

INFORMATION REQUIREMENTS

CLEARINGHOUSE

303-721-7500 -- sales@irch.com

The Dangers in Failing to Manage a Records Retention Program

by Donald S. Skupsky, JD, CRM, FAI

Thank you, Andre, and thank you for all our guests who are on the phone. We actually have an international audience today, and I look forward to talking with all of you. Unfortunately because of the amount of content we have in today's program and the number of participants that we won't be able to take live questions, but please after the session is over. You have our email. You have mine on the first slide, and you'll have Andre's at the end. Please contact us with questions. We will be happy to answer your questions, normally at no charge. I know most consulting firms don't do that, but we do. That's been our hallmark from the beginning.

Today's topic is going to look at a variety of different issues. I wanted you to first get an idea of what I am going to cover. First, I want to make sure we're on the same wavelength. I know many of you know what a retention program and why we do it, but there's some key points I want to bring so we can better understand the problems of failing to manage that retention program so we have a consistent understanding of that.

Then if we have time, which I am expecting, I want to bring in 2 other topics that relate to this topic, and one is managing retention program for an international organization. This has come up over and over, and it's a question, should we manage retention for everybody or should we just manage it for a segment of our organization? We'll explore that question.

Then we've gotten this issue of big data. I've gotten so many questions about keeping everything forever so we can research it forever. I want to make a few comments related to that, because this also is a question of not managing your information, keeping it forever, and not applying retention and what the impact of all of that is. All the topics do have some relationship, one to another.

What is a retention program? The way I describe it is it's a component of a records management program that systematically determines the appropriate period for preserving the records and controls the destruction of the records at the appropriate time. Notice both the components are systematic. There must be a standard way of doing things. It must be documented. It must be consistent. Those are all part of the idea. What is a full records management program? That's going to consist of managing records from creation through maintenance and disposition, standard definitions of what all these things are.

Thus, what are the components? What do we have to deal with? Of course, the records retention schedule, identifying what records are to be kept and for how long, the procedures for implementing that schedule, the process of destroying records, what sort of documentation we maintain related to destruction of records, and some sort of compliance with the procedures that may include training. People have to know what it is they need to be doing, and then there is a fighting chance that they will in fact do that.

Audit is something unfortunately that's missing in many programs. Audit confirms that the program works the way it's supposed to. You can have your auditing people do this. The records management people could do it, but there needs to be some independent confirmation that your procedures are being followed, similar to audits that are done in your HR area, in your accounting areas, and other areas of your organization.

We need some sort of coordination with legal holds, as I describe it in other seminars. We basically try to establish a retention program for everybody, and we want to make sure that everybody involved is participating in it. When there is a legal problem, we want to make sure that legal holds are managed properly within the organization.

Okay, next. Why establish a records retention program? A records retention program, of course, will save us money. Cost savings is extremely important and was a key in the paper world. A lot of people are claiming in the electronic world, we don't have the same types of issues. I'm not sure that's true. We'll talk a little bit about that. Legal compliance is a key reason for establishing the retention program. It ensures that records that should exist do exist, and records that should have been destroyed are in fact destroyed, but it also is a key element as we get into litigation.

Litigation protection is very much misunderstood. There are a lot of litigators, these are plaintiff's attorneys typically, who believe the goal of a records retention program is to make sure that harmful records do not exist. This is an untrue statement, even though they've repeated it in their conferences and their literature. A records retention program cannot determine what records are helpful in litigation and what records are harmful, because you never know what the issues are and retention takes place well before the litigation begins. It's neutral in terms of whether it's helpful or harmful, but important for a variety of reasons which we'll discuss shortly.

Improved access to information. You get rid of the junk and we can get access to the good information of our organization directly. We can make sure we are using only the most current information and not being distracted by outdated or replaced information.

Okay, so now we get into the main topic of today's program. What are the problems related to retention if there are program failures? That something goes wrong, you don't have a program, you don't implement it completely, something can go wrong. What are some of the problems you're going to have to deal with?

