large data producing entities to identify those law firms who can serve as E-Discovery coordination counsel or national E-Discovery counsel, pick your term because not – frankly not everybody in the country is as experienced in the new rules as they need to be.

And in several years I think we all will be on the same page but right now and for the next several years we're being retained and other firms are being retained to serve in that capacity and to write guidelines for the in-house legal departments and to help train the outside lawyers or intervene or parachute in if there's some sort of despoliation allegation.

I think you want to take us to the next slide Eric.

Eric Schwarz: Yes. Thanks Bob. This is a simple representation of a corporate network. And the only point I really want to make with this slide is that one of the biggest changes, I believe from a practical application standpoint of the amendments to the federal rules is the changing definition which flows all the way through the rules from electronic document to electronically stored information or ESI and interestingly in the notes, as Bob mentioned, that a lot of the substantive materials in the notes.

But the committee was unable to actually agree on a definition of electronically stored information. So we are left with that phrase and a lot – that brings a lot more into play. The electronic document definition, at least we had some of the traditional document characteristics. It had to have an author. It had to have a beginning and an end; those types of things.

And what we've seen since then is a lot more information brought in under the electronically stored information rule book. Some of the things to keep in mind are Blackberry servers instant messaging and the connection to Blackberry servers.

Instant messaging is becoming more and more frequently requested. There are judges that are – that are entertaining that. The – I would say at least 50 percent of the judges that are part of Sedona group, with Bob and I, would fall into that camp around instant messaging.

If you currently do not save instant messaging I would suggest that you consider making very clear in your policies that instant messaging is not to be used for substantive business discussions. That is a communication tool only, much like the telephone.

Robert Owen: And also I would interject that I would suggest that the policies states that instant messaging not be used for the purpose of transmitting attachments because it will immediately become a tool that people use in their business.

If you can disable it on your particular IM application do so. Obviously the securities industry is required to save IM's just to use them for three years but there is more of an open field for the rest of the business world.

Eric Schwarz: That's a great point Bob. There's also some things to consider with the devices that you don't control, things like personal PC's, loose media to people – that people take home, PDA's. If there's PDA's and Blackberry's that are not actually owned and controlled by the corporation but you allow the employees to use them I think if you allow employees to work at home – and Bob please jump in on this – but if you allow employees to work at home from their home computers it is probably pretty much a slam dunk now a days that that is going to bring their home computers and ((inaudible)) in to scope.

Robert Owen: I agree with that. I would also say that voicemail is increasingly an issue. I'm participating in a client conference call this afternoon and the discussion is "how do we respond to a request for the preservation production of voicemail".

Until recently many of the voicemail systems lived in the analog world. Increasingly they are becoming digitized and some systems, as many of our listeners already know no doubt, permit the transmission of voicemails as an attachment to an email.

This blurs the line between voicemail and electronic documents. And so expect to see some action in this area in the future. The important point for our attendees is to focus on the issue and to adopt a policy in their company that treats voicemail as either a record or not and prescribes retention periods and so forth.

So it's – I advice policies – sorry, I advice companies to – policy's a problem away but it does require some advance attention.

Eric Schwarz: Yes. We ((inaudible)) – those are very good points Bob. And I think one of the things that it really illustrates is that now technology has implications that go beyond the business unit, and when you are considering new technology you should make sure that legal and records management has the ability to weigh in because sometimes a very simple tweaks to both the policy and how the information – the technology is put into place can make a lot of this a little bit easier.

For example with the voicemail attachments and unified messaging they are very, very difficult to deal with from review standpoint if that becomes necessary. And one of the alternatives to that is to have your email record when the voicemail comes in, who it came in from so the person using a Blackberry knows that they have a voicemail and to check it and who it's from so that they have a rough idea of how important it is but not to actually attach

the wave file, thereby dramatically reducing your records management and potential litigation hold and review requirements.

Robert Owen: I agree 100 percent.

Eric Schwarz: Some industry insights; what we really see in many years of doing this is three sort of central types of problems. Around the technology side one of the biggest hurdles, when the litigation hold order or the government subpoena comes in is that there's an inadequate information inventory for your electronic information.

(Socks) has required some pretty good information regarding your structure data, people also tend to have a better handle on the structured data but it's very, very frequent, especially if companies are global, are growing by acquisition or both that the unstructured data is relatively uncontrolled and a lot of effort upfront, really just in identifying who controls such information, what are the retention policies around it, what formats is it in, where does it live, you know where are the email service, how often are they backed up and those types of things.

