

Spoliation & Legal Holds: **Digital Haystack** Problems Affecting the Corner Office to the File Room

ARMA Utah
March 20, 2008 (8:30 – 10:00 a.m.)

Presented by John Isaza, Esq.
Howett Isaza Law Group, LLP



Agenda

- 1) Discuss the Digital Haystack
- 2) Summary of Spoliation Doctrine
- 3) The Duty to Preserve Continuum
- 4) Recent Legal Trends in Spoliation Cases
- 5) Four Key Components of a Legally Defensible RIM program, including legal holds and retention schedules

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Challenges: Distributed Data

- They call them “Personal” Computers
- Unstructured data is largely unmanaged
- Records management is applied rigorously, but mostly to inactive paper
- Desire to retain information for reuse and Knowledge Management

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Distributed Data: Definition

by *Pike & Fisher, Digital Discovery & E-Evidence, 9/20/06*

Information belonging to an organization which resides on portable media and non-local devices such as home computers, laptop computers, floppy disks, CD-ROMs, personal digital assistants ("PDAs"), wireless communication devices (e.g., Blackberry), zip drives, Internet repositories such as e-mail hosted by Internet service providers or portals, web pages, and the like. Distributed data also includes data held by third parties such as application service providers and business partners.

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Distributed Data (cont'd.): The Electronic Data Explosion

- Storage capacity for same price doubling every nine months
- Humankind producing over two exabytes of information per year (two trillion megabytes)
- Over 90 % of all corporate communication is electronic; Less than 30 percent is ever printed ...

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Distributed Data (cont'd.): Potential Universe

Documents, Books, E-mail, Word, Reports, Presentations, Backup Tapes, Intranet, Instant Messenger, Web Sites, Mail, Faxes, Cell Phones, Blackberrys, Newspapers, Court Decisions, Palm Pilots, Databases, Pagers, Voice Mail, Blogs, Discussion Boards, Paper, Extranets, Directories, Wikis, Adobe PDFs, CD-ROMs, Conferences, Temporary Internet Files, Magazines, Floppy Disks, Schedulers, Laptops, Networks Storage, Lexis, Westlaw, Web, Seminars, Hard Drives, RAM, System Log Data, ISP's, PST files, Third Party Service Providers...

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Impact Formula

Distributed Data + Huge Volumes + Judicial Scrutiny = Increased Risk

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Impact: Increase in Volume

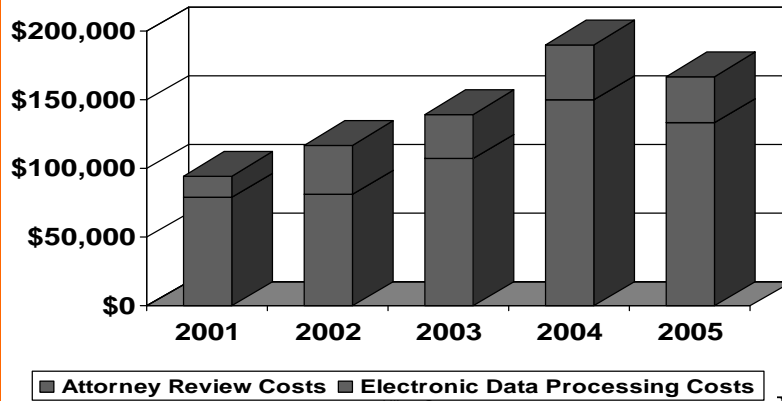
- Exploding Document Collections (per custodian)
 - 1998: 4 boxes
 - 2001: 14+ boxes
 - 2002: 35+ boxes
 - 2003: 16+ boxes
 - 2004: 77+boxes
 - 2005: 141+boxes



