Sponsor: Jordan Lawrence, An ACC Alliance Partner
Moderator: Lewis Shaffer, Assistant General Counsel - Chemtura
Speakers: Alice Lawrence, Partner - Jordan Lawrence, **Bruce Radke**, Attorney - Vedder Price and **Timothy Carroll**, Attorney - Vedder Price

ASSOCIATION OF CORPORATE COUNSEL
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Moderator: Lewis Shaffer
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Operator: Just a reminder, today's conference is being recorded. Lewis, please begin.

Lewis Shaffer: Good afternoon and welcome to the ACC-Jordan Lawrence Webcast, Records Compliance and Risk-Reductions the 2006 Survey.

My name is (Lou) Shaffer, and I'll be your moderator for today's presentation.

Before we begin, I'd like to direct everybody's attention to the links box, which is located on the right side of the screen. When the Webcast is over, I'd like everybody to please take a moment to fill out the brief survey that's located there at item number six, which is the ACC Webcast Evaluation.

At the links box, you'll also find links to the speaker's bios, the 2004 Records Management InfoPAK and a copy of today's slides located at number four. There will be one additional speaker's bio, which will be for Tim, which will be put up momentarily. And you'll see that as item number seven shortly.

Under the links box, you'll also see that there's a chat feature. Anytime during the presentation, if you have a question, please type it in and hit send. Questions will be answered, if time permits, at the end of the session. I'll also give instructions at the end - at the conclusion of the Webcast as to how you can e-mail the speakers with individual questions as well.

This one-hour presentation will reveal the latest statistics as part of Jordan Lawrence's 2006 Records Control Best Practices Survey concerning the levels of record control compliance and risk-resolution. Today's Webcast will address practical steps towards corporate records compliance and enforcement.

I should note that my company, which is Chemtura Corporation, which is a chemical manufacturer, is currently in the process of revising and finalizing our corporate's management - corporate's record management program. And we have largely utilized the resources of Jordan Lawrence's best practices approach.

Let me take a moment at this point to introduce our speakers for today. We have Mrs. Alice Lawrence who is with Jordan Lawrence, Bruce Radke and Timothy Carroll who are both with Vedder Price.

Alice Lawrence is an industry-noted expert in executive strategies that enable companies to establish and enforce legally defensible corporate records programs. She joined the firm in 1990 as a project manager, where she worked with hundreds of major corporations on complex corporate records issues.

In 1993, Alice became a principal of the firm, Jordan Lawrence, and Director of Operations. She pioneered the development effort of the company's Web-based enforcement tool, Enforcement Solutions. She currently manages strategic alliances and consults with top executives on

enterprise-wide programs with corporations such as Northern Trust, NiSource, my company Chemtura and Plantronics.

Bruce Radke joined the Chicago office of Vedder Price in 1998. He is a shareholder and a member of the firm's Litigation Practice Area. Bruce regularly counsels clients, including a Fortune 25 company, on enterprise-wide record management programs and electronic communications policies. He has both written and spoken extensively on a variety of topics relating to records retention, e-mail and electronic discovery.

Bruce has also had substantial experience in a variety of litigation matters. His practice specializes in complex commercial litigation, which include contract disputes, business torts, intellectual property, patent infringement, trademark, licensing and related matters. He has been involved in numerous cases arising out of breaches of representations and warranties made in connection with corporate acquisitions and related transactions.

His representative clients include GE Insurance Solutions, Home Depot U.S.A., Inc., ABN AMRO Mortgage Group, Royal Numico, Rockwell Collins, General Binding Corporation and General Nutrition Companies.

Tim Carroll joined Vedder Price's Litigation Practice Area in 1999 and has vast experience in handling a wide variety of commercial litigation matters through trial and arbitration. This experience includes those relating to security fraud, misappropriation of confidential information and trade secrets and other business tort actions.

Tim has counseled numerous clients, including Fortune 25 retailer, an enterprise content management company and a defense contractor, on both implementing and - adopting and implementing records management programs and electronic communications policies.

Now that you've been introduced to the speakers, I'm going to turn the program over to Alice.

Alice Lawrence: Thanks, (Lou).

Lewis Shaffer: You're welcome.

Alice Lawrence: I'm happy to be here. And I'd like to personally thank everyone for participating in this afternoon's Webcast.

As mentioned by Lewis, I'm Alice Lawrence, the partner in charge of client services here at the Jordan Lawrence Group.

Many of you may have participated in the ACC sponsored 2004 survey on records compliance. And as you know, we have recently concluded an update to that survey, our 2006 edition of the survey regarding records policy practices, enforcement and other critical issues.

We continue to strive to provide the ACC members with high-value information around records management practices. Our hope is that you find the survey, along with the - today's Webcast will provide useful data to benchmark your company's records management practices and to invoke some critical thinking around your key issues that will be raised today.

