

# 5 Ways to Build Stronger Cases with Case Management Software

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# Table of Contents

1. Introduction	3
2. Investigative Standards	4
3. Labels and Notices	4
4. Audit Trails	5
5. Software as a Service	7
6. Flexibility	9
7. Author	10

## Introduction

The number of formal investigations conducted in the modern enterprise is rising. Ethics programs, litigation risks and government regulations motivate organizations to conduct official investigations on myriad topics - from fraud, to contract disputes, to HR allegations and much more.

For any investigation, a desirable outcome depends on the process. Law and society respect "due process" and "due diligence." They hold the results in higher esteem if the investigation follows a process that is fair, logical and disciplined.

These investigative virtues are promoted by i-Sight's case management software for investigations.

Investigations can take time and involve many people. During the course of any investigation, the responsible personnel can change. Attention and memories can fade.

i-Sight's software enforces an intelligent investigative framework. It makes and keeps records in a fashion that engenders the respect of third parties, such as judges, auditors and government officials.



## Investigative Standards

By setting and monitoring standards for the execution of each investigation, an enterprise can show that the process produced credible results and complied with requirements of law and internal control.

Law prefers that organizations regulate themselves. In the US, the Federal Sentencing Guidelines teach that the legal system will reward an organization, when it gets into legal trouble, if it maintained a genuine legal compliance program.

The i-Sight solution fosters and documents compliance and self-regulation. It does this by recording the steps of each investigation and issuing timely notices and reminders to those responsible for each step.

It urges supervisors, executives, or even representatives of a board of directors, to monitor the progress of an investigation. i-Sight's documentation of notices, reminders and monitoring can confirm for a court or government authority that, in fact, the organization was regulating itself, even if particular employees engaged in unethical or illegal activity.

i-Sight software has the capacity to enforce rules that govern the processes in an investigation. For instance, a rule might stipulate that a certain threshold of evidence is necessary after an initial inquiry, otherwise the investigation ends.

## Labels and Notices

i-Sight software enables an enterprise to incorporate efficiently and directly into the investigative record legally desirable labels and notices that protect the enterprise and promote a positive outcome.

Labels and notices in an investigation file have legal impact. Recognized labels (such as attorney-client privilege and attorney work product) can influence a court.

## Privilege and Work Product

Two legal doctrines can shield investigation-related information from disclosure in court or in pre-trial discovery. The first doctrine is attorney-client privilege, which ensures that communications between an attorney and his or her client remain confidential. The second is attorney work product, which prevents disclosure to adversaries of materials prepared by or under the direction of an attorney for a client in anticipation of litigation.

The application of these two doctrines can be controversial in particular cases. Often, courts hold that records of a routine internal audit (or business audit) within an enterprise are not protected by either doctrine, even though a lawyer may have been involved or litigation may have been one of the reasons for the audit. (Edna

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Selan Epstein, *The Attorney-Client Privilege and the Work-Product Doctrine*, Volume 1, 2007 page 356 et seq.)

The division between a mere internal audit, on the one hand, and a protected record or communication, on the other, can be open to interpretation. This is a risk for an enterprise that conducts a sensitive investigation.

i-Sight's software mitigates the risk in two ways. First, it places custom labels and notices directly into the investigative record. Second, it automatically encourages and documents attorney engagement in an investigation.

### Persuading a Court

A label or notice on a report declaring that it is protected can help persuade a court that, in fact, it is entitled to protection. Example notice: "Confidential. This record is protected attorney-client communication and attorney work product to formulate legal advice in preparation for dispute."

According to a leading legal commentator, a notice declaring attorney-client privilege is "like chicken soup for an illness". Though it's not guaranteed to succeed as a self-fulfilling declaration of legal status, it might help and normally won't hurt. (Edna Selan Epstein, *The Attorney-Client Privilege and the Work-Product Doctrine*, Volume 1, 2007, page 877.)

For these reasons, an investigator is wise, under the advice of counsel, to embed notices into the investigative record. i-Sight software provides ample notes fields for embedding such notices, and can set rules for doing it automatically.



i-Sight Case Record

Records
Reports
Maintenance

EXIT SAVE & EXIT SAVE REASSIGN CANCEL

Attorney Client Privilege

Case # 2012-000014	Case Category Discrimination	Recorded 03/13/2012
Status Open	Case Type HR	Date Due 03/23/2012
Ownership Accepted		
Case Owner Jakub Ficner jficner@customerexpressions.com		

- Case Status
- Case Details
- Issues (2) + ADD NEW
- Case Linking (0)
- Attachments(0)
- History

## Audit Trails

Extensive, secure audit trails built into i-Sight software help to establish that (a) the evidence collected in an investigation is trustworthy, and (b) the enterprise's legal team was engaged in the investigation to an extent that was appropriate for meeting legal standards, while also being efficient and economical.

i-Sight software is rich with metadata, audit trails and time stamps that document each step of case development. The history section of the software records who opened a case and when. Like a meticulous filing clerk, it documents when particular items of evidence were incorporated into the case and by whom. It records precisely who looked at which parts of the case and when.