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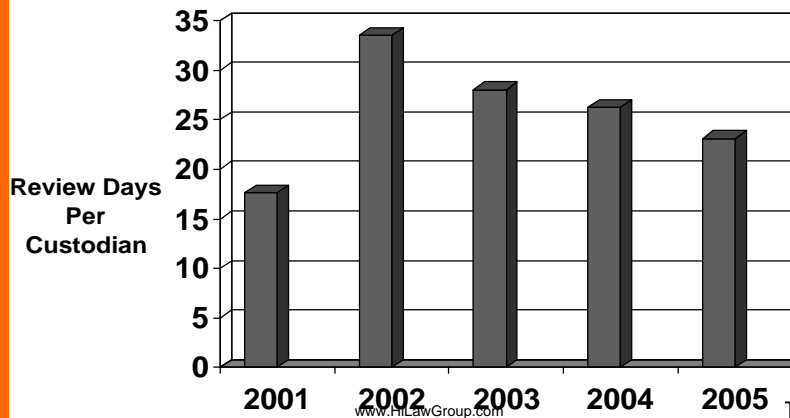
Impact: Review Costs Per Custodian



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Impact: Review Costs in Days



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The Spoliation of Evidence Doctrine

- Where courts have great discretion, at minimum, to impose sanctions for destroying records relevant to pending or potential litigation.
- Some states recognize it as a separate cause of action, while others simply give courts discretion on how to punish the parties involved.

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Examples of Spoliation Sanctions

- Evidentiary or legal sanctions
 - Not allowing documents introduced at trial
 - Special jury instructions or assumptions
- Financial sanctions
 - Pay other party's attorney fees (e.g., \$9.2M in Qualcomm case)
 - Pay some remuneration to aggrieved party
- Fines per Statute (e.g., \$5 mill per S-Ox)
- Imprisonment per Statute (e.g., 20 yrs per S-Ox)
- New lawsuit in states where available
- Attorneys reported to state bar for sanctions

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The Duty to Preserve Continuum

- 1) Statutory or regulatory obligations to preserve;
- 2) Statutes of limitations;
- 3) Duty arising from potential or threatened litigation or investigation;
- 4) Duty created by preservation letter from opposing counsel or agency;
- 5) Duty created by service of a complaint and resulting civil discovery statutes, discovery requests or court orders.

Items 3 to 5 should trigger litigation holds.

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Zubulake v. UBS Warburg, SDNY 02 CV 1243 (July 20, 2004).

- Example of duty triggered by notice from opposing counsel
- Zubulake brought a gender discrimination claim against UBS Warburg with the EEOC
- By the time EEOC granted a right-to-sue letter, UBS had destroyed relevant e-mails, despite counsel's request not to destroy
- Court grants Zubulake an adverse inference jury instruction due to UBS's willful destruction of email.

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Zubulake v. UBS (cont'd.)

- The e-mails found on the backup tapes that UBS was required to restore proved that:
 - 1. E-mails related to Zubulake had been deleted after UBS had been instructed by opposing counsel to retain them
 - 2. Some of the recovered e-mails supported Zubulake's claim
 - 3. This implied that the deleted e-mails would have supported claims also (i.e., Culpable state of mind in deleting relevant e-mails)

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Zubulake v. UBS Warburg, SDNY 02 CV 1243 (cont'd)

- The Court noted certain key shortcomings: the attorneys' failure to communicate with the client's information technology personnel.
- "It is *not* sufficient to notify all employees of a litigation hold... Counsel must take affirmative steps to monitor compliance so that all sources of discoverable information are identified and searched... [C]ounsel and client must take *some reasonable steps* to see that sources of relevant information are taken."

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U.S. v. Arthur Andersen, 125 S. Ct. 2129 (2005)

- Example of duty created by potential investigation (i.e., foreseeable litigation or investigation)
- Reversal by Supreme Court
 - Arguments Profered
 - “Reasonable probability of an investigation” vs.
 - “contemplation [of] particular official proceeding”
- Significance of Lower Court Rulings
 - “Threat of an official investigation”

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Other Preservation Challenges

- Chain of custody issues
- Authentication issues
- Ensuring the integrity and preservation of Metadata
- *Williams v. Sprint/United Management* (D. Kansas 2005) 230 F.R.D. 640
 - Age discrimination case, where the court considered sanctions against defendants for “srubbing” metadata that was to accompany certain Excel spreadsheets related to the reduction in force at Sprint.
 - Plaintiffs claimed the metadata would have contained information such as file names, dates of the file, authors of the file, recipients of the file, print-out dates, changes and modification dates, and other information.

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Williams v. Sprint (cont'd.)