The first sign of failures in the retention program, that means that records that should have been destroyed are not destroyed, thus we have this huge accumulation of what I'm going to refer to as junk. Some of you may be offended by my use of the word junk, but junk is basically material that has no value to your organization. You throw it in the trash can. Day in and day out as you get your snail mail from the post office or even as you wade through your mounds of email, you'll make quick decisions that most of this is junk and you'll discard it very quickly. The same is true with information that was once important but is no longer important. It's now no longer useful to your organization, and I would classify it as junk. Junk is a cost. Junk is a distraction. Junk is a problem. I would strongly recommend you deal with that.

Unmanaged information. If you don't apply principles of records management and records retention, you end up with huge amounts of unmanaged information. This has been the problem with email, which is one of the topics of the previous webinar, where there was huge amounts of information that is found in your email system that is typically unmanaged. Some of you are a little more organized than others. You will create folders for important information. You will create rules that will transfer important information to certain folders. When you receive information in particular and sometimes when you send it, you will also preserve the information in appropriate shared folders. All of this is pretty much informal.

Most organizations have not yet evolved to a formal email management system, so we still have huge amounts of information in organization that are unmanaged. Without a retention program to get rid of the junk, we end up with more unmanaged information because one of the things a retention program does is preserve identifiable records or certain identified records within the retention schedule, and make sure we can eliminate the rest because they are not records of the organization, records we have to maintain.

The more junk we have in the system, the more unmanaged information we have in the system, creates an inability to find information we need, or even if we can find it, it takes longer and we are sometimes not certain we have the best version, the final version, the official version of the record. All these things do add up and create problems for us in managing our records. Retention plays an important role in accomplishing all of this.

I have been in a situation in a number of expert witness cases where I have been asked to introduce evidence of a retention schedule and indicate the retention program functions within an organization, or by the way, just the opposite, to critique a destruction of records and indicate that it was not done under a retention program and what were the problems.

Here's generally the process I would follow in introducing a retention schedule into evidence. First we want to introduce the retention schedule from the period in question. If the litigation relates to a matter that occurred in 2008 to 2010, we want to introduce the retention schedule from that period, and actually probably just the prior period. 2007 would have established the retention program that would have been in existence in 2008 when this matter first arose. An earlier retention schedule would have covered the disruption of certain types of records, and therefore, it would be important to

identify which of the retention schedules are in question and make sure those are the ones that are introduced.

The retention schedule procedures, what it is we were supposed to do. Now my slide does not include in the procedures training, but training is the knowledge of those procedures transferred to your employees. The procedures need to be understood by the employees to be implemented. Otherwise, they won't do what you want. Employees left to their own discretion don't necessarily do the same thing, nor do they necessarily do what the organization wants them to do. But with proper training and direction, employees are happy to participate in a retention program. In fact, they would rather be told what they're supposed to do than have the responsibility on their own shoulders.

I have this discussion with many organizations as we develop programs. They question whether a department needs to sign off on it, and it needs to be responsible for it. My experience is that the retention program is for the organization. The organization is responsible for it. The organization will tell people what it is they need to be doing. Most people are absolutely thrilled to be told what to do, that therefore the responsibility and the consequences of that action is not on their shoulders, as long as they do what the company has asked them to do.

We need supporting legal research. It's amazing how important this has been when I have introduced a retention schedule into evidence as an expert witness and in live testimony, a deposition, or even in one of my expert reports. Supporting legal research is extremely important to show that you systematically did legal research to support your retention conclusions. You didn't make up the conclusions. You didn't guess at it. It came from some objective source.

As you may be aware and I did talk about this in our last webinar, Information Requirements Clearinghouse believes in full legal research. We believe in showing all the research, compiling it all, and then making conclusions. Legal requirements, which are those laws that establish specific retention requirements for which you must comply, should be followed. By showing what those requirements are, you can show that the retention period was based upon a strong legal basis.

We also recognize there are 2 subjective values, which are legal considerations like statutes of limitation, as well as user needs, how long users need the records to do their job. Both important values that need to be cataloged, but these are subjective. Different people can reach different conclusions. The legal requirements are objective and therefore create a quasi-standard for records retention. The supporting legal research is a very significant document demonstrating that the retention schedule was taken seriously by the organization, and the retention schedule was based upon something objective and not just subjective opinions.

