FINAL TRANSCRIPT

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**ACC - Records Retention and E-Discovery Issues for Nonprofit Organizations

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PRESENTATION

Steve Garrett - *Texas A&M Research Foundation - Assistant Vice President, Corporate Secretary & Attorney*

I'd like to welcome you to The Association of Corporate Nonprofit Organizations Committee webcast entitled -- Records Retention and E-Discovery Issues for Nonprofit Organizations. My name is Steve Garrett and I will be the moderator for today's presentation. I am the Associate Vice President and General Counsel for the Texas A & M Research Foundation. I also serve as the chair of the Web cast sub-committee of the Nonprofit Organizations Committee of ACC.

Our panel today consists of two partners from Pillsbury Winthrop Shaw Pittman. The firm is the sponsor of the ACC Nonprofit Organizations Committee. Rob James is a partner in the firm's San Francisco office where he handles corporate and commercial transactions and counsels a variety of organizations on client's programs. He has spoken and written articles on the topics of records retention programs, his focus in today's presentation. He has served as the general counsel for several California nonprofit organizations including the California League of Food Processors and was the chair for three years for The Easter Seal Society of the San Francisco/Bay area.

Mark Koehn is a partner in Pillsbury's Northern Virginia office. His primary focus is in intellectual property litigation. Mark helps his clients leverage their digital assets and manage risk by developing and implementing strategy for litigations and litigation avoidance. Prior to become a lawyer, Mr. Koehn was a senior consultant with the predecessor to Accenture where he supervised design and installation of information systems including the pilot for the U.S. Securities and Exchange Commission's electronic data gathering and retrieval system.

If you wish to pose questions to our panelists, please send them to me, Steve Garrett, at SRG@rf-mail.tamu.edu and I'll present your questions at the conclusion of the presentations. Or if you prefer, after the Web cast, you can send an email to Mr. James or Mr. Koehn. Their email addresses are listed at the end of the session materials.

The audio file for this Web cast will be available for replay on the ACC Web site about three hours after the end of this presentation. It will be archived on the ACC Web site for about a year. In case you haven't gotten your materials yet they're still available on the ACC Web site, it's www.acca.com and then click on the Web cast that's off to the left, click on the Web cast or the link for today's Web cast. The materials are at the bottom of that page. And so with that I'm going to turn it over to our panelists today.

Rob James - *Pillsbury Winthrop Shaw Pittman - Panelist*

Very good, it's Rob James. Thanks very much Steve and welcome from all three coasts, from California with me, Mark Koehn in Virginia, and Steve in Texas. Judging from Mark and my conversations with Steve it appears that a good chunk of the ACC Nonprofit Organizations Committee members will have a fair degree of exposure to this subject either by having to sit through prior seminars or be exposed to law firm alerts of dealing with this subject or by firsthand battle experience. We often find that the clients that are most motivated to see us are the ones that have been through unnecessary costs from record management issues in some prior piece of litigation.

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But likely if you've had exposure in the generic area to articles and presentations they've been with a rather strong focus on business for profit organizations. These presentations draw a lot from the Sarbanes-Oxley reforms and therefore refer quite a bit to securities laws and securities transactions or they will be focused on the particular needs of for-profit organizations such as claims arising from when revenues are booked for a particular quarter.

Another distinction is that when presentations are made for for-profit organizations the orientation is largely towards organizations that have a very large scale and reach by which I mean there are special problems in records management relating to coordination across many divisions and subsidiaries, reaching across many jurisdictions or even countries. And most particularly in navigating not only the law but the political science, if you will, of records management, the need to coordinate work efforts among large law departments, records management departments, and information technology or IT departments which may even have further subdivisions.

Mark and my partners, Jeff Glassie and Jerry Jacobs, who do a lot of work with the ACC Nonprofit Organizations Committee have been educating or re-educating Mark and me on some of the particular needs of nonprofit organizations in this area. I'll be the first to admit, and hope I didn't mislead anyone with the title, there is no such thing as a particular law of e-discovery or a law of records retention that has particular reference to nonprofit organizations as opposed to other organizations. But it seems that there are some special circumstances of nonprofits that we can give focus in this presentation that do have some distinctive features.

First of all it's our experience that nonprofit organizations are often more intertwined with other independent entities whether it is a member organization having relationships with its members, individuals or business entities; whether it's a sister organization such as the relationship between a credentialing institute and the professional organization that that credentialing institute relates or serves; or the government, since so much of the nonprofit enterprise particularly in the last 30, 40 years has become a way in which in government or public policies are advanced and funding is often provided -- or a flow of technology and products and services flow between nonprofits and governments.

Secondly, there is more of a focus on specific tailored organizations missions oftentimes more narrowly focused than for-profit organizations in terms of the legal categories that are applicable to their records. And of course you do not have the overwhelming factor of needing to comply with laws relating to transfers of equity in public or private markets that color a lot of these discussions.

And third, there is a focus -- common focus on efficiency, cost efficiency of records management rather than necessarily trying to craft a records program to deal with litigation strategies of keeping documents or retaining documents with reference to improving merits in litigation. There's a lot of focus on saying regardless of the type of dispute coming in what is the way that we can most efficiently manage the costs of having to keep these records, produce them, and review them.

Oftentimes there are compressed organization charts so that our nonprofit clients chuckle when we talk about the legal department having to coordinate with the records department, having to coordinate with the IT department when in fact two or maybe all three of those hats are worn by the same beleaguered executive director of a modest sized nonprofit.

So we'll try to keep those principles in mind as we go through our examples. I'm on to page 2 of our PowerPoint. Basically we will go through briefly because I think some people have had experience with us already but just why we are here. What has happened in the information and records area for organizations in the electronic era.

