

Corporate  
**COUNSEL**

**2003 CLE SEMINAR**

**Electronic Records Management  
with a Twist:**

**The Impact of The Sarbanes-Oxley  
Act of 2002 on Electronic Discovery**

# The Impact of The Sarbanes-Oxley Act of 2002 on Electronic Discovery

## Moderator

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## Speakers

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John Wilkerson

Turner, Padgett, Graham & Laney

# Sarbanes-Oxley Act & Rules

- **Sarbanes-Oxley Act of 2002**
- **SEC Rule: Implementation of Standards of Professional Conduct for Attorneys**
- **SEC Rule: Retention of Records Relevant to Audits and Review**

<http://www.sec.gov>

# Sarbanes-Oxley Act § 802

**Amends Chap. 37 of title 18, USC, §1520. Destruction of corporate audit records**

**(a)(1) Any accountant who conducts an audit of an issuer of securities to which section 10A(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78j–1(a)) applies, shall maintain all audit or review workpapers for a period of 5 years from the end of the fiscal period in which the audit or review was concluded.**

# Sarbanes-Oxley Act § 802

(2) The Securities and Exchange Commission shall promulgate ... such **rules and regulations**, as are reasonably necessary, **relating to the retention of relevant records** such as workpapers, documents that form the basis of an audit or review, memoranda, correspondence, communications, other documents, and records **(including electronic records)** which are created, sent, or received in connection an audit or review and contain **conclusions, opinions, analyses, or financial data relating to such an audit or review**, which is conducted by any accountant....

# Sarbanes-Oxley Act § 802 - Rule

¶ 210.2-06 Retention of audit and review records.

(a) For a period of five years after the end of the fiscal period in which an accountant concludes an audit or review of an issuer's financial statements to which section 10A(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78j-1(a)) applies, or of the financial statements of any investment company registered under section 8 of the Investment Company Act of 1940 (15 U.S.C. 80a-8), the accountant shall retain workpapers and other documents that form the basis of the audit or review, and memoranda, correspondence, communications, other documents, and records (including electronic records), which:

- (1) Are created, sent or received in connection with the audit or review, and
- (2) Contain conclusions, opinions, analyses, or financial data related to the audit or review.

# Sarbanes-Oxley Act § 802 - Rule

¶ 210.2-06 Retention of audit and review records.

(a) For a period of five years after the end of the fiscal period in which an accountant concludes an audit or review of an issuer's financial statements to which section 10A(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78j-1(a)) applies, or of the financial statements of any investment company registered under section 8 of the Investment Company Act of 1940 (15 U.S.C. 80a-8), the accountant shall retain workpapers and other documents that form the basis of the audit or review, and memoranda, correspondence, communications, other documents, and records (including electronic records), which:

- (1) Are created, sent or received in connection with the audit or review, and
- (2) Contain conclusions, opinions, analyses, or financial data related to the audit or review.

# **Sarbanes-Oxley Act § 802 - Continued**

**Amends Chap. 37 of title 18, USC,  
§1520. Destruction of corporate audit records**

**(b) Whoever knowingly and willfully violates subsection (a)(1), or any rule or regulation promulgated by the Securities and Exchange Commission under subsection (a)(2), shall be fined under this title, imprisoned not more than 10 years, or both.**

# **Sarbanes-Oxley Act § 103**

## **Auditing, Quality Control, and Independence Standards and Rules**

**(a)(1) each registered public accounting firm shall—**

**(i) prepare, and maintain for a period of not less than 7 years, audit work papers, and other information related to any audit report, in sufficient detail to support the conclusions reached in such report;**

# Sarbanes-Oxley Act § 104

## Inspections of Registered Public Accounting Firms

**(e) RECORD RETENTION.—**The rules of the Board may require the retention by registered public accounting firms for inspection purposes of records whose retention is not otherwise required by section 103 or the rules issued thereunder.

# Sarbanes-Oxley Act § 105

## Investigations and Disciplinary Proceedings

(2) TESTIMONY AND DOCUMENT PRODUCTION.—In addition to such other actions as the Board determines to be necessary or appropriate, the rules the Board may—

- (A) require the testimony of the firm or of any person associated with a registered public accounting firm...
- (B) require the production of audit work papers and any other document or information in the possession of a registered public accounting firm or any associated person thereof...
- (C) request the testimony of, and production of any document in the possession of, any other person...
- (D) provide for procedures to seek issuance by the Commission, in a manner established by the Commission, of a subpoena....