Consistency of retention. People look to see if comparable records of different parts of the retention schedule are handled the same way. It is very difficult to explain why contracts are kept 6 years after they expire in 1 department, 10 years after they expire in another, and 22 years after they expire in a third. Contracts should be kept for the same period. In fact, all comparable records should be kept for the same period, unless there's a very compelling reason why they should not.

One of those compelling reasons, for example, should be the designation of an office of record. Office of record indicates where the official version of the record is, and they get the full retention period. Everybody else has copies. They may be listed on the retention schedule but those records in a certain department that are copies are only copies and have a much lower retention than the official retention of the office of record.

Implementation. The program must actually be in place. This could be done by testimony. It could be done by confirmation of the audit that the program did in fact take place and people were following it. You need some sort of documentation of destruction. Failure to have that makes it difficult to show you actually destroyed records. There is no standard, no requirement, on what the documentation should be, just some evidence indicating that the records were destroyed.

For example, documentation in the paper world of a box of invoices could indicate box 1234, invoices from May through June of 2010, have been destroyed, or whatever the year was. That is sufficient. Of course, you don't document every piece of paper. In the electronic world, it's even more difficult because we have a group of documents that were destroyed. Therefore, the practice probably needs to identify on this day that all documents of a certain class that corresponds to the retention program were destroyed, but you don't have to, of course, identify every document. Otherwise, you'd be maintaining a huge amount of information.

The key to this presentation is that we have documentation of the retention schedule in place of testimony. You can show a retention program existed in 2005 based upon the documentation from 2005 without introducing the records manager for that time, employees for that time, into evidence. They can testify if they're available. People can testify that they participated in the retention program, but you could prove the retention program and its credibility and accuracy through documentation, if you've established a good program and you have the types of supporting information I've described on this slide.

Now what do you do if you don't have a retention program? How do you present evidence of the destruction of records? To be facetious, you would probably testify as follows, "Um ..." How are you going to explain the destruction of records from 2005 without documentation of a retention program? Where did the records go? Why are some records missing? Others are in existence.

Of course, the other party in litigation is going to come up with all sorts of reasons why that occurred and none of them are going to be favorable to you. There is really no way of explaining a destruction of records without a retention program. Therefore, the most important part of a retention program is having the program. I've identified the types of components I would like with such a program that can help you explain it. The most important failure of destruction of records without a program is your inability to be able to explain what transpired.

What are you stuck with if you don't have a retention program? How do you explain the destruction of records? Who will explain it? The employees who worked at that time, they don't remember. Your

records managers have moved on, if you had one at that time. Nobody remembers exactly what you did. Certainly nobody can remember destroying a certain record which is pivotal in this case.

In fact, even with a retention program, let's go back to my example of a box of invoices. If these were invoices 100 to 200, there is no way you can prove that invoice number 123 was actually in that box and was actually destroyed, but by having a system, we can infer by the systematic destruction, the consistency, the retention program, the audit, confirmation that invoices 100 to 200 no longer exist anywhere, that invoice 123 probably was destroyed.

Without a retention program, there's no way you can explain the missing records. What information or documents are available to support your testimony or that testimony? There won't be anything available to you without a program. Without a properly implemented program, the materials you might have are very sketchy and you cannot necessarily confirm that things happened the way they were supposed to happen.

How do you show compliance, that records that should have been kept were in fact kept? Regulatory agencies issue all these regulations, and they expect you to follow them. When you do a regulatory audit, they want to make sure that you are in full compliance with their requirements. In case you are not certain why they have all these regulations related to recordkeeping, the answer is simple. The regulatory agencies expect you to keep records of your regulated activities. They will then come in and review what you did, based upon the records you kept.

Your failure to keep records for the right period of time does not allow them to do their regulatory function. They get upset with that, and they impose fines and penalties as a result. It is not, as some people expect, that the regulatory agency periodically comes in and looks around and sees your activities, and then determines you're in compliance. If they come to your office, they're looking at your records that you are required to keep under the regulations. If you don't have a retention program, you don't know what it is you're supposed to keep and how long you're supposed to keep it.

How do you explain missing records in litigation or a government investigation? You have no ability to do that. The key here is that, without a documented retention program, you need to provide persuasive live testimony of individuals. You have no documentation to be able to prove what you did. Live testimony in this field is nearly worthless. You getting up there and saying, "Oh yes, we destroyed records systematically on a retention program." Of course, the next question is, "What was that program?" You will say, "Oh, we kind of followed some rules," whatever they may have been. You need documentation of a program, and of course you need that program.