Secondly to say why it matters. The demands that courts and other investigators and auditors will have on your records in matters that we refer to as e-discovery, and why it's necessary to have a plan ahead of time for how you will respond to that type of litigation, investigation or audit. Then prospectively what can be done to get the house in order ahead of time, the need for a records retention program that is customized to the types of records and the types of organization that you have. And then, finally, as Steve Garrett indicated, a time for questions that are focused on your needs in the nonprofit sector.

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Slide 3 gives some of the usual numerical references trying to put into terms that at least I can understand what is happening in this area. It's hard to imagine when those of us who have been through warehouses of hard copy documents to realize that not only is that the tip of the iceberg it's kind of a melting tip.

This 90% quote that I have here about 90% of organizational information now being either created or at least stored electronically is data from 2001 so you can only imagine how that has continued to increase. Increasingly, hard copy records in many organizations are more of a legacy as the tipping point has gone towards electronic storage of even records that were not created originally in word processing software for example.

The other figure two-thirds of this information never being printed just shows you that you can't trust your eyes to just assess the job for either litigation or for retention program. Again, I would expect that fraction to increase over time.

I have a lot of difficulty comprehending these numbers, and so to me the thing that I can't understand as a young attorney on either litigation or corporate side is the bankers' box, 18 x 12 x 12 inch repository that can hold about, say, four reams of paper. Just to give you a feeling for what people talk about a gigabyte of information we're talking about roughly 40 of those bankers' boxes of information and that's not only a unit of space but also a unit of time.

If any of you have been a young attorney doing due diligence or document review you know just how much attention you would have to give to that quantity of information. But at least available on the Web site is an estimate that shows with 10,000 users with perhaps a little bit of high volume of transmission can generate enough information for 38,000 gigabytes which amounts in this calculation to 1.5 million bankers' boxes. And Steve I haven't attempted to figure out whether that covers the Texas A&M football field one deep or two deep, but it's a pretty graphic visualization of how this information emerges.

And the final statistic simply indicate how prevalent the electronic world is sweeping around the world, and why it's necessary to get ahead of this before these waves overwhelm the resources of an organization for any particular inquiry by a government that expects you to have your house in order.

Slide 4 just confirms in the first part what I think you would understand which is that certainly you should expect that any discovery request or document policy will now apply to any information whether hard copy or created or stored electronically. Obviously that will include word processing, spread sheet, presentations like this one. It will also include databases such as the ones that nonprofits may have for membership, donation, applicant records, including documents that you may have maintained by independent contractors if you were able to control that information, generally you will need to cause it to be applied. Or even Internet usage if you have e-commerce, a web site by which goods are ordered that information may be present in your hands or it may be present in the hands of a hosting organization for your Web site.

We also confirm that this applies to any storage medium, not just the obvious ones of the computer disks, but also such things as phone logs. With Internet phone records you may even have actual conversations. You may have media such as CDs and diskettes that employees walk out with every night or keep at their homes. And Mark Koehn introduced me to this one that in some litigation just knowing where the rental car or the car has been through toll zones and on the road may be relevant to some types of cases.

Mark, I might turn it to you to cover the next couple of topics and just kind of set the scene for what we're dealing with, mainly how sticky electronic information is and how volatile and changeable it is.

Mark Koehn - *Pillsbury Winthrop Shaw Pittman - Panelist*

Yes, thanks Rob. This is Mark Koehn. I'm on slide 5. The issue with electronic information that is hard for most folks to grasp when they haven't dealt with it in discovery is primarily the volume. The amount of information that is stored in electronic form

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vastly outstrips usually the information in the paper form, and in many ways it's because there's tons and tons of redundant information out there.

If you can imagine at one company you've got somebody's hard drive and one of the employees has a hard drive and maybe that's backed up monthly. All of a sudden now you've got 12 hard drive's worth of information. If that information had to be searched it adds another dimension to the discovery issue. If it were just Joe Blow's files and he keeps a box of his files or a storage bin of his files, that file exists in one place in the paper world. He adds and subtracts to it as he goes through the normal course of business, and maybe he makes a copy of it at the point that he hands some of it to his counsel. But there's really just one.

But if you've got backups of electronic all of sudden you've got the question, well which of these many backup tapes do you want to look at? And then right a way you've got a reason maybe for a dialog with the other side. We'll get back to that in a little bit. So there's this persistence issue.

That also becomes a thorny issue when you believe that you may not have records of a certain kind because you go to reach for a particular backup or a particular resource and it's not there anymore. And so your initial indication may be that you no longer have the electronic information that's being sought. But unless you've got a total grasp on where all your backups may be, all the servers, all the hard drives, all the various DLT tapes, CD-ROMs and other things you may be inadvertently telling somebody misinformation if you don't have a good handle on that. You may indicate you don't have info when you really do because you'd be surprised by how many copies do get made in the normal course of business.

Here on slide number 5 what we've tried to do is show just how many copies there could be of a single document, and again I guess we start out with one hard drive and you may have 12 monthly backups. And now you multiple that across several hard drives. And then if you start talking about email there may be even thousands of copies of the same document across various email boxes and servers and the like. So the volume and the persistence of these documents is a huge issue.

Flipping to the next slide 6, another thing that's different with respect to paper, once a paper document is created and unless it's altered by somebody by hand wherein printed some how it generally is considered fairly static. Electronic documents are even if they're not edited per se, for instance, changing a word on the face of the document, every time a document is moved or accessed in some way at least some data with respect to it changes and the data--this kind of data is known as metadata. It is essentially file information, document information that kind of rides along with what you think of as the document when you, for instance, pull up a letter or a spread sheet.

You see the letter, a spreadsheet on the screen, but what's riding along with that file is certain fields of information like who was the creator of it? Who was the last editor of it? What time was it created? What time was it last edited? And certain other information and so even -- even just to be accessing a file if you go and look at it some may think that that mean nobody understands that they've seen the information but some might get into the metadata and be able to track and have a history of who actually access to and reviewed and looked at a document.

