

GUIDE TO RISK MANAGEMENT IN THE DIGITAL WORLD

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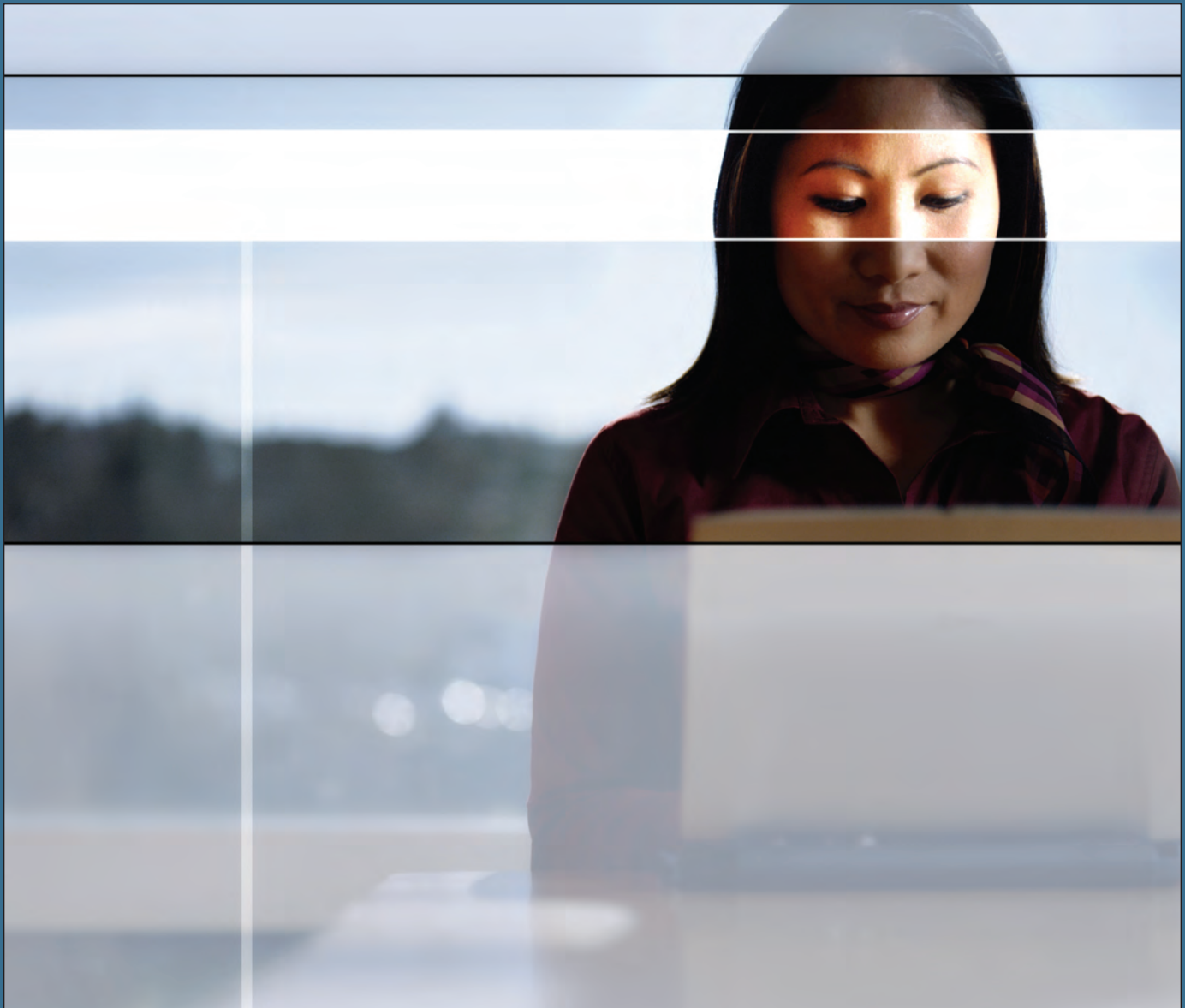
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**RISK MANAGEMENT IN
THE DIGITAL WORLD**

“The value of a professional liability claim against an accounting firm can increase substantially if the firm has failed to follow reasonable document and data retention policies.”