Then we get to the legal compliance issues that I started talking about, without legal research for retention. Every retention program needs to have legal research to identify the laws that affect the records and how long to keep it. You don't know what records to keep and you don't know how long to keep them. Otherwise, you're just guessing. A retention program actually goes beyond identifying what records can be destroyed after a period of time, and also confirms that certain records need to be kept and the period of time they need to be kept by your organization.

Failures in compliance are going to result in fines and penalties and loss of rights. A regulatory agency can shut you down. In the environmental areas, if you have a manufacturing site with smokestacks, you are not keeping records of your emissions, they are going to shut you down. That means your entire business is stopped because you are assumed to be polluting the air and you have no confirmation you're in compliance with air pollution laws or Clean Air Act. Therefore, they have no choice but to do this.

Fines and penalties can cost your organization a huge amount of money, and then they in turn come up with some sort of agreement with you to allow you to keep operating, but you will have additional responsibilities that you normally would not have had if you had been in compliance all along. All in all, it's a bad practice not to have required records, and you need a retention program to know exactly what it is you're supposed to have. If you don't do the research, you don't know what it is you're supposed to be doing.

It's only through the legal research that you have the answers. Now of course, you don't have to do it, but somebody competent needs to do it. To just turf it off to your law firm to give an informal opinion is not sufficient in my opinion. You need substantial information that could confirm you have a program, confirm the legal research was complete, covered all the jurisdictions, all the types of records, in order to be able to make a strong case if you're ever challenged.

The other area is litigation. If you don't have a retention program, litigation holds become very troublesome. As you know, in litigation, if you get a subpoena or even if you get notice of a litigation, relevant records may not be destroyed until that matter has been solved, regardless of what your retention program says. On 1 side, you have a retention program which is identifying records that can be destroyed after a period of time. On the other side, you have legal holds that stops the destruction of records even if the retention period is up.

When the matter is over and the legal holds are removed, then if the retention period is up, the records can immediately be destroyed. Without a retention program, without this systematic destruction of records, the holds cover a huge amount of documents, cover all your junk emails, all your junk drafts, all your desktop records, all your servers, all your backups, all your big data systems and your data mining systems. Everything is a potential if it is relevant to the litigation. The fact you elected not to manage your records properly, not to destroy them in a timely manner, is your problem.

Discovery. To look in all these places costs you money and disruption and time. My experience so far is this type of discovery typically does not undercover a lot of smoking guns. We've seen the dramatic television shows about the smoking guns. Most corporations are trying to do the right thing because they consist of people who are trying to do the right thing. We do know that there are rogue corporations who do engage in illegal activities, but that's not the norm. People are trying to do the right thing as best they can with limited resources.

When you get a discovery request, all bets are off. You have to respond to that discovery request. You have to do the full search. You have to produce the records. It's great cost, disruption. It's an

unpleasant experience. When you turn the records over to the other side, in most cases, the smoking gun doesn't exist. The other side is not getting the documents that win their case. They have met much information already that support their case or they wouldn't have started the litigation from the beginning.

Occasionally they find something, but in most cases, discovery is just a cost to the organization. It's trials and tribulations you have to go through in every lawsuit. The more records you have, the more recorded materials you have, the more junk you have, the higher the cost. A retention program gets rid of the junk, lowers the cost of discovery.

Then we have adverse consequences. If you have inappropriately destroyed records, even before litigation, in contemplation of litigation, to cover up wrongdoing, or even worse, while litigation is in progress, even though the records are not so relevant, you could lose the whole case. There's a documented court cases where the parties have lost the case outright for the improper destruction of records. More likely, you'll lose on an issue. If the records had existed and we find that they were improperly destroyed, then you might lose on a particular issue that you cannot defend yourself. I have seen this occur in an arbitration. You need to be really careful.