The Court gave defendants the benefit of the doubt this time, but added that:

“When the Court orders a party to produce an electronic document in the form in which it is regularly maintained, i.e., in its native format or as an active file, that production must include all metadata unless that party timely objects to production of the metadata, the parties agree that the metadata should not be produced, or the producing party requests a protective order.”

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Notable Cases On Triggering Events for Legal Holds

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Oxford House v. City of Topeka (D. Kansas 2007) Lexis 31731

- Inaccessible back-up tapes case
- Duty to preserve does not extend to backup tapes maintained solely for disaster recovery
- Plaintiffs contended Defendant failed to preserve certain emails sent to City Council members concerning permit considerations

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Oxford House (cont'd.)

- Tapes backed up the emails, but rotated every six weeks & thus overwritten by subsequent backups
- Alleged destruction on 6/05
- There was no evidence that tapes contained the deleted emails when notice to preserve received 8/05

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Oxford House (cont'd.)

- Plaintiffs alleged duty to preserve arose before 8/05, based on anticipated litigation
- Court said backup tapes are considered inaccessible and no need to preserve
- “[A] party need not preserve all backup tapes even when it reasonably anticipates litigation.”
- Court did not address if backup tapes were the only source of the records

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Oxford House (cont'd.)

- Oxford case illustrates how revised Federal Rules also apply to government agencies
- A surprising number of government works still believe the revised FRCP do not apply to government entities
 - They think governmental immunity will shield them

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The Notice to Insurance Carrier

Phoenix Four v. Strategic Resources Corporation (SD NY 2006) 2006 WL 1409413

- Investment company sued its investment adviser (Phoenix was SRC's sole client).
- Complaint filed 5/19/05.
- As of 4/21/04, SRC gave notice to its insurance company that a dispute existed.

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Phoenix's Spoliation

- Between August & October, 2004, SRC delivered all of Phoenix's paper records & transferred electronic accounting records to Phoenix's accountants.
- In February 2005, SRC was evicted from offices SRC vacated in 3/05, and left behind marketing documents, old prospectuses, trade publications and 10 computer work stations (which landlord destroyed).

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Phoenix Four Spoliation Holding

- Adverse inference instruction granted for abandoning hard copy documents and computer workstations at former SRC offices.
- Defendants had an obligation to preserve these abandoned items because they should have known that the evidence might be relevant to the potential shareholder litigation ... about which SRC notified its insurer.
- “It is a pity that we do not have copies of the actual notices, but these references to future litigation, while thin, are adequate to support a finding that the SRC Defendants were obligated to preserve the abandoned evidence.”

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Phoenix Holding

“Their indifference constituted an act of gross negligence that is not excused by the disarray of their business affairs.”

“...counsel's obligation is not confined to a request for documents; the duty is to search for *sources* of information.”

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Filing Claims with Admin Agency

Zubulake IV (SDNY 2003) 220 F.R.D. 212.

“In this case, the duty to preserve evidence arose, at the latest, on August 16, 2001, when Zubulake filed her EEOC charge...But the duty to preserve may have arisen even before the EEOC complaint was filed.”

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Water Cooler Discussions

Zubulake IV –

“Merely because one or two employees contemplate the possibility that a fellow employee might sue does not generally impose a firm-wide duty to preserve. But in this case, it appears that almost everyone associated with Zubulake recognized the possibility that she might sue.”

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Conversations with Supervisors

Broccoli v. EchoStar (D. MD 2005) 229 FRD 506, 516-17

- Another employment discrimination case.
- Broccoli informed two of his supervisors at EchoStar, both orally and via email, of the sexually harassing behavior.
- Broccoli made numerous complaints to them regarding the inappropriate behavior throughout 2001.
- His supervisors subsequently relayed, verbally and via email, the complaints to their superiors at Echostar.

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Broccoli Spoliation Actions

“Under EchoStar's extraordinary email/document retention policy, the email system automatically sends all items in a user's "sent items" folder over seven days old to the user's "deleted items" folder, and all items in a user's "deleted items" folder over 14 days old are then automatically purged from the user's "deleted items" folder.”

“The user's purged emails are not recorded or stored in any back up files. Thus, when 21-day-old emails are purged, they are forever unretrievable.”

“The electronic files, including the contents of all folders, sub-folders, and all email folders, of former employees are also completely deleted 30 days after the employee leaves Echostar.”