We were really pleased with the large number of companies of the ACC members who took part in this survey. With hundreds of companies participating, you can put some confidence in the data. It's pretty significant.

Today we're not only going to report back to you the findings of the survey, but additionally provide some insights and perspective based on our company - based on our experience of helping companies address records management challenges.

Right now, I'm going to cover the four significant challenges the survey identified that companies are facing in managing their records.

First and foremost, the greatest challenge of managing records is overretention, probably no surprise to the audience. The amount of hard copy and electronic information that companies maintain continues to swell at exponential rates. Certainly since the 2004 survey we conducted, it is evident that companies are increasingly challenged by the volumes and redundancies of records they maintain.

Overretention of records seems to stem from a couple of areas. First, we think it's quite evident from the survey results that companies just have inadequate naming standards and retention practices. There's often a tremendous inconsistency across departments, lines of business, different media maintaining the same information.

The second contributing factor seems to be a more conscious decision by companies and quite surprising to us. Without adequate records controls, companies are simply just defaulting to keeping everything. This, however, creates enormous problems in the terms of cost, efficiency and compliance.

This notion of keeping everything to be safe, never getting rid of information because you might need it in some case really is putting compliance in jeopardy and often exposing you to unnecessary risks and cost associated with that.

The second issue might be somewhat of a new terminology for some people in the audience. The second issue that we've identified based on the survey results is the deficiency from respondents regarding a regulatory tagging, ability, or I could say inability. This means being able to tag specific regulatory requirements to relevant record types. I'm not talking about

retention. I'm talking about the other more complicated requirements that you're now faced with. We were quite surprised with the results and I'm going to show you some of those details.

The requirements around things like FACTA and HIPAA, the Gramm-Leach-Bliley Act, the New Jersey Identity Theft Prevention Act. Those are just a few examples that don't govern retention but they govern how and when you can destroy records - not when, but how you can destroy records in a secure manner.

Each of these regulations has specific requirements for managing and destruction of hard copy and electronic records that contain consumer or personal information. Regulations such as the U.S. Patriots Act, SEC and Sarbanes-Oxley and others also require rapid production of certain types of records. We would consider that an additional regulatory tag that doesn't have anything to do with retention but it's the requirement for rapid production.

The third issue identified by a majority of respondents is an alarming deficiency in the ability to identify and place records on hold which might be required for litigation or investigation. Survey respondents reported having varying abilities to place records on hold when required to do so, and particularly struggled across different media when the records were maintained redundantly.

The fourth issue that was identified is an overwhelmingly number - low number of respondents that audit the enforcement of their company's records management practices.

I thought it might make some sense right now to review the survey results against primary obligations that all companies have in maintaining their corporate records. Essentially, a company's obligation related to records management can really be boiled down to these five record obligations. I'm going to talk briefly about each one of these obligations. And then I'm going to dive deeper into each obligation and show you the actual results of the survey that was just completed in 2006.

First, a company must maintain records long enough to meet any regulatory or valid business requirement that might exist. I think it's also important here to note that companies are not, obviously, required to over-retain records or to keep multiple redundant versions of the same information.

A company must also be able to produce records as needed to meet legal, regulatory and other demands, which of course are why the retention requirements are in place - originally the reason why they're in place.

Thirdly, a company must be able to manage legal holds effectively. This is perhaps the most critical requirement. However, our survey respondents expressed low confidence in their ability in this area, which I'll share with you.

Companies must also be able to tag certain records to specific regulations beyond the retention requirements, but those that impose those other requirements I discussed about rapid discovery, privacy or secure disposal obligations.

And lastly, a company should dispose of records in strict compliance with the approved retention standards. This cannot be selective or managed haphazardly. Consistency is the critical component here.

I know these all seem pretty straightforward. Now let's look at each one of these against the actual survey results.

For a company to retain records long enough to meet their legal and business requirements, we think two ingredients are required.

The first is a well-constructed retention schedule that balances both the valid business requirements. From our experience, identifying and validating business requirements tends to be the bigger challenge for most companies. We think, in part, this is due to the fact that unlike the regulatory requirements that are dictated by a specific regulation, the business side typically just does not have a point of reference on how long to keep records. And they invariably end up opting for unnecessarily obsessive retention periods.

In general, our benchmarking data that we maintain here at the Jordan Lawrence Group typically supports a much shorter business requirement than what most business areas would determine if they didn't have that point of reference. So we think that benchmarking is real helpful. Perhaps it's this reason that most of the respondents reported a 32 percent - only a 32 percent satisfaction level with their current retention policy.

