



# Litigation Holds: Key Issues and Best Practices

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**D**ue to the new guidelines imposed by the Federal Rules of Civil Procedure, an increase in client waiver of privilege, and a growing awareness by judges and trial attorneys of the impermanent nature of electronic information, the issue of litigation holds is becoming a critical issue for law firms.

Electronic information is transitory in nature, easily lost, overwritten or modified; therefore it is critical to take immediate action to prevent loss, or suggestion of loss, of that data. Being sanctioned for spoliation of data is one of the most serious issues facing defendants in litigation today. Spoliation—the destruction, modification or loss of potentially relevant information when the firm is aware of a pending or active litigation—can result in sanctions ranging from substantial penalties to a default judgment.

The timelines outlined in the new Federal Rules of Civil Procedure, as well as the requirement for parties to make an early disclosure of the sources and types of electronically stored information that may contain potentially relevant information, have significantly reduced the amount of time firms have to review and respond to a litigation hold. The amount of information about potentially relevant repositories that a firm is expected to have at hand for discussions with opposing counsel has also grown.

It is necessary then for firms to have not only a thorough understanding of their infrastructure and the systems used to create and store information, but also a very clear, defensible system in place to manage imposition of a litigation hold consistently.

While some law firms are still in a reactive mode in dealing with litigation holds and a few still have not developed any policies or processes, most are viewing this as an important

risk management issue and undertaking a thorough process and policy review and update to address these considerations.

Firms should take steps to establish a process that can be applied consistently when a litigation hold is initiated. This process will provide the firm with a workbook of forms and policies to use for each implementation of a litigation hold. This workbook should include the following items:

- ❖ Documented workflow for review, notification and implementation of a litigation hold
- ❖ Assignment of responsibilities
- ❖ Standard checklist to be used for all notification activities
- ❖ Standard template to be used for notification to custodians of a litigation hold
- ❖ Data map outlining all user accessible repositories, their retention periods, backup schedules and contact information for business and technology owners
- ❖ Documented reporting mechanism outlining the litigation hold steps and processes
- ❖ Standard repositories and naming conventions for data collection storage
- ❖ Industry standard tools (defensible) for collection, and trained collection personnel
- ❖ Training materials and activities for attorneys, IT staff and records staff

Unrelated to the litigation hold workbook, firms should establish and publish a records retention policy that outlines the proper management of information and disposition of

records at defined intervals. This is crucial to allow a firm to establish guidelines around what information is available on the system and set parameters relevant to the hold around that body of information.

## Litigation Holds – Best Practices

There are five phases of a litigation hold process. Law firms should develop policies and processes for each phase.

**1. Litigation initiation:** It should be noted that the duty to preserve does not always start with receipt of a subpoena or notice to hold. A firm has a duty to preserve all relevant information, in all paper and electronic forms, from the moment it becomes “reasonably aware” of a potential litigation. Simple trigger events such as knowing or hearing about facts that are likely to lead to litigation, events that have precedent with prior litigation, and so on, may be construed to constitute reasonable awareness.

Firms should have clear policies and processes to address how litigation holds should be identified and initiated, and they should formalize subsequent litigation hold policies to withstand spoliation claims and allow for routine, quick steps to preserve records. This means a firm should designate a single point of matter intake for litigation holds; this can be a partner or counsel, such as the ethics or risk management partner or the firm’s general counsel.

The firm should also develop a policy defining cross-departmental roles and implementation responsibilities, including a documented workflow for review, notification and implementation of litigation holds. The policy should also outline considerations of legal and cost issues, determination of when to issue a hold, structure and approach to managing legal holds, and documenting steps to implement holds with a standard checklist and template for notification

A formal policy should also identify roles and responsibilities within the litigation hold process including identification of those individuals with overall responsibility for litigation holds and responsibility for the execution of the litigation hold process. Also, once the policy has identified the relevant custodians, it should outline how the relevant custodians will be notified and include a process for review of hard-copy materials.