That's just something that doesn't live along side a paper document. Also there's the issue of deleted information, deleted documents, and this is a concept that I guess is probably best described by an analogy. If you can imagine the space in a computer that's used for storage of information and let's just say information, let's make it the simplest form, different documents, a bunch of Word documents, Microsoft Word documents. Let's say you've got 10 documents. Imagine the space in the computer like a big quilt. And each time you save a Word document it takes up a little bit of space on the patchwork of that quilt.

Well, when you decide to delete one of those documents what happens is not that the patch that corresponds to that document gets pulled up and replaced immediately. What happens is a little flag is attached to that patch on the patchwork, and that flag just says, "Hi, I'm a space that can be used over again. Rewrite over me the next time you need some space."

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Well, it doesn't mean that the very next time you save a document that space will get used up. That space may be sitting there ready to be reused for several weeks or several months. And so what this means is that even after you've deleted something really behind the scenes it's only been flagged for reuse by the computer so that later within weeks or months it's possible with the use of certain kinds of software, forensic software, to go back and identify areas that had been flagged for overwriting but essentially have not yet been overwritten. Essentially allowing if you do the investigatory work pulling back what was perceived as a deleted document. Again, that's something that just doesn't exist in the paper world.

And then the costs they certainly do add up. I think, Rob, you wanted to jump back in here on slide 7, I think we are now.

Rob James - *Pillsbury Winthrop Shaw Pittman - Panelist*

Exactly, just very briefly to tow this back up, to just identify that the much vaunted efficiencies from storing electronic information and using it in the business world does have an offset particularly when it's time to systematically report what the organization has or does not have that is relevant to a particular legal issue.

So that the great efficiencies of being able to draw information sporadically for organizational needs from a nonprofit's records have to be set up against the cost that when you really have to put your reputation on the line and provide under oath that you have made a completely responsive delivery to an investigation, audit, or subpoena there are costs. So there's the original costs of putting the whole system in motion with the archiving, and we'll get back to the question of whether there's too much unnecessary archiving going on in the organizational world. But also on the back end of retrieving the information, of separating and preserving it, in the case that there is a piece of litigation that says that you can't get rid of materials that you would otherwise would have the legal right to do so and particularly, reviewing for relevance.

I must admit that the cost of reviewing for relevance has been going down, maybe not as quickly as the cost of the memory in the first place. For example, we used to think that one problem with the review was that you couldn't search image documents. We have documents saved in what was known as a dot.tif format for some of the early versions of Adobe and that was all well and good, but it was stored somewhere, but you would still need to put it up on a computer screen or a print out to review it. Well, these days more and more sophisticated image programs do allow you to search for text if the document was well preserved. But I don't think those costs are going down far enough to ignore that by any means.

And then ultimately the cost from the information is kept in terms of information that takes longer than necessary and causes costs in the litigation both on the content of the information as well as just the shear volume. Costs resulting from information that you should have kept, either there was a legal need and you were exposed to sanctions or there was helpful information that would have helped you prevail in a matter that's no longer around or can't be retrieved. And so the bottom line and the only place were apologies I'm shouting in this PowerPoint is the bottom line, which is there comes a tipping point at which the costs of recovery and response to discovery may be higher than the settlement value or demand value of a claim, which puts you into a very undesirable spot of being not able to afford to fight a claim that you believe is merit less.

And not only is that bad in a static sense if that becomes known that you were an organization that has to pay out rather than fight, you can imagine the incentives that create for those claims going forward. So, I'll stop shouting now, but turn it over to my litigator colleague Mark Koehn, who will talk about why this matters in the forum.

Mark Koehn - *Pillsbury Winthrop Shaw Pittman - Panelist*

Sure. But picking up on that last point Rob, the cost issue is one to always keep at the forefront. Because when courts look at whether the discovery is proper or not, one of the many factors they look at both for purposes of whether the discovery will be allowed, for instance, when you file for a protective order and ask that the discovery not be allowed, or for purposes of shifting costs. One of the things that they do look at is the cost of the effort to product the documents including, of course, electronic documents; as compared to the amount in controversy. So, courts do have some guidance out there in the case law that they

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should not be allowing a $50,000 case to be dragged into the realm of $ 1 million electronic discovery. If you have a multi-million dollar case then maybe you may have to pay hundreds of thousands for electronic discovery. But there is the idea that you need to keep the case reigned in to the size and the shape that it is expected to be about, at least in the amount in controversy.

If we're on to page 8, Ron and I have done a few of these examples here of the power of email and these are from our own personal involvement. This first one is actually a paragraph from a complaint in a case that I was involved in. It was a case where my client was the plaintiff and in fact had detailed email information from a number of contractors that had done work for him. And those emails laid down some tell-tale language including that some of the work that was being done was a charade and that the software was "totally hosed " You can see here quotes. This was actually part and parcel of a complaint and it is something that when people talk about email and the power of email, sure you think about the trial and will that email comes out in trial. And will the plaintiff's counsel or defense counsel pop it up on a bulletin board so that the jury takes a hard look at that.

That's certainly one place where it can be used with great power, but don't forget that email if somebody is lucky enough, I guess, or maybe unlucky enough have it used against them, to have it at the beginning or the outset of the case and many times it can flag for the other side that you have some important information. And some information that will likely be eye grabbing and you can do that right up front as we did in this case in the complaint.

Next example is from the case of Mr. Quattrone who was a trader with Credit Suisse and in that case, although I didn't have direct involvement in that case, this is a case where there was an email that went out to persons at the company to catch up on your file cleaning. I believe that was on, let's say, day one, or day two, the defendant here Mr. Quattrone had learned apparently about an investigation that was in the offing. He picked up and forwarded on the email and said we strongly recommend that you do this. And later argued that he was really just pushing the same document retention policy that the company had had.