The second ingredient to ensuring that records are maintained long enough to meet the requirements is a clear understanding of what records they have and where they are. Unfortunately, the survey clearly indicates that companies do not know what record types they have or where they have them, as only 29 percent of the respondents reported having a complete listing of paper records. And this number dropped all the way down to 17 percent of companies confidently say they can identify and have a complete listing of what records they keep in their organization electronically.

Inadequate retention schedules, coupled with insufficient knowledge of where records reside, it's no wonder that only 25 percent reported being satisfied with the enforcement of their corporate records policy.

Additionally, with so much redundancy of records, the sheer volume makes it a challenge to consistently apply retention requirements. One of the first things that we do at the Jordan Lawrence Group is when we're working on a records program we concentrate with our clients on

clearly identifying record types across all media. And then we tie retention standards to each of those record types for both the regulatory and the business requirements. Once that's identified, redundancy can then be minimized.

By taking this approach, our experience has been that as much as 50 percent of a company's records that they are currently maintaining are not needed. There's no regulatory, there's no tax, legal or business requirement to maintain that information. Addressing this excessive overretention of records will not only mitigate unnecessary legal risks, it also produces some operational and some real financial value for our clients.

Many of the same issues pertaining to the lack of record type knowledge and the inflated inventory of records in both hard copy, electronic give cause to the next challenge identified in the survey. A records retention program should ensure the immediate accessibility of records.

Consider that the respondents reported that most record production requests involve five or more different sources, in conjunction with the data that we just heard from the previous slide that only 29 percent have a complete listing of paper and 17 have a complete listing of electronic records. The survey is showing a little bit of some conflicting opinions.

Nearly half of the respondents think that they can enact legal holds effectively, but the vast number of them don't know what records exist or who owns or controls them. It's not surprising that 48 percent of the respondents are less than satisfied with their ability to produce records in a timely manner.

The results are somewhat better when you look specifically at paper, although less than 60 percent satisfaction is still pretty low with the media that you know could argue is the easiest to control or the easiest to manage. You can do that centrally.

When asked specifically about e-mail, the results drop just below 50 percent satisfaction level and a little bit lower when talked about electronic records. These are electronic non-e-mail records. The broader picture that's being painted here is that if records are not immediately accessible, then it becomes virtually impossible to confidently place records on hold with any certainty or with any precision.

Ironically, nearly half of the respondents felt they could enact legal holds effectively, but a vast majority don't know what records they have. So how can you have a legal hold be effective with so much missing information?

When we asked more specific questions about hold management in the survey, the ability to pinpoint specific records, 90 percent reported they were unable to do so. Eighty percent, they were unable to pinpoint specific holds to people. So the 90 percent to record types, 80 percent back to an individual that may control the information.

Then we dug a little deeper and we asked the respondents the ability - their ability to stop destruction of records, you know which would be required to stop destruction of records at a specific media type. Fifty-eight percent of the respondents reported being unable to suspend the destruction of paper records. Sixty-five - sixty-five percent reported being unable to suspend the destruction of records in e-mail, which we all know has become you know the biggest favorite target of any adversary of your organization. Sixty-seven reported being unable to suspend destruction of electronic records, the non-e-mail electronic records.

Even in light of these survey results, I can tell you there's a very effective strategy to addressing these issues, but it's not keeping everything. With the average cost being as much as $2 per e-mail message to produce and review, a company that keeps every e-mail could be risking a financial disaster, regardless of the content of those e-mail messages.

We work with our clients on centralizing this knowledge about what records they have, who owns and controls them and where records are held so that they are able to enact immediate and verifiable holds on records without having to hold everything.

Perhaps one of the biggest areas of the emerging risk, because of the added complications, not just for retention, but this concept of regulatory tagging across all media for rapid discovery, privacy, secure disposal requirements, those are just a few of those requirements beyond retention.

While your retention and management policy needs to consider the fate and - federal and state requirements, it should also identify which record types are subject to things like Sarbanes-Oxley, HIPAA, FACTA, any industry-specific requirements such as GLB, anti-money laundering, ITAR. Publicly traded companies must also tag the SEC records, SOCS records, Sarbanes-Oxley and so on. As you can see from these percentages from - of the respondents, for companies who have tagged their record types to various requirements, it's very low.

Additionally, considering that in the last 12 months there are 35 states that have either enacted or have privacy legislation pending, these new requirements are particularly challenging for your larger companies that operate in multiple states. And it could be very challenging to construct and successfully manage a program that can connect the myriad of requirements to the actual records that are being produced and maintained in the field across state boundaries. Our approach with clients is a combination of both automation and a strong audit process.

Overretention of records exposes the company to unnecessary risks and creates excessive cost. It's just simply a waste of money and it really is a major risk. With the enormous costs of e-discovery, the plaintiff's bar can really exert enormous financial leverage against a company that has not effectively addressed how it manages its records. And based on the survey responses, companies really need to take action immediately.