**2. Identification:** Identification of responsive custodians, as well as the potentially relevant data stores is a critical element to properly establishing a litigation hold. This requires particularizing the litigation hold to the firm, as well as interviewing key personnel to establish practices regarding communication and information management.

This process requires that firms implement formalized pre-hold practices for data identification, including conducting a periodic inventory of data sources, locations, retention schedules; developing a data map showing all repositories, their retention periods, backup schedules and owners including all client data and administrative systems; and conducting an annual review of cases, trends.

The process also demands that the firm develop the means to determine scope of the litigation hold by identifying issues and employees and locating potentially relevant data. Attorneys will need to become fully aware of document retention policies and data retention architecture to instruct IT. They should also understand procedures in place to preserve information.

**3. Notification:** Given the transitory nature of electronic information, it is critical that information managers and potentially relevant custodians are notified as soon as possible regarding their obligations under a specific litigation hold. As outlined in the roles and responsibilities discussion in the section above, this process spans multiple people, and IT should be notified immediately of suspension requirements.

There should also be a routine, checklist approach to document notification and response. Any legal hold notices/memos should be sent to custodians and personnel in control of relevant computer systems and should clearly and sufficiently describe the kinds of information to be preserved so the affected custodian can segregate and preserve files and data. The memos should also clearly outline follow-up steps that will be taken by IT and records managers, define relevant time frames and whether a hold applies to ongoing creation of records and remind custodians that information may reside in locations outside enterprise control

**4. Compliance:** Attorneys must oversee compliance of preservation and show that reasonable steps are being taken to guard against spoliation. The developing nature of a litigation may also create a situation where stakeholders have to change notices, add custodians or identify additional sources of data. All of this requires that the firm, specifically legal counsel, periodically reissue hold notices and/or reminders, and that includes advising attorneys of continuing obligations.

Attorneys must also ensure that data is marked or “locked” for preservation compliance. Keep in mind that not deleting is not preserving. Systems that support litigation holds should be identified and utilized, and, if data is collected, a chain of custody process should be initiated.

Sound training and acknowledgement systems are imperative. Issuing a notice without adequate follow-up does not constitute compliance. Acknowledgement of receipt of the notice by the custodian should be received and tracked, and processes need to be in place to follow up if acknowledgement is not received. A well documented reporting system can also be a guard against spoliation.

**5. Release and audit:** Litigation holds should have a defined life cycle, the last phase of which is the release of the hold and a review or audit of compliance with firm policies and processes. For this phase, the firms should ensure that release notices are sent to reinstitute normal retention procedures after completion or resolution of the matter.

Remind attorneys and employees as well as records management and IT staff that eligible records should be

destroyed to avoid needless storage costs and the retention of potentially harmful records. Also, make sure records eligible for destruction are not subject to additional litigation holds.

Auditing should be used to demonstrate procedures were carried out in an appropriate and timely manner. In this regard, the firm should develop and use activity logging and audit trails and set up a process to continually verify progress. It's also advisable to hold periodic reviews of materials on hold to determine responsiveness to subsequent litigation hold requests.

### **The Cost of Not Planning Ahead**

Failing to properly identify, scope and impose a litigation hold can represent a significant risk to a firm. Even providing the opportunity to suggest the possibility of spoliation or loss of information by not having policies and processes in place represents a risk that most firms find unacceptable.

Advance planning means having the tools, systems and processes outlined above in place and having personnel trained in the steps necessary to implement the preservation obligations of a hold. It also means providing some training to information technology and records management staff so that they understand what is expected of them and what the consequences of failure to consistently and adequately comply may be to the firm.

Taking these steps provides the best opportunity for a firm to prepare for imposition of a litigation hold in a consistent and defensible method. Following these best practices also demonstrates to a court that the firm has exercised reasonable diligence in attempting to preserve potentially relevant information. 