And one of the easiest ways to overcome that is to really to do it once and then to keep it updated. So to go through an exercise that identifies the sources of unstructured data, very similar to a (Sock) site survey but without a lot of the rigor because what you're really trying to do is just identify what data creators you have and where that is, how much of it there is and what the retention policies are around it.

The next big thing is the central coordination of discovery requests and the responses to that. Bob mentioned on a previous slide the benefits to having national electronic discovery counsel. One of the benefits to that, whether it's from an outside firm, whether it's from a in-house specialist within your companies, it's really there's a lot of judgment calls on how things are done.

And one of the things I think that you really want to make sure is that your consistent in that your across litigations, across different in-house lawyers and across outside firms that whether or not you – for example, if it's hard drives as a policy for key players, how you respond to information requests, what your 30-B6 depositions look like. Those types of things should all be consistent.

Plaintiffs firms now are really comparing results in how you respond and what you do. The SEC is definitely doing it across regions. And so I think there's a great deal of value from having a central coordination and actually an assigned discovery response team that includes IT folks, so your 30-B6 deposition people are working from the same information manual and from the same game plan, that your business unit leaders and legal are all involved with discovery response and everyone knows what they're going to do and does it in the same way.

What the first two generally lead to is your legal hold to preserve too much or too little, and very, very frequently both and you end up – the Ford – the Firestone case is a very good example. It's publicly available on the internet and it really kind of ((inaudible)) sizes what could sometimes happen.

Ford ((inaudible)) Firestone as you recall was a lawsuit involving the tires from the Explorer and the Expedition; very defined sort of area. What Ford did initially was to take a snapshot globally of electronic data within the company which was obviously burdened with some very expensive –

But they did not take a deep dive within the engineering groups and others within the tire for the Expedition and the Explorer, that group, and they actually received a fairly severe sanction for that and the judge specifically commented that yes, it was very sensitive and you captured a lot of information but there was information you should have captured but you didn't.

Robert Owen: OK.

Eric Schwarz: "Planning the E-Discovery Life Cycles", really what we want to get across on this slide is that – and I wanted you to have a slide for your – in your information and in your records. These are some of the tasks throughout the policy – the procedure that need to be done.

And as you can see there's quite a few. Usually there's parallel work streams. And for those of you in-house of corporations I think it's very interesting to think about the fact that electronic discovery is probably the only thing or activity within your organization that can have a seven or even eight figure price tag that does not usually have a project plan attached to it.

And in my experience certainly – and Bob please weigh in – a lot of what occurs – a lot of the problems that occur because there isn't a project plan, there isn't specific accountabilities assigned to all of these types of activities that have to occur and there's parallel work streams that are on track and that often leads to things not getting done, which results in some of the types of decisions that you've seen where people have thought things are done but they actually weren't and also the run away costs as their no sort of central control of the process is going on.

Robert Owen: That's a great point Eric, and at some time in the last four or five years many of us who litigate experienced a change to where we became equal parts their lawyer and process manager and project manager. We're not trained as project managers. We've learned on the job.

But the dollars attached to these decisions are huge and the more sophisticated clients already have in place E teams comprising membership from IT, from legal, from records management and compliance. And it is important that in that blue box, far to the left, a lot of work be done now.

If there's one lesson I'd like our listeners to take away it's that you need to do this work before the problems happen. You need to define your legal hold procedures. You need to train your people and you need to have a records management program and define – and to train your people in their records retention responsibilities and their records destruction responsibilities.

You need to inventory your data. You need to identify supporting technologies and supporting technologists I would say. You may need to engage someone like Eric and his firm now to prepare for the (Heart Scott Redino) or for the ((inaudible)) subpoena because when it happens it's happening very fast.

Eric Schwarz: Great point Bob. And I would even emphasis that even if you receive a subpoena tomorrow or you have one in hand, to successfully – to successfully navigate that – those waters I would very strongly suggest that you set up a project team to deal with the subpoena, and that project team should have IT, it should have legal, it should have compliance; whatever is appropriate within your organization.

And even if it's a – even if it's a relatively small matter at this time that project management structure does not have to be burdensome. It can be very inexpensive. Consultants can help with this but many organizations have program or project management organizations within themselves that can actually be brought into play to help – to help manage this process.