Records need to be destroyed in accordance with the retention policies, otherwise, companies will continue to incur unnecessary discovery and operational costs. In fact, like I said, we find, on average, companies have 50 percent of Legacy records with no requirement to be retained, which should just be eliminated or deleted.

If you think about it, if you've developed this policy, why have a policy if you're not going to enforce it. With a policy in place, your organization is setting a level of expectation. If you're not going to comply with it, you're really just better off not even doing a policy.

And while the 2006 survey results provided some interesting, sometimes some surprising results, nothing is more surprising than this last statistic. Seventy-one percent of respondents still do not audit compliance against their records policy.

After all the cases, all the negative press, companies continue to leave the enforcement of the corporate records policy to the discretion of their employees. Your financial corporate reputation, personal risks that you have in the legal department should be enough to move companies to the same standards for audit that you have with all of your other corporate policies.

I'm going to close my portion of the Webcast in a few slides, but I want to give you a few thoughts about where to begin.

First and foremost, you must first develop a clear understanding of what record types your company has. As simple as this sounds, it's rare we go into a company of any size and find universal acceptance as to what the corporate records are.

Next, you need to determine who owns and controls each of the record types. Both the official version, but also, and perhaps even a little more difficulty, all the convenience owners of records

must be identified. Make sure you're also linking these record types back to the individual departments that own and control them, as well as the people who have access to them. That's really critical in pinpointing that hold that was so deficient in the survey results.

Next, you need to define where records are held or where they're maintained, what media they're on, what application they reside in, the repository of the records, a physical location, where the records reside. You know, after all, you can't destroy records in accordance with the schedule or you can't access them if you don't have this supporting information.

And finally, once you have adequately defined what records you have, where they are, you must tag them against those retention - the retention requirements, but also those regulatory tags about privacy, rapid production, secure destruction and so on.

This information is essential in order to meet your records management obligations of retention, production, regulatory requirements beyond retention, and ultimately, and probably as importantly, the timely and consistent destruction of your records as soon as it's permissible.

Before I things - before I turn things over to Bruce and Tim, I again want - I again want to thank you for participating. I encourage you to contact the Jordan Lawrence Group for a copy of the 2006 survey. And coming soon, our revised InfoPAK on records management will be available. Also, please feel free to contact me with any questions about today's material or questions specific to your initiative.

Thank you.

Bruce Radke: And thank you. This is Bruce Radke from Vedder Price. And I want to thank the ACC and Alice, as well as Jordan Lawrence, for providing us with the opportunity to speak to you all today.

(Lance): And Tim and Bruce, this is (Lance) from (CommPartners). Just try to get as close as you possibly can to your speaker.

Bruce Radke: Thank you. How is this?

(Lance): That's better.

Bruce Radke: All right. (Lance), if you could advance the slides for us. It's not - there we go. I take that back.

As (Lou) had mentioned, Vedder Price is a national law firm with a number of leading attorneys in a variety of practice areas, including records management. That is one of our key components of our practice that we would like to discuss with you today.

And let me just pause for a moment for a bit of a shameless plug. Our records management group enables its clients to develop customized, yet comprehensive, solutions to minimize its litigation risk and cost, increase its records management efficiency and achieve compliance with applicable governmental regulation statutes and industry best practices. Shameless plug finished.

Alice talked, to a large measure, about where companies are at and, in generally, where companies need to go. And we would like to follow up on those very important points and just touch on, generally, what a, from a legal perspective, what should a records management program include, some of the elements that your company's program should entail.

And Alice had mentioned, there are a number of companies, and we see it all the time, that are storing sale records that have outlived their legal requirement, as well as their operational needs. So whenever - one of the first steps that you need to do in implementing a comprehensive

records management program and that is to go in and look if you can get rid of a number of those stale records. And as Alice has mentioned, there's a large volume of those records that can be destroyed.

The next thing the records management program must do is provide for the suspension of records destruction. And you know following Zablocki and all the cases that have followed it, courts are going to take a much more hard look at litigants who fail to preserve documents in light of pending or reasonably foreseeable litigation. And that litigation hold procedure must be part of your overall records management program. It must be an integral part of that in which you must preserve records as a seamless component of your overall program.

And also, the records management program should provide for periodic audits. And Alice had mentioned, there's a huge lack in that in current practices.

And one of the key components of the auditing processes is that if there is a hiccup in your production in discovery, you can demonstrate that not only have you taken good faith efforts to implement a compliant program and comply with litigation holds, that if you conduct audits to ensure compliance with those litigation holds and ensure that documents are being disposed of when they should be disposed of, if there is a hiccup, you can show to the judge, judge, we've done everything we can, but, yes, there is a slipup.

