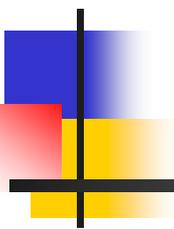
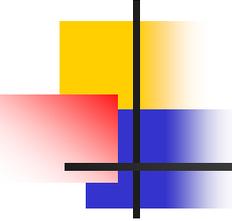


Compliance: Records Management and the Law



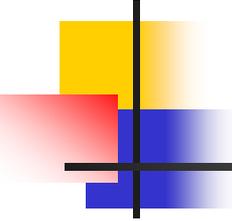
Upland Inland Empire Chapter
ARMA International
2008 Annual Seminar
Riverside, California

Barbara E. Nye, CRM
Ictus Consulting, LLC



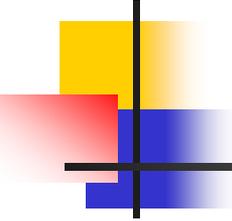
Introduction

- Definitions
- Records Management and the Law
- Legal Requirements:
 - Fact or Fiction?



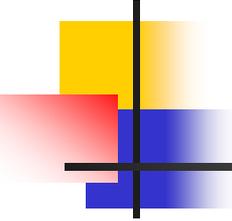
Definitions

- Records Management
- Record
- Records Retention Schedule
- Law
- “Adequate Documentation”



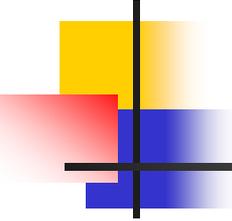
Definitions

- Records Management:
 - Systematic control of records throughout life cycle (ISO 15489)
 - Records Life Cycle: from creation (or receipt) until disposition (destruction or long-term preservation as archives)
 - Promotes compliance, accountability, and transparency



Definitions

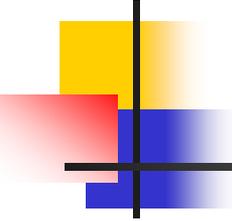
- Record:
 - Contemporaneous evidence of a business transaction
 - Adequate record: incorporates content, context and structure
 - Information created, received and maintained as evidence by an organization or person in pursuance of legal obligations or in transaction of business (ISO 15489)



Federal Records Act

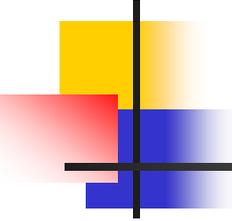
“Record” Definition

- “... “records” includes all books, papers, maps, photographs, machine read-able materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data in them.” (44 USC 3301)



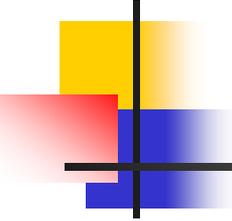
Definitions

- Records Retention Schedule:
 - A policy document
 - List of records series, assigned responsibility (owner), retention period
 - Promotes compliance



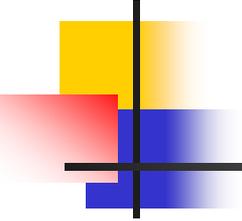
Definitions

- Law:
 - A binding custom or practice of a community
 - A rule of conduct prescribed as binding and enforced by a controlling authority



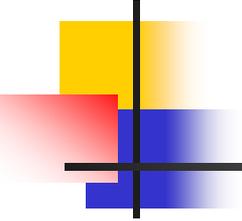
Definitions

- Adequate Documentation (ISO 15489)
 - Contemporaneous
 - Complete
 - Accurate
 - Reliable
 - Trustworthy
 - Useable
 - Has Integrity



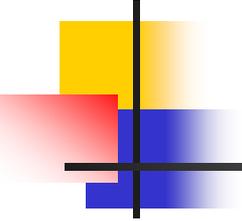
Records Management and the Law

- Sources of Law:
 - Executive Branch
 - Legislature
 - Administration Agencies
 - Courts



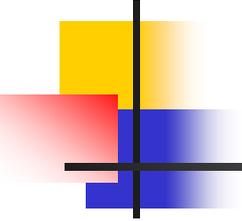
Records Management and the Law

- Types of Law:
 - Executive Order
 - Legislative (Statutes)
 - Administrative (Regulatory)
 - Judicial (Case Law)