But what you really can benefit right up front, even if you haven't done the pre-work and you have a subpoena in hand is a project plan that says these are the tasks that need to get done, these are the individuals are responsible for executing these tasks by these dates and this is the budget that's going to be required and just to have regular meetings of that, to have executive buy in on the steering committee and to make sure everyone is aware of what needs to get done, what's falling through the cracks and so that management can actually make strategic judgment calls about what they do and do not need to focus their attention on.

Robert Owen: That's an excellent point. One of the first things – actually the first thing we do when we are engaged to implement a records management policy and a retention schedule and litigation hold procedures is to form a steering committee with the client. And it's important that decision makers with budget authority be at those first meetings so they know what the scope is and the importance is.

And thereafter these cross disciplinary encounters at the meetings are really proving to be valuable because the different silos of these business entities are being forced to work together and the results are actually quite positive.

Richard Westling: Bob and Eric, I've noticed that maybe from the in-house perspective we have a couple of questions that are coming in regarding best practices with backup tapes and issues of mirroring hard drives.

Obviously the – I assume these are questions from folks who are dealing with sort of not having the preplanning time, what do we do when we get the subpoena, it arrives today, now what. And I was hoping you could develop a little bit more of just some basic best practices on the backup tape issue.

Robert Owen: Well I see the question about the backup tape, and the question is really you know do we have to stop purging because a lawsuit is filed and endless preservation of backup that –

I as a practice do not generally advice that the backup tape rotation be suspended simply because a litigation has come in. If you read ((inaudible)) lake, and it's probably the high water mark but it's excellent guidance to follow, backup tapes are outside the per view of accessible information.

However if you do discover that one of your key players has recently deleted some information that could be relevant to your case, in that – in that instance and in that instance alone it's probably advisable to take a snapshot at least of that key players backup tapes and put them aside.

But if you start preserving backup tapes every time a case gets filed you will have overlapping data sets that will be a nightmare to manage. As far as mirroring hard drives I think the same would pertain. You know mirroring hard drives just saved fragmented data, deleted data, things that are typically not considered to be accessible information.

I tell clients that they'd better have a good reason for doing it. Now if it's an investigation and the government is asking for it, that's a completely different kettle of fish but in the civil side I would say generally not unless you have a strong reason to do it.

Eric, what's your perspective?

Eric Schwarz: Well I definitely agree with respect to the back up tapes. And in fact I always advice clients that I think the easiest low hanging fruit, the chains that they could make simplest in their organizations to really reduce the risk and cost of this is to go back and essentially not have backup tapes past, you know, one or two weeks.

Backup tapes need to be for disaster recovery only. And to have backup tapes that go back a month, six months, a year I think IT departments often keep those simply because they can and really that there isn't a need to have those backup tapes.

Many organizations that I've seen from the questions that are rolling in are already on the two week cycle and that leads to the question, I think you addressed Bob, about the – do you have to pull those tapes each and every time. And certainly when we work with clients I think the answer to that is no. As long as you can focus the legal holds such that a combination of the custodians of the data, which would be the individual users with respect to their hard drives, with respect to their email and then network administrators and others controlling the sort of network data sources are appropriately notified with appropriate instructions such that they – such that they will preserve the relevant data rather than taking the shot gun approach.

Robert Owen: That's a good – and I was assuming in my prior answer the existence of a good records management program, the existence of a good legal hold procedure that can be proven up in court if push comes to shove.

If you don't have that I think that changes the calculus, but if you have those things saving backup tapes is in most cases not advisable.

Eric Schwarz: The one – with respect to the hard drives I think that that is a – that is a risk cost decision that individual clients have to make. There are – you're correct about the

fragments of data, the deleted files, generally not relevant. For key players you may decide to image a hard drive and just to make sure that you have potentially any information –

Sometimes we see people – you find out later someone you thought had very good intentions and was on order to preserve their data, was a very key player in the litigation turns out maybe they didn't have the best of intentions or that accidents can occur frequently.

If it's a really key player – you've instructed someone to hold email for example and because of network requirements on space they are holding those emails on their hard drive.

Richard Westling: Right.

Eric Schwarz: And then their computer gets stolen at the airport or, you know, the hard drive crashes. I mean these things do happen and several times I've had that happen on engagements that I'm working on. And it's just very difficult to explain when it's one of the key people in the lawsuit. So you may decide to take that extra precaution of taking an image so you have the information preserved, you know which doesn't mean you review it and produce it later.