I think in large measure where if you've taken all those steps, you've conducted periodic audits, that the judge is going to give you a bit of a pass. It's only those instances in which companies have not done all the good faith steps and then they do have a hiccup where there're problems.

Now in terms of another aspect, whenever companies are developing their records management programs, oftentimes they focus on those records that are within the corporation's control, those, you know, those e-mails on the central server, those documents that are in central repositories or

in storage facilities. But there is a huge amount of records that are outside the company's control and those tend to be prime fodder in litigation, and those are records under employee control.

Typically you find e-mails one of those categories. We find a lot - a number of our clients have employees who store and maintain e-mails in PSE files, and those are really difficult to capture and then to manage. Also, we see a number of instances in which electronic documents are stored on employees' CDs and floppy disks and hard drives and also transferred on thumb drives.

Now why is that important, because all those places are places where a company must go to look in terms of responding to discovery. And, as Al mentioned, there are - Alice mentioned, there are about four or five different sources that a company must look for in responding to discovery requests and these places containing records under employee control are certainly where that - where those must be looked at.

What does this mean? This results, to a large measure, in inconsistent record keeping practice and also it's very difficult to fully comply with litigation holds. And if a judge has ever asked your company whether or not you've been able to produce documents and have you produce all documents responsive to discovery requests, it may be difficult to provide sufficient assurances to those judge - to the judge that you have, in fact, produced all the records responsive to a discovery request.

Well what's a solution in light of this? And that is we have come up with a policy regarding e-mail retention. We all know that e-mail is a big problem. And a lot of companies, undoubtedly your company as well, is struggling with those issues. And one of the first things, in terms of developing an e-mail policy, you must distinguish between record e-mails and non-record e-mails.

Non-record e-mails, those are you know typical e-mails. Joe, could you - could we meet for lunch today at 12:30 at such and such restaurant? Record e-mails consist of you know business

transactions, negotiations and evidence of contractual performance. Non-record e-mails can be disposed of after a very short period of time. And studies have shown that the majority, anywhere between 50 to 70 percent, of a typical company's e-mails are non-record e-mails.

And this approach of distinguishing record versus non-record e-mail is fully supported in the law. For example, the National Archives and Records Administration has recently promulgated some regulations that suggest or that distinguish between transitory, that is non-record e-mails, and record e-mails. And under those recent regulations, non-record, or transitory e-mails, can be disposed of after 180 days.

With respect to the record e-mails, those can be grouped in buckets according to records classification or possibly departmental or employee types and managed in accordance with your overall records management schedule.

The reason for this is that you're minimizing your litigation risk and you're reducing storage cost. Think of it as a funnel. If you've got all of your company's record and non-record e-mail groups together and you're hit with a discovery request, think of the enormous cost that you're going to have to incur simply from winnowing out the wheat from the chaff to produce those e-mails that would be responsive to your discovery (plot).

And also, just in terms of operational efficiency, it's going to be very inefficient if you need to locate an e-mail for business reasons how many e-mails you're going to have to look through. But if instead you can winnow out the record from non-record e-mail and then manage your record e-mail in accordance with your overall record retention schedule, the amount of time, effort and disruption to your business in producing an individual e-mail or groups of e-mail is going to be significantly less. That, in and of itself, avoids those expenses is certainly one of the ROIs in terms of adopting this approach.

And the problem is not going to go away. In fact, it's going to continue to grow worse. And this lies, talks or provides some startling statistics about the current stance of where we're at, you know. Forty-five percent of the - of your stored files are duplicate and, to a large measure, you're never going to need to use those documents in the future.

And as a result of maintaining those records, as Alice mentioned before, you can have some pretty adverse consequences. As Alice mentioned in her presentation, discovery alone costs anywhere between ($50 to $2) per e-mail to restore, to produce and then have an attorney review those e-mails. Despite that fact that only you know a very small number of companies have established means for handling e-discovery requests, including e-mails.

And as a result, (place) attorneys are becoming very aware of those facts and now have really focused on e-mail in terms of addressing discovery requests to their opponent. And they now have used that as a hammer by which they've been able to attempt to extract settlements from companies who simply want to avoid the costs and hassle of e-discovery.

And as Alice mentioned before, consistency and compliance is key. One of the things that got Arthur Andersen in trouble is the fact that they were not complying with their records management policies. They had one of the finest records management schedules in existence of programs, but the problem was is they simply did not comply with those existing policies. And it's one of the opening remarks in the - in the case against them that the prosecutor had noted. It was the policy simply wasn't enforced.

