

The Legal Hold Solution

For a Straightforward E-Discovery Process

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Like many organizations, NEC Corporation of America is in the process of redefining its business to respond to a prospective recovery in 2010 while continuing to adjust to the complex realities imposed by the recession of 2009. That complexity in the market is encouraging businesses to seek simplicity in their core operations by implementing user-friendly tools that save on staff time, and minimize effort and frustration, particularly in the legal department. With former initiatives related to innovating knowledge management, contracts creation and electronic billing in place, many in-house teams are focusing their efforts in the new year on legal hold solutions that offer quick deployment, seamless integration and, above all, defensibility.

Proper protocols for document preservation are an essential element of modern practice. "People ought to be looking for systems and technology that address their specific needs to provide an audit trail, mitigate the risk against inadvertent document destruction and defend against any potential sanctions," advises NEC Corporation of America's senior vice president and general counsel Gerald Kenney. "Look for those things that mitigate the risks to the company—no more, no less," he adds.

The Complex Problem—Tracking and Coordination: In general, established case law requires preservation of all records, paper and electronic, when a party learns of litigation, "reasonably anticipates" an event or receives notice that it is imminent. The gap between the ambiguity of the initial triggering event and the protracted nature of 21st century litigation, however, makes determining the scope of any potential dispute much more complex, particularly when done manually.

Many still manage the process in this manual fashion and, therefore, enter the "meet and confer" conference required by Rule 26(f) of the Federal Rules of Civil Procedure with some level of uncertainty. Upon receipt of a litigation notice, there is a varied set of protocols necessary to identify appropriate custodians, distribute a notice requiring the preservation of potentially relevant documents, conduct employee interviews, schedule document collections and track the results of each stage using a standard spreadsheet and email correspondence. While success is possible, without a repeatable workflow, the margin of error is often too high.

To reduce that margin, currently available legal hold technology removes human error from the system and, as a result, provides users with a compliance road map that reflects more integrity. That map provides an auditable trail for document management purposes, as well as a tool to ensure defensibility of the process to an adversary and the court.

Legal teams can automate the entire workflow and access a full employee database, which permits notifications created from approved templates to specific individuals with the click of a mouse. Once prospective custodians advise whether they have responsive documents in their possession, the system will coordinate the entire chain of custody and correspondence through to production.

The key is to maintain a streamlined solution under a single platform that integrates with diverse email systems, reduces spoliation and enables flawless management of custodian interviews. This permits effortless data collections through proper assignment of tasks, monitoring of results and sharing collection details.

The value of verification: Every organization should strive at the outset for adequate implementation of systems and technology that address specific needs to provide an audit trail, mitigate any risk of inadvertent document destruction and avoid sanctions. It is the simplified approach to the complexity that will ensure that litigation focuses on the merits, rather than the information that supports them, by remaining true to the mission of the legal department: compliance and accountability.

The power of process: The establishment of a proper process begins with an understanding of the goals for legal hold and tools that enable any user, regardless of his or her technical proficiency, to master the approach with little effort. To maximize effectiveness, in-house counsel should focus on process first and technology second, but while concentrating on tools that enhance the process by offering intelligible implementation, uncomplicated deployment and universal accessibility.

Simplified tools also enhance communication with outside counsel and streamline management by providing structure to the relationship. Traditionally complex processes and unnecessarily complex technology can often overwhelm practitioners. In addition, during the current period of austerity, the marginal

returns on additional features beyond those required to ensure defensibility are unjustified and potentially unnecessary.

Consistency is key: Success comes with products that offer ease of use while offering consistency. They also enable direct lines of communication between attorneys and custodians, which is an essential component of legal hold. Broken lines present preventable errors for which courts have little tolerance. In a cost-conscious community, the threat of sanctions is too much to bear.

Legal hold tools that teams can reliably implement within weeks, rather than months, are part of the 2010 trend toward efficiency, cost-effectiveness and customer-orientation. Organizations can always add functionality as they mature in their e-discovery profiles.

The Straightforward Strategy

While the maturity of an organization is a key factor, the industry itself is at a tipping point, where there is an expectation of excellence in every aspect of practice. The steadfast adherence to deadlines, commitment to responsiveness and the articulation of straightforward strategies for controlling content, now serve as the pillars of the modern system. In addition, technologists and legal teams are at a watershed in their interaction, which makes meeting these expectations more likely. Both are committed to the operational success of the organization, and the minimalist framework will enhance communication between all parties.

There is no question that legal hold is an issue that plagues every organization, large and small. Those organizations that successfully manage to navigate its many pitfalls do so by selecting tools that provide a simple, user-friendly platform, which is easy to implement and seamless in its integration. Doing so enables their legal teams to create defensible, auditable and well-respected protocols that provide protection. For that reason, "Technology teamed with clear, concise business processes will be key in overcoming the legal department's challenges in 2010," says Kenney. ■

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