Robert Owen: It also – it's also dependent on where you are and what the circumstances are. I violated my own advice about two years ago when a client of mine was sued in a purported nation wide class action in southern Illinois in one of those – in Madison County, Saint Claire county jurisdictions and we made a backup snapshot of the companies global records management system, rather computer system because we did not want to be accused of despoliation and it was like buying insurance.

It didn't come to anything. We've never impressed on the point but, you know, what you need to do is make reasonable decisions at the time. If you're not saving something I suggest that you record the reasons why so that two years later at this despoliation hearing you will be prepared to defend your actions from the perspective of the point in time when the decision was made rather than in hindsight, which of course is how all despoliation motions are decided.

Eric Schwarz: Yes. And we've got a couple question that are centering around when employees leave do you have ((inaudible)) all their computers, some of those types of things. And one of the things I really suggest is that there's a continuum and it depends on how significant an individual person is to a litigation, but you have a lot of options.

At the very sort of far stringent, abundance of precaution side is imaging the hard drive as we talked about.

Male: Right.

Eric Schwarz: As you further slide down the scale a very simplified thing that you can do is instructing folks to make sure that all documents their preserving for the litigation holds are put into a common location, for example "my documents". "My documents" can then be snapshotted on a regular basis centrally from the network to make sure that if you do have a crash of the hard drive or that type of thing that you've got all the – you know in

combination with the instruction to put relevant documents in "My documents" you have that backed up.

And you can also make that process simpler when an employee leaves in that IT can simply copy things into "my documents" folder, provide that to either the supervisor or to the person in legal responsible for litigation holds.

So there is a continuum and it is a cost risk decision. And Bob there is one other question here and it has to do with the litigation hold. And it said that you – in order to execute a proper legal hold our company will have to purchase expensive software, is there anyway to shift that preservation cost to the opposing parties.

Robert Owen: I would say I've never heard of it, period. Preservation is I think widely regarded as something that the producing party has to bear. I've never heard of an attempt to cost shift on preservation. Although, you know it's something that you could raise at the 26-F conference namely to the affect that well I don't believe that your preservation demand letter is sufficiently targeted, I think it's way abroad but I will propose a compromise.

You pay the cost of preservation and I'll – and I'll – and I'll do it but of course preserving the data isn't the only cost. You have to review it. It's a process that you have to review it, you have to redact it in some cases and then you have to produce it. And so the mere cost of preservation is only the beginning.

Richard Westling: We're getting a little bit closer to the end and I wanted to ask you Bob, just to extend a little bit more for that on folks. Specifically if you have a well structured litigation hold program that identifies potential custodians, clearly explains to them what types of information to preserve, provides instructions to them as to how to preserve that information, specifically in this example, this question, the emails and has some efforts towards compliance and following up to insure the custodians are doing that.

Is that – will that meet the reasonable effort standards so that you don't need to purchase expensive software and centrally identify these relevant emails with sort of artificial intelligence or those types of things?

Robert Owen: I think so. There are – there are two approaches over broad these days. One is the former that you have described and it very much involves management of the process, creation of policies, employee training and so forth.

And the second, very broadly speaking is archiving everything for a couple of years and putting the emails in a – in a searchable database, running search strings pertinent to each of the litigations against that database, pulling out the hits and so forth.

The problem with the second approach, "A" it's costly, "B" it doesn't touch paper. So you're still going to have to reach out to your end users, to your data custodians for purpose of collecting their paper. And you know it's kind of a which way do you go decision. It is not – there's no clear answer. It depends on your organization. It's a cost benefit analysis. Both can be legally defended, provided that the process is well documented and followed.

I'm going to move on. And I see one other question's in the queue that I will get to as I talk about from the judges perspective. What we're talking about here is – and let me take you back to the title slide, "Reasonable Anticipation, Triggering Mechanisms for Duty to Preserve" and this is from the judge's perspective.

I want – I really do want to emphasis this because if you read despoliation cases that have been decided in the last five or ten years I maintain there is not a single one, other than perhaps ((inaudible)) judged someplace, but even then where a party has been severely sanctioned if it was proceeding in good faith in a reasonably diligent and competent manner.

If you read the cases closely, the Morgan Stanley case, now reversed, the (Zubiley) case, the metropolitan opera case you will find in each of those cases a perception by the judge that counsel that – for the client that ended up being sanctioned or the client itself was evading discovery or intentionally destroying evidence and impeding the litigation.

