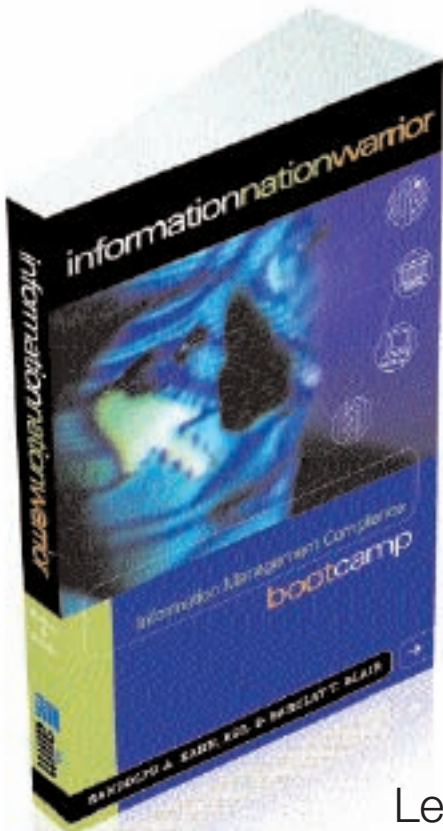


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Special Excerpt

Chapter 15:

Ensure That Legal
Responsibilities Are Clear -
Especially When Trouble
Strikes

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Ensure That Legal Responsibilities Are Clear—Especially When Trouble Strikes

15

“Although it did not do so willfully, maliciously, or in bad faith,” the defendant allowed e-records required to be preserved in the context of the lawsuit to be “destroyed during routine deletions of computer information.”

Applied Telematics v. Sprint⁴³

A telephone company is sued. Electronic records are requested. However, when the company tries to locate them, the records are gone. Why? Was it the nefarious action of a rogue employee seeking to cover his tracks? Did someone look at the records and decide that they contained harmful material that had to go away?

No on both counts.

In fact, the records disappeared as part of a routine purge or recycling of the storage media at the company. Apparently, no one had advised IT about the need to suspend the recycling procedure due to the lawsuit. Apparently, IT didn't get the memo, if there even was a memo.

The reality today is that more and more of what we do in the digital world—including the way we create, use, manage, and dispose of information—has serious legal implications. Moreover, in a world where each employee has the ability to create (or destroy) the thousands of electronic records they possess on their desktop computers and other devices, the need to ensure that everyone clearly understands their legal obligations has never been greater.

There are two major reasons that organizations need to have ready access to their information; 1) to run their business, and 2) to satisfy the legal obligation of making information available (even if it's harmful to their legal position)

when requested in a lawsuit, audit, or investigation. Apparently this latter obligation of preserving and producing information in court proceedings or to regulators has been lost, as so many companies and individuals have been alleged to have destroyed evidence over the last few years. Given this reality, more than ever the Warrior needs to carry the message throughout the organization about IMC legal responsibilities and requirements. The need for this guidance is especially acute when the organization faces contemplated, imminent, or pending audits, investigations, or litigation.

The Legal Hold Challenge



A party is obligated to retain evidence that it knows or reasonably should know may be relevant to pending or future litigation. . . Obviously service of a discovery demand places a party on notice to preserve the materials explicitly requested, but the duty to preserve arises whenever a party has been served with a complaint or anticipates litigation.

Mathias v. Jacobs⁴⁴

When the automobile was introduced, there was very little infrastructure to support it. The “rules of the road” were not adequate to support the faster, heavier, noisier contraptions. But, slowly, as the automobile became an integral cog in the machinery of everyday life, that infrastructure did develop. Over the course of more than one hundred years, laws, regulations, and policies matured and evolved, and continue to evolve today.

In much the same way, the laws, regulations, and policies surrounding the use of electronic information in the legal context continue to evolve and grow in sophistication. According to one court, “[c]omputers have become so commonplace that most court battles now involve discovery of some type of computer-stored information.”⁴⁵ With the burgeoning amount of electronic information in most every organization and the corresponding obligation to manage and perhaps produce it for a lawsuit, questions are now being asked and answered by courts daily. What does that mean for an institution with thousands of

Test Your Warrior Quotient:

Which statement is the most correct in the context of discovery for litigation?

