

Top 10 Ways General Counsel Can Avoid the Cover of the Washington Post

I've been in the eDiscovery game a long time and I've seen my fair share of world-class legal departments as well as the haphazard hoping to elude judicial rebuke. There is nothing worse than seeing Counsel on the front page of the Washington Post. Nothing.

What typically places Counsel on the cover of the Washington Post is not the glory of a significant matter but more about how a matter, significant or insignificant, was handled. The real shame is evident when an insignificant matter laced with mistakes and/or negligence could have and should have been easily avoided.

History has shown that the best way to avoid judicial sanctions (and the "Office of Counsel's" mug appearing on the Washington Post) is to have a defensible legal hold process. Below are my top ten suggestions a GC should consider when implementing a defensible legal hold process.

#1. TRADE IN SPREADSHEETS AND EMAIL

Today, I still see many agencies managing their preservation noticing obligations using emails for notification and spreadsheets to track the results. Attorneys send the notices to hundreds and/or thousands of potential custodians. Then tracks "read receipts" or returned emails for compliance with the hold order via a spreadsheet and saves all the emails.

This process might work for a mere two or three preservations a year, but no one can be expected to use this process to manage the number of emails required for six, ten or thirty preservations and all without making mistakes.

A common problem occurs when the custodian has a question and the email gets lost in the process. By the time someone gets around to sifting through their email, data has been spoliated.

There are a number of enterprise-based tools on the market to manage the notification and response tracking process. Feature sets range based on the complexity of the legal department's needs. Trading in spreadsheets for an automated tool to manage legal holds can be one of the top ways to avoid an unfortunate situation.

“Since departments units are accustomed to managing risk every day, a pure compliance play might not be enough. One of the best ways to gain budgetary approval is to identify a ‘return on investment’ to complement the need for compliance.”

#2. MINIMIZE BUREAUCRACY IMPACT

As everyone knows that works with or within government agencies, facilitating change across departments within a agency can be challenging. Unlike a corporation that can update policies and procedures at will, departments within an agency have to work together to minimize the impact to each other. Otherwise, there is more effort spent in the bureaucracy than the actual project itself.

Implementing an effective legal hold process requires minimizing the impact of the new process across the agency. Change is not easy within the government and therefore an updated process and tool should be well communicated to all parties involved. Stay true to the legal hold process and minimize the use of technology that may complicate its adoption.

Select a tool that minimizes IT involvement beyond the basic legal hold process. Legal Hold products that incorporate more advanced features like document collection and data mapping will most likely cause considerable objection by IT as they evaluate the impact to the network.

#3. AUTOMATE THE PROCESS

How many times have you relied on someone to provide a status update and that individual is out on vacation or sick? What about the times when someone transfers within an agency but is now located out of a different office? Life happens, but that information is needed immediately to make decisions.

An automated solution provides a repeatable process that everyone can follow which adds process and structure to an often "one off" process. The solution also provides up-to-the-minute status information critical to making sound decisions. Having the information easily accessible to multiple members of the legal team cuts the risk of a single person managing the information process. With automation, the responses to notices and status of interviews are readily available to the attorneys and decision makers.

#4. MINIMIZE RISK OF SPOILIATION

Spoilation is most often described as altering or destroying evidence. What typically happens is the negligent destruction of data because of timing or poor communication.

I recently experienced the following scenario. A staff attorney trying to manage the legal hold process with spreadsheets and email misses a question embedded within the body of an email because the subject matter looked like all the others. Six months later the custodian was on the witness stand and was asked why the data was destroyed. It wasn't a deliberate act, no ulterior motive or smoking gun waiting to be exposed. It was simply a missed email that didn't get answered. Unfortunately, the result was an adverse inference charge.

An effective legal hold tool has a built-in question and answer module customized by the matter. Not only does it record the custodian's commitment to preserve data, it allows the legal department to ask specifically tailored questions early on. Now, the results of the custodian's responses can be analyzed and prioritized into interviews and collections. Timeliness and a repeatable process allow the reduction of spoliation due to poor communications and unintended negligence, not to mention uncomfortable time on the witness stand!

#5. CREATE DEFENSIBLE PROCESSES

Most judges seem reasonable when presented with a defensible process. However, their patience wears thin when the expected mature process of the agency does not correspond with the legal hold process presented. As we all know, when using a manual or unstructured process, there is always the risk that steps may be missed.

I hear this example often: An employee transfers departments or leaves the agency. Internal communications between HR, IT and Counsel are often fragmented. HR notifies IT, who then shuts off access to systems and repossesses the laptop. However, neither the HR or the IT department proactively contact Counsel to see if that employee had an active legal hold and if the laptop should be preserved. Instead, IT policies take over and the data is lost.

In the example above, changes to HR systems can immediately flag a legal hold and generate an alert or report to the respective attorney to insure preservation immediately takes place. A legal hold application with repeatable and defensible processes will not only insure that the process is followed but provide necessary reporting to prove it- just in case.

#6. MIGRATE OFF HOMEGROWN SYSTEMS

I see this danger almost as often as spreadsheets and email. Many agencies develop their own legal hold system to handle the

noticing and tracking process as they mature beyond spreadsheets and email. The legal department expresses a need and an eager internal development person says "I can do that". The application is developed and legal starts using it.