So I think it's important to display your reasonableness, to conduct yourself in a reasonable manner and that's just a fact of life. Here are some indicators to the court of good faith. And I believe that these paraphrase the guidance that we're going to see from the Sedona conference some time in the next month.

Eric was one of the two co-authors with a partner of mine, Gregg Wood of the forth coming Sedona guidelines on triggering mechanisms and we're getting very close to the end but you can see that – you know that determination is made whether circumstances give rise to a credible shred of litigation. That's the decision you have to make.

Is there a procedure for reporting potential threats of litigation upstream to our responsible decision maker within the organization? The decision as to whether a credible threat exists is based on an established procedure that's consistently followed. That's a piece of the process.

Whether the evaluation of the threat is based on pertinent investigation and evaluation, you know whether the decision maker determines when litigation is reasonably anticipated based on known facts. And in the end what this leads up to is that the evaluation process is analyzed by courts and opposing parties based on this consistent application and not some hindsight evaluation. So it's important to have your processes in place.

One of the questions that came in was do we have to implement a litigation hold every time we get an EERC complaint. And I think the answer to that is clearly no. Many major companies get dozens or hundreds every week and it would paralyze the company to do that. I think you need a procedure in place for deciding is this one going to go to litigation or not. If it is going to go to litigation in your best judgment that's, I think triggering mechanism.

But if it's a routine complaint or something that in your experience as a company is not going to go to litigation I would say – I would say no.

Let me get to the early meeting of counsel because this is something I promised to cover with some specific advice. The 26-F conference, which I described before, I think sets the E-Discovery tone for your whole case and I think it's important for counsel and clients to

project confidence and competence, not only to comply with their requirements but you need to project the determination to fight and to feed unreasonable discovery demands.

You do not want your adversary thinking that your E-Discovery preparedness is a soft spot that it can use to drive up the nuisance value of the case. So you need to do your homework. You need to get these policies in place. You need to know your client and your clients' data stores. You need to coordinate closely with those entity – the departments we were discussing earlier, the IT, the compliance, the risk management, you need to know where the data is.

By all means do not make factual statements at the 26-F conference that you can't prove and be very cognizant of how you would prove the things that you're saying. Who's your witness? What document or policy can you produce to the court to show what you are asserting? Take care not to respond to provocative unreasonable demands in an unreasonable way. Maintain a posture of reasonableness.

There's a really excellent publication by the Sedona conference published this year called "Conducting a Successful Rule 26-F Conference Under the New Rules" and I commend it to all of our listeners. Is the 26-F conference going to be on or off the record? I think the assumption that we all make is the 26-F conferences are off the record.

You know maybe you send a letter recording your agreements afterwards but that no one's going to quote anybody else. But you know we are beginning to see in certain jurisdictions plaintiff counsel who will bring a court reporter to the 26-F conference and refuse to conduct it unless it's on the record.

So I've been telling audiences that I foresee the 26-F conference becoming more and more structured as everyone gets more experienced with it. Whose to know but it is important to set the ground rules for your 26-F conference ahead of time and as I said before to memorialize all agreements that you – that you reach.

((Inaudible))

Robert Owen: Go ahead Eric.

Eric Schwarz: No. Sorry, I just – we have a couple minutes left and there's one question that I would like us both to address because –

Robert Owen: Great.

Eric Schwarz: --I think a lot of people are going to have this very same issue. And the question was how do you preserve a real time database like SAP? You know will the paper give – was the paper shot – snapshot satisfactory et cetera?

And my suggestion with respect to structured databases like SAP, especially very large databases, is that you start with – you start with looking at the business processes, identify the information within the SAP, the subset of information within the SAP database that is required to be preserved and then what the granularity is of the data that's already being

preserved that you may find that most of the data is already being kept to a five year or more period.

But identify the subset of the data and then you can preserve that data either by just adding some capacity to save that little data, leaving it in the SAP database or – and the alternatives that can't be done, make extractions in a commonly useable form.

We usually use sequel server with clients and just do straight dumps of the relevant information to sequel servers so that it can be used later without any specialty software if necessary.

Robert Owen: That's a great answer and I have nothing to add to it.

Richard Westling: Well guys I think our time is up for today. I want to thank both Bob and Eric for their participation, thank the participants for their good questions and simply remind everyone to please fill out the evaluation form for this web cast.

And at this point I'd like to thank everybody and you may now disconnect.

END