“Under normal circumstances, such a policy may be a risky but arguably defensible business practice undeserving of sanctions.”

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Broccoli Holding

Court granted Broccoli's motion for sanctions and included an adverse spoliation of evidence instruction in the jury instructions.

“In short, the evidence of a regular policy at EchoStar of “deep-sixing” nettlesome documents and records (and of management’s efforts to avoid their creation in the first instance) is overwhelming.”

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Retainer of Counsel & Experts

Silvestri v. GM (4th Cir. 2001) 271 F.3d 583 –

- Airbag failed to deploy.
- Plaintiff failed to give GM notice that vehicle at issue was to be destroyed.
- While Silvestri was in hospital, his parents retained an attorney.
- Attorney retained two accident experts “in anticipation of filing a lawsuit.”

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Silvestri Holding

- Silvestri fired his attorney and retained new one.
- At trial, GM sought spoliation sanctions.
- Court granted sanctions by dismissing the case.
- Destruction of the vehicle resulted in extraordinary prejudice to GM (i.e., the inability to defend itself).

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Compilation of List of Potential Opponents

Rambus v. Infineon (ED VA 2004) 220 F.R.D. 264;
Samsung v. Rambus (ED VA 2006) 2006 U.S. Dist. LEXIS 50007;
cf Hynix v. Rambus (N.D. Cal. 2006) 2006 U.S. Dist. LEXIS 30690 (opposite ruling in CA)

- Retention policy 2 years before lawsuits
- Held office “Shred Days”
- Goal to make company “battle ready”
- Same facts in all three cases

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Rambus Holdings

- The court in two of the decisions found spoliation, because duty attached when list of potential opponents and potential causes of action were created.
- Court viewed “Shred days” as pretext for destroying relevant documents.
- Court in California was more forgiving! Court determined that retention policy and “Shred Days” were not adopted in bad faith.

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Imminent Lawsuit Apparent

- *In Re: Napster Litigation* (N.D. Cal. October 24, 2006)
Case No. C MDL-00-1369 MHP.
- Instant action against investors in Napster (Hummer Winblad), who invested in May 2000 knowing of pending lawsuits against Napster.

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Napster Misconduct

Hummer issued email in June 2000 advising of email policy, including:

1. We do not retain e-mails, it is your responsibility to delete your handled e-mails immediately.
2. We do not use e-mail to chat about matters related to public companies or matters such as the above.
3. We do not retain written copies of e-mails in our files.
4. Our document retention policy is that we do not retain documents on any public or acquired company and retain limited information on private companies. All retained information is stored in central files, please do not retain other docs in your own files unnecessarily.
5. We do not retain files separate from our central files which are periodically checked for compliance to policies.”

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Napster Spoliation

- In June 2000, one of plaintiffs told Hummer of recording companies' intent to sue Napster.
- On June 26, 2000, Hummer named in one lawsuit.
- 8/01 counsel for Plaintiffs writes Hummer intent to sue letter.
- 4/02 Hummer says "We know we are going to be sued."
- Instant action filed 4/03 and served 8/03.

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Napster Holding

- “A party’s motive or degree of fault in destroying evidence is relevant to what sanction, if any, is imposed.”
- No default sanction issued here, even though “Hummer deleted emails it had a duty to preserve.” Duty attached in June 2000.
- However, preclusion, adverse inference and financial sanctions granted.

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Four Steps for Legally Defensible Policies

Step 1:

- Clear written document retention policy, procedures and schedule that meet business needs.
- Policy is endorsed by senior management.
- Retention schedule defines when, where and by whom those records that are required by law or contract, or are otherwise deemed valuable to the company, are routed to appropriate archives, and those records no longer required are to be properly destroyed.
- Procedures specify the means of destruction.

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Four Steps (cont'd)

Step 2:

- Must take reasonable steps to ensure that this policy is effectively communicated to all employees, and is followed (e.g., periodic audits, compliance days, certifications).
- Haphazard implementation will not provide a defense in a negligent spoliation claim.
- Deferred compliance, as in the Arthur-Andersen case and especially if it occurs only when a problem looms, is likely to be even more damaging.