Timothy K. McNamara



INTRODUCTION

risk (rĭsk) n.

1. The possibility of suffering harm or loss; danger.

management (man'ĭj-mənt) n.

1. The act, manner, or practice of managing; handling, supervision, or control.

As the American Heritage Dictionary suggests, risk management is the process by which one attempts to manage or control the possibility of suffering loss.

In the case of accountants, whether you practice in a large firm or small, the current climate, rules, and regulations all speak loudly and clearly: As a professional you must manage your risk if you wish to be successful.

As we all know, the words “Enron” and “Arthur Andersen” no longer signify the names of proud, profitable institutions. Instead, they now stand for a new era which has ushered in terms like “Sarbanes Oxley” and brought to prominence an arcane legal concept known as “spoliation” (destroying evidence).

The destruction of e-mails and other “documents” in high profile litigation throughout the country in the past several years has sent warning signals to us all. Moreover, the revolution in the way in which information is created, processed, and maintained in the modern, digital world has added a whole new layer of risk to the operation of any business, and especially for accounting firms. The handling of e-mail alone has spawned a cottage industry of vendors and consultants.

However, this risk can be managed. As always, an “ounce of prevention” will prevent a “pound of cure.”

The remaining sections of this document will guide you in your exploration of Risk Management in the Digital World by looking at the following:

Overview on digital risk management—pg. 2

Risk Management Team—pg. 4

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E-mail Content and Management—pg. 10



**OVERVIEW ON DIGITAL
RISK MANAGEMENT**

“Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a ‘litigation hold’ to ensure the preservation of relevant documents.”

Zubulake v. UBS Warburg LLC (Zubulake IV), 220 F.R.D. 212 (S.D.N.Y. 2003)



OVERVIEW

While the business world has wrestled with the question of what to keep versus what to destroy, the legal system has been wrestling with the question of what electronically stored information (among the universe that is kept) must be disclosed in litigation, or otherwise.

As is often the case, the answer is: “It depends.” Among other things, it depends upon:

- What you have kept?
- Why you have kept it?
- Where “is” it?
- How do you maintain it?

A rough rule of thumb is that if electronically stored information is accessible, i.e., actively used for information retrieval, then this information likely is subject to disclosure.

Conversely, if certain information, e.g., backup tapes, is truly maintained solely for the purpose of disaster recovery and would be significantly burdensome and expensive to resurrect (in the court’s eyes, not yours), then the information may not be subject to retrieval and disclosure.

The rules that govern litigation in federal courts have been revised and will be effective December 1, 2006. State courts are likely to adopt similar changes. Thereafter, the general rule will be that a party is not obligated to produce electronically stored information from a source that is not “reasonably accessible” because of “undue burden or cost.” That is the good news. The bad news is those terms are largely undefined and nonetheless may be trumped by a showing of “good cause,” again, undefined.

These new federal court rules also offer some comfort to the business world by acknowledging that sometimes data may simply be lost as a result of the “routine, good faith operation of an electronic information system.” As always, there are numerous exceptions and other factors to consider, but the good news is that the judicial world is recognizing that sometimes retrieving data “is easier said than done.”



RISK MANAGEMENT TEAM

“Once a ‘litigation hold’ is in place...counsel must become fully familiar with [the] client's document retention policies, as well as the client's data retention architecture. This will invariably involve speaking with information technology personnel, who can explain system-wide backup procedures and the actual (as opposed to theoretical) implementation of the firm's recycling policy.”

Zubulake v. UBS Warburg LLC (Zubulake V), 229 F.R.D. 422 (S.D.N.Y. 2004)



IMPORTANCE OF A TEAM

First and foremost, firms must address the fact that risk management is not a technology issue...it is a firm issue that requires both expertise and influence. The digital risk management team ideally should include:

- Managing Partner/CEO
- IT Director
- Records Management Director
- Legal Counsel

In many firms, technology and firm administration have been saddled with the “paperless” project. Management often tends to ignore the risks and fails to allocate the necessary resources in order to protect the firm. Many paperless projects have grown from departmental solutions into enterprise or firm-wide risks. The question is: how do we protect our firm and reduce the risk of litigation, government investigation or audit?