But in a second trial, -- in the first trial I think there was a hung jury -- in the second trial the government made detailed use of the metadata. Again, that is the data that you don't see on the space, but is captured behind the scene, that actually showed the timing of when the email was created by Mr. Quattrone and when it was sent out. And without getting into the details of exactly what that metadata said, they were able to use it to rebut his defense that he sent the email unthinkingly without really paying attention to the obstruction investigation.

And the jury sided with the government on that and again based largely on email. And I think the general sense is and Rob and I have gotten this sense from a variety of cases, that there is just the sense that most people think email is where the truth be told, and when they see it's in writing and it is from your client or maybe your client's adversary and if it is in there it ought to be true and it ought to be right and that is certainly not always the case. But unfortunately, it's a kind of eneric perception that it is out there and reason why there is a lot of excitement both for and against the use of email.

We're on to slide 10 at this point. E-Discovery, I guess this a little bit goes back on what the general theme here is today. It is the norm now. You should be expecting requests for electronic discovery. I think for years people have used their definition of the term document in discovery requests to include a laundry list of various kinds of documents including electronic. But that it's not until the last several years that folks have re-circled and focused on the heightened interest in the electronic aspect of that definition. You're going to see that more and more. We'll a little bit later to the federal rule. There is a - - there have been some approved, but not yet effective changes made for the federal rule that are anticipated to go into effect early in 2006. That tune up, so to speak, the federal rule to kind of take account for the explosion in electronic discovery. And we'll get to that in a little bit.

The courts are increasingly electronic document savvy. You'll find many decisions out there now, where the courts are weighing into the issue. What's important there though is that you do need, and here's a foot note for some advice, do not presume that the court is indeed e-savvy, they may be. But even if they are e-savvy you need to educate your judge in your case about the electronic document issues in your case. Because every non-profit, just like every other company, has different electronic document systems. They have different business systems, they have different means. The difficulties or ease with which they can retrieve and produce information differ just as much as they do for every other company. And of course, although they may

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in one case or another get it right, and in other cases they don't always get it right about whether the plaintiff or defendant is able to grab hold and preserve and produce electronic documents with the ease or regularity that the courts would suggest.

And I'll give as one example, there is a case -- a series of cases, one called -- the plaintiff in it was called Zubulake. And the judge in that case indicated at one point that maybe one of the things counsel could have thought about is to do a keyword search across the company's information systems. And then based on that, save off the hits or the important documents that were hit in response to that. I don't know the particulars of that case, but I'm highly doubtful that that would have been possible, as I know most laptop computers don't even have the capability to key word search across every single file that's saved on the hard drive. To imagine that capability across company systems, it may be possible for a few subsets of documents to be keyword searched that way.

But generally, keyword searching involves indexing and processing and all sorts of other work that needs to be done before you could even think about key word searching. So, courts are thinking about this, but a little knowledge can sometimes be dangerous and you need to make sure that your counsel and your counsel's experts that may be working with them are going to educate the courts on that. And then just to close out the slide here, sanctions for non-compliance can be significant. There's monetary fines of course, default judgments in the worst cases. Adverse inferences are something that are becoming popular and because they're somewhat flexibility it could be that certain documents can't be used. It might even be that certain persons whose emails were lost can't be called to give live testimony because the idea is that there is nothing there that can be used to rebut it if the opposing side has made a good case if the information rebutting the live testimony would have been in the email that may have been lost. Of course, civil contempt and criminal liability are always out there.

Key cases, I mentioned before the Zublanki case, just on the last slide, it's actually a series of cases, where the court actually gives quite a bit of useful guidance about electronic documents discovery issues.

Rob James - *Pillsbury Winthrop Shaw Pittman - Panelist*

I'm aware of no less than seven reported decisions and they're giving roman numerals like Rocky movies.

Mark Koehn - *Pillsbury Winthrop Shaw Pittman - Panelist*

Yes, they certainly are and it's -- I have to say that it's kind of a mixed bag of what I think is good and maybe questionable guidance that it is in there. Because there are a number of things that are maybe case specific there that should not be applied out to every single case of electronic discovery. And -- but one thing that's a clear and resounding message and this court was I think, laying down a strong line is that gone is the day that counsel can say that they are not aware of these issues, and that they -- even if they're not very aware of these issues they have a responsibility to educate themselves so they can do their jobs and pay attention to electronic discovery and make sure that things are saved sensibly, reasonably and reasonable diligence be applied, et cetera. It really is kind of the poster child for time to wake up and we all do need to pay attention to these things.

Like, I don't know if I can commit every single case as a good reading, but they're worth looking at some of the highlights. In this case, the seven factor analysis or cost shifting that is in the particulars of the Zublanki case that I've highlighted on this slide, is something that is being picked up by many, many other courts. Now, interestingly, it's really maybe not much different than the kind of analysis that you might think of whenever a motion to compel comes up and the other side claims undue burden but because of the electronic documents context and that in this case, the cost was actually not shifted in its entirety. It got some fanfare as a case that really tried to split the baby. Actually, I think in that case it wasn't even right down the middle, I think it was more like 60/40. I didn't commit that to memory, but I think the defendant, UBS, paid the lion's share of the cost for some e-discovery work that needed to be done, but the plaintiff paid the other half.

But under the seven factors that the court will look at in determining whether it is too burdensome to go after electronic documents that the plaintiff may want to go after, they look at things like the specificty of document request. So, the idea here

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is if you ask generically for electronic documents regarding this or that topic, even if that particularity of the topic is defined, the real question is well, what electronic information. Are you looking for electronic information off of old computer backup tapes? Are you looking for it from the hard drive of one or two key employees? Are you looking for it from email server backups that were taken only in the last month?

