

**Questions from ACC Webcast  
Infusing Records Policy Into Technology  
Presented by Jordan Lawrence**

**Wednesday, April 18, 2007 at 12:00 PM ET**

**Presenters:**

**Dan Cooperman**, Senior Vice President, Secretary and General Counsel,  
Oracle Corporation

**John Patzakis**, Chief Legal Officer, Guidance Software

**Alice Lawrence**, Principal, Jordan Lawrence

**Moderator:**

**Sonia Cudd**, Assistant General Counsel, McCormick & Company Incorporated

**1. Do you have an example of a "data map" to share?**

**Answer from Alice Lawrence (Jordan Lawrence):** Jordan Lawrence does and will share an example of a "data map", please contact Marty Provin at [mprovin@jlggroup.com](mailto:mprovin@jlggroup.com) or call 636-821-2250.

**2. How do you balance the need to notify all potential individuals of a litigation hold against the need to keep potentially sensitive litigation from being publicized to people who may not need to know about it.**

**Answer from Alice Lawrence (Jordan Lawrence):** This is a decision for counsel, however without knowledge of the location, media, application and owner of relevant information it is very difficult to execute a defensible litigation hold.

**Answer from John Patzakis (Guidance Software):** EE provides the flexibility to immediately collect from the custodians in such circumstances, without the end-user being aware. Ideally you want to go through the full interview and notification process, but in some circumstances, that is not feasible or idea, thus such flexibility adds to the strength of the overall process.

**3. What does "GRC" stand for on this slide?**

**Answer:** Governance Risk and Compliance

#### **4. What is "ERP"?**

##### **Answer from Dan Cooperman (Oracle):**

- Enterprise Resource Planning (ERP) refers to the collection of business applications and solutions needed to run your critical business functions (i.e. HR, Finance, Customer Relationship Management, and Business Analytics). From Oracle, these include Oracle E-Business Suite, PeopleSoft Enterprise, Siebel, JD Edwards World, and JD Edwards Enterprise One.
- A detailed summary of these applications can be accessed here: <http://www.oracle.com/applications/home.html>

#### **5. What impact does DOD certification have on eDiscovery, compliance...etc?**

**Answer from John Patzakis (Guidance Software):** As "DOD Certification" is a varied term, I am not clear if the question addresses, for instance, Department of Defense (DoD) Common Criterion Certification for Information Technology utilized in the eDiscovery process, or perhaps is in reference to the Information Assurance requirements for organizations under DoD reg 8570.1.

If the question applies to Common Criteria requirements, there are technologies available on the market that both meet common criteria requirements and are utilized for eDiscovery or other forms of compliance investigations. For instance, EnCase Enterprise is currently in the process of Level 2 Common Criteria Certification.

If the question applies to Information Assurance, there are a lot of interesting issues here. First, if DoD information assurance mandates actually conflict with the production of certain relevant electronically stored information ("ESI") then there is a potential argument that such information is "inaccessible" as defined under Rule 26 of the Federal Rules of Civil Procedure, as amended. Some courts and commentators have suggested that data protected by privacy regulations may render such data inaccessible under Rule 26, and thus an analogy can certainly be applied to national security data. Please send me an email at [legal@encase.com](mailto:legal@encase.com) if you would like me to provide those cites.

Secondly, and on the flip side, an established eDiscovery and records management process can also be utilized to help comply with such DoD information assurance requirements. For instance, one major federal contractor we work with also utilizes their eDiscovery search and collection technology to perform proactive data leakage searches to identify and remediate classified data spillage, as required by DoD reg 8570.1.

#### **6. What is the definition of "Record," and where does this definition come from?**

**Answer from Alice Lawrence (Jordan Lawrence):** Recorded information that has on-going business, legal, operational, compliance or historical value, in paper or electronic form (including microfilm, microfiche, photograph, map, computer disk or tape, software, video, audio, or other recorded information), originated or received by the Company, which the Company intends to retain as evidence of its business operations and activities.