And as I mentioned before, the Zablocki case has really caused a shift in the court's appreciation of obligations on companies to comply with litigation holds. And there's a - you know Zablocki has been discussed at length. But what I would like to do before turning it over to Tim is kind of talk about some of the things that we have seen in our practice that courts have interpreted

Zablocki. And as a result, some of the allegations of - on companies to manage their records and comply with litigation holds.

I think, to a large measure, before the Zablocki decision, courts were struggling with the electronic records and how those electronic records get preserved in accordance with litigation holds.

And I had an interesting conversation with a federal court judge in Ohio several months ago shortly after the Zablocki (five) decision came out. And he asked me what I did. And I told him that I was involved in records management and e-discovery practice. And we started talking about it.

And he said, you know, before Zablocki, I struggled with how all of this was going to shake out. But in - as a result of Zablocki and the guidance that the courts have given litigants following Zablocki, he said I'm not going to give litigants as much of a pass as what I was before. I'm now expecting litigants to understand their discovery obligations and I'm expecting that them - that they will comply with those obligations. And I'm expecting that they will take reasonable methods - measures to ensure that they are complying with those - their obligations.

So as a result, I think you're going to see that courts are going to take a much harder look at how companies manage their documents and, in particular, their e-discovery obligation.

That being said, I would like to turn it over to Mr. Carroll to talk about when your company is on notice with respect to litigation, Tim.

Timothy Carroll: Bruce, thank you. And thank you to everyone for participating in today's Webcast.

Alice did a great job of highlighting some of the difficult issues that companies face with respect to building and implementing a lawfully compliant records management program. And Bruce sure did a great job of extending that to electronic communications and e-mail.

I want to talk about another challenge that you're facing today and that is the issue of litigation hold. Hold management capabilities, as we saw earlier in today's presentation, are limited. We want to talk today about one of the biggest issues and that is when is your company on notice. And after it is on notice of pending or reasonably foreseeable litigation, what does it have to do to comply with the legal obligations applicable to it.

(Lance): And Tim, again, this is (Lance), and just be as close to your microphone as possible. Thank you.

Timothy Carroll: Great. Appreciate the heads up. So let's talk for a moment about when your company is on notice. This is not an exhaustive list, but these are five examples where we have seen courts require a party to issue litigation holds and subsequently issue sanctions or other negative remedies with respect to their failure to preserve records.

Of course the famous tool being used now by the plaintiff's bar is to send out a preservation of evidence letter even before litigation has commenced. And with a preservation letter, your litigation adversary is most likely putting the company on notice so that he or she may later say that you were told to start preserving records A, B and C or records that related to the employment of Employee X and your failure to do that resulted in a spoliation of evidence claim and the like.

So your company - there have been courts which have held that a preservation letter is sufficient to put your company on notice. So the internal legal department should be on the lookout for

preservation letters. And members of the predatory plaintiff's bar may be looking at that as a mechanism by which they can impose notice on your organization.

Obviously, a clear item is when your company receives a summons of complaint. At that point you are expected by the courts to comply with any litigation holds. There's a recent case we'll talk about in a little bit that came out from the district court in Michigan stating that (Bill Davis, Inc.'s) obligation to preserve relevant evidence certainly commenced upon its receipt of summons of complaint. I think that's an uncontested issue.

Obviously, once you're in litigation, you may receive a request for the production of documents which will alarm your company or alert your company to the requirement to start safeguarding evidence germane to a pending litigation matter or governmental action, as well as when a court issues a preservation order.

We were on the phone with a client yesterday who has a class action pending on the West Coast and the judge had issued a preservation order, which is far reaching. Obviously the company needs to tread carefully before disposing of any record that might be relevant to that.

Then probably the most difficult issue for a company to look at is when is litigation reasonably foreseeable. Certainly when that preservation letter comes aboard, comes across the desk of a general counsel or someone at a general counsel's office, an issue will be - the company will be alerted to the issue at that point.

But in some cases we have seen, even a lack of a preservation letter or complaint, circumstances that are sufficient to trigger the obligation to begin holding records. In the (Breckley) versus EchoStar case, which is a great case. I urge everyone on the call today to get a copy of it or contact us for a copy of it. That case dealt with EchoStar's failure to preserve communication in light of threatened litigation. And interestingly enough there, the triggering event was complaints

made to supervisors regarding certain alleged misconduct in the workplace. And that, according to the court, was enough to put the company on notice of reasonably foreseeable litigation.

The next two cases, Stevenson and Union Pacific, and a third case that's not up there, (Louis) versus Remington Arms, one of the (seminal) decisions in records management dating back to 1988, deal more or less with the issue of Legacy documents or institutional notice. Legacy documents, I think we're all familiar with the term Legacy records from the IT context where you have Legacy systems and data, unstructured data that survives throughout the various changes that take place in your IT infrastructure.