Even if you don't lose the case or you don't lose on a specific issue, if you said that you have managed records or it's found that you have improperly managed them or improperly destroyed them, it raises doubts about your credibility as a whole. You lose credibility on the records issue. You also lose credibility on your substantive issues. If it shows that you have sloppy practices, nobody can rely on your records, some exist that should not have existed, others exist that should exist, there's no consistent retention schedule, we might have a schedule but it hasn't been implemented, there's no confirmation of accuracy, et cetera, et cetera, you lose credibility. You haven't done this task very well.

However, I have found, if you have a program, you have all the records, fully supporting your position, it is a slam dunk. The other party is dumbfounded. They don't know what to do about it. In fact, just recently, won an arbitration on my expert witness testimony because I had everything lined up to support a retention program that was totally credible, totally defensible. The other party was left with nothing. They actually settled outside of court.

Okay? That's that whole topic. The answer is have a retention program. Implement it. Give it the proper amount of resources. In the long term, it's going to save you money. It's going to save you trouble. It does require some work, but it's worth doing.

Moving on to the next topic, the international records management program. Some of you who don't deal with international issues can generalize this of how broad your program should be. Should we do everything? Should we do part of it, et cetera? Where does the international program come in? Its applicability is if you have offices outside the United States and Canada, you're doing business outside the United States and Canada, so some people are doing business but they don't have offices, or you're a foreign country, a company doing business in the United States.

Which laws do you follow? How do you get all your offices in different locations to follow a consistent retention schedule? In this case, they're in different jurisdictions, therefore they have different requirements. Similarly to an organization in the United States, you may have multiple jurisdictions that you have to comply with. The question is which jurisdictions do you comply with, and the answer is all of them. They are laws. There are laws in all those jurisdictions, and you're required to comply with all of them.

What's the interest then in the organization? That the organization wants to comply with all the country laws, and they want all the country offices to comply with the retention. Every jurisdiction, every location, they want to be complying with the requirements that that jurisdiction has to follow. Please remember, if your office is in the United States, and you have an office in Switzerland, for example, United States office has 1 set of rules and Switzerland has another set of rules. There may be some overlap, and I'm not going to get into all the details where there's overlap.

I'll give you at least 1 example. If, for United States tax purposes, the Department of the Treasury, IRS, wants to tax revenue related to United States business. If the business solely takes place in Switzerland or some other country, the United States cannot tax that transaction. However, you need to be able to prove in the United States what business was in the United States and what business was done in Switzerland. If IRS has no other evidence of where the transactions took place, they will want to claim that all your business is taxable in the United States.

You don't want that to happen necessarily, and therefore you will want to have good records to show that a certain number of transactions took place in Switzerland. Of course, the Swiss taxing agency wants to make sure they're getting the revenue for transactions that took place in Switzerland. They will want to audit those transactions, and will expect those records to exist in Switzerland. They're not traveling to the United States to audit Swiss transactions for an office in Zurich. These are the interests of the regulatory agency and things you're trying to work through.

Here are some of the problems with international legal research. The first and most obvious is language. With all the languages of the world, there are laws out there in those native languages. That is the language of the law. I don't speak those languages. I speak English and I understand English, but I don't understand the law in Spanish or Chinese or Japanese or French. There are people who do, but if I'm asked to interpret all of those, I'm going to have great difficulty.

I'm going to look to English translations, as we do here at Information Requirements Clearinghouse. Our international law database is based upon English translations. That's all we could deal with, but a translation is an interpretation. It's not the official version of the law. It's not what the law really says. It's what an interpreter thinks it says. Therefore, it may be correct and hopefully it is, but it may not be. You're already dealing with an interpretation when you don't deal with the native language. If you're going to deal with legal research around the world, that becomes a huge problem.

Legal research, it's difficult to find all the laws, so the main law research services in the United States, Lexis and Westlaw, only have a very limited set of English translations of foreign laws. They have some

laws in their native language, but not very much, not a full set, not a lot of jurisdictions. Where do you go for that information? We'll talk about that in a second, but you can't go to the normal legal research sites. For those who prefer to do their legal research online, you have great difficulty finding it.

Of course you're going to want to work with English translations. Of course if you're fluent in another language, you can probably work with the law in that language and maybe use the internet to find a law in that language, but you're limited on countries. If you speak Spanish, you don't speak French and you don't speak Chinese or Japanese. You do have difficulty in assembling all the legal research.

