



211:Information Management & Records Retention Programs

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Michael J. Bolton is senior counsel to Baxter Healthcare Corporation's litigation group in Deerfield, Illinois. His primary assignment within the litigation group has been the management of the BioScience litigation, including the AIDS and Gamagard(r) mass torts and other product liability litigation involving the BioScience business. Baxter Healthcare Corporation is the principal domestic operating business of Baxter International Inc. Baxter International Inc. is a global health care company that, through its subsidiaries, provides critical therapies for people with life-threatening conditions. Baxter bioscience, medication delivery, and renal products and services are used to treat patients with some of the most challenging medical conditions including cancer, hemophilia, immune deficiencies, infectious diseases, kidney disease, and trauma.

Prior to joining Baxter Healthcare Corporation, Mr. Bolton worked as an associate at the Chicago firm of Wildman, Harrold, Allen & Dixon. He then served as a trial and supervising attorney in the office of the corporation counsel for the City of Chicago.

Mr. Bolton graduated, cum laude, from the University of Illinois and obtained a law degree from the University of Michigan.

Jeff Hatfield

Jeff Hatfield is a director for Jordan Lawrence Group in Wild Wood, Colorado and leads the company's marketing and strategic business alliances. He has worked with senior management at over 300 national and international companies, assisting in developing and implementing high-impact records and information control solutions and systems.

He is an accomplished speaker, has been published in numerous trade publications, and conducts seminars for general counsel, information management, audit, and risk management groups.

Mr. Hatfield received degrees from the University of Missouri-Columbia and the University of Missouri-Rolla. He also received an MBA in international business management from St. Louis University.

Janice L. Innis-Thompson

Janice L. Innis-Thompson is chief counsel-compliance and records management for International Paper Company (IP) in Stamford, Connecticut. Her responsibilities include providing legal counsel for IP's internal audit group, Sarbanes-Oxley Section 404 compliance, oversight of IP's compliance functions, and updating IP's records & information management program.

Prior to joining IP, Ms. Innis-Thompson worked as a federal prosecutor in Jacksonville, Florida, Buffalo, New York, and Brooklyn, New York. She also spent a year at the U.S. Department of Justice as counsel to the director of the executive office of United States attorneys, where she worked with Janet Reno and her staff on initiatives affecting the 96 United States Attorneys offices

nationwide. Immediately following law school, she clerked for the Honorable Joseph W. Hatchett, United States Court of Appeals, Eleventh Circuit.

She is on the boards of the Center For Governmental Responsibilities in Gainesville, Florida and ACC's Westchester/Fairfield County Chapter (WESFACCA), where she serves as the secretary.


Ms. Innis-Thompson is a graduate of University of Florida College of Journalism and Communications and University of Florida College of Law, where she served as associate articles editor for the *University of Florida Law Review*.

Mark W. Reardon

Mark W. Reardon is a counsel in the litigation group, located at The Boeing Company's world headquarters in Chicago. His responsibilities include conducting and managing civil litigation, claims, and internal investigations, as well as federal government protest matters.

Prior to joining Boeing, Mr. Reardon served in the U.S. Army Judge Advocate General's Corps for five years providing legal advice regarding federal procurement law and defending protests of computer systems acquisitions.


Mr. Reardon received a BA from Knox College and his JD from Seton Hall University.



Session #211
**Information Management & Records
Retention Programs**

Jeff Hatfield - *Jordan Lawrence Group*
Janice Innis-Thompson - *International Paper*
Mike Bolton - *Baxter Healthcare*
Mark Reardon - *Boeing*

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Business Problem

There is often a disconnect between Legal, IT & Business areas regarding the development and enforcement of records policies.

They are unable to establish a common language.

Companies face legal and business implications resulting from their ability (or inability) to enforce their records management policies.

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Program Requirements

To protect your corporate interests, you must be able to do these four things:

- **Keep** records long enough to meet requirements
- **Locate** records quickly and effectively when needed
- **Destroy** records appropriately when obsolete
- **Protect** records with precise and immediate legal “holds”

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Critical Knowledge

To meet these requirements, you must have critical knowledge of your records:

- **What** record types you have
- **Who** owns or controls each record type
- **Where** records are held
- **When** to appropriately destroy records

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Common Barriers

- Focus on documentation only
- Employee discretion
- Vendor obstructions
- Inconsistence across platforms/media
- Lack of auditing/monitoring
- Limited control of e-mail

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Records Classified by Control Type

Who Is The Custodian Of Records?

Inventory-Tolerant Records

Company controlled
Trackable records
Easy to enforce

Inventory-Resistant Records

Employee controlled
Difficult to enforce
Emphasize user responsibility

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Step 1: Gather Information

- Company structure
- Inventories
- Contacts & participants

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Step 2: Set Standards

- Record type naming
- Record owners – official & convenience
- Platform/media decisions
- Retention requirements

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Step 3: Implement

- Integrate policy & requirements into processes
- Set controls
- Train employees
- Apply "hold" requirements
- Initial clean-up

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Ongoing Enforcement

- Regularly scheduled notices
- Audit/monitor compliance
- Update proactively
- Consistency & objectivity

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Critical Activities for Successful Records Management

- Create awareness
- Focus training on document creation
- Provide user-friendly employee tools
- Leverage cross-functional expertise and business input
- Limit e-mail volume
- Audit compliance

Zubulake V:

Court Imposes Severe Sanctions on Firm for Destroying E-Mails During Litigation and Provides Guidance on Managing Litigation Holds

By Tom Freeman, Reed Smith LLP

July 1, 2004

On July 20, 2004, in her fifth written opinion in a “relatively routine employment discrimination dispute,” Judge Shira A. Scheindlin of the U.S. District Court for the Southern District of New York imposed sanctions against UBS Warburg (“UBS”) for destroying relevant e-mail messages during the litigation. The Court ordered UBS to pay expenses and attorney fees incurred by plaintiff Laura Zubulake in pursuit of the missing e-mails. *Zubulake v. UBS Warburg LLC, et al.*, S.D.N.Y. 02 CV 1234 (SAS) 7/20/04; 2004 U.S. Dist. LEXIS (S.D.N.Y., July 20, 2004).^{*} In addition to the monetary sanctions, Judge Scheindlin also granted plaintiff’s request for additional discovery and for a jury instruction permitting a negative inference to be drawn from the missing evidence.