1. You need to produce paper versions of the relevant electronic records for litigation.
2. You need to produce any and all paper and electronic information that may be relevant.
3. You need to produce any and all *originals* of paper and electronic documents.
4. You need to produce any paper and electronic information that may be relevant and you may have to open up computer systems to let opposing counsel see the requested information in electronic form.

The best answer is number 4. Even if you produce paper records and print-outs of electronic records, you may still have to allow your adversary access to see your original records, documents, and information in their native computing environment.

employees and thousands of computers spread across the country or the world, and millions of voice mail, email, and instant messages a day?

The simple fact is that when an organization is involved in, or anticipates that it will become involved in, a lawsuit, an audit, or an investigation, regular record keeping rules need to change. Any disposition or alteration of information potentially relevant to the proceeding must stop immediately.

The Legal Hold Process

Organizations should employ a process designed to notify employees of the need to preserve information related to a lawsuit, investigation, or audit. This process is commonly referred to as a “Legal Hold,” “Document Hold,” “Litigation Hold,” or “Records Hold.” The process should be described in a written policy.

Warriors should develop a Legal Hold process that includes:

- A policy specifically for the Legal department regarding their responsibility to provide a Legal Hold notice to the rest of the organizations' employees and the circumstances and timing of providing such notice.
- A separately written company policy outlining employee responsibilities and preservation procedures. What the lawyers are required to do in the context of a lawsuit, audit, or formal investigation will be different from what the rest of the employees will have to do. So don't confuse the employees by melding both policies in one.
- A standardized method for providing the Legal Hold notice to employees. Legal Hold notifications should be as clear as possible and stated in plain English so that all employees will understand what is required. Refrain from legalese to the extent possible.
- A statement from executive leadership in operations or training manuals that clearly expresses the company's commitment to records and information management compliance. In policy, training, and on a periodic basis through other mediums, it is prudent to remind employees of their further obligation to preserve any information that is even potentially relevant, even if it hurts the company. If employees are going to "listen" to anyone they are likely to listen to executives, so make sure the executives "speak" on this topic often.
- A training program to educate employees about their preservation and retention responsibilities, with updates on new legal and regulatory requirements, and their responsibilities relative to these changes.
- Audit or spot check procedures to make sure employees are following the policies. Recent court cases make clear that just sending out one notice to employees to preserve may not be sufficient. In addition to sending reminder notices, you need to check that employees are doing what they are supposed to.

The Legal Hold Notice: A Checklist

When writing and issuing the Legal Hold notice, the Warrior should address the items in this checklist:

- Send the Legal Hold notice to employees likely to have responsive materials. Unless the matter impacts the whole company don't send the notice to everyone. The "shot gun" approach to distribution can undermine the process by overwhelming employees with so many notices that when they need to take some action they fail to.
- Spell out what's required of employees in plain English. For example, "Do NOT destroy, revise, alter, hide (by encrypting or otherwise), or move company records."
- Be specific about which records need to be preserved—records, documents, and drafts (paper or electronic) created within a specific time period that are about a particular product, customer, or business deal. Clarify the need to preserve relevant documents normally scheduled for disposal according to standard retention guidelines.
- Do **not** include any privileged information or a lawyer's analysis about the merits of the matter as it could undermine the Attorney-Client Privilege.
- Provide the responsible lawyer's contact information in the notice so any questions can get addressed immediately.
- Contact affected business unit leadership as they will likely know who may have information that needs to be preserved or know how to get it.
- Communicate directly with key players responsible for discoverable information on a consistent basis—a blanket statement to all personnel may no longer be sufficient.
- Retain evidence of having sent a clear message describing legal obligations and employee responsibilities to show good faith efforts on the part of the organization.
- When the matter is concluded, send employees a Notice of Termination of the Legal Hold and indicate that regular record keeping rules once again apply. Remember that information may be subject to more than one Legal Hold so verify if other pending matters require the information to still be preserved. Above all else, never rush to destroy, no matter what.

Test Your Warrior Quotient:

What should your legal hold notice include?

1. A copy of the court order telling the employees what they should do
2. A very broad statement telling them to preserve “anything relevant”
3. A simple and understandable list of the information that needs to be preserved
4. All of the above

If you answered number 1, you would be providing a document that even lawyers have a hard time interpreting, so the average employee would likely neither read nor understand.

Answer number 2 is not the best answer either. It is not the employee’s responsibility to determine what is relevant in any given matter—it is the lawyer’s job to define potential relevance.