Interpretation, how do we understand law in those countries? What is a statute of limitation? How is it understood in that country? In the United States, we have a general understanding, and that's the same in Canada, but in other countries, they may think of it differently. They may think of records retention differently. They may not view retention laws as enforceable. They may view it as just guidelines. There are many differences in understanding of laws. Unless you are knowledgeable in all of that, you have great difficulty dealing with that.

Custom and practice is the phrase that I've coined that, considering everything about the law, what do people really do? In the United States, and I mentioned statutes of limitation, years ago, some people thought it was a requirement. I've done a lot of research. Others have done some research. Now it's commonly understood it's not a requirement, although some organizations, especially in the public sector, want to treat a statute of limitations like a requirement. It's not a requirement, just a period of time you can sue or be sued. That will influence a retention decision, but I view that as a legal consideration, not a legal requirement, not something you have to do.

We understand how to deal with that in the United States. I don't know in Germany how they view such issues, or in France, or in Switzerland, or elsewhere in the world. Of course, once you get out of the free world where there are democracies, we get into the communist world and the dictatorship world, where custom and practice has nothing to do with written law. Custom and practice is whatever the local thug tells you to do, whatever the dictator tells you to do. That is what you do if you want to do business in that country.

That again has nothing to do with custom and practice. There are people in those countries who understand that custom and practice, but we here in the United States who live in a democracy based on law have difficulty dealing with all of that. We certainly would have difficulty researching the laws in those countries, when in fact the law didn't matter, because the dictator would do whatever he or she wants.

Sources of legal research in the international arena. We do have some international law firms who have offices throughout the world. They will do research for you, extraordinarily expensive as you might imagine. They're reluctant to give you the full text of the law. What they often want to do is give you an opinion. The opinion may include some citations, but if you want to compile all the laws related

to all the jurisdictions where you're doing business, you're going to have great difficulty. We can do this in the United States. We can do it in Canada. We have great difficulty doing it in other countries.

Also, you should be aware there are some services that can help you. Many of the services, all those that I've looked at, have a limited scope of legal research. None are complete. Some that have researched a country thoroughly may have done it 2 years ago, and you need the most up-to-date laws. Therefore, you would need to pay extra to have an update provide you with that type of information. It too is expensive, not as expensive as the law firms, but pretty expensive, and it's difficult to manage and update because now you're going to have thousands more laws.

Our typical retention schedule in the United States for an organization doing business in all 50 states and territories, US federal, let's say is about 3,000 laws we have to consider. If you add Canada into that, maybe there's another 1,200 or so laws that typically would have to be considered with the Canadian provinces. Then you start building up the numbers as you go into the other countries. This one has 500. This one has 200. You can imagine the amount of laws you're accumulating that you need to manage and keep up-to-date on a regular basis, all pretty difficult.

I'm going to give you 2 options. One option is the central management, for those who want to be in control of the entire retention program. Let me give you the description of that. You compile the legal research. You're going to have to deal with the English translations because you're not knowledgeable of all the languages for the retention laws in all the countries in which you're doing business. You need to apply ... That could be thousands, if not tens of thousands, of laws. You apply the legal research to your records. You're going to find that there are differences, huge differences, in some countries.

I had mentioned Switzerland. It's the one I remember. In the United States and Canada, the legal requirements for accounting tax records is 6 years from the end of the fiscal year. For Switzerland, it's 10 years. Other countries, there are a few that are up to 15 years. Traditionally, in retention, we follow the longest requirement. When you get into this international retention, you might want to separate the schedules by country, so that means you've got multiple schedules to manage with different retention periods and perhaps different record series, or you want to have a main rule that just about everybody follows with a few exceptions that there are differences based upon the legal research in certain countries.

You can, if you want, develop retention schedules for all the countries separately. There are many attempts that people have made and there's still made. You got to keep then the schedule up-to-date and make sure there's an update on the legal research as there are changes in those countries. The problem of doing this is the cost, astronomical, hundreds of thousands of dollars to compile the legal research, costs related to your resources, the number of people you're going to have to dedicate to this task to make sure you have all the laws, you're making the decisions, you understand the records in every one of those countries.