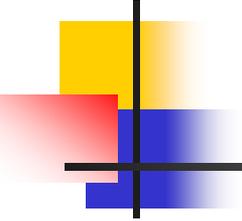
Records Management and the Law

- What do you need to know?
 - Federal Records Act - 1950 (44 USC 2901)
 - Jurisdiction
 - Legislation
 - “Silent to Specific”
 - Litigation
 - Legal Holds
 - Spoliation
 - FRCP – revised 12/2006



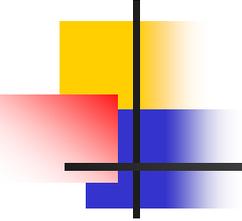
Records Management and the Law

- What do you need to do?
 - Work with legal counsel
 - Conduct legal research
 - Establish policy
 - Develop procedures
 - Communicate with staff



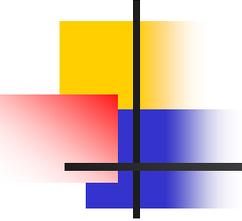
Records Management and the Law

- Jurisdiction
 - Working with legal counsel:
 - Identify entities promulgating rules
 - Identify specific recordkeeping requirements:
 - Retention period
 - Forms
 - Formats
 - Access



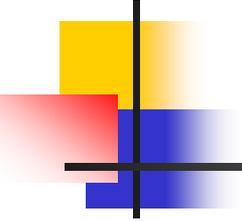
Records Management and the Law

- Admissible as evidence in court:
 - Made at or near the time of the event or transaction
 - Made based on information by or from a person with knowledge of the event
 - Made in the course of regularly conducted business activity
 - Made as a regular practice of the business
 - Shown to fulfill the above criteria by a competent witness (the records custodian)



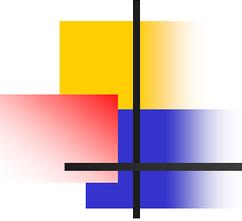
Records Management and the Law

- Records Management and Litigation
 - Work with legal counsel to:
 - Communicate requirements to staff
 - Enforce “legal holds”
 - Prevent document spoliation



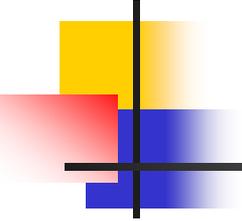
Records Management and the Law

- Legal Holds:
 - “Suspension of the retention period and destruction for the affected records”
 - Duty to preserve
 - Potential (threatened) litigation
 - Pending (actual) litigation



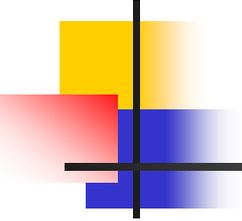
Records Management and the Law

- Spoliation
 - Plundering of evidence
 - Intentional or unintentional destruction or disappearance of things or documents during litigation
 - Recent rulings and legislation (SOX) broaden spoliation beyond litigation to investigations



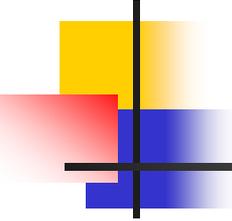
Records Management and the Law

- Examples of legal hold failure and document spoliation
 - Zubulake v. UBS Warburg
 - Testa v. Wal-Mart
 - Anderson / Enron



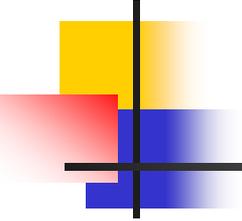
Examples of Federal Laws Affecting Recordkeeping

- COPPA
- E-SIGN
- FACTA
- FCRA
- FOIA
- FRA
- GPEA
- HIPAA
- OSHA
- SOX
- UETA



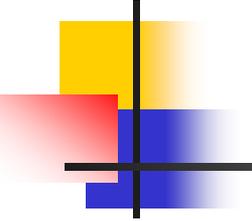
Examples: California State Laws Affecting Recordkeeping

- Calif. PRA
- CA GC 12236
(model)
- CA GC 34090
(cities)
- CA GC 26201
(counties)
- CA GC 60200
(special districts)
- Brown Act
- Information Practices
Act (Civil Code 1798.1 et seq)
- CA Shredding Law
(Civil Code 1798.80 et seq)