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Four Steps (cont'd)

Step 3: Enact administrative procedures that will immediately stop the routine destruction of records when and if they become the subject of corporate governance, regulatory or legal concerns (i.e., the Legal Holds Policy and procedures with top considerations such as who, when and how will notice be handled, to whom will notice go out, where are responsive records stored, and how will hold be lifted).

Step 4: Companies must guide and train all employees on how to prepare effective, accurate records.

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The Role of the Records Retention Policies, Procedures, and Records Retention Schedule

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Records Management Policy

- Policy and procedures needed, with RRS
- Result in proactive records management
- Targeted suspension/restart of records destruction when needed
- Ability to retrieve subpoenaed records
- Efficient document review & production
- Management of documents across cases

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The Records Retention Schedule

- List of company records by series & function, with retention dates
- Need to research retention requirements:
 - HR – 3 yrs to TE+X
 - Finance – TA + X
 - Industry specific – 1 yr to Indefinite
- Sources for research & templates include:
 - Off the shelf regulatory research software (e.g., <http://www.irch.com/products.htm>)
 - Websites such as www.arma.org library for templates & books or <http://www.archives.gov/records-mgmt/initiatives/erm-guidance.html>
 - Country specific public law cites (e.g., FindLaw.com)

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Define a “Record”

- The definition of a record might be “information on any media recorded with the intent to preserve the position, rights or obligations of the Company.”
- Conversely, a “non-record” might be defined as “Documents not meeting the definition of a Record.”
- Examples of non-records might include duplicates, published reference materials, transmittal memos and routing slips, Memos and postings that do not relate to the functional responsibility of a department or individual (i.e., announcements of meetings, agendas, reservations, confirmations), and drafts.

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Record Management Tip

- Store “records” in a dedicated server that manages lifecycle
- Consider all others non-records or copies with a shorter retention
- Must still rely on end-users to determine records (technology is not there yet, especially for e-mail)

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The Role of the Legal Holds Policy

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Solutions (cont'd): Legal Holds Policy

- What is it?
- Top 10 Critical Items to Include
 - Includes issuing party responsibilities

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What is a hold policy?

Sample definition recommended to a client:

“Suspends routine destruction of Records and other documents upon a finding that such suspension is necessary under applicable law due to actual or reasonably anticipated litigation or governmental investigation (or audit, for any documents not otherwise appropriately retained under a [Tax Audit Record Series](#)).

To be reasonably anticipated, particular litigation or investigative proceedings related to specific facts and circumstances must be anticipated, and not the mere fact that litigation regarding a particular topic is a general possibility. The Legal Department shall wholly or partially release a Legal Hold and issue instructions to return to routine retention those released Records and other documents immediately after the matter has been wholly or partially resolved.”

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Top 10 Items to Include

- 1) Legal Department is to wholly or partially release a Legal Hold;
- 2) Legal Department must identify key players;

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Top 10 Items to Include (cont'd.)

- 3) Legal Hold memo should identify the subject matter of documents to be retained, and the individuals whose documents are subject to the Legal Hold.
- 4) If the Legal Hold applies to all members of a group (such as a department), the Legal Hold memo shall identify the current members of that group.
- 5) The Legal Department is to send a Legal Hold memo to all such individuals, providing instructions on the preservation of documents and Records, both paper and electronic.

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Top 10 Items to Include (cont'd.)

6) The Legal Hold memo should identify any computer system for which automated deletion of data may be affected by the Legal Hold, and the Legal Hold memo shall be delivered to the Information Technology Department.

7) The Legal Department and the Information Technology Department must jointly determine how best to practically implement the Legal Hold with respect to the automated deletion of electronic data.

8) The Information Technology Department is also responsible for implementation of the procedures for handling the data of terminated employees that may be subject to a Legal Hold.

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Top 10 Items to Include (cont'd.)

9) Legal Hold memo must be sent to the records management department to suspend destruction of affected Inactive Records, and to the Department Records Coordinator(s) of any impacted departments to suspend destruction of department records not in the control of individual custodians.

10) The Legal Department must notify affected individuals and departments when the Legal Hold is wholly or partially released.

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Thank You

Howett Isaza Law Group, LLP
John J. Isaza, Esq.

Jisaza@HiLawGroup.com

(949) 632-3860

21163 Newport Coast, Ste. 214
Newport Coast, CA. 92657

www.HiLawGroup.com
(949) 632-3860

