

Get Control of Your Legal Hold Process

Technology makes it better, faster, and easier

The cost and effort involved in complying with court mandates related to [electronic discovery](#) can be overwhelming for organizations dealing with litigation. Case law dictates that companies must preserve all forms of relevant information when litigation is reasonably anticipated. This may not sound complicated on the surface, but preserving potentially relevant [electronically stored information \(ESI\)](#) immediately presents challenges.

A notice or communication from legal counsel to suspend normal disposition of records triggers the legal hold process to preserve all forms of relevant information, both ESI and otherwise. An official notification (such as a subpoena) or an event (such as an accident causing injury to people, property or the environment) can also create reasonable expectation of litigation. Failure to demonstrate a repeatable, defensible legal hold strategy can bring court sanctions and fines. Unfortunately, many legal departments fail to develop a comprehensive legal hold management approach that ensures compliance with FRCP (Federal Rules of Civil Procedure). The bright spot on the horizon is new technology that supports a sound methodology and repeatable process.

The first step is to analyze the duty to preserve information. This requires experience, analyzing the facts on a case-by-case basis, and making a determination based on a variety of factors. Establishing guidelines can help. For example, only matters that exceed a minimum ceiling for potential damages might automatically trigger a legal hold.

The next step is to establish a clear scope that strikes the right balance. The scope of the legal hold should be confined only to data systems and individuals identified as having relevant information (custodians). Casting too wide a net drives up costs, while preserving too little increases risk. Based more perhaps on the art of law rather than the practice of law, this careful consideration includes facts and circumstances, key players, previous similar cases, and various locations where potentially relevant data may be stored.

Technology clearly proves its worth at this point in the legal hold process. Integrating the legal hold process with the legal department's [matter management](#) solution offers greater control over the discovery process by storing matter management and legal hold information in a central location. Legal departments can automatically monitor progress, set reminders, and enforce a policy to escalate the request to higher levels if needed. A full audit trail of notices and responses proves measures are being followed.

The notification process proceeds much more smoothly with repeatable and consistent messaging based on templates and accurate matter information automatically pulled from the system. Technology enables workflow that ensures that notices are reviewed and approved prior to distribution. Summary reports and online statistics deliver at-a-glance information for a comprehensive view of the legal hold process. Portals offer a place where people involved in the hold can interact and more easily collaborate.

Subsequent to notifications, and depending on specific responses, counsel may want to conduct interviews with persons identified as holding relevant information. To reduce business distraction, technology affords faster and more effective interviews with the option to conduct them online or in-person. In addition, templates help formulate consistent questions and reduce the need for follow-up interviews.

Legal holds can endure for several years amid changing circumstances. New information may come to light that makes it necessary to modify the hold. Technology tools to track and compare

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information in the system with the facts, so legal hold teams can make modifications and avoid missing important data or doing anything improper.

Implementing the hold presents other stumbling blocks. A key communication challenge is maintaining alignment with the internal IT group, which essentially sits at the nexus between the corporation and its information. While IT can be very helpful in initiating holds and implementing instructions of the hold, they may fail to consider the ramifications of moving data. Regular meetings about projects, plans and the IT roadmap provide the legal department an opportunity to advise and prevent unintended consequences. After all, as one legal professional recently pointed out, the goal of a records retention program is not to retain records but to destroy them as fast as legally possible. To put it even more forcefully, "They are kept for the benefit of those who sue me." IT may keep information longer than needed without realizing the potential impact.

The left hand needs to know what the right hand is doing, particularly when employees who are part of a legal hold leave the company. Human Resources, IT, and Finance departments can use checklists that help, but even a well-intentioned person can let information fall through the cracks when the process isn't thoroughly followed. Technology can save the day by flagging records and triggering automatic notifications to appropriate departments or individuals. For example, sending a reminder to IT can prevent them from carelessly wiping clean the laptop of a custodian or erasing shared folders -- both actions that could bring court sanctions.

Litigators lift the hold when they settle a case, or when the time period for an appeal passes or the scope of litigation changes. Until then, tracking people and data sources through the life of the hold is crucial in reducing the risk that evidence is overlooked or mishandled.

For many organizations, business continuity and business stability are a constant struggle. Besides not being sued in the first place (a fantasy for almost every organization), the best answer is to create a process that is repeatable, auditable, and defensible with clear-cut rules. Technology can power the process, help maintain tight control over your ESI, and bring additional benefits such as improved efficiency and reduced cost of electronic discovery.

For more information about a sophisticated approach to [legal hold management](#), please contact [Kiersted / Systems, LP](#) at www.kiersted.com or 1-866-543-7789.