In August 2001, Zubulake filed a gender discrimination suit arising out of her termination as an equities trader. Soon after receiving notice of lawsuit, UBS’ inhouse and outside counsel instructed personnel to retain relevant electronic information. However, these instructions did not specifically mention UBS’ electronic backup files, which stored deleted e-mails and were periodically recycled as part of the firm’s normal data retention procedures. This “failure to communicate” resulted in the destruction of discoverable electronic information when, notwithstanding the litigation hold instructions, certain UBS employees deleted relevant e-mails. In her written opinion, Judge Scheindlin held that it is not enough for lawyers merely to instruct a client to preserve e-mail and other relevant evidence once litigation is reasonably anticipated. Rather, counsel must take “affirmative steps” to ensure that evidence is preserved.

Although Judge Scheindlin found both UBS and its lawyers were to blame for the apparent “failure to communicate” that resulted in the destruction of the e-mails, she concluded that “the duty to preserve and produce documents rests on the party,” not its counsel. While many of the deleted e-mails were eventually recovered, the court-ordered data recovery came at great expense and delay. Judge Scheindlin concluded that the failures that led to the destruction or delayed production of relevant information significantly prejudiced Zubulake such that sanctions were warranted.

The Court noted that, “while UBS personnel deleted e-mails, copies of many of these e-mails were lost or belatedly produced as a result of counsel’s failures.” But “while more diligent action on the part of counsel would have mitigated some of the damage caused by UBS’ deletion of e-mails, UBS deleted the e-mails in defiance of explicit instructions not to.” The Court further noted that, “If a party acts contrary to counsel’s instructions or to a court’s order, it acts at its Client Bulletin 04-34 own peril.” Thus, the Court found only UBS’ conduct rose to the level of culpability necessary to support sanctions. Having concluded that UBS was under a duty to preserve the e-mails and that it deleted presumably relevant e-mails willfully, Judge Scheindlin considered the proper sanctions. She first concluded that the jury will be given an adverse inference instruction with respect to e-mails deleted after notice of the litigation was communicated. Second, she ordered UBS to pay the costs associated with any depositions or re-depositions in light of the recent information. Third, UBS was ordered to pay all reasonable expenses, including attorneys

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This document is presented for informational purposes and is not intended to constitute legal advice.

fees, incurred by Zubulake in connection with the motion. Fourth, Zubulake is free to introduce at trial the testimony of UBS personnel, which was later contradicted by the belated e-mails. Finally, Judge Scheindlin ordered UBS to pay for the restoration of the remaining relevant backup files.

Significant Lessons of Zubulake for Counsel Judge Scheindlin has established herself as perhaps the most knowledgeable and influential jurist on ediscovery issues. This opinion, as well as her earlier orders in Zubulake, provide important guidance for corporate and outside counsel on the electronic discovery issues and effective record management. After concluding that UBS' willful destruction of presumably relevant e-mails supported sanctions against the client, Judge Scheindlin's order focused significant attention on the role of counsel in managing electronic discovery and litigation holds. The Court's order specifically details counsel's "duty to effectively communicate to her client its discovery obligations so that all relevant information is discovered, retained and produced." In Judge Scheindlin's view, it is not sufficient for counsel to simply notify employees that there is a litigation hold and expect that the party will then retain and produce all relevant information. Counsel must take reasonable affirmative steps to accomplish the following:

- (1) "identify sources of discoverable information";
- (2) "put in place a litigation hold and make that known to all relevant employees by communicating with them directly";
- (3) reiterate the litigation hold instructions "regularly" and "monitor compliance so that all sources of discoverable information are identified and retained on a continuing basis"; and
- (4) "call for employees to produce copies of relevant electronic evidence and...arrange for the segregation and safeguarding of any archival media (e.g., back-up tapes) that the [client] has a duty to preserve." These steps are likely to become the standard of "best practices" for counsel in future litigation. While most of these practices are likely frequently followed, Judge Scheindlin's prescription for regular reiteration of the litigation hold and monitoring compliance probably are not common practices today. Given the notoriety of the Zubulake case and Judge Scheindlin's reputation, these practices will likely be adopted by other courts in evaluating electronic discovery issues and requests for sanctions. Accordingly, firms or counsel in any pending litigation or agency investigation who fail to adopt these practices act at their peril.

Lawyers in Reed Smith's Record Retention and e-Discovery Group have extensive experience in assisting clients identify, retain and produce discoverable information in litigation and regulatory investigations. Reed Smith's lawyers are mindful of the challenges confronting companies today and can help you develop practical and responsible solutions to the issues at your company.

Reed Smith, a leading global law firm with nearly 1,000 lawyers located in 16 U.S. and two U.K. cities, represents Fortune 100 as well as mid-market and emerging companies. Clients include technology companies and entrepreneurs, financial services firms, life sciences companies and health care providers and insurers, communications companies, manufacturers, universities, non-profit organizations, real estate developers, and municipalities throughout the United States, the United Kingdom, and in 40 other countries. For more information, please visit reedsmith.com.

From Andersen Hearing

Excerpt from Transcript of the Hearings before the House Energy and Commerce Oversight and Investigations Sub-committee on the Destruction of Enron Related Documents

January 24, 2002

Congressman Tauzin: Does it have to be raised, Ms. Temple, [Arthur Andersen's in-house legal counsel] when you are the counsel representing this company internally on litigation? Does anybody have to raise it? Or is [it] somebody's responsibility in the company to say, "Stop destroying documents, we're under investigation." Whose responsibility was it, if it was not yours? Did somebody have to raise it? Whose responsibility, Mr. Andrews?