The problems I mentioned before, the English translations, and the custom and practice, your interpretation sitting here in the United States is not necessarily what they'd think. Now you want to have a complete retention program because of all the reasons I gave before, why you want a retention program, why you want to be able to explain it, et cetera, but there are some practices actually in the international arena that you can't deal with very well. That is privacy.

In the international arena, we have international privacy laws that restrict retention. Sometimes it's less than the minimum, the United States and Canada. For example, in Europe today, there are requirements that you cannot have certain personal identifying information, even of your employees, for more than 5 years. In the United States, based upon conclusions under the law, you probably have to have that information for 6 years or longer. A retention period of no more than 5 or at least 6 is incompatible and is near impossible to manage in 1 consistent scheme. Therefore, this is going to force you to make some changes by country.

All in all, even though we have our own international law database, we actually recommend option 2 to most organizations. I call it the US-Canada only retention schedule as a nickname. What's its description? You develop a US retention program or a US and Canada retention schedule. The United States and Canada are both blessed with a large number of laws. Unfortunately I think Canada may have been influenced by the United States too much on this issue, but they also have the same fundamental principles as the United States. They can't punish somebody under a due process type concept unless they've been put on notice of what it is they're supposed to be doing.

Therefore, they have a large number of laws, both on the federal and the provincial level, but except for 2 health and safety areas that I remember, basically Canada and the United States come out about the same for a retention schedule, so you can easily blend those 2 together. You could establish the US and Canadian schedule as the standard or the minimum for other countries to follow. Provide that schedule then to the legal counsel in the other countries, so they will use the United States or the United States and Canada schedule as their minimum schedule. If they don't have one, that's the one they follow. Makes it real easy. You don't have to know what all those laws are. That is the minimum they will follow.

Now I do recommend that the laws are reviewed in those other countries, and the other countries can add on to the retention and keep the records in their country. For example, if the accounting transactions in Switzerland need to be kept for 10 years, they will add on 4 more years to the normal US 6 years, and keep their accounting records for 10 years and keep them available in Switzerland so they could be audited.

What's the problem with my approach, which is my preferred approach? You have no central retention schedule. You don't know what everybody is doing. You have no involvement in other countries, other than you send them the retention schedule. You're not keeping track of every change they make, what the retention period is, et cetera. You may work with them, consult with them, gather some information, but you're not systematically maintaining 1 retention program.

You have a US-Canadian program that you're maintaining, because that is also, in the world, the place where you have the highest level of interest in retention and the most regulations and requirements. The rest of the world, by the way, is not as concerned about retention as we are in the United States, although there's a growing interest in this area, but you are allowing your other offices to maintain their own retention schedule, based upon the US, perhaps with some add-ons, typically not less than that, unless there's a privacy law conflict. You and others will periodically confirm they're doing what they're supposed to, but you don't manage it centrally.

What is the advantage? The US and Canadian retention program is very reasonable. We're used to it. We know what the values are. They're pretty common. They are typically no more than the rest of the world would do. The rest of the world may have some longer periods, or they don't have retention in certain areas. It's a good starting point. The retention would still be followed in other countries as the minimum level, so other countries will follow this as a standard, but your costs are significantly lower. Your resources, you don't need this huge amount of research. You're not paying a huge amount for the legal research and the management of all of that. This is why I suggest this alternative practice.

I want to close out today with another related subject and that relates to big data. Big data basically is a new phenomenon that is growing about keeping records forever. Let's keep everything forever, keep all our data, all our databases. Don't apply retention. Don't destroy it. Don't manage it so much. Just keep all this raw data, and if it is managed and indexed, we'll keep that in metadata also. Make it available then to the organization in the future to do any type of legal research they might want to do in the future.

This is advocated by some people as adding great value to the data, allowing us to use it in the future, created great economic opportunities for our organization. They want the big data for research and data mining, advantages of what they can learn from it. In some cases, they don't know what they're going to learn. My nephew was hired by a large insurance company to do legal data mining within their data, not for insurance purposes but anything of value in trends they may be able to determine of new directions for that particular company.

There's a similar trend to not manage unmanaged information. It's too difficult for the IT people and the vendors who are selling systems. Please remember where my critique is on the IT and the vendors. It's too difficult for them to manage information, at least that's what they're saying. It requires people to do too many things. The vendors hate the management of information, because in order for them to be successful in selling the system, you got to set up this, you got to set up that, you got to do training, you got to do all these types of things. There is some movement among some vendors to not want to management the information but sell systems that will hold this unmanaged information. By the way, there are some IT people and some vendors who do get it and do understand that managed information is in the best interests of the organization.