# Sarbanes-Oxley Act § 105

## Investigations and Disciplinary Proceedings

(2) TESTIMONY AND DOCUMENT PRODUCTION.—In addition to such other actions as the Board determines to be necessary or appropriate, the rules the Board may—

- (A) **require** the **testimony** of the firm or of any person associated with a registered public accounting firm...
- (B) **require** the **production of** audit work papers and any other **document or information in the possession of a registered public accounting firm or any associated person** thereof...
- (C) **request** the **testimony of, and production of any document in the possession of, any other person**...
- (D) provide for procedures to seek issuance by the Commission, in a manner established by the Commission, of a **subpoena**....

# Sarbanes-Oxley Act § 105

## Investigations and Disciplinary Proceedings

### (3) NONCOOPERATION WITH INVESTIGATIONS.—

(A) IN GENERAL.—If a registered public accounting firm or any associated person thereof refuses to testify, produce documents, or otherwise cooperate with the Board in connection with an investigation under this section, the Board may—

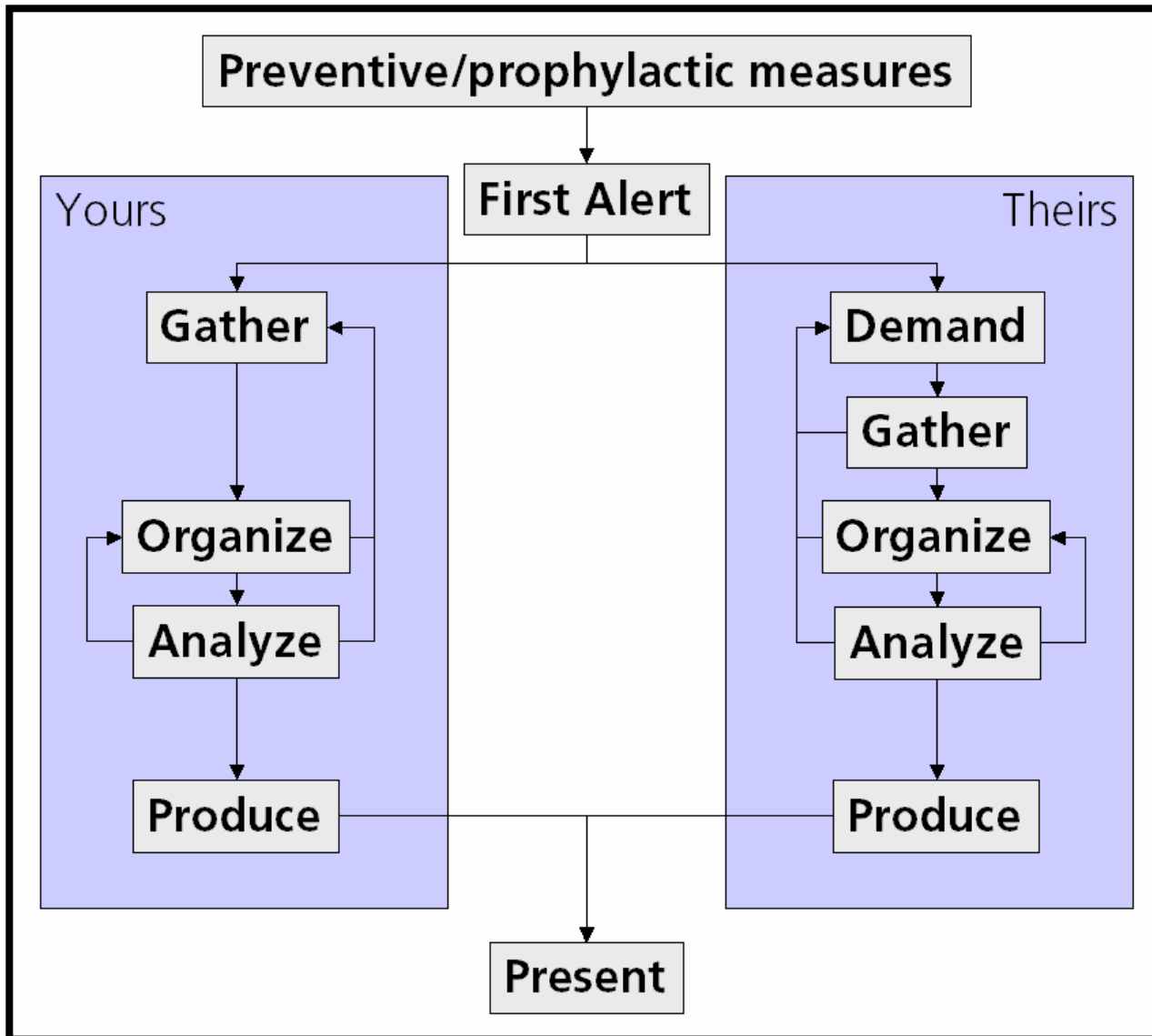
- (i) suspend or bar such person from being associated with a registered public accounting firm, or require the registered public accounting firm to end such association;
- (ii) suspend or revoke the registration of the public accounting firm; and
- (iii) invoke such other lesser sanctions as the Board considers appropriate, and as specified by rule of the Board.