Mr. Andrews: In our policy . . .

Congressman Tauzin: Was it your president? Was it you? Who was it?

Mr. Andrews:[Managing partner for Arthur Andersen's Global Audit Practice] In our policy, that responsibility, a policy that we're revising and I acknowledge we're revising, in that policy that responsibility is with the engagement partner.

Congressman Tauzin: With an accountant, not a lawyer? You give the responsibility to an accountant to decide whether it's legally permissible to destroy documents relative to a proceeding? Let me just tell you, I don't know what's going to happen out of all this. I really don't. I hope you're all OK, I don't know. But I'll

tell you this, every accounting firm that is listening to this had better listen very carefully. If all of your policies are to let accountants decide when it's legal to destroy documents in a pending investigation, an awful lot of people are going to be in trouble down the road, not just in this case. And I hope you think seriously about what kind of policies you have on retention of documents and whether those policies are clear or vague or whether you just send memos out for somebody else to interpret or whether you eventually recognize, as you did, Ms. Temple, at some point, that they needed guidance. They needed guidance on what not to do and what to do as you eventually gave them. And they should have gotten that guidance a long time sooner. You see, we wouldn't be here. We'd be scheduling the Enron hearing right now, but we're here discussing what happened at your company because this guidance never went out when it should have gone out and because your company did not have a clear policy on making sure the documents were not destroyed once a notice was given by the SEC that it was checking into your business. Now that's got to change.

And if you don't change it, I promise you, we will.

January 24, 2002 Transcript of the Hearings before the House Energy and Commerce Oversight and Investigations Sub-committee on the Destruction of Enron Related Documents, witnesses from the accounting firm of Arthur Anderson LLP, 2002 WL 93115 at p. 73 (F.D.C.H.)

Records Policy Enforcement Assessment

In order to protect your corporate interests (assets, financial position, executives, employees, etc.), reduce legal risks and unnecessary costs, your company must be able to demonstrate consistent compliance with the following four requirements:

Keep records long enough to meet requirements consistently throughout the entire organization and across all media types.

Q – Are records retention requirements linked and applied to all records on all media?

Locate records quickly and effectively when they are requested.

Q – Can you accurately, quickly and confidently find records when requested under litigation or examination?

Protect records when they are subject to litigation or examination.

Q – Can you effectively safeguard against records destruction or tampering when records are known to be (or suspected to be) part of a current or imminent litigation or examination?

Destroy records when they become obsolete.

Q – Can you demonstrate that records are destroyed consistently and systematically in accordance with your policies regardless of media type?

The only possible way to meet these four requirements is to capture, standardize and continually manage the following four types of information about your company's records:

What record types your company retains.

Q – Do you know on a continual basis what record types are being retained throughout the organization?

Who controls each type of record.

Q – Can you quickly and easily determine who to contact within your company to communicate instructions such as retention requirements, destruction or legal "hold" notices?

Where records are located.

Q – Do you know what records are retained in various facilities and storage systems and where they are located?

When records become obsolete.

Q – Are your records retention requirements strictly and consistently applied to all records?

If you answered "No" to any of these questions, your company could be exposed to unnecessary potential legal risks. You have the opportunity (and responsibility), through a few easy steps, to increase your corporate protection and discipline by actually enforcing your records policy.

For more information on records policy enforcement, contact Jeff Hatfield, Jordan Lawrence Group, at 636.527.1025 or jhatfield@jlggroup.com.

SEC Press Release

SEC Brings Enforcement Action Against Banc of America Securities for Repeated Document Production Failures During a Pending Investigation

Firm Is Censured and Pays a \$10 Million Penalty to Settle Charges

March 10, 2004

Washington D.C., March 10, 2004 - The Securities and Exchange Commission announced today a settled enforcement action against Banc of America Securities LLC (BAS) for violations of the recordkeeping and access requirements of the securities laws. The violations occurred during a pending Commission investigation that is seeking to determine whether, among other things, BAS engaged in improper trading of securities prior to the firm's issuance of research concerning such securities. As part of the settlement, BAS has agreed to a censure and a \$10 million civil penalty.

The Commission found that BAS repeatedly failed to promptly furnish documents requested by the staff, provided misinformation concerning the availability and production status of such documents, and engaged in dilatory tactics that delayed the investigation.

"Today's action makes clear that we will not tolerate unreasonable delay in responding to our inquiries and will act aggressively to protect the

integrity of the Commission's investigative processes," said Stephen Cutler, Director of the Commission's Division of Enforcement.

The Commission's order finds that BAS willfully failed to preserve or promptly furnish certain records after they were requested. In particular, the Commission found that BAS failed promptly to produce (i) electronic mail, including a particular e-mail exchange relating to matters that BAS knew were under investigation, (ii) certain compliance reviews, and (iii) compliance and supervision records concerning the personal trading activities of a former senior employee of the firm.

In addition to the censure and \$10 million penalty, BAS consented, without admitting or denying the Commission's findings, to cease and desist from committing or causing violations of Sections 17(a) and 17(b) of the Securities Exchange Act of 1934 and Rule 17a-4(j) thereunder.

<http://www.sec.gov/news/press/2004-29.htm>

2004 ACC Records Management Survey Highlights

In May 2004, the Jordan Lawrence Group conducted a survey of Association of Corporate Counsel members to gather information related to common records and information management issues facing corporate legal departments. The following is a portion of the data gathered from over 250 corporate counsel responses.