The primary objective is getting everyone “on the same page,” i.e., translating “legal speak” to “computer speak” and vice-versa. Effective December 1, 2006, court rules and procedures will require that attorneys representing clients in litigation be familiar with and conversant with the client's information management system and data retention infrastructure.

An effective data retention policy requires forethought and a risk management team that understands the system's operation. This is critical because document retention/destruction policies must be halted once a legal claim is reasonably anticipated and in other circumstances. This is generally referred to as a “litigation hold” and applies to all documents or electronically stored information that relate in any way to the potential claim.

GETTING STARTED CHECKLIST:

- | | |
|--------------------------|--|
| <input type="checkbox"/> | Managing Partner or CEO has identified this as a priority |
| <input type="checkbox"/> | Identify your team members |
| <input type="checkbox"/> | Pull all existing policies/procedures |
| <input type="checkbox"/> | Assess best practices |
| <input type="checkbox"/> | Consult legal counsel to identify applicable laws or regulations |
| <input type="checkbox"/> | Ensure compliance with state accountancy laws and regulations |



CONTENT MANAGEMENT

*“Don't write anything you can phone.
Don't phone anything you can talk.
Don't talk anything you can whisper.
Don't whisper anything you can smile.
Don't smile anything you can nod.
Don't nod anything you can wink.”*

*Attributed to Huey Long
Notorious Louisiana governor*



Should you keep everything? Or keep nothing?

ANSWER:

It depends.

“Absent a legal requirement to the contrary, organizations may adopt programs that routinely delete certain recorded communications, such as electronic mail, instant messaging, text messaging, and voice-mail.”

Sedona Guidelines: Best Practice Guidelines & Commentary for Managing Information & Records in the Electronic Age, Comment #3.c. (September 2005). (emphasis added)

Examples of “legal requirement[s] to the contrary”

- Sarbanes Oxley
- state accountancy regulations
- state law
- federal law, e.g., IRS, SEC, DOL, EPA, etc.
- self-imposed “litigation hold”

There are many opinions and multiple philosophies, but few firms have been tested unless they have been involved in litigation. Those that have been involved in litigation typically believe that “less is better” if your policies support the clean up of audit files and email. There are currently rules pertaining to public company audit files and those rules are likely to “trickle down” in many or all states to private and not for profit companies. There are also those firms who have taken the approach used in the broker/dealer business and they save everything. The technology is available and affordable to do so. The catch is that if you are faced with litigation, it will be expensive to defend yourself due to the pure volume of records you will need to retrieve and legal counsel will need to examine.

One difficulty spawned by the digital age is that it seems to have transformed the analysis regarding “document retention” to one of medium rather than message. In other words, rather than retaining information based on its content, some people focus on the medium of communication.

However, in terms of media there is no difference. Relevant information is relevant, regardless of where or how it is maintained.

The bottom line is that there is no right or wrong answer. Each firm must assess this issue in light of the nature of its practice, client base, claim history, applicable law, and analysis of best practices of comparable firms. Regardless of whether you opt to save a lot, or save only a little, as long as there is a business justification for your decision, then your practice will be defensible (so long as it is followed and enforced). Inevitably, there may be occasions when you wish you had saved more and there may be occasions when you wish you had saved less. The key is to manage your risk by exercising your business judgment, developing procedures, and sticking to them.

Q&A

When is a claim “reasonably anticipated” such that you must suspend any “document” destruction?

ANSWER:

“When you knew, or should have known, of the potential claim.”