# **Sarbanes-Oxley Act § 307**

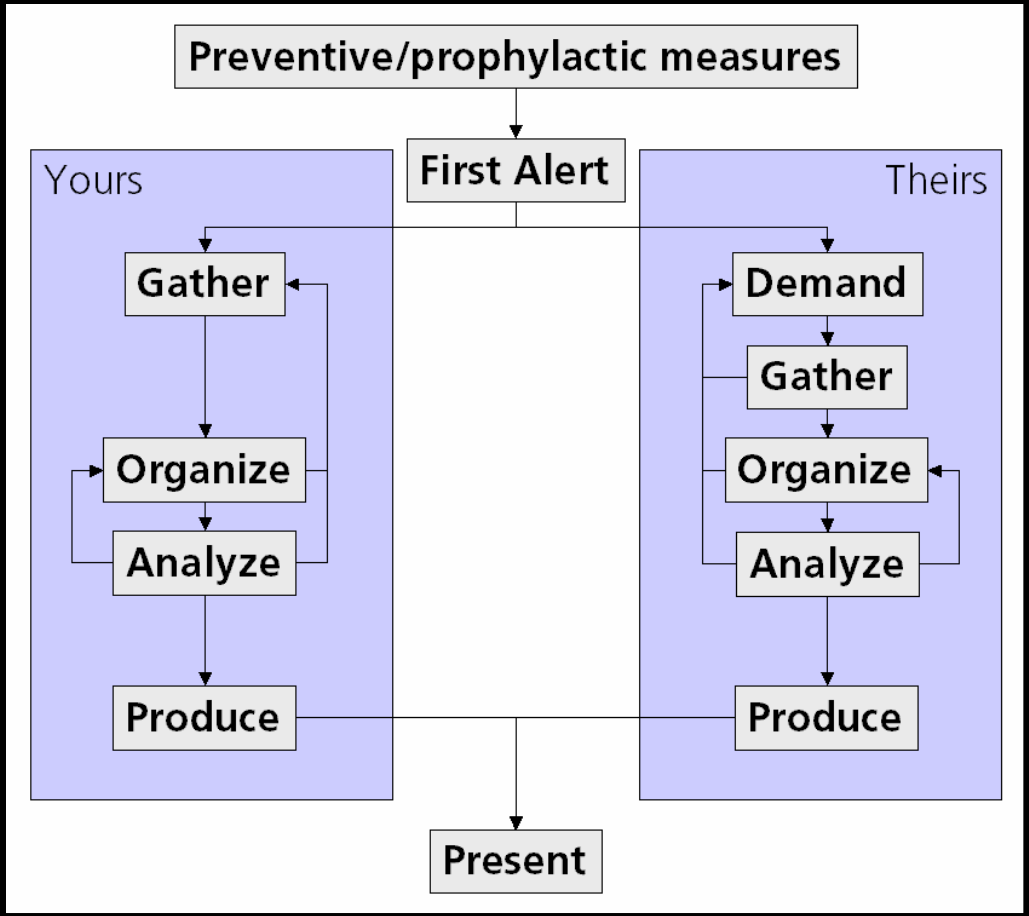
## **Rules of Professional Responsibility for Attorneys**

**Not later than 180 days after the date of enactment of this Act, the Commission shall issue rules, in the public interest and for the protection of investors, setting forth minimum standards of professional conduct for attorneys appearing and practicing before the Commission in any way in the representation of issuers....**

# The ED Process



# The ED Process



## Before Litigation

Retention issues

Pre-litigation prep

## Early Litigation Steps

Freeze & sweep

Requests

Responses

## Later Steps

Collection

Organization

Reformatting

Analysis

Presentation

# The ED Process

## Advice

Legal

Technical

Strategic

## Services & Software

Retention

Collection

Conversion

Storage

Searching

Analysis

Presentation

## Testimony

Affidavits

Deposition

Hearings

Trial

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