Counsel Responded:	Percentage:
Corporate Records Policy	
Does not have a records management policy	24%
Has a policy but no enforcement of it	41%
Has a policy and keeps it enforced	18%
Requires sign-off for verification of employee policy review	5%
Conducts mandatory training for employees	5%
Disciplines employees for non-compliance with their policy	6%
General Records Management Practices	
Has difficulty finding records when needed	48%
Can easily find records when needed	20%
Does not have records classified into logical standards	51%
Has most of their records classified	14%
Cannot identify who owns or controls records	42%
Can easily identify who controls their records	3%
Has a retention schedule that is insufficient or out dated	26%
Has no records retention schedule in place	18%
Keeps records longer than necessary company-wide	52%
Allows employees to set record type names	36%
Employees are inconsistent in complying with the policies	47%
Employees are in compliance with records policies	9%
Records Destruction	
Destroys records "As Needed"	63%
Never destroys records	8%
Allows employees to destroy records they control "As Needed"	73%
IT destroys records "As Needed"	63%
Storage vendors never destroy records	25%
Employees determine retention and destruction	40%
E-Mail Management	
Auto-deletes e-mail	28%
Restricts e-mail by size	36%
Classifies e-mail according to set records standards	3%
Deletes e-mail back-up according to retention requirements	28%
Has e-mail policy in place	46%

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<http://www.sec.gov/news/press/2004-29.htm>



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AUGUST 2003

LEADING PRACTICES IN INFORMATION MANAGEMENT AND RECORDS RETENTION PROGRAMS: What Companies are Doing

**Part of an Ongoing Series of
ACC's "Leading Practices Profiles"SM
<http://www.acca.com/vl/practiceprofiles/>**

All companies create records as part of their business. Whether the company is big or small, public or private, domestic or international, it will generate and need records, and managing them will be an important challenge.

Recent legal developments have helped to focus attention on the need for and importance of having sound records programs that are properly implemented. During the past few years, highly publicized cases involving document destruction elevated records management issues to the front pages of major newspapers. In addition, the Sarbanes-Oxley Act of 2002 (Sarbox) and the related Securities and Exchange Commission's rules on Management's Report on Internal Control over Financial Reporting and Certification of Disclosure in Exchange Act Periodic Reports¹ add requirements and consequence components and help to emphasize the importance of this issue.

Adding to the records management challenge are dramatic changes in business processes made possible by technology and the increasingly global nature of doing business. Documents are drafted in virtual offices and distributed for comment simply by hitting a "send" button. Colleagues in multiple office locations can communicate electronically to help bridge time differences and can work over corporate intranets that facilitate access to document libraries and real-time shared drafting tools. Work processes are facilitated

¹ SEC Release No. 33-8238 (June 5, 2003), effective date August 14, 2003.

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by hand-held portable devices, personal computers, laptops, pagers, voice mail, and database and software packages that allow for easier access, processing, storage, and retrieval of important information. And the list of technology making business processes more efficient and records management more difficult goes on.

This leading practices review looks at what the following seven companies are doing in the area of information management and records retention: **Applica Incorporated; CarrAmerica; Office Depot, Inc; Seagate Technology; a fortune 500 chemical company; a multinational consumer goods corporation with over 30,000 employees; and a super regional bank holding company.** Companies were asked about “what” they’re doing, and “how” they developed their programs. They identified program components that they consider “leading practices,” and shared views on critical success factors and challenges.

The seven companies also identified resources used to develop their programs or that might be helpful to others. The resulting resource list is included at the end of this document. Many of the web sites included on the resource list also have links to additional resources. ACC’s Records Retention InfoPAKSM is also an excellent resource, and includes legal requirements, records retention program plans, retention guidelines, and lists additional resources relating to records management.

Section I below provides summary overviews of programs, processes and themes identified through discussions with seven companies. Section II contains individual program summaries for each of the seven companies reviewed.

I. SUMMARY OVERVIEW OF PROGRAMS, PROCESSES & THEMES

PROGRAMS

Although the program designs and details vary, each company reviewed shares in the common goal of properly managing important business information. A common feature among many programs is that specific personnel at each company have been designated as having responsibility for records or information management. Some companies have created a centralized records management (or information asset management) group while others have designated a records custodian or “key master.” For many, designated records personnel link with records coordinators or liaisons that are distributed throughout the organization and perform records management as a corollary duty.

All of the programs reviewed included defined records types and retention schedules. Once again, the various programs vary in details. Some programs have a single list of record types with a single schedule that is applied across the company. Others have programs with varying records types and schedules. Some companies developed the lists of records and schedules centrally, while others empowered each business unit to develop its own schedules.

PROCESS TO DEVELOP PROGRAMS

Several companies developed records management programs and retention schedules in-house. Some engaged outside consultants to develop and administer programs. Others engaged outside counsel to evaluate existing policies, research legal requirements for records retention, or develop records categories and retention schedules. Most companies with on-line or web-based training modules developed training programs with outside assistance.

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THEMES

Although each business and records program is different, some general themes emerged:

- **Consistency:** Consistency in implementing the records program, consistency in defining records types, and for some, consistency in applying a single schedule of records types and retention periods, are themes described as important.
- **Training:** Educating records coordinators and employees about the existence and requirements of their records programs is a critical success factor identified by most companies. Many companies are using technology to make training available through on-line or web-based programs. For some, training is mandatory.
- **Top Management Support:** Devoting resources to the records program and describing the importance of the program in company communications are examples of top management support, which has been identified as a critical success factor by many of the companies.
- **Compliance components:** Complying with the program is as important as having one. Some companies designate a day or portion of a day each year (or semi-annually) to allow employees to focus on records program requirements. Some companies rely on records coordinators to evaluate program elements. Some programs require compliance certifications.
- **Electronic records:** Developing program components to help address electronic records is a key challenge identified by many; however, one of the companies has identified its programs in this area as a leading practice.

LEADING PRACTICES

Below is a list of practices that companies viewed to be leading practices for their programs. Additional details on these leading practices can be found in the company program description summaries in Section II below.