At first it is a great addition but very quickly gaps in the process begin to surface. The system does not integrate well with other systems within the organization or lacks key functionality. Unfortunately, the project has been deemed complete and the development resources have moved on. The legal group/department now is left to supplement the system with their own additional resources.

Any ROI that could have been realized is now replaced with a manual process and risk of reporting inaccurate information. The idea was solid but there was no way the team could have thought of every scenario when building the original system. And, it becomes another legacy application that has to be supported but does not meet the base requirements. Just another reason to think twice before building your own legal hold application.

#7. SUPPORT THE COMPLETE LEGAL HOLD PROCESS

The legal hold process starts with the duty to preserve and ends when the matter is resolved and the hold order is released. The steps in between are typically a mix between internal capabilities and leveraging external parties. Regardless of who performs the steps, the legal department is responsible for insuring compliance with the entire process. As a simple guide, the following are high level capabilities that legal hold applications should include:

- Creation, distribution and tracking of preservation notice and responses
- Schedule and track interviews
- Schedule and track collections
- Send reminder notices to custodians
- Escalate non-response to managers
- Notify custodians of release of hold order
- Provide chain of custody reporting
- Integrate with internal systems (i.e. HR, matter management, email)

Additional features deemed important by most corporations:

- Online question and answer module for analyzing custodian responses
- Ad-hoc reporting
- Customizable distribution lists

There are many additional features available in products on the market but these are minimums that should be included to support the complete legal hold process.

#8. ENSURE THE LEGAL HOLD SOLUTION IS DESIGNED FOR ATTORNEYS

Attorneys are becoming much more technology savvy than people give them credit for. During my recent visit to the Sedona Conference annual working group, I noticed more laptops, iPads, and smart phones displayed than ever before. The common theme, however, was that these tools needed to have an attorney friendly workflow. Attorneys do not want to learn new and complicated technologies to do their jobs. The theme of "practice more law" has never been more appropriate than it is today.

A legal hold application needs to be easy to use, intuitive, with an easy to follow workflow. The sophistication of the application needs to be behind the scenes and not one that is intimidating or complicated to the user. Otherwise, attorneys will not use it.

“ The most successful and cost effective legal departments are the ones that invest in educating and training their people on e-Discovery and specifically legal hold processes.”

#9. INVEST IN INTERNAL RESOURCES

The most successful and effective legal departments are the ones that invest in educating and training their people on e-discovery and specifically legal hold processes. Quite often there is one or two people chartered with the role of "e-discovery Expert". At least one should be an attorney. If the attorney is not technology savvy, invest in an e-discovery guru. Some suggested resources can be either an existing IT person or a paralegal interested in expanding their technology knowledge.

The Federal Rules of Civil Procedure do require interpretation for each agency. A recommended best practice is to have an expert that is knowledgeable and can advise both the legal and IT teams on the best tools and processes to implement for that organization.

#10. INVEST IN A STANDALONE PRODUCT

Many vendors in the eDiscovery space are expanding their offerings to support more of the EDRM model. Lately, I've seen a wave of products entitled "Legal Hold." The term "Legal Hold" is often referred to as the process of securing documents as evidence rather than the management of the legal hold process itself.

Products that have a complete solution as described in this article tend to be stand-alone products versus add-on modules to other e-discovery products. Use the features described in this article as a starting point to ensure you understand the difference.

ABOUT RICH HALL



Rich Hall has more than 20 years experience as a senior business, operations and technology professional with technology and Fortune 100 companies. Hall played a significant role in developing the internal e-Discovery solution at Enron supporting hundreds of civil matters, federal investigations and numerous law firms. Hall is credited with designing and implementing the industry's first complete e-Discovery solution integrated with matter management spanning Legal Hold to Production with the industry's first real-time e-Discovery Dashboard. Hall is the Vice President of Electronic Discovery at Bridgeway Software in Bellaire, TX and holds an undergraduate degree in Management Science from Georgia Institute of Technology and a MBA from the University of Houston. Rich can be contacted via rich.hall@bridge-way.com.

ABOUT BRIDGEWAY

Bridgeway is dedicated to providing software solutions and professional services to implement best practices for the offices of the general counsel and corporate secretary. Leading corporations and government agencies optimize productivity and reduce risk with Bridgeway's integrated technology approach for complete legal enterprise management. Bridgeway implements systems in the areas of electronic discovery, matter and case management, electronic invoicing, cost management, corporate governance, contract management, litigation risk assessment and entity management. Founded in 1989, the company is headquartered in Houston, Texas with representative offices in Philadelphia and Toronto. More information about Bridgeway eDiscovery, Bridgeway Legal Hold, eCounsel®, LawManager®, Smart Invoice, Corridor™, Secretariat®, and Bridgeway Diligent Boardbooks™ is available at www.bridge-way.com or by calling 888-272-4699.

This case study is for informational purposes only. Information contained in this publication has been obtained from sources Bridgeway considers to be reliable, but it is not warranted by Bridgeway. The entire contents of this publication are copyrighted by Bridgeway Software.