Again, with respect to electronic documents, this temple aspect adds a whole different dimension to what you should be toning up as whether the specificity is appropriate or not. Whether the information is available from other sources to give you an idea as to how that might apply in electronic discovery. For instance, if a discovery proponent is saying I would like to see all such documents off of lots and lots of old backup tapes. If there is a good and fair evidence maybe supported by a declaration that such information although may not be 100% replicated is likely to be 85% to 95% the same as what's on the company's active storage systems today. That maybe the argument would be we don't need to go after the old backup tapes because to get 85% of what may be on there from active storage systems that are more readily accessible, that should be taken into account in whether or not to press ahead. So availability from other resources can be active files as opposed to archived and back-up taped files.

Cost compared to the amount in controversy, we mentioned that one already. Cost compared to the resources of the party. And I'm sure most still on the phone now say that I'm a non-profit, my resources are constrained. Well, certainly that is something that point number four is one that you would always want to promote if you ever get into a battle of electronic discovery. Each party's ability to control the cost and the incentive to do so. Here that would in many cases favor a non-profit who I'm going to guess in lots of litigations, non-profits are probably brought in as a third party subpoena respondent and I think that the factor five, their ability to control the costs. If they're not a plaintiff or defendant driving the scope of the case, that is a factor that they should be able to play up as a third party subpoena respondent. The importance of the issues at stake is always a considered and the relative benefits to the parties. And again, if you're a third party there is no relevant benefit. The benefit is that you are going to have to pony up documents that are going to cost you money and you should certainly be looking to have cost shifting done in those cases.

Another case, that is a key case, this is not about cost shifting the Residential Funding versus DeGeorge case is a case that makes most folks hair stand on end. Because it stands for proposition and is I think a reasonable proposition. But one that is scary, because but for the grace of God, we all have our own ordinary negligence at various times. But here is a case, where the court, lower-court, district court had not wanted to give an adverse interest or a sanction because it perceived that the party that was unable to provide email in this case in a timely fashion had not committed any violation or collation in bed faith or in gross negligence, but the Second circuit said, no that was the wrong standard.

Ordinary negligence can be enough. And their reasoning was I think was fairly sound in that, it can be enough because it doesn't matter that you did it by mistake, what matters is that the other side doesn't get the information that would've highly valuable. So, whether it is on purpose or not, maybe that has something to do with the level of sanction that might apply. But it really may not have anything to do with whether there should be an inference for the inference for the information not being there. I mean, if you can try to demonstrate as to what the information may have been or should have been, an inference might be applied in a case like this. Here, I think there was at least some undercurrent of a reason to hold back it was beyond ordinary negligence in this case.

The phrase used by the court was purposeful sluggishness, which again is another thing that makes people's hair stand on end. Because they said, well, the information wasn't really lost, it wasn't destroyed. It wasn't like one of those cases where it was gone evaporated and couldn't be used at all; it just came out really late in the case. But here it was enough for the court that purposeful sluggishness had -- actually had an impact in this case. And so a sanction was something that could be required.

We're onto slide 13 at this point. Here we just call out a particular example of a kind of non-profit that there maybe some representatives of here on the line. But in our experience associations unfortunately, can be the frequent hub of communication and are therefore often discovery targets as a third party in litigation. Not because the association itself was on the line, but because the association has got members and the members have been communicating over a topic that is at issue in the case.

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And, the association counsel well knows that they have an attorney-client privilege, of course the associations, but they generally -- unless there are some certain or particular circumstances that may apply. But generally, would not have a privilege relationship with individual company members. And so, because of that it's something that they need to pay attention to as the association is collecting information and having discussion with the members. Sometimes there can be a sense that such discussions can be held in complete confidence and that is not going to be the case in many circumstances.

In responding to discovery, the idea should be to get your arms around the electronic documents as you always do. You should consider whether whose -- quite apart from privileged issues whether there may be any non-disclosure agreements and whether they're implicated and whether Protective Orders should be sought and then also consider whether since the association would be distinct from particular members consider whether it makes sense to have at least post-discovery request discussions shrouded under a common interest agreement if that is appropriate.

To give you a recent example of an association being pulled in as a third party to a litigation matter. In the mutual funds investment litigation which regards market timing and I'm on to slide 14 now, there was a subpoena serviced on the ICI which is an association. It's essentially the trade association for mutual funds. And in a letter order by the court and you can find this on the Internet if you just plug in some of the key terms you may see here on the slides, the court recognized that the subpoena would require production of virtually every document in ICI's files regarding market timing, late trading and other topics. Of course the subpoena was not limited it the documents in ICI's files related to the particular case. It would encompass documents relating to every member of ICI.

Now after saying all that and not actually addressing what the burden would be, the court went on and for reasons of a stay that was unrelated - sorry, a stay that was related, it decided not to enforce the subpoena but you can look at that letter ruling and say to yourself that that is the kind of thing that you would not want to see coming to your association and most associations would be very concerned about production of that information not only for what it may mean for its members and the problems that may result from that but also just the sheer expense of having to go through documents across this entire association. It really was a case of too close for comfort but for now at least this is considered stayed. And there are other examples out there. This is not just specific to securities association.

The pending federal rule amendment, were on the topic. We're - excuse me, slide 15 approved in mid-September and essentially scheduled to go into effect in December 1 of next year unless the Congress or the Supreme Court intervenes on the issue. The Federal Rules of Civil Procedure will be updated in a number of ways and here we've only highlighted a few, but I commend you to look - again these things are readily accessible on the Internet. You can plug in some key terms that you'll see here on a Google search and you'll find various other commentary on the federal rule changes and probably a copy of the rules themselves.

If you need to you can certainly email us, Rob or myself after this and we can send you some information about the whole panoply of the rule changes. But the ones that are highlighted here first is that for purposes of providing documents they need not be provided in an electronic means if they're not readily - reasonably accessible without undue burden or costs. Now that is somewhat consistent with the Zublanki factors and that the idea here though is that if you are the discovery respondent it is your burden to come forward with some evidence that to produce the electronic documents for instance from backup tapes or other things that the discovery proponent is looking for wants that information you need to take the time and spend the resources to develop a satisfactory description of just how difficult it would be. And the more detail there I think the better to be able to show that -- for instance add metrics into your declaration.