ALWAYS consult with legal counsel first, but in response to the question of whether you should implement a “litigation hold”:

The answer is clearly “yes” if you receive or are served with one of the following:

- A lawsuit
- An EEOC charge
- A demand letter from an attorney
- A subpoena for a client’s files and work papers

The answer is “probably” if one of the following is true:

- You report a potential claim to your insurance carrier
- You have consulted with an attorney regarding a potential claim
- You suspect a claim may be brought against you

Other events that should cause you to evaluate your document retention responsibilities:

- You are fired by the client (especially if there has been a defalcation)
- Client files bankruptcy
- Bankruptcy trustee or creditor’s committee requests access to your files and work papers
- You are advised of a material misstatement in a prior year audit
- Client refuses to pay your bill
- You decide to sue a client for nonpayment of fees

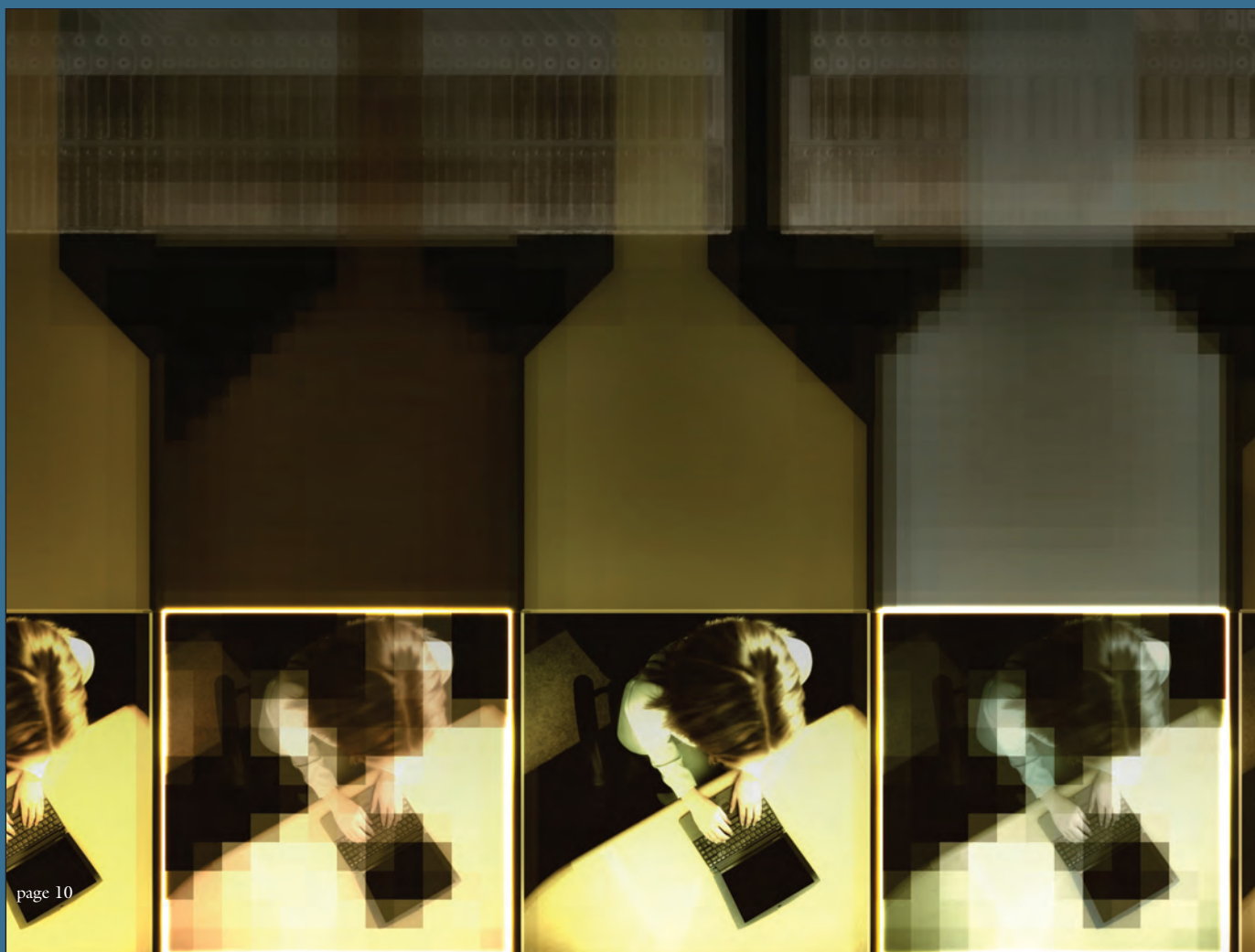
The tendency is to feel immune to any of these issues simply because you are a small firm or do not do any assurance services. The above applies to your tax and consulting practices as well. If your firm does have adequate policies and procedures, has everyone been adequately trained? Are they being adhered to by everyone?