I'd like to thank Karen Samson, who is an associate of ours, who we've done a lot of work with in the past, who's her own consultant also, who pointed out an article to me. It's called Retention and

Disposition Policies Could Soon Become Irrelevant. It was in May 20th, 2015. It's quoting a person who I have not yet met, Mark Barclay Bit Blair from ViaLumina Company. He's the founder of information governance. By the way, this topic falls in the domain of information governance. Should we govern the records? It was in one of the health journals, but we can probably find similar articles elsewhere.

Let me quote you some of the stuff he said. "The powerful irony is that this is the world as it exists. No organization of any kind is getting rid of information. The people who matter in organizations don't believe in retention schedules, don't trust them," Blair said. "We went from a world well we were accidentally keeping things forever, and now we're doing it intentionally."

I can certainly agree with him in the newer companies, the high tech companies, the startup companies, especially those in the last 10 years who are really not interested in records retention and management of information. I find this difficult to accept in the older companies, the utilities, the railroads, the petroleum companies, groups like that that have been managing records for decades. I don't believe they necessarily think the same way, but we'll accept that there are organizations moving in this direction of unmanaged information.

He goes on and say, "Give me credit. I understand all the importance of privacy and records retention. The question is, are these concerns going to slow down the train? I see no evidence that it will. I literally think we're moving to a place where it'll cost more to get rid of it than keep it." I present this as the trend that contradicts everything else I've talked about in today's session, of properly managing records, applying retention, et cetera, that there is a trend to keep big data, keep everything forever, for future research purposes. Whatever happens will happen, and we understand the values of records retention, as he's saying, but that's not as important as this other goal.

I have a response to that. In the last few minutes, I'll give you my response. Keeping everything forever has been a disaster, and will continue to be a disaster, in terms of cost, litigation problems, regulation problems, information management problems. We were there 35 years ago. Keeping everything forever in case we're sued. Those organizations were sued, and they really wished they didn't keep everything. Not because the retention program will cover up wrongdoing, but a retention program will get rid of the junk, reduce the volume of records. Then when you need to review those records for litigation, discovery, for regulatory purposes, you have what you need for the right period of time. It's a much less expensive and troublesome process. However, if you had everything, can you imagine what it would cost in discovery?

Big data, as I said before, is advocated by some IT people and vendors. It's too difficult for them to get people to do anything. It's easier to sell and implement big systems and people have no responsibilities. Every time we make people conform to indexes, into an electronic document management system that has rules and standards and ways of doing things. Some of the most popular, I wouldn't even call them electronic document management systems, they are a step up from a shared server by one of our largest companies, not to be named in today's program, but they basically offer a glorified shared server. Most organizations and the IT people with them love it because there are no

rules, no requirements. Those of us in records management are horrified by this. Rules can be applied but we have to assert ourselves.

The proper management and retention of records is crucial to protect an organization. I've emphasized this over and over. By the way, we expect pushback. It's a normal part of implementing any good procedure instead of doing nothing. We have found this in email, where we never asked users to do anything. We found this in electronic records, where we've never asked users to apply retention or systematic managed records. We have allowed them to put records in shared servers without retention periods and proper management, and given them huge discretion. As we change those, there is pushback. I discussed that previously in a previous session on email, that there will be pushback when you ask anybody to do something with their email system. The reality is we need to do that to properly manage records.

In summary, while people would like to manage everything that they're dealing with and have total control over all the records, all their data, and things like that, there are areas where advocates want you not to manage, to keep stuff, forget about retention. I believe they're wrong. I believe proper management is the way to go. I believe it is doable. It is the most responsible thing we can do. I hope you feel the same as I do.

I would appreciate your cards and letters. I would enjoy carrying on this conversation fully in the future. If there are questions, please send them along. You now have all our information. You can contact either Andre or myself, and email us, but I look forward to talking with you in our next webinar which will probably take place in August.

I wish you a good afternoon, and let us know if you have any questions. Thank you so much. Bye.