Number 3 is the correct answer. Employees can best fulfill their responsibilities when they have a clear understanding about what they need to preserve. A simple, yet comprehensive, explanation of all the paper and electronic material they will need to garner and preserve is the best way to ensure employees fully understand what is expected of them.

Manage Information Today— Prepare for Tomorrow

Warriors must help their organizations prepare for the discovery process in advance. The organization must know what electronic information it has, where that information is located, and how it might best be corralled and managed.

- **Enable ready access to information.** Failing to produce records quickly enough can have serious repercussions and may be viewed as purposely failing to cooperate. A prominent securities firm recently faced a Securities and Exchange Commission (SEC) probe in which it provided only a “small fraction of the responsive emails” six months after the initial request, and did not produce all relevant documents until two years had passed. Investigators repeatedly objected to the rate at which the emails were being

produced, informing the company that they were failing to meet the SEC's expectations. Ultimately, the SEC penalized the company \$10 million, an amount that might have been considerably less if the organization had produced requested information more quickly.⁴⁶

- **Bolster long-term access to legacy records.** Document where records can be found so they can be viewed and produced even several years down the road. Include in your documentation the technology requirements that must be met to ensure legacy records can be produced after new hardware and software versions are implemented. Ensuring access may require maintenance of obsolete hardware or software tools that have no use in active business operations but are needed to access or restore old records information.

What Kind of Information Should You Be Prepared to Produce?

A discovery dispute in a recent case illustrates the extent to which an organization's computer systems can be subject to a discovery request. The plaintiff in this case argued that the defendant had breached their software agreement, believing the defendant had illegally attempted to combine the plaintiff's proprietary software with other software tools. The defendant was ordered to preserve backups of all systems that contained any part of the software and related materials in question, and preserve backups of their email servers, pending further orders. This included, "any associated software, whether used for development, production, or otherwise, including source code, object code, history or log files, or revision tracking files."⁴⁷

Industry Resources

Kahn Consulting, Inc.
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Kahn Consulting, Inc. ("KCI"), is a consulting firm specializing in the legal, compliance, and policy issues of information technology and information management. Through a range of services including information management compliance program development, risk management audits, policy development and evaluation, product assessments, legal and compliance research, and education and training, KCI helps its clients address today's critical issues in an ever-changing regulatory and technological environment. Based in Chicago, KCI provides its services to Fortune 500 companies and state and federal governmental agencies in North America and around the world.

AIIM



The Enterprise Content Management Association

About AIIM - The ECM Association

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For over 60 years, AIIM has been the leading international non-profit organization helping users understand the challenges associated with managing documents, content, and business processes. AIIM's core values reflect this long-term perspective:

- **International**—Members in over 75 countries
- **Independent**—Unbiased and vendor neutral
- **Implementation Focused**—Processes, not just technology
- **Industry Intermediary**—Users, suppliers, consultants, analysts, and the channel

AIIM defines Enterprise Content Management (ECM) as the technologies used to capture, manage, store, preserve, and deliver content and documents related to organizational processes. The ECM industry provides information management solutions to help users:

- Guarantee business **CONTINUITY**, 24x7x365
- Enable employee, partner, and customer **COLLABORATION**
- Ensure legal and regulatory **COMPLIANCE**
- Reduce **COSTS** through process streamlining and standardization

Get connected to the AIIM community, and see how AIIM can help you advance your professional career and grow your business. Visit us on the web at www.aiim.org.

MARKET EDUCATION—AIIM provides events and information services that help users specify, select, and deploy ECM solutions to solve organizational problems.

- ***AIIM E-DOC Magazine***

AIIM's bi-monthly flagship print publication reaches over 30,000 readers an issue with intelligent articles, case studies, thought-provoking columns, and lessons learned.

- **M-ID Magazine (Managing Information and Documents)**

This leading publication, read by thousands of document management professionals in the United Kingdom, focuses specifically on the needs of those individuals responsible for the capture, storage and preservation, management, processing and delivery of information and documents.

- **Wednesday Webinar Series**

No need to leave your office to attend a Wednesday Webinar. Each online presentation is FREE, and given by an industry expert, analyst, or author, and focuses on a specific ECM related issue each month.

- **Content Management Solutions Seminars**

This FREE Seminar Series travels to 20 cities throughout the US and Canada and helps to educate thousands of end-users on the latest ECM technologies, critical implementation issues, and allows them to meet one-on-one with the experts.