E-MAIL CONTENT
AND MANAGEMENT



“KPMG’s tax shelters weren’t too bright. It’s internal memos on the shelters were really dim-witted.”

Forbes magazine, October 3, 2005



SMOKING E-MAILS

RULE #1

Envision your e-mails on the front page of The New York Times...or a large easel displayed to a jury of your peers.

RULE #2

All retention policies, whether hard copy or electronic, must be:

- Documented
- Communicated
- Enforced
- Updated

INTERNAL AUDIT CHECKLIST:

- Does your employee manual provide guidance on the appropriate use of e-mail?
- Do your document/data retention policies address personal handling of e-mail?
- Do you have a “written” document/data retention policy?
- Has your policy been updated within the last year?
- Do you follow and enforce the policy?
- Do you remind all personnel at least annually about the existence of the policy?
- Does your policy distinguish between your record/data management program on the one hand and your disaster recovery plan on the other?
- Does your retention policy specifically acknowledge the possibility of a “litigation hold” and specify how it will be implemented and enforced?

NOTES

DEVELOP A PLAN FOR RISK MANAGEMENT IN THE DIGITAL WORLD.

Strategic Objective	Measurement
1. Minimize risk and exposure to the firm while ensuring efficient internal and client service operations	<ul style="list-style-type: none"> • Compliance with applicable law, regulation and policy • Timely response to valid requests from legal system • Timely classification, storage, retrieval and use of intellectual property of the firm
2. Utilize technology to accelerate and manage the firm’s Record Retention and Destruction Plan	<ul style="list-style-type: none"> • Efficient storage and retrieval of content • Efficient backup for disaster recovery purposes
3. Ensure all owners and employees understand the firm’s Record Retention and Destruction Plan	<ul style="list-style-type: none"> • Universal awareness of policies and their intent • Universal compliance with policies and use of implementing tools
4. Monitor and insure compliance with the firm’s Record Retention and Destruction Plan	<ul style="list-style-type: none"> • Universal compliance with policies and use of implementing tools • Continuous and ongoing monitoring • Regular feedback to executive leadership • Timely and effective corrective action if needed
5. Implement and release “litigation hold” situations as required	<ul style="list-style-type: none"> • Timely response to requests for records from legitimate outside authority • Timely suspension, and resumption, of normal record handling policies

MENT IN THE DIGITAL WORLD

JONES & Company LLP

Strategy/Initiative	Due date	Assigned to
1.1 Assign executive responsibility for risk management (RM Partner) 1.2 Establish Risk Management Task Force <ul style="list-style-type: none"> • Include CEO/COO, Records Management, Legal, IT, plus others as desired 1.4 Research applicable laws, regulations, and policies <ul style="list-style-type: none"> • Include principles from Sedona Guidelines (thesedonaconference.org) 1.5 Write Record Retention and Destruction Plan	May 1, 20xx May 15, 20xx June 30, 20xx July 15, 20xx	CEO/MP Risk Management (RM) Partner RM Team RM Team
2.1 Evaluate available technologies <ul style="list-style-type: none"> • In-house systems (maintained internally) • Web hosted (sourced maintenance) 2.2 Ensure distinction between “archive” and “disaster recovery” 2.3 Select appropriate IT systems and tools 2.4 Install, configure, and implement IT system 2.5 Conduct admin and user level training on IT system	June 30, 20xx June 30, 20xx June 30, 20xx July 31, 20xx August 31, 20xx	IT / RM Team IT Director RM Team IT and vendor IT / Learning Director
3.1 Ensure record retention learning objectives are included in all individual development plans 3.2 Evaluate best sources for training <ul style="list-style-type: none"> • Internal • External 3.3 Include in individual performance plans and evaluations	July 15, 20xx July 15, 20xx July 31, 20xx	RM Partner / Learning Director Learning Director HR / Supervisors
4.1 Establish compliance monitoring plan 4.2 Test compliance through use of monitoring plan 4.3 Provide feedback on plan compliance to executive leadership 4.4 Initiate corrective action as needed for compliance issues	July 31, 20xx Quarterly Quarterly As needed	RM Team RM Partner RM Partner CEO / RM Partner
5.1 Ensure record retention and destruction plan addresses who authorizes “litigation hold” and what that requires 5.2 Ensure all owners and employees are trained on what (and what not) to do in this circumstance 5.3 Test procedures at least quarterly	July 15, 20xx August 31, 20xx Quarterly	RM Partner Learning Director RM Partner

