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Step 6 for Legal Holds: Modification

This is the sixth article of a series aimed at helping organizations discharge their duty to preserve ESI

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This is the sixth installment in a series of articles aimed at helping organizations implement an effective written litigation hold. This article covers modification of the legal hold.

If new information comes to light during the **enforcement process**, the litigation hold must be modified. Past cases and prominent commentators agree that a single, one-time notice is not enough to meet the legal requirements of a litigation hold. Case law requires the organization to enforce the effectiveness of their litigation holds and to modify the hold if necessary to help preserve records related to the trigger event.

WHY MODIFY THE SCOPE OF THE LEGAL HOLD

During the enforcement process it may become clear that the scope of records being maintained is too broad or too narrow. Examples of scope changing events include where additional record custodians did not receive the original hold notice, additional documents or ESI are requested by the opposing party, or new formats of electronic documents or new data locations are found. Any one of these events could signal a need to modify the scope of the litigation hold. The modified hold must be sent to all recipients of the original hold as well as those newly identified custodians deemed relevant.

The modification process is very easy to understand. It involves adding to the notice an expanding list of what is included within the original hold. It can be expanded by adding categories of records, custodians, locations of records, file locations, third parties with information, or data types. Anything that was not included in the original hold but now considered pertinent should be included.

This broadening process generally carries little risk. Failure to broaden the scope of a litigation hold when necessary, on the other hand, carries a huge risk.

Modification of a litigation hold can also include a necessary narrowing of the hold. Unlike broadening the scope, narrowing it carries some inherent risk and should be implemented only under the guidance of legal counsel or with the permission of an opposing party or through court order in a lawsuit.

A narrowing can be accomplished through several means. Custodians can be released from their responsibilities to preserve certain records or certain records can be released from the hold. Whenever custodians or records are released from the hold, a new hold notice should be sent to all recipients of the original hold notice.

By and large, narrowing the scope of a litigation hold can be the most significant way to reduce the costs of discovery. The smaller the amount of information included and the fewer people involved, the smaller the economic impact of the litigation hold.

Whether you broaden or narrow the scope of a legal hold, maintain a log which keeps track of the modifications. It should include a note or memorandum describing the change and the underlying rationale. The reasoning behind the change may be necessary to defend the litigation hold modification.

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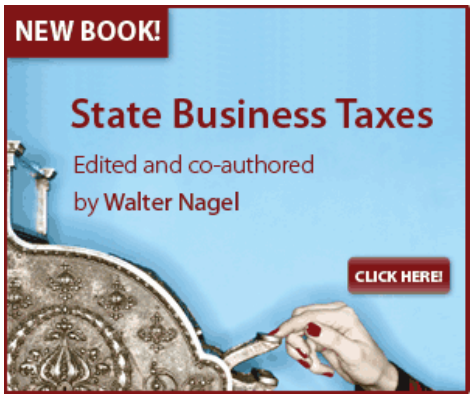

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BUY-IN FROM POTENTIAL LITIGANTS AND COURTS

Because sanctions can carry high costs it may be appropriate to discuss any narrowing of the litigation hold with the investigating agency or the opposing litigant before implementing the change. Opponent buy-in is key -- it pre-empts the opponent from arguing that the organization destroyed relevant evidence.

No matter if the opponent agrees or not, it is advisable to go one step further by obtaining court approval for the modification of scope. Federal courts encourage both parties to meet and determine the scope of records to preserve, including ESI. Federal courts have the authority to dictate preservation orders even if the parties fail to reach an agreement. The same principles apply to any further modification to the scope of preservation.

*John Isaza, partner at **Howett Isaza Law Group**, and John Jablonski, partner at **Goldberg Segalla**, are authors of "Seven Steps for Legal Holds of ESI and Other Documents" (ARMA International 2009).*

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Legal Holds and Trigger Events blog by John Jablonski, and contributor John Isaza, is devoted to tracking cases, articles, commentary and trends involving legal holds and trigger events

Book Review: '7 Steps for Legal Holds'

The book "**7 Steps for Legal Holds of ESI and Other Documents**" (ARMA International 2009) contains an interview checklist for key players, as well as a checklist for IT considerations to help organizations enforce the effectiveness of their litigation holds. It also contains key areas to search for ESI and sample legal hold procedures. The book can be purchased from ARMA Internation for special price of $67.00 until March 15; regular price for non-members is $100.00.

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