These time stamps and data points are credible because they are created by a neutral third party, that is, i-Sight itself. If a question were to arise about when evidence was collected or reviewed, the software will provide an authoritative answer.

Such detailed chronology adds immeasurable value to an investigation.

## Documenting Attorney Engagement

This paper introduced above "attorney-client privilege" and "attorney work product." When there is question whether attorney-client privilege or attorney work product applies to a matter, the degree of direct attorney engagement can be relevant. Attorney engagement can be documented in i-Sight. The software can remind an attorney to look at a case and then note when the attorney did examine or take action in the case.

### History

02/01/2012 05:04:41 PM EST: Attachment item # 1 created by Jakub Ficner  
 02/01/2012 05:04:00 PM EST: EMail item # 3 created by Jakub Ficner  
 02/01/2012 05:02:41 PM EST: Action item # 2 created by Jakub Ficner  
 02/01/2012 05:01:58 PM EST: Action item # 1 created by Jakub Ficner  
 02/01/2012 04:45:27 PM EST: Document Initially Recorded by Jakub Ficner

## Security of Evidence

### Deters Evidence Tampering

i-Sight's time stamps and other metadata deter fabrication and manipulation of evidence. In any given set of facts and circumstances, if date and time can be established with assurance, then proof of many other facts (such as who created evidence, where and how) can be established by inference.

### Authentication of Evidence

The trustworthy timekeeping in i-Sight helps investigators authenticate their work. An investigator can incorporate periodically into the investigative record an

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affidavit that affirms the evidence and notes collected as of that time.

An affidavit is a formal attestation by a witness (the investigator) about evidence. The affidavit helps in case the investigator becomes unable or unwilling to support the investigation at some time into the future. (Might an investigator collect evidence on a case, and then refuse, or be unavailable to explain or authenticate the evidence later at trial? Yes. See "Investigator Refuses to Testify," Observer-Reporter (Washington, Pa.) - Jan 16, 1982 Page B3. The story tells of a former county medical investigator who had conducted an autopsy, but then refused to testify at trial because he was no longer being compensated.)

Traditionally, an affidavit is in writing, signed and notarized, stating essentially, "I John Doe, investigator, hereby sign and affirm the evidence stored as of this time in this case record as my authentic work. The date is ... and the time is ..."

One way to incorporate an affidavit into i-Sight is for the investigator to sign and notarize a paper affidavit, scan it as a pdf, and store as a unit of evidence in the investigative case. i-Sight's time stamp on the scanned document lends it credibility.

An alternative would be for the investigator to create and sign an affidavit by webcam on his or her computer. The investigator can save into the case evidence a webcam clip of the event, stating, "I Jane Doe Investigator hereby sign and affirm the evidence stored as of this time in this case as my authentic work. The date is ... and the time is ..." For more on webcam legal signatures see, <http://bit.ly/a0X9kZ>.

Either way, the affidavit reinforces the credibility of the investigator's evidence and work as of the time of the affidavit.

## Software as a Service

i-Sight's software as a service (SaaS) framework provides enterprise customers an efficient tool for managing modern investigations. i-Sight's data center is located in Canada, among the best countries in the world for data storage on account of its stable government, strong economy, predictable legal system, and robust privacy protections.

Investigative information is sensitive from the perspectives of both individual privacy and enterprise confidentiality.

Although the storage of investigative data in the hands of a third party can raise issues, the storage of the data in any place can raise issues. Storage of data in-house does not, in itself, prevent legal access by government or private litigants or prevent access by hackers or dishonest employees.



## The Advantage of Canada

Canada is known as a leader in the legal recognition of data rights, which gives i-Sight's customers greater assurance about the protection of their data and about the privacy of personal data. Canada's system of law and government is stable. In 2011 Transparency International ranked Canada among the top 10 least-corrupt countries in the world, well ahead of the United States, which ranked 24th. (Corruption Perceptions Index)

Privacy International ranks Canada second (tied with Romania) for best privacy protection in the world. Greece is the only country that ranked higher. Canada was ranked well ahead of any other G8 member country; the United States ranked 40th. "The 2007 International Privacy Ranking." Privacy International. 2007-12-28.