- **Auditing to Assess Compliance:** Annual auditing conducted by one company's Global Records Management group and records coordinators was identified as a program strength, with approximately 3500 spot audits conducted this past year.
- **Electronic Records Management:** Identifying electronic records management as a program strength, one company shared how its program components include systems for desktop application retention prompting and automated deletions, and detailed system analysis of electronic systems that provide detail to the system administrators to facilitate retention guideline implementation for various records maintained and archived by electronic systems and software.
- **Global Application without Exception:** Having one program that applies to records created at all levels of the organization around the world is a program strength identified by one company's Global Records Manager.
- **In-house Storage:** Storing inactive U.S.-based records in-house at buildings designated for records storage is a strength identified by another company. The in-house storage capability includes a climate-controlled secure facility for electronic storage.
- **Intranet Information Asset Management Website:** Having an intranet website that was developed in-house and posts a wide variety of resources is a significant program feature shared by one company as a leading program practice.
- **On-line/Web-Based Training:** On-line records management training programs developed in-house is a strength identified by another company. Four records-

related training modules developed by this company utilize macromedia flash technology and include audio, the ability to stop, start and skip around, and tests to confirm understanding of training modules.

II. COMPANY PROGRAM SUMMARIES

Following are summaries from discussions with the seven companies about their programs. Some companies wished to share information about their programs but remain anonymous and company descriptions have been used in lieu of company names.

Applica Incorporated

Applica's current records retention program is the result of its desire to develop a coordinated records management program for the combined company following a large acquisition in 1998. A Senior Management Committee, consisting of leaders from Legal, Risk Management, and Information Technology, as well as the Corporate Controller, was developed to evaluate needs and map a path forward for the company. The corporation's Vice President - Legal, Lisa Carstarphen, used the Association of Corporate Counsel's (ACC) InfoPAKSM on Records Retention as a starting point, and then interviewed vendors to assist with Applica's program efforts. Applica selected The Jordan Lawrence Group to help develop its program. Carstarphen describes herself as the "key master" for the program, which is web-based and provides a systematic process that establishes and enforces records management and focuses on managing on-site and off-site documents in a consistent way pursuant to a set records destruction schedule. Carstarphen shared that Applica's program has taken about one year to develop. Program costs also include annual fees to support the web-based program.

Program

Applica's program for managing records is an "intelligent system" says Carstarphen. She shared that the program is web-based, consistent, scheduled, systematic, searchable, and includes a system override function, for which Carstarphen is the "key master." The program sends destruction notices to off-site storage vendors managing files for Applica, as well as to the designated "record retention representative" in the relevant business unit and to Carstarphen in legal. The notices are based on the company's record retention schedule and include the location and description of the documents scheduled for destruction. The record retention schedule, as well as email and retention guidelines, are posted and distributed automatically by the web-based system. Users are prompted to respond to the system to verify receipt and understanding of the corporate intentions for records control.

Process

Applica started with ACC's InfoPAKSM and then developed a Senior Management Committee that evaluated various outside vendors to assist with developing its records program. Once selected, Jordan Lawrence consultants then met with business groups to re-standardize the records retention policy and schedule. The policies and schedules were then drafted with assistance from Jordan Lawrence and outside counsel. Jordan Lawrence built and loaded the web-based document retention system. Applica is

preparing to roll out its new document retention system and will train employees on it in person.

Communications

Applica is communicating its program via emails to employees, training programs, and by posting its records retention policies on the intranet, with a hyperlink to the web-based program.

Compliance; auditing

To help migrate to the new system, Carstarphen and some additional records representatives plan to meet with each department, deliver training on the new system, and designate a portion of the day to devote to records retention compliance to address historical documents. For documents at off-site locations, the plan is to pull mislabeled boxes, divide and forward them to relevant departments and have records managers within the departments determine necessary action using the retention schedules as a guide. Once the program is rolled out, Applica's internal audit department will audit compliance with the records retention schedule.

Main Challenge

Carstarphen notes that document retention is not the main function of the business units so there is an uphill battle to get people to focus on document retention. In addition, the integration of electronic documents presents an additional challenge.

Email

The Jordan Lawrence system focuses on document types, which can be either electronic or hard copy documents. Email is not a specific document type, so it's not tracked separately. To help manage email, Applica plans to shrink the size of its electronic mailboxes, with a goal that this will help employees to focus on the types of documents created and managed via email and will sensitize them to manage them elsewhere if the document needs to be maintained for a business purpose. Additionally, back-up of Applica's email system is on a weekly basis and each back up tape is overwritten the next week.

CarrAmerica

CarrAmerica turned to outside counsel to develop its records retention schedule. Its challenge was to develop a single schedule that could apply to its records developed and managed within 13 different states. The result: a single consolidated records retention schedule developed using the most conservative retention period for each category of records. CarrAmerica also utilizes a CD-Rom package to track records requirements updates on a quarterly basis. The program's current focus is on paper records.

Process for Developing Program; Outside Counsel

CarrAmerica's decision to reach for outside resources to help define records retention requirements was driven in large part by the need to research relevant legal requirements in 13 states. CarrAmerica's Associate General Counsel, Eileen Wallace, scoped the effort by asking outside counsel to research records retention requirements in 13 states and to develop a single schedule that utilized the most conservative requirement for each type of

record. CarrAmerica's outside counsel looked at where CarrAmerica had facilities, what types of records they had, and then worked with records retention contact and with Wallace in legal to develop the records schedule. The draft retention schedule was then distributed for comment to each business department at CarrAmerica to confirm that the schedule was consistent with business needs. On cost for this effort, Wallace shared that CarrAmerica negotiated a flat fee but gave outside counsel the ability to market the resulting schedule to other clients. On timing, CarrAmerica's outside counsel shared that the development effort required a few months.

Implementation

Wallace shared that CarrAmerica has a custodian of records who coordinates the retention and destruction efforts. The custodian coordinates with contacts in each department before scheduled destruction. CarrAmerica also has a semiannual corporate records clean-up day (which may vary from location to location) where employees are given a portion of their workday to go through their individual offices and files and address records consistent with CarrAmerica's retention schedules.