The Legacy documents has a different connotation in the litigation study. There may be records that your company has that are not germane to a pending lawsuit but it may be required to hang on to because of past litigation or your company's particular litigation environment. And some courts have held this - the foreseeability requirement to be satisfied because you have related litigation.

In the Stevenson case, there was a malfunctioning railroad crossing gate that continued to cause problems and resulted in many accidents. There were some pretty short regulations for maintaining the maintenance records relevant to that crossing gate.

But the interesting part of this decision was that the court, the 8th Circuit, ruled that the company, not withstanding the short and expressed retention period, probably had an obligation to hang on to records relating to the maintenance of that crossing gate, just because of its history. The crossing gate was subject to prior litigation, and it was reasonably foreseeable, according to the court, that these types of records would become germane to future litigation.

And again, the (Bill Davis) case is a great one to show the issue that you know once that complaint comes across, you have an affirmative duty to start preserving records.

The next slide is an actual - there you see a summons in a civil case that many of you are probably all too familiar with. This, obviously, triggers a requirement on the company to implement a litigation hold.

Here's a sample discovery request matter that I actually received in a real case. The interesting part about this is that if you look at the scope of the request, not only the volume of data, but the potential location as to where that information may live, was quite onerous. And this actually resulted in the filing of a motion to compel by one of our co-defendants in that case.

And a judge, who I respect and have litigated many cases before, deemed this to be a valid discovery request, even though the co-defendant would have to look at its backup tapes and other repositories in places like Oregon and Washington, which are states that had absolutely no connection to the litigation.

So again, implementing a litigation hold is going to be the key obstacle here. And Bruce put forward an earlier slide which talked about the Zablocki standard to issue a litigation hold at the outset of pending or reasonably foreseeable litigation.

And I want to talk for a moment about some of the practical considerations and difficulties. Because of the vast amount of duplicate information maintained by your organization, because of the ease in which IT can duplicate and backup data, it's become quite difficult to even locate the requested information.

This became a major issue in the Morgan Stanley case, who you all - who I'm sure everyone in the audience is familiar with. The inability to locate backup tapes and relevant e-mails led to an adverse (infringe construction) that the Florida state court judge entered against Morgan Stanley and ultimately led to a large jury verdict against Morgan Stanley.

So where you locate the records is going to be a huge obstacle that your company must overcome, as well as who is going to be involved in implementing the litigation hold. Whenever Bruce and I go into a new client engagement and counsel them with respect to developing an electronic communications and disposition policy, we often ask that legal, senior management, IT, record management, key department managers and, to the extent necessary, have individuals from the organization participate in the development of the program.

This is so that when the litigation matter comes across your desk, you're already going to have an existing infrastructure to adopt and implement litigation holds and implement litigation hold strategies. And it's very important, from our perspective, to have a combination of personnel involved. Legal, obviously, will be most familiar with the litigation.

But you're going to have people like the records manager or department managers, and certainly the individual users, who are going to have a better familiarity with where those documents are to the extent those records are backed up. E-mail servers or backup tapes, you're going to need IT involved and they're going to need specific instruction.

One of the big downfalls we see when we go into audit litigation hold programs is that legal often gives IT insufficient direction on what to look for and where to look. And IT will, at that point, run kind of an open-ended search. And who knows whether they're spending the company's resources efficiently. And as a result, we have seen a communications gap between IT and legal. Much has been written about that lately.

But also, IT will have a good feel for the waterfall events within a company. How often do e-mails, record e-mail hopefully are kept in accordance with the records retention schedule. But non-record e-mails, how often do they fall off the waterfalls, how often are they disposed of, is

there a way to retrieve any deleted or disposed of e-mails by way of forensics or other techniques? So IT needs to be involved in that effort to a great - to a great extent.

Also, Bruce alluded to this earlier; potential sources of evidence could be hard copies, backup tapes, e-mails. Instant messages is a big issue right now, especially in a broker deal over context. I have personally litigated cases where I have been successful in issuing requests notice to inspect or requested, in fact, home computers. Executives who work from home and who are subsequently involved in disputes. Servers, of course, PDA, BlackBerrys and (remeda) data or the data about the data which often need to be produced in the context of providing e-mails and other communications stored electronically.

So these are the potential sources of evidence and IT may have the best feel for where the records may live. You know one suggestion we have is to make sure that legal is giving adequate direction about what to look for.

One of the more recent developments we've seen is that now your chief technology officers or CIOs are often being requested to provide deposition testimony on behalf of the company, what we call a representative witness from the Federal Rule 30b6, where they have to go in and sit down and answer questions under oath about the system profiles.

What is the policy for managing e-mail? Are - is the usage of home computer or home remote access allowed? Have there been modifications to the computer system since the litigation was commenced? Where and how is information stored? So getting your arms around these issues earlier is going to allow you to position yourself in subsequent litigation.