You've got an IT department person providing a declaration about how difficult it would be. Have them put the metrics in some way that the judge will understand -- that to search this many backup tapes per tape would take X many hours of person and computer time. It would unearth conceivably as many as X many gigabytes of documents that if those documents were to be printed it would be on the order of so many boxes. Those kinds of metrics are fair game to explain to the court and illustrate for them what the burden would be. And I think that unless that's done you run the risk of having a court say well it's just backup tapes, it's just electronically all you need to do is keyword search. But keyword searching gigabytes and gigabytes of information really may cull it down some but you'll still end up with maybe hundreds and hundreds of boxes of documents to review and

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the interest of course is in trying to keep the mass of documents that need to be reviewed to a minimum again if you're the discovery respondent.

If you're the proponent you may want to look at that but a footnote -- many plaintiffs don't realize when they ask for documents that they may be asking for an ocean of electronic documents and once you get into a meet and confer discussions with them you might find that they're really not looking for the ocean that you think they are and the sooner you can figure that out through meet and confer the better off you'll be because you won't have to be preserving them all and you won't have to be worrying about producing and having those reviewed pre-production et cetera.

One of the other items here under the rule changes under 34b is that if electronic documents are collected and the form in which they should be produced for instance native electronic or PDF form or TIF form, if it's not provided the respondent can go ahead and produce them as they're stored ordinarily or in reasonably usable form. That flexibility allows you to produce the documents in a form that you believe would be appropriate for the other side to review them in and your electronic documents vendor who no doubt you would use to be producing documents will be able to help you figure what is a reasonably useable form for the other side.

The sanctions Rule 47f is something that is going to I think give comfort to many but it shouldn't give them too much comfort. There the idea is that as an exceptional circumstances a court may not impose sanctions for failing to provide electronically stored information lost as a result of routine good faith operation of an electronic information system. This is not a permission to ignore your obligation to preserve. If you need to be preserving the normal routine operation of the electronic information system likely will need to be altered in some way so that you do preserve electronic documents.

What this is though is at least when it goes into effect a statutory flag that will suggest that if you makes mistakes that sanctions may not be imposed but again whether you're making a mistake or not is going to have a lot to do with - there will be I guess - whether you're perceived as making a mistake or not, whether your information system has been continuing to run in good faith or whether its been altered properly for preservation efforts will have much to do with how you explain to the court how you made those changes. Why you made those changes and reasonable diligence is always required in discovery and so when you're making these kinds of changes and you're tuning your electronic info systems backup retention et cetera, you've always got to do something that's reasonable.

If you've got a specific request for a particular electronic document you've got to take that into account. That's what they're talking here when they talk about as an exceptional circumstances. There will always be this idea that you need to pay attention to the particulars of your case and that's what we're talking about there.

Duty to preserve evidence. The duty attaches-

Rob James - *Pillsbury Winthrop Shaw Pittman - Panelist*

I think Mark I was going to touch on this one and as well as the follow on the litigation plan and then lead into the retention program and then also just Mark looking ahead on slides 18 through 22 if you can pick out a couple of those points maybe for the Q&A session and let me get in a little bit on the retention programs as well.

The duty to preserve evidence its Hornbook law that that attaches not only when the matter commences when the complaint is served but also when its reasonably anticipated. Sometimes courts a little looser and talk about reasonably foreseeable. It's certainly well before the subpoena is served. I mean the worst part of the Arthur Anderson case is not the conduct of in house lawyer Nancy Temple but rather it's the business email stop the shredding the subpoena has arrived. That's clearly never was the law even before Sarbanes-Oxley -- certainly isn't now.

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In the employment context certainly the duty attaches at or before the time that the employee files an a grievance through administrative agencies or labor representatives. There's even some dicta that begins as soon as one employee registers a complaint about the behavior of another employee. There is some authority however that it's not just simply the abstract possibility of a dispute, certainly without being to cynical as soon a manufacturer releases a complex product on the market there's some foresee ability that there will be litigation relative to that product but there's not a requirement that all records be preserved against that abstract possibility.

The Supreme Court in a criminal case did say that there had to be a particular official proceeding in contemplation. I think that's probably to strict for the civil world of responding to civil discovery. It's no comfort to go all the way to the Supreme Court of the United States to get a reversal on that point. But this is an open point. Our policies normally do just restate the matter that it be reasonably anticipated.

That leads to next slide, slide 17 which is the litigation response plan which should be part of the corporation or non-profit organization's policy namely that everyone in the organization should have the duty to tell the general counsel that a lawsuit has commenced or is anticipated, and then it's the general counsel's responsibility to get out the word to the organization generally that we need to have a record pulled.

One of the Zublanki opinions confirms that just that initial communication is not enough. You need to follow it up and with some of our larger organizations we even have a collection of these things on an Internet site so that new hires or arrivals can be aware of what holds are in effect before they've landed. It's then the duty of everyone who keeps records whether it's the records department or individual employees to segregate and preserve these records and certainly suspend any disposition of them.

Slide 23 that I will jump over to - we'll get back to some of the practical considerations if there's time but just onto - now we understand what consequences there are embattled -- what can be done ahead of time. We refer to a records retention program rather than a policy. It's not just the policy that sits on the bookshelf or the Internet site although that's certainly a key part of it. You'll see I've listed five items, first and foremost being the tone set by upper management that employee and organizational competence depends on compliance with the laws. It's something on which performance will be measured and it is a core value of the organization. That tone in rolling out a program or restarting one is very important both the fact of it as well as the appearance of it in any later situation in which its called into question I guess.