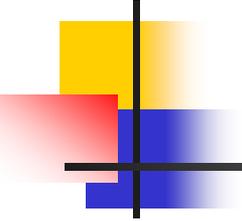
Recordkeeping Regulations (Examples)

- 8 CFR 274.2a
 - I-9 Forms
- 26 CFR 36001
 - Tax returns
- 29 CFR 1904
 - OSHA forms



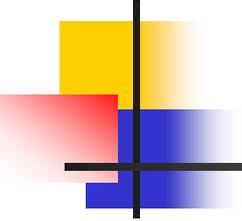
Recordkeeping Guidance

- Statutes of Limitation
 - CCP 335: "The periods prescribed for the commencement of actions other than for the recovery of real property, are as follows:..."
- Federal Rules of Civil Procedure
- Uniform Business Records as Evidence
- Hearsay evidence



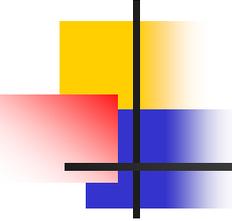
Additional Research

- Articles by:
 - Carol Chosky
 - Rae Cogar
 - John Isaza
 - Randy Kahn
 - John Montaña
 - Bob Williams



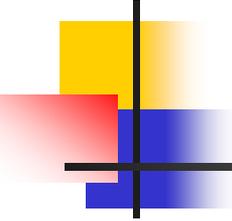
Standards and Best Practice

- ISO 15489
- DOD 5015.2
- ISO / TS 23081
- Associations:
 - NAGARA
 - nagara.org
 - AIIM
 - aiim.org
 - ANSI
 - ansi.org
 - ARMA
 - arma.org



Legal Requirements –

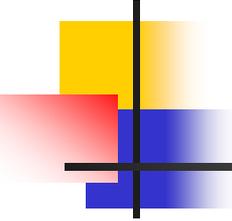
Fact or Fiction?



Fact or Fiction?

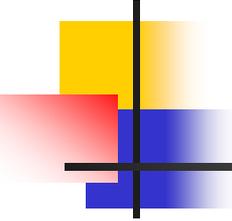
(David O. Stephens, *Records Management: Making the Transition from Paper to Electronic*, ARMA International, 2007)

- Records Management Programs are mandated by statute and retention requirements are driven by the government.
- New recordkeeping technologies must receive formal government approval before they are “legally proven” and safe to implement.
- Some record storage media are legally acceptable and some are not.



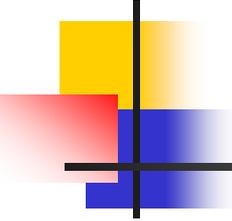
Legal Requirements – Fact or Fiction?

- Commercial transactions must be supported by original records and authenticated signatures.
- Records retention requirements are driven by the government.
- Most government-imposed retention requirements mandate a 7-year retention, based on the IRS model.
- Records must be retained to match the longest time period in a statute of limitations.



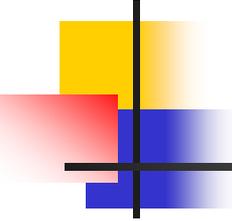
Legal Requirements – Fact or Fiction?

- Records may be destroyed in accordance with the retention schedule until a subpoena is received.
- In a litigation-intensive environment, indefinite retention is best in order to retain whatever might be necessary to defend the organization.
- Retention periods are legally sufficient as long as they satisfy all statutory and regulatory requirements.



Summary

- Legal concepts related to records management
- RM Programs support compliance
- Laws pertinent RM Programs
- Legal requirements – facts and fictions



To be continued...

Additional research:

- CFR: www.gpoaccess.gov/cfr/index.html
- US Code: www4.law.cornell.edu
- All: www.findlaw.com
- California Codes: www.leginfo.ca.gov/calaw.html
- California Code of Regulations: www.oal.ca.gov

Contact Information:

Barbara E. Nye, CRM

Ictus Consulting, LLC

Pasadena, CA -- bnye@ictus.com – 626.795.7117