Email

At CarrAmerica, it's the individual's responsibility to manage limited email space. Wallace shared that CarrAmerica's old email system included an auto-delete function that deleted email after a given cycle. Wallace explained that space requirements are driving individual behavior for managing emails now.

Challenges

When asked about challenges in implementing the records retention program, Wallace shared two: getting people to focus on real business needs for diverging from the schedule; and overcoming people's concept that there is a need to keep everything because they may need it at some point.

Office Depot, Inc.

"All companies need a document retention and destruction policy. This has become increasingly important since Sarbanes-Oxley, and the Enron and Andersen cases," shared John Noyes, National Coordinating Counsel for Office Depot, Inc. Noyes is spearheading Office Depot's re-evaluation of its document management programs at the request of Office Depot's General Counsel, Executive Vice President & Corporate Secretary, David C. Fannin. Office Depot is working with an outside records retention consulting group to develop its program for hard copy and imaged documents. Noyes anticipates that the effort will require around one year to complete. Noyes hopes to leverage his litigation experience and to bring the added perspective of how documents are used as evidence in litigation to the overall effort. His program plans include developing an additional program to manage electronic discovery requirements, and he is evaluating outside vendors to help in this area.

Program

Office Depot's program, once developed, will be a web-based automated program that is based on orderly document naming conventions, identifying responsible groups for managing these documents, and providing notices of the needs to archive or destroy documents in accordance with a schedule. Although the web-based system is automated,

the legal department will have the ability to override the schedule to place holds on documents. The first step, according to Noyes, is to engage outside counsel to have them assist in reviewing existing policies. Then, for companies who need outside assistance in developing a management program, Noyes recommends hiring a reputable and experienced vendor. "Policing compliance" is a third critical component of the program according to Noyes, who believes that these steps will "theoretically save volumes of paper and provide for an orderly system of how documents and records are managed."

Electronic Documents Program

Noyes' objectives for updating Office Depot's programs include developing a plan for managing electronic documents in connection with electronic discovery. Noyes attended a seminar sponsored by the Defense Research Institute in Chicago, Illinois, focusing on document retention and electronic discovery. Noyes noted that the conference speakers included vendors specializing in the area of electronic evidence discovery (see Sidebar identifying program resources).

Education about the Importance of the Program is Key

Education and recognition by non-legal specialty units that implementing a records retention program is an important company goal, is a key success factor according to Noyes. "A good records retention policy is an asset of any company," says Noyes, "and people should understand that this is being done and what the timing and goals are." Accordingly, Noyes has authored several communications to company personnel to "keep the records management issue alive in the minds of people who will be managing the program."

Seagate Technology

Seagate Technology has a worldwide information asset management program that spans the U.S. and 11 other countries. Managed by Dan Vasey, the Worldwide Information Asset Management department (IAM) consists of a core group of five, with two of Vasey's reports located outside the U.S. Approximately 1200 individuals throughout the company serve as records coordinators and are responsible for managing records within their various departments and facilities. Once assigned, the records coordinators receive the policy and training from Vasey's group and are then empowered to implement the program. The program includes a strong link to legal, with Vasey reporting directly to Seagate's Assistant General Counsel.

The program includes an IAM intranet website managed by Vasey's group. The website posts a wide variety of resources, including records policies, procedures, retention schedules, contact information, storage vendor information, newsletters, articles of interest, and web-based training. The program addresses 471 document types, and sets retention schedules that may vary based on geographic location. Seagate's records policy governs all records regardless of media type. Although Seagate worked with outside resources to develop its records retention schedules, its intranet website, implementing databases, and on-line training programs were developed in-house.

Vasey shared that in light of increased scrutiny regarding corporate record keeping, Seagate "took a serious look" at its records policies to confirm they met legal

requirements and found that “in all cases, Seagate’s program meets or exceeds the legal requirements.”

PROCESS FOR DEVELOPING SEAGATE’S PROGRAM

Seagate’s records policies were developed in-house; retention schedules were developed with the assistance of outside resources; and the IAM intranet, associated database, and on-line training components were all developed in-house.

To develop its retention schedules for the 471 document types, Seagate engaged an outside consultant to help develop its U.S. retention schedule, and an outside law firm to help develop the Seagate’s international retention schedules. The schedule development effort blended information on legal retention requirements with input from the various business departments on business needs for retaining records, with the legal requirements serving as a floor for retention periods.

Vasey shared that IAM’s process includes a continuous improvement component, and that the program and its components are re-evaluated and re-vamped as needed on a rolling 12-18-month cycle. As part of this effort, Seagate participates in benchmarking efforts to learn about best practices utilized by records management peers.

TRAINING

Seagate’s intranet and training programs were developed in-house. The training programs are mandatory for records coordinators, although the medium for receiving training is flexible (in-person or on-line). The on-line training programs use a macromedia flash technology and include audio, the ability to stop, start and skip around, and tests to confirm understanding of training modules. The on-line training includes four major modules: How to Archive; How to Request Documents & Send for Storage; Can you Shred It; and an Overview of the Records Program & Policies. Most training modules are around 20-40 minutes long, and the technology allows the IAM group to track who has taken and successfully completed the courses. IAM is also developing a records certification program and Vasey hopes to get 100% participation once it’s in place.

IMPLEMENTATION

Vasey and Eric Pesik, an in-house attorney with Seagate, describe Seagate’s program as de-centralized, with business unit records coordinators having responsibility for managing their unit’s records. The business department managers decide how to define “inactive” records for their departments. Records coordinators manage the records and, once they become inactive, archive them using an on-line database to input meta-data on the documents prior to shipping them off-site.

Once archived, the IAM group becomes the custodian and tracks records retention and destruction schedules sending periodic notices first to tax and legal and second to the business department to receive approvals prior to destruction. Vasey shared that business units need to demonstrate a compelling reason to override any approvals authorized by legal and tax. Once the destruction sign-off is complete, IAM sends a notice to the storage vendor and, in turn, receives a certificate of destruction from the vendor for its files.