OTHER GENERAL RISK MANAGEMENT ISSUES

Engagement letters

The use of engagement letters is one of the most important risk management tools for a professional. Also, avoid “engagement creep,” i.e., expanding the scope of your engagement without documenting that you are doing so.

Subpoenas

Accountants often receive subpoenas to produce documents and/or testify in cases in which their clients are involved. With respect to any subpoena, ask yourself:

- ___ Have I advised the client and their attorney that I have received the subpoena?
- ___ Does the subpoena call for testimony, or just the production of files and work papers?
- ___ When is the compliance date? Remember that in most jurisdictions, irrespective of the compliance date, you have a limited amount of time to object to the scope of the subpoena, whether on behalf of yourself or your client.
- ___ Do I have the client’s written consent to produce his, her, or their files and work papers?
- ___ What about persons or entities related to the client; is there a risk that their files or confidential information may be inadvertently produced?
- ___ Who is going to pay for my time and other costs in responding to the subpoena?
- ___ Has there been a defalcation or some other event which might suggest that the underlying purpose of the subpoena is to obtain our files and work papers to develop a professional liability case?

Two heads are better than one

Seek help from your colleagues if you see trouble on the horizon. If you receive a demand letter, or a client hints at a claim, or a significant billing dispute develops, do not try to solve the problem by yourself. You’re not likely to be objective. Seek guidance and assistance to solve the problem. Better a problem solver now than a trial witness later.

RETENTION POLICY

The following checklist is inspired, in part, by *The Sedona Guidelines for Managing Information and Records in The Electronic Age*, as published September, 2005.

ITEM	YES	NO	N/A	COMMENTS
1. Your firm should have policies and procedures for managing documents and data.				
a. Do you have written policies pertaining to document and data retention?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
b. Are those policies current? (Updated and approved by management within the past 12 months.)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
c. Have the policies been reviewed and approved by legal counsel?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
d. Do the policies mandate the retention of all information and documents? For what period of time? _____	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
e. Are there industry specific regulations you must adhere to?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
f. Do your policies distinguish between preserved data that is reasonably accessible and data that is preserved solely for disaster recovery?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
2. Your firm's document and data retention policies and procedures should be workable and molded to your practice.				
a. Are the policies realistic and enforceable?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
b. Do you utilize a Risk Management Team?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
c. Is management represented on the Risk Management Team?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
d. Does someone with records management expertise serve on the Risk Management Team?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
e. Is legal counsel on the Risk Management Team?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
f. Is the IT department represented on the Risk Management Team?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
3. As a general rule, you don't have to save all electronic information.				
a. Do your policies list the documents and data that can be routinely destroyed when they no longer have value?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
b. Do you follow your policies regarding routine deletion of certain voice recordings, email and other electronic communications?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
c. Do the policies allow for the destruction and recycling of old hardware and related media?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	