We often like to see more about solution, implementing a good and effective litigation hold strategy, implementing and adopting - adopting and implementing e-mail retention policies or solutions. But, unfortunately, these companies wait or do not implement strategies and solutions,

they often have to contend with the issues and preparing your Rule 30b6 witnesses and documenting the process is very important to defending the company.

So let's give you some guiding principles. We strongly encourage each of you to be proactive in adopting, modifying and implementing your current records management and e-mail management practices. With respect to e-mail management, engage IT early. They may have solutions with respect to auto classification, setting up repositories to handle record e-mails for the brokers desk, for people in the tax department, personnel and other areas that will allow you to have a better idea as to where and how information lives within your organization.

Consistency is something that Alice mentioned, something that Bruce mentioned. That's going to be the key. We want our clients and people who we interact with to have consistent and to document the consistent policies that they have. It's OK to modify. It's OK to augment your policies. And in fact, sometimes that can be cloaked under the self-evaluative privilege. But consistency is going to be the key.

If you have (Frank Batrone) writing an e-mail to his fellow brokers start disposing of stuff now because the SEC is coming, that's a red flag that will not be countenance by a court.

Again, issue enforceable and clear litigation holds. That was a standard set forth by Judge (Shamelin) in the Zablocki decision. And something that we encourage you to do, having IT and legal develop a strategy for that will help with respect to your e-mail and recovering other electronic communications.

Periodic updates and audits regarding your e-mail retention, your RM program and your litigation hold strategy are also necessary. Repeating your litigation holds every three to six months, auditing responses, making sure that you are taking steps to comply with preservation orders are all part of the process that you need to be engaged in for each piece of litigation.

And then documenting the steps to demonstrate your good faith. We've uncovered that most companies have a good heart. They have records retention policies in place. Now, obviously, most companies are not enforcing their litigation - I'm sorry, the retention schedule and are not fully complying with the records management program.

But to the extent you have built a records management program, to the extent that you have a program in place to implement litigation holds and you have taken steps to comply with the schedule and the litigation hold program, you should be documenting those steps. That will be helpful for you to demonstrate a clean heart before a judge. Having the ability to go in and wear the proverbial white hat in a court will go a long way to undermining an adversary's challenge to your records management practices.

So with that, one final case study and this I think sums up the issue - a lot of the issues that Alice went through earlier. But let us know if you think that this is an aberration. But in the late 1980s, a large oil company purchased a Pennsylvania-based corporation for its assets and customer base. It wasn't looking to buy facilities; it wasn't looking to buy large buildings or anything like that, just looking to buy the business. The operation was shut down. The customer relationships moved over.

Eleven years later, in litigation, records that would have belonged to the old company were requested. The legal group was surprised to find that they still had 10,000 boxes at a warehousing facility. Faced with the discovery demand, the corporation spent over $2 million looking through those 10,000 boxes of old records. Most of them could have been disposed of long ago. Only six of those boxes were even remotely connected to the litigation and in no way was it a smoking gun type of document that the adversaries were hoping for found.

Instead, the company simply wasted $2 million searching for records that should have long since been disposed of under their existing retention policies. And the head of litigation at that large oil company was quoted as saying, "We do this all the time and act like it's just the cost of doing business." This is an excellent case study.

One of the things that we have found was that you know in the light of the Zablocki ruling and in light of the new attention that corporate counsel are paying to the issue of records management and e-mail management is that companies are working on ways in which they can better or more quickly comply to litigation discovery requests.

We still are advocating that companies have a more proactive approach by designing and building that records management program with your records management consultant using legal counsel to make certain that the program is lawfully compliant and will protect you. And then streamline your ability to respond to litigation down the road so that you're not spending $2 million for every major piece of litigation just looking for stale records. It's an all-too-common problem and one that doesn't have to be the case.

If you have any questions about the content of our program, or if you have any desire to read the EchoStar or the (Bill Davis) recent decision, please feel free to contact us. I think it's necessary reading. Everyone seemingly has read the Zablocki decision, but we'd be happy to forward those out to you as well.

And with that, we will turn it back to (Lou) to end today's program.

Lewis Shaffer: Thank you. I'd like to thank, once again, Alice, Bruce and Tim for an excellent presentation.

As you can see on this last slide, you have the contact addresses for the three of them. And feel free if you have any questions or comments to e-mail them at those addresses. There are also some questions that were asked in the chat box. I believe those will be answered as well.

If those of you who joined us late or had some trouble earlier with the audio, the archives of this session will be available by May 19 on the ACC Web site and that will remain there for a one-year period.

And finally, I'd like to remind everybody, once again, to fill out the evaluation which is under the link area on number six, if you could please fill that out. Thank you.

Male: Hello.

END