ELECTRONIC RECORDS MANAGEMENT UNDER REVIEW

Seagate has several initiatives under way to evaluate and develop programs for managing electronic information. These include looking at systems to track and manage email, and developing retention requirements linked to document types that can be built into electronic document repositories. Vasey plans to have programs in place to address these areas within the next 12 months.

Leading Practices

Vasey and Pesik described three of Seagate's leading practices in this area: Seagate's on-line training on records management modules; the IAM intranet site; and IAM's ability to map business processes to help streamline processes and evaluate change-driven interactions.

RECENT DEVELOPMENTS: HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT OF 1998 (HIPAA)

Vasey described changes implemented at Seagate to address HIPAA, which include splitting out medical records from personnel files; ensuring that medical records are kept in a locked, secure environment; setting limited access to medical records; tracking access to these records; and developing an appropriate archiving system with limited access rights.

A Fortune 500 Chemical Manufacturing Company

"Global" is the defining term for this corporation's program. According to the corporation's Global Records Manager, the program is "global with no exemptions." It applies to records created at all levels of the organization, and has top management support, including a Global Records Management Committee that consists of executive leaders for Information Systems, Legal, Tax, and Controllers. In addition to the full-time Global Records Management staff, which is relatively small, there are several hundred records coordinators within business units and functions around the world who support the program in addition to their regular job duties. The program was developed primarily in-house and has an in-house attorney who supports Records Management among other responsibilities. Records program elements include an internal web site with records retention policy materials, plus training, compliance certifications, audits, and in-house storage of U.S.-based inactive records. The corporation has had a formal records management program for nearly 50 years.

Process for Developing Program

The current program was developed internally. An outside vendor was used to develop a new, customized web-based records training program for the company. In addition, off-the-shelf inventory software packages are used for monitoring inactive records stored in-house.

Communications

Early on in the program, paper manuals (listing of record titles and retention times) were distributed to program coordinators. The manuals were numbered, management knew who had them, and paper updates were circulated. Today's program has entered the electronic age: the manual is now electronic and available on the corporation's internal web site. Legal "freezes" or holds on documents are also posted on the internal web site

in addition to being communicated directly to the personnel most likely to have records subject to the hold. In addition, during the first quarter of each year, employees receive a variety of communications from the Records Management function, the Records Management Committee, and the records coordinators regarding the annual compliance certification process.

Compliance

Early in the first quarter of each year, employees receive a series of communications informing them of the need to review and certify compliance with the corporation's records program. In many portions of the corporation, business units designate a day, or a portion of a given day, to focus on the effort. Local records coordinators are available as resources to assist employees throughout the effort. Employees are required to sign a certification statement acknowledging compliance with the program. These certifications are rolled up to management so that managers can assess the corporation's efforts in this area. Although the certification process is currently a paper process, the corporation hopes to automate it.

Audits

Each year, the corporation's Global Records Management group and records coordinators perform numerous audits to assess compliance with the program. This past year, approximately 3500 spot audits were performed (out of 50,000 employees). Audits also occur at the department and system levels.

Recent Changes

In order to address the ever-increasing issues involving management of electronic records, the Records Management staff now reports to Information Systems and is aligned with the Knowledge Management Group after almost 50 years of reporting to the Controller's function. In addition, records management policies are undergoing review given recent events, which highlighted problems with some corporations' records management practices. A team was formed internally to review various company policies and evaluate and refresh them. Internal efforts to review the global records program included internal focus group sessions and benchmarking with peers. An outgrowth of that process was the creation of a new records category (consolidating several categories with similar retention times) to help simplify records management compliance.

Training

"The bottom line is that we want people to understand the program and comply" shared the Manager of the Global Records Management staff. The corporation has used commercial training videos such as "For the Record" and "Buried Alive," and has developed a new web-based Records Management Training class. The web-based training is currently available and will be made mandatory next year. All new employees will also be required to complete the course within 3 months of joining the corporation. The vendor who helped develop this program is Pinneast.

Challenges

Main challenges include: rapid growth of electronic records volume; managing a global program; completing first quarter certifications; and having resources (people) to help facilitate the program, especially internationally.

Critical Success Factors

According to the Manager of the Global Records staff, “credibility of the program, having been around for around 50 years, is something we’re proud of.” Another key program element is that it applies to all levels of people, everywhere. In addition, top management support, including multiple high-level business leaders on the Records Management Committee.

Leading Practices

When asked about the corporation’s leading practices in this area, the Manager of the Global Records Management staff said: (1) the program is global with no exceptions; (2) auditing (which they hope to strengthen even further); and (3) in-house storage capability, including climate controlled secured facility for electronic storage.

**A Multinational Consumer Goods Corporation
with over 30,000 Employees**

This Multinational Corporation has had a formal records management program in place since the late 1970s. Its Manager, Information Access Department shared that the program is known amongst its records management peers as having a real strength in managing electronic records. The current program was developed and is managed in-house, although outside consultants helped to get the program started in the 70s and were consulted again in the early 90s. The program includes an annual compliance process, annual reports to the General Counsel, integration with various electronic systems, and electronic mail and system prompts for managing email and electronic documents.

Records Function

The Information Access Department (IAD) consists of the Manager, 5 analysts, and 1 support staff. The corporation also has a separate Legal Records Center that includes a manager and 6 Records Specialists. The Legal Records Center Manager reports to the Manager, IAD, who in turn reports to the Director, Legal Administration.

Other departments have records coordinators who are responsible for coordinating compliance with the records program. Training is offered to records coordinators six times per year, and includes classroom and on-line training.

Mission & Scope

The program mission is “To facilitate efficient access to all information resources by promoting consistent information management practices.” The program’s primary goal is to protect information; a secondary goal is to remove information that is of no further value. The program Manager stated that the program applies to all business units where the parent company has at least a 50% ownership interest. Program requirements are also sent to non-US locations to provide general requirements to be used as a baseline.