**7. *Have you identified tools that help your company move away from piecemeal and towards holistic approach?***

**Answer from Dan Cooperman (Oracle):**

- It is tempting to take a quick ad-hoc or project-based approach to compliance requirements in general and certainly to records and information management--whether these requirements are mandated by external governing bodies or by our own internal initiatives. With a piece-meal approach to addressing records and information management, it would be difficult to gain an overall understanding of the risks our organizations face or the to identify the opportunities to build business value. In the long run, we end up with complex and inconsistent processes that make it difficult to address the next new requirement that comes along.
- To effectively address records and information management and really Governance, Risk and Compliance in general, counsel and IT should consider taking a holistic approach. So many facets of Governance are intertwined and for the organization that looks at Governance initiatives in the sum, and not the pieces, will ultimately do a much better job of infusing policy into technology and leveraging technology to meet compliance and business objectives alike.
- [http://www.oracle.com/solutions/corporate\\_governance/governance-risk-and-compliance-business-brief.pdf](http://www.oracle.com/solutions/corporate_governance/governance-risk-and-compliance-business-brief.pdf)

**8. *What is the difference between content and a record?***

**Answer from Dan Cooperman (Oracle):**

- First, as I am sure most of you would agree, not everything is or should be treated as a record, subject to formal records management policies. Second, and this is the gotcha, while everything is not a record, everything you have is subject to discovery. So it is critical that you understand this difference and apply an aggressive retention and destruction policy to get rid of non-record information that provides no useful benefit to the organization, as soon as possible.
- Given a records and information inventory, and a definition of what is, and is not a record, legal and IT should, develop a clear understanding of the organizations current technology infrastructure, clearly define legal and compliance requirements of technology for records and information management, identify parallel initiatives like information lifecycle management, and it is also important to identify other initiatives underway that are being driven by the business. This is the perfect opportunity to gain leverage from corporate governance requirements.

**9. *Do you have an example of an in-house litigation hold notice/memo?***

**Answer from Alice Lawrence (Jordan Lawrence):** Jordan Lawrence does and will share an example of a "litigation hold notice", please contact Marty Provin at [mprovin@jlggroup.com](mailto:mprovin@jlggroup.com) or call 636-821-2250.

**10. What is ESI?**

**Answer:** Electronically Stored Information

**11. The litigation hold process seems most effective once you have already assessed your current records keeping system. What would you recommend in the interim for a company that starts an assessment process today and then needs to impose a hold before that is complete?**

**Answer from Alice Lawrence (Jordan Lawrence):** Jordan Lawrence's assessment process is typically completed in 45 days, should the requirement to execute a hold occur prior to completion, counsel would have to determine the appropriate action.

**12. Any comment regarding legal hold notification to a non-party to the suit?**

**Answer from John Patzakis (Guidance Software):** The duty to preserve computer information can certainly apply for non-parties. The Federal Rules of Civil Procedure, as amended, specifically Rule 45, provide for third party subpoenas seeking electronic evidence. Non-compliance of a third party subpoena can result in sanctions and even contempt of court penalties. Additionally, courts have extended the affirmative duty to preserve evidence to instances when that evidence is not directly within the party's custody or control so long as the party has access to or indirect control over such evidence. See, *In re NTL, Inc. Securities Litigation*, 2007 WL 241344 (S.D.N.Y. Jan. 30 2007); and *World Courier v. Barone*, 2007 WL 1119196 (N.D.Cal. April 16, 2007))

**13. Is there a source for best practices for retention policies, especially relative to litigation related documents?**

**Answer from Alice Lawrence (Jordan Lawrence):** Jordan Lawrence provides best practices and benchmarking data for policy and supporting documentation.

**14. Will panelists talk about their experiences (and observations of other orgs) being proactive v. reactive in records retention? Do you see that corps still require some "burn victim" or critical event before they become proactive?**

**Answer from Alice Lawrence (Jordan Lawrence):** The amendments to the Federal Rules of Civil Procedure really necessitate that companies take a proactive approach to at a minimum their map records and information and define processes for suspending destruction of information.

**Answer from John Patzakis (Guidance Software):** Human nature being what it is, there is always a reactive element that motivates many companies. However, over the past year we have seen many companies proactively put a process in place in response to the new amendments to the Federal Rules of Civil Procedure (FRCP), which effectively mandate that a large organization establish a systemic process.

For instance, one of the most important aspects of the FRCP amendments is that they direct attention to electronic discovery issues early in the litigation. The new rules require that relevant electronic evidence be identified, preserved and disclosed at the initial outset of the litigation, thus necessitating, among other requirements, an effective process to meet these preservation obligations. The Committee Advisory Comments to amended FRCP Rule 26(f) provide that: “failure to address preservation issues early in the litigation increases uncertainty and raises a risk of disputes,” and the Comments to Rule 37(f) – the so called “Safe Harbor” provision -- discuss the necessity of an effective litigation hold capability to preserve data at the outset of a case.

In response to these very meaningful and impactful requirements, many companies have not waited to be burned by a critical event they were not prepared for.

**15. *How is a company able to do an overall assessment of regulations and the time periods required by each for retention?***

**Answer from Alice Lawrence (Jordan Lawrence):** Jordan Lawrence provides these services through the ACC Alliance program.