Key reasons Privacy International cited for Canada's high ranking and the lower ranking for the United States are:

### Canada:

- Comprehensive federal statutory privacy rules - the Privacy Act, which deals with personal information held by the government of Canada, and the Personal Information Protection and Electronic Documents Act (PIPEDA), which deals with personal information held in the private sector.
- Provincial privacy commissioners have made privacy-enhancing decisions and taken cases through the courts (particularly Ontario, where i-Sight's data center is located).
- Court orders are required for government interception of data, and there is no reasonable alternative method of investigation by government. This demonstrates a greater legal respect for privacy.

### United States:

- No comprehensive privacy law like PIPEDA.
- Through the USA Patriot Act, Congress approved a presidential program for intercepting, without court order, foreign communications over US networks. The USA Patriot Act contrasts with the practical need under Canadian law for government to get court orders.

The Privacy Commissioner of Canada is an authoritative figure in Canadian law and politics; a figure of equal prominence does not exist in the US. The Commissioner monitors and advocates compliance with the Privacy Act and PIPEDA. In 2010 the International Association of Privacy Professionals recognized Canada's current Privacy Commissioner, Jennifer Stoddart, with its prestigious Privacy Vanguard Award.

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Canada's judiciary is known for leadership on privacy rights in the information age. This leadership is exemplified by *Jones v. Tsige*, 2012 ONCA 32 (CanLII), an internationally-noted case that recently recognized a new tort cause of action for invasion of privacy.

## Legal Boundaries at Data Center

Notices prominently posted at i-Sight's data center declare to legal authorities, such as police or a bankruptcy trustee, substantial boundaries. They indicate that information stored at the center is the property of i-Sight's respective customers. They warn any legal authority that personal information is subject to rights of privacy, which are respected in Canada. They further inform legal authorities that if they do need to take steps to access or impede data, their lawful purpose can, through the use of skill and diligence, be accomplished without infringing the rights of bystanders, such as non-involved customers and individuals.

## Flexibility

i-Sight's offering provides each customer flexibility to manage investigative data according to the customer's legal, security and operational needs.

A responsible investigation is not a cookie-cutter event; investigations come in many forms. Customers using i-Sight software are wise to work with their ethics team and legal counsel to customize the software for different kinds of investigations. The process of customization will bring rigor to investigations and ensure that special rules are met. What's an example of a special rule? When European law applies, certain internal investigations about employees must be subject to data protections (such as destruction of data after a certain time) to protect employee rights of privacy. (McDermott Will & Emery, "An Employer's Guide to Implementing EU-Compliant Whistleblowing Hotlines," August 23, 2011.)

Today a single investigation can involve hundreds, even thousands, of units of evidence, including e-mail, text messages and screenshots or screen videos of web and social media sites. i-Sight enables an investigation team to collect and document this evidence with efficiency and attention to detail. It provides a capacious locker for storing evidence files, along with note fields for describing and analyzing each unit of evidence and an automatic history trail to show who stored the evidence and when.

i-Sight's data center employs layers of security and backup. Depending on terms of service, special arrangements can be made with customers for data encryption and exporting of data for backup storage outside of i-Sight's data center.



## Author



### Benjamin Wright

Texas attorney Benjamin Wright is the author of the treatise *The Law of Electronic Commerce* and senior instructor at the SANS Institute for "Law of Data Security and Investigations." He graduated from Georgetown University Law Center in 1984. He maintains a matrix of popular blogs at [gplus.to/privacy](https://gplus.to/privacy). This paper is not legal advice for any particular situation. If the reader needs legal advice, he or she should consult an attorney. There is no guarantee that use of i-Sight's software will lead to a particular legal outcome.

A man in a plaid shirt is sitting on a wooden dock by a lake, working on a laptop. The background shows a calm lake and distant hills under a clear sky. A large orange semi-transparent box is overlaid on the upper portion of the image, containing text.

For organizations wrestling with the increasing cost, complexity, risk and volume of internal investigations, i-Sight can improve the efficiency of existing resources through adaptive case management. About 60% of a typical investigator's time is spent on non-investigative activities such as administration, meetings and report preparation.

i-Sight can free your investigators from secretarial work, allowing them to spend more time investigating. An optimized investigative process built on the i-Sight case management platform gives you the freedom to focus on investigations and identifying trends to reduce future risk. i-Sight customers typically eliminate 25-50% of an investigator's administrative burden and deliver more polished and consistent investigative reports in minutes instead of days or weeks.

Call us today for a free demo 800-465-6089 or visit <http://i-Sight.com>

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