- **Service Company Executive Forum**

This exclusive meeting (in its 30th year) is being held November 10–12, 2005 in San Antonio, TX. It provides a unique opportunity for senior level service company executives, VARs, VADs, and systems integrators to come together and network with peers, discuss current and future business challenges, share experiences and strengthen business relationships.

- **Online Solution Centers**

Join hundreds of AIIM web visitors at an AIIM Online Solution Center. Get focused articles, presentations, research studies, and more, for the Financial Services and Healthcare industry and Federal/State/Local Government.

- **Wall Posters**

Thousands of office walls have been plastered with our wall posters. Help educate yourself and your colleagues on the lifecycle of ECM and Records Management.

- **IMExpo**

This FREE event travels to 5 cities in the UK, and is dedicated to enterprise content management. The event offers a plethora of presentations, exhibits, and resources to help you tackle the projects to support your business processes, and raise the performance of your organization.

- **Info Ireland**

Ireland's only dedicated two-day event for Information Management reaches hundreds of industry professionals. Tackle the issues connected to the management of documents, records and content, through briefings, discussions, and industry networking.

PROFESSIONAL DEVELOPMENT—AIIM provides an educational roadmap for the industry through online educational programs that help end users and suppliers learn more about the ECM industry.

- **ECM Certificate Program**

This intensive, web-based certificate program contains two levels of education that provide a clear roadmap for industry professionals looking to expand their professional development and awareness of

ECM technologies. Learn the “Fundamentals” in Level 1, then, get the “Building Blocks” in Level 2.

- **IM University (UK)**

AIIM Europe’s suite of dedicated expert-led education programs include a four day intensive program as well as a number of one day classroom based programs. IMUniversity also offers webinars—one off web-based lectures from industry figures—and a series of online lessons that cover all the fundamental aspects of ECM.

- **AIIM Annual Conference & Expo**

Produced by Advanstar Communications in cooperation with AIIM, this three-day networking and educational event for the ECM industry offers real solutions for business professionals seeking the latest technologies to develop, capture, manage, and store documents, information, and digital content to support business processes, comply with governmental regulations, drive down costs, and gain a competitive advantage.

- **ChannelConnection**

VARs, systems integrators, and service company professionals have one source for education, news, and resources to reach vendors and buyers of document management products and services.

INDUSTRY ADVOCACY—AIIM is the voice of the ECM industry in key standards organizations, with the media, and with government decision-makers. As an accredited American National Standards Institute (ANSI) development organization, AIIM plays an essential role in creating national and international standards, technical reports, surveys and recommended practices dealing with document and content management.

- **Committees**

Industry professionals dedicate their time to the growth and advancement of the document management industry as well as increasing their own expertise to develop AIIM standards and AIIM programs. Join a committee today that will shape the way the ECM industry grows.

- **Industry Watch Surveys and Analysis**

Several times a year, AIIM polls its end-user community for information about the ECM industry and shares the results with the membership.

PEER NETWORKING—AIIM chapters, programs, and our Web site create opportunities that expand the international base of users seeking ECM solutions and allow users, suppliers, and channel members to engage and connect with one another.

- **Communities**

Join an AIIM community and get connected with your peers in the ECM industry. Online or in person, these groups help to build your industry knowledge, connect with others in the industry, and increase awareness of the need for document management products in the business world.

- **39 Local Chapters**

Broaden your network and knowledge base, build business and personal relationships, and keep abreast of new technologies and products when you become involved in a local chapter.

MEMBERSHIP—Through year-round support, AIIM offers five types of membership to suit your needs. Pick the one that's best for you and become a recognized leader in the ECM industry; increase visibility for your company's products and services; develop standards for the industry; get news, information, and education; and network with industry professionals and peers.

- **Associate Membership (Users)**

Access to online content, DOC.1 newsletter, *AIIM E-DOC Magazine*, and special events.

- **Professional Membership (Users)**

Access to members-only content, ECM Toolkit, committees, awards, and discounts on education and tools.

- **Trade Membership (Suppliers)**

Comprehensive market exposure through event and program sponsorships

- **Advisory Trade Membership (Suppliers)**

Representation on the AIIM Board of Directors plus maximum exposure and exclusive sponsorship discounts.

- **Channel Membership (Resellers, Distributors, and Service Providers)**

Specialized training, company visibility, education, and networking.