POLICY CHECKLIST

ITEM	YES	NO	N/A	COMMENTS
d. Do the policies allow for the routine deletion of residual, shadowed or deleted data? What about metadata?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
e. Do the policies protect the organization against spoliation claims?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
f. Have you consulted with counsel to consider other legal requirements, i.e., state and federal laws and regulations?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
4. Do your policies and procedures address the destruction of documents and data in a way that is consistent with and serves your business needs?				
a. Do you have defined roles and responsibilities for those who will implement and enforce your policies?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
b. Do you provide employee training and guidance with regard to your policies?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
c. Do your policies consider the impact of changing technology on documents and data retention?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
d. Do you conduct annual compliance reviews and address new or changed circumstances?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
e. Do your policies accommodate privacy rights?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
f. Are your policies reviewed and revised as necessary?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
5. Your firm's policies and procedures must halt routine destruction of documents and data when you reasonably anticipate litigation or government investigation i.e. a "Litigation Hold."				
a. Do your policies provide for implementing a "Litigation Hold" under certain circumstances?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
b. Have you identified the specific circumstances that will/may trigger a Litigation Hold?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
c. Have you identified who is responsible for implementing a Litigation Hold?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
d. Do your policies include effective communication procedures to implement a Litigation Hold?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
e. Do your policies require that steps taken to implement a Litigation Hold be documented?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
f. Do your policies require that you segregate documents and data to prevent inadvertent routine destruction? What about backup tapes?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
g. Do your policies outline how to lift a Litigation Hold?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	

ABOUT THE AUTHOR



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Tim has been involved in the business litigation practice of the firm since 1980 and has served as Chair of the firm's Litigation Department and for a number of years served on the firm's Executive Committee. His practice has included jury, non-jury and appellate litigation throughout the Midwest and in the United States Supreme Court. He devotes a significant portion of this practice to professional liability and the representation of accounting firms.

Tim received his Bachelor of Journalism (B.J.) degree from the University of Missouri-Columbia in 1977 and his J.D. degree from the University of Missouri-Kansas City in 1980.

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Gary Boomer is the CEO of Boomer Consulting, Inc., an organization that provides strategic planning and consulting services to the leading firms in the accounting industry through The Performance^{3™} Process. Boomer strategies provide a transformation road map, team building and excellence while helping you make more money, attract quality people and grow your business. Prior to the development of the company, Gary was a partner at the regional CPA firm of Varney & Associates.

Gary is recognized in the accounting profession as the leading authority on technology and firm management. For the past ten years, he has been named by *Accounting Today* as one of the 100 most influential people in accounting. He consults and speaks internationally on management and technology related topics including strategic and technology planning, compensation and developing a training/learning culture. He acts as a planning facilitator, provides coaching and serves on many advisory boards.

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He is the creator of and a facilitator for The Boomer Technology Circles[™]. Each circle is comprised of approximately 20 firms from unique geographic areas. The Circles meet three times per year and are connected through a private extranet. These circles help the best firms get better!

As an author, Gary has captured valuable knowledge in his book *Performance^{3™}*. He is also the author of, *Successful Technology Consulting... The Boomer Advantage* and a contributor to *The Boomer Advantage Guides[™]* on: Outsourcing, Strategic Planning, Paperless Transition, Human Capital Attraction & Retention, Learning & Training, Succession Planning, Partner Compensation and Selecting a Managing Partner. He writes "Boomer's Blueprint," which is a regular column in *Accounting Today* and publishes the Boomer Bulletin[™], a technology newsletter with international circulation.

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Ken is a contributing author to the Boomer Bulletin™, a technology newsletter with an international circulation of over 6,000 and is published regularly in many state society newsletters. He has been a featured speaker on several nationally broadcast web events on the topic of “Paperless Office.”

Ken is also a contributing author to *The Boomer Advantage Guides*™, a series of industry guidebooks published by Boomer Consulting focusing on topics of current interest to the CPA profession, including *The Boomer Advantage Guides*™ on: Outsourcing, Strategic Planning, Paperless Transition, Human Capital Attraction & Retention, Learning & Training, Succession Planning, Partner Compensation and Selecting a Managing Partner.

Ken has been with Boomer Consulting, Inc. since its formation in 1996. Prior to that, he served as the Firm Administrator for Varney & Associates, PA, Consultants and Certified Public Accountants. He has over 30 years of leadership experience, in both private industry and government, in the areas of training, financial management, and computer system integration.

He holds a Bachelor of Arts degree in Economics from Lafayette College in Easton, Pennsylvania and a Master of Business Administration from Creighton University in Omaha, Nebraska. Ken is also a Microsoft Certified Professional and a Certified Document Imaging Architect (CDIA+).

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