



## A Few Words on Legal Hold

By John Olsson (printed in *Chicago Lawyer*, August 2011)

Legal Hold. It is among the beginning stages of the EDRM flow which outlines the entire electronic discovery process. This process has been tamed bit by bit over the history of e-Discovery, starting from the processing, review and production end and steadily moving left across the spectrum. One of the last hold-outs in this trend has been Legal Hold, which is one of the final untamed frontiers of the electronic discovery universe. Until now, that is. Civilization has finally arrived at this last outpost and is ready to set up shop.

As with many concepts, there is theory and reality. In theory, Legal Hold is supposed to be a well-regulated process that begins with a “triggering event” that would lead a reasonable person to think, “uh oh, we could get sued.” A triggering event could be many things – the firing of a troublesome employee, a cease-and-desist letter from somebody’s counsel, or an embarrassing article about misdeeds that makes the front page of

the Wall Street Journal. From that point, counsel is obligated to send notices to all employees who potentially possess information regarding the possible litigation indicating that they must preserve all data – paper and electronic – that could plausibly be used as evidence. Ideally, all custodians will respond to this notice, indicating their level of involvement and the types of data they possess. All this information would be tracked and coordinated, including the sending of reminder letters, questionnaires, and responses to questionnaires. The goal is a successful collection of all potentially relevant data, tracked by what Judge Scheindlin and others have mandated must be a “repeatable and defensible” process.

That is the theory. The reality, at least from experience, can be somewhat different. Many legal holds are not started at the time of the triggering event – a good number don’t get started until a complaint is served, and then it is most likely too late. Additionally, the notification and tracking process may leave a lot to be desired. The proverbial wheel is frequently reinvented for new legal hold actions as far as letters and questionnaires are concerned, and tracking is often left in the hands of an overworked paralegal or junior associate, armed with a legal pad and pen or, if lucky, a working knowledge of spreadsheets. The end result is generally far from the “repeatable and defensible” process, and many Counsel surely suffer sleepless nights over this.

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## A Few Words on Legal Hold (continued)

Now, with advancing technology, the theory and reality have moved closer together. SaaS solutions, such as Method by kCura, are now available and can almost completely automate the notification and tracking process, bringing one closer to achieving the desired “repeatable and defensible process.”

Almost all the work involved takes place during the set up. Employee lists and information from Human Resources can be incorporated, and individual custodians selected as appropriate for holds. Initial Hold Letters and follow-up templates would be agreed upon and also stored for future use. Further, individual questions for questionnaires can be drafted and made available for use on an as-needed basis. These lists, letters and questions can be used again and again for hold after hold.

Once this is done, counsel can directly select custodians, choose questions for the questionnaire, and essentially press the proverbial start button to then manage the automated process of sending, receiving and tracking all emails and questionnaire responses. Every piece of correspondence must be acknowledged when received by the custodian, so compliance with the hold can also be tracked. If a custodian is not acknowledging the hold for any reason, individuals will be identified so that they may be prevailed upon (by personal visit or otherwise) to comply.

The key benefit of legal hold automation is the ability to track everything done during the entire hold process, so when all is said and done documentation can be generated illustrating every

step that was performed along the way, achieving compliance while reducing exposure. This will likely please any Judge you may find yourself in front of, while your opponent is frantically working his way through boxes of hand written information on legal pads. ○

### About the Author

**John Erik Olsson** is Director of Discovery Solutions for [TechLaw Solutions](#), an e-Discovery solution provider offering services from early case assessment through hosted data review and production. He has worked as a prosecutor and investigative counsel at the county and state level, as well as working as an attorney and e-discovery project manager at AmLaw 200 Law Firms.