Compliance

The primary method for implementing the program is through an “Annual Compliance Process.” Under this process, IAD Analysts send information packages (include retention guidelines for given department) to the records coordinator for each department to confirm whether the listed records categories for that department are accurate or

whether any changes are needed. If there are documents that might be eligible for destruction, the information package also includes a notification of eligibility for destruction and the manager is asked to sign off on the destruction notice. The company's legal and tax departments also sign off on destruction notices before destruction proceeds.

The Analysts track departmental responses to the Compliance package. Records destruction notification sign-offs are pursued separately, if necessary to obtain appropriate responses in order to ensure consistent adherence to retention guidelines. Senior Management receives a report at the end of the year identifying which departments have complied with the compliance verification process. In addition, the corporation's General Counsel receives an annual report of the records program that also provides high-level compliance results.

Electronic Records; Leading Practices

Among the leading practices identified by the Manager, IAD are: desktop application retention prompting and automated deletions, and detailed system analysis of electronic systems (such as SAP, etc...) that provides detail to the system administrators to facilitate retention guideline implementation for various records maintained and archived by electronic systems and software.

On managing email, monthly prompts go to each desktop reminding individuals to review expired email information (e.g., more than 18-months old) that no longer has value. Individuals have one-month to review and mark any email with ongoing value for another 18-month review period. If an email is not marked to indicate ongoing value, then it is automatically deleted after 19 months. Individuals that have information that is targeted for discovery can be exempted from this automated function during the discovery process.

For desktop applications (such as document creation programs), weekly prompts are sent electronically. Here, the system is set to look for documents that haven't been updated in 24 months. Again, individuals have 30 days to review, and potentially renew the expiration cycle for the documents prior to the auto-delete function taking over. According to the Manager IAD, these routine prompt and review processes help to create the culture of being sensitive to document retention issues.

Sarbox

The company looked at documents related to external audits and evaluated them to confirm that retention requirements met at least the minimum criteria.

Critical Success Factors

The company's Manager, IAD, shared that strong senior management support for the program is a critical success factor. In addition, the Information Access Department's partnership with the legal function is very important to the program's success.

Super Regional Bank Holding Company

At this super regional bank holding company, each business unit is responsible for knowing the requirements of its function and for developing the relevant retention periods for its records. The proposed schedules are then forwarded to the legal and the corporate compliance departments for approval. To assess whether any new processes were needed to comply with Sarbanes-Oxley (Sarbox), the company evaluated its processes that were already in place to address the Federal Deposit Insurance Corporation Improvement Act (FDICIA) requirements. According to the company's Assistant General Auditor, the company already had a strong internal controls process relating to records based on FDICIA requirements, and this process created the framework for its quarterly certifications under Sarbanes-Oxley.

MORE ON SARBANES OXLEY-RELATED PROCESSES

The company's Assistant General Auditor explained that the company developed a Sarbanes-Oxley database within its internal audit function to track its quarterly certification efforts relating to internal controls. Applying its FDICIA template, the company requires each business unit manager to identify its internal controls, describe any weaknesses, develop action plans to address any weaknesses, and certify statements back to the FDICIA Task Force. For FDICIA compliance, this is done once a year, but for Sarbox it's done quarterly. The FDICIA Committee then compiles and consolidates all of the certifications and rolls them up to the CEO and CFO to provide the basis for their certifications.

Internal Audit Department's Role

Prior to Sarbox, the internal audit department didn't perform a central audit function for records retention requirements, shared the company's Assistant General Auditor. Post-Sarbox, the internal audit department is a more prominent part of the process because it reviews certifications, checks with business units to confirm any weaknesses identified, and works closely with business units to ensure follow-up and resolution of items identified. Audits are performed on a quarterly basis and the audit work reviewing the internal control systems is also subject to seven-year retention period.

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ACC thanks Renee Dankner, former senior counsel at Mobil Oil Corporation, for her work on this profile.

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RESOURCES

Please note that this listing does not constitute a recommendation or endorsement for any product, service or company. Please find below a list of companies and resources identified by companies interviewed or by ACC as possible resources that may be helpful in developing or assessing records retention programs.

RETENTION MANAGEMENT SOFTWARE; CONSULTING RESOURCES

Cohasset & Associates

<http://www.cohasset.com>

Information Requirements Clearinghouse

<http://www.irch.com>

Open Text Corp.

<http://www.opentext.com>

The Jordan Lawrence Group

<http://www.jlgroup.com>*

ASSOCIATIONS/INSTITUTES

Association of Corporate Counsel (ACC)

<http://www.acca.com> – ACC's recently revised InfoPAKSM on Records Retention is available through ACC's website at <http://www.acca.com/vl/infopak.php>.

American Society of Corporate Secretaries (ASCS)

<http://www.ascs.org>

Association of Information & Image Management (AIIM)

<http://www.aiim.org>

Association of Records Managers and Administrators (ARMA) International

<http://www.arma.org>

Defense Research Institute (DRI)- has E-Discovery Task Force w/ annual mtgs-

<http://www.dri.org>

Institute of Certified Records Managers (ICRM).

<http://www.icrm.org>

* Denotes ACC Alliance Program partner. See <http://www.acca.com/practice/alliance.php> for a description of professional products and services offered by ACC Alliance partners.

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WEB-BASED/ON-LINE TRAINING

Pinneast

<http://www.pinneast.com>

Integrity Interactive

<http://www.integrity-interactive.com/>

LRN-Legal Resource Network

<http://www.lrn.com>

WeComply

<http://www.wecomply.com>*

Training Videos

Commonwealth films Videos: "For the Record"; "Buried Alive"

<http://www.commonwealthfilms.com>

ELECTRONIC DISCOVERY VENDORS

Electronic Evidence Discovery

<http://www.eedinc.com/>

Evidence Exchange

<http://www.evidenceexchange.com>

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