Also that is the communication of this through training the assumption of responsibilities by the individual departments and employees as well as enforcement and audit to make sure that's its happening and this is a changing process because laws change. The organization's missions may change and markets and audiences may change in each of those may affect what records are kept or for how long they need to be kept and this policy usually sits along with the other ones that you have about creating the right kind of records in the first place. Who owns those records. Who has access to them and if records are to be destroyed what secure shredding or other means of permanent disposition do you have so you don't have the opposite problem which is things that you intended to dispose of - that aren't disposed of.

Slide 24 recaps the overall concept of the retention program supported by a fair amount of authority these days that you need not - there's not a legal obligation of any person or organization to keep every piece of electronic organization it ever generated. My analogy is that these add value to the organization just like any other asset if you can use them to achieve your missions and of course meet legal responsibilities keep them. If not, absolute independent contractual or other duty there is no legal obligation to keep them and you'll see favorable citations not only from the Supreme Court and Arthur Anderson but also in the Sedona guidelines which is a collection of research and participation including judges and prosecutors that is very helpful to cite.

Page 25 is the challenge of email for this next decade, I would say, which is finding ways to separate the wheat from the chaff. There is a quantum of information and emails that constitutes records that under law must kept or under the business policies of the organization are required to be kept, but then there's a lot of information that need not be kept. If it doesn't have enduring

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value to the organization, if it doesn't evidence a transaction or otherwise fit in a legal category it can be considered ephemeral information that can be routinely disposed of. So the logistics just for this -- getting us to this presentation for example must have been 40 or 50 emails with draft attachments, none of which would constitute records for any organization -- ACC, Pillsbury, or Texas A&M. But the challenge is how do you separate that in an efficient manner.

There are programs now available that will sweep through and clean out in boxes after 90 days but you would only be comfortable with such a feature if you were confident your employees were well trained to pluck out the records that did require to be preserved move them into project specific files, or print them out or save them in some way that they match the legal requirements.

I would note a cautionary piece here that even Microsoft has this feature but does not activate it for its internal uses, saying that it just can't keep control over what would be thrown out along with the bath water.

Slide 26 -- a big piece of designing the record program is understanding practically what the capabilities of the organization are, and non-profits will be in many cases very stretched for this purpose. I often ask the question exactly why are archives of the type that Mark described being kept. Why have monthly backups being kept going off into the past if there is no real need for backing up other than the particular need of being able to recover from a disaster -- from a power outage or a natural casualty that affects the individual organization's site. That would call for retaining backup tapes for perhaps 15 days and keep them in a separate location from the organization. But beyond that why are you doing it?

A second question of why are you doing it relates to the ever expanding capabilities of IT systems. The new rage these days is unified message systems UMS which is a way that you can get your voicemail by email. You can just be on your email and click on a wav. file and hear your voice mail which sounds wonderful for the traveling person wanting one place to contact, but as Mark indicated if people think that the email speaks the truth and that people let down their guard you can imagine what preserved voicemail would be like in some of these cases and how difficult it would be to retrieve and screen for responsiveness.

Page 27 is the meat of the retention program namely what are the requirements. They fall in three main categories. The first are there are expressed parts of the law that say you must keep a record for a duration of time. This typically shows up in the regulatory arena. I've indicated some environmental ,occupational, safety, health and even Sarbanes-Oxley for non-profits because Sarbanes-Oxley not only regulates public companies but it also regulates auditors. And I suspect that the auditors who certify your statements are probably flowing down to you the rules that they apply in their enterprise more generally which will mean that they'll want you to keep papers related to their certifications of your financials for the seven-year period contemplated by Sarbanes-Oxley.

The second category are statutes of limitation which are not mandates that you keep records. It's simply a period of exposure where you may be hit with a claim and the question from an organizational standpoint is will you be disadvantaged if you don't have records during the time period in which you have that exposure. And the third is business needs. You may well have needs particularly in the R&D area to keep records to show what paths have been crossed. What ideas have been tried and have not worked. What donor lists have been mined and - but from a business standpoint you may want to keep for a period beyond the duration that don't particularly have a legal downsides to them and then finally on the flip side there are laws that say you must destroy records particularly those related to personal privacy and prescribe particular ways in which they have to be destroyed.

Slide 28 tried to recap some examples we've run into in the non-profit world. In view of time, I won't go over them other than to note the lobbying one. Most organizations that have dealings with the government know about the federal forms they must file. They know the government keeps them for six years but my point is that the state requirements often are much broader going into not only the reports you make to the government but also records internal to the organization of whom you have lunch with and what was said and then a number of other examples obviously related to the tax exempt nature of the organization or tax returns for any unrelated activities that are taxable.

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Slide 29 refers to the combination in the program of the policy itself which is the verbiage instructing which organizations to take which actions with what is usually attached as a schedule. A schedule usually has at least two columns one being the type of records kept by the organization usually broken down into the categories that you actually have so contracts, employee records, occupational safety and health records and then opposite that in at least a second column is the time period for that thing to be retained.

Your records managers will probably be familiar with the program device Donald Skupskee (ph) and a lot of us outside lawyers as well as organizations us nomenclature and you'll see that that might just be an abstract number of years keep something for a particular period of time but unfortunately for the IT department in particular a lot of these time periods float. You will want to keep records for as long as the tax audit period is open for example or for as long as a particular employee is around plus a given number of years.

So its kind of false certainty in these retentions schedules some of which are abstract and you can say okay ex-years after it was created it can go away whereas others are keyed off of the lifetime of an activity or a legal or tax exposure and then certain items that have to kept for so long or have no approved disposition time period and those are maintained for an indefinite period.

Slide 30 I've just indicated a few specific cases that have to be dealt with the first being ethical walls within your organization. In non-profit organizations this may be particularly needed for trade associations where you may have competitors that are officers of your organization or otherwise having access to information of the others.

Standard setting organizations are another example where this may be necessary where technical information is provided under non-disclosure agreements that need to be respected. There are peculiar problems when you try to launch one of these programs in the midst of litigation. How do you carve out what's subject to litigation now from issues going forward. And I've already mentioned the issue of these spiffy new IT programs that allow you to automatically delete things, but are cautioned that nobody should actually flip the switch on on one of those things until you've got organizational culture that will understand what needs to be done.

And that really leads to slide 31 the first piece of course probably being expressed or implicit in almost every outside law firm presentation to ACC, but I do stress that whether it's inside or outside knowing what goes on in the discovery process, what the technology in electronic era consist of and what your organization is, as a practical matter, capable of doing will condition how you put one of these retention programs into motion.

In view of time, Steve, let me stop there and see if you yourself or others have questions we could respond to if Mark wanted to touch on anything additional.

Steve Garrett - *Texas A&M Research Foundation - Assistant Vice President, Corporate Secretary & Attorney*

All right thanks guys. We are kind of running out of time. I want to put just one issue on the table and I think it appears somewhat on pages 19 or slides 19, 20 or 21 something like that. It has to do with the issue of meta data what about a situation where the records management program itself calls for storing the documents are archived in an imaged format and will basically strip off all the original meta data? Now those archive files lets say they're PDF form will have their own associate with it but the original meta data is gone. Can you program calls for that and will the courts kind of punish you if they find out that that's not what they like or not what they want to see? Do you have any cases on that?

Mark Koehn - *Pillsbury Winthrop Shaw Pittman - Panelist*

No, I don't have a case on it but if you're going to find a legal decision that's going to say that your business records policy has to be driven by the possibility of litigation. That's not what's required. What's required is reasonable entry, reasonable diligence

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and reasonable care in responding to discovery requests. So the point is if for instance you've got a -- part of your business model includes - you're generating let's say Word documents Microsoft Word that has meta data with it you use them in business. But then at some point those documents get printed and then maybe signed and then imaged and that's why you want to keep an image because you want the signed version of it for instance.

Once that's imaged that wouldn't have any meta data with it and if the business process is that you don't need to keep the Word version around anymore or we want to keep it as signed images that's fine if that's the normal routine business process but once you have to do a preservation effort if you reasonably anticipate that potentially responsive documents that may get requested - remember you don't have to save the entire world on an outside chance that you opponent is going to ask for things that irrelevant right you don't have to do that. But if it's within the realm of reason that your opponent in the dispute would want to keep those electronic versions of those things that you image and you would usually discard that again - that's the example of where your electronic business systems routinely would get rid of those and that routine getting rid of the automated or maybe its because when people are told when it gets printed and imaged that they should then delete you would probably put a litigation hold in there if you think that that's the kind of thing the other side is going to want and want to be produced.

There's no -- I can't imagine a court saying you're in trouble from the get-go because your business system anticipated getting rid of those files routinely.

Steve Garrett - *Texas A&M Research Foundation - Assistant Vice President, Corporate Secretary & Attorney*

One last question. You'll have to keep it real short and that has to do with - recently I've been looking at a lot of vendors myself about -- to set up a structure to maintain the records management system. And I noticed that one of the models that's out there that several of the vendors do offer and some of them offer both types -- but one of them is Online Storage. What issues might that bring up if you're using a model where your database is online somewhere where you're not and you don't have ready access to it. In about a minute or so can you do that because we're going to have to close out?

Mark Koehn - *Pillsbury Winthrop Shaw Pittman - Panelist*

When a third party might be involved?

Steve Garrett - *Texas A&M Research Foundation - Assistant Vice President, Corporate Secretary & Attorney*

Your third party vendor is your database manager offsite and issues concerning crashes. Issues concerning availability and access, whether or not that plays very much of a role in deciding whether or not to do that.

Mark Koehn - *Pillsbury Winthrop Shaw Pittman - Panelist*

Well you have to go back to just functionally and I guess as a legal matter what's - when you ask for discovery its what's in your possession, custody or control and I think the example you're giving is it physically in your possession or custody? Doesn't sound that way. Is it within your control? It might be because if this vendor is under contract to you to be storing information that is for your benefit, there's I think, at least maybe an argument that they should then respond to your request that they then begin preserving the information in a way that's different than they would normally for the normal course of business. I won't be surprised that you're going to get asked to pay for more for that because that's beyond the contract services. But you likely will have control and you have to exercise some.

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Rob James - *Pillsbury Winthrop Shaw Pittman - Panelist*

I think you probably have the control. Whether you'd be liable if they have some complete crash or other failure there might be some reasonable grounds to mitigate your exposure that you wouldn't have with your own employees. But generally if you contract with someone I think it would be deemed to be within your control.

Steve Garrett - *Texas A&M Research Foundation - Assistant Vice President, Corporate Secretary & Attorney*

Okay, well I think we're out of time. That concludes today's Web cast and I'd like to thank the panelists for the time and excellent presentations. I know I learned a lot. I also want to thank the firm Pilsbury, Winthrop, Shaw Pittman for sponsoring our Web cast. And once again let me remind our audience that the audio file for the Web cast be available on the ACC Web site that's www.acca.com in about three hours from now they ought to be posted and will be archived there for about a year.

Amd I want to thank our audience for attending our Web cast. Remember, if you have any questions related to today's topic send an email to Mr. James at rob.james@pillsburylaw.com or Mr. Koehn -- and by the way I'm going to spell Mr. Koehn's last name, it's k-o-e-h-n. I think that's right Mark?

Mark Koehn - *Pillsbury Winthrop Shaw Pittman - Panelist*

That is.

Steve Garrett - *Texas A&M Research Foundation - Assistant Vice President, Corporate Secretary & Attorney*

It's at Mark.koehn@pillsburylaw.com. Thanks to everybody.

Mark Koehn - *Pillsbury Winthrop Shaw Pittman - Panelist*

Thank you.

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