

# LEGAL HOLD OBLIGATIONS FOR DISTRICT EMPLOYEES



# AGENDA

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- Federal Rules of Civil Procedure
- What is a legal hold?
- What are the responsibilities of the Corporate Records Officer when a legal hold is declared?
- What are your obligations when a District employee receives a legal hold?
- Questions??

# Federal Rules of Civil Procedure Overview

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Federal Rules were amended in 2006 to include Electronically Stored Information. . . .

Federal Court – applies to all cases filed or pending as of 12/1/06

- Local Rules need to be referenced on a per-jurisdiction and per-judge basis
- Most State Courts are adopting or adapting the Federal Rules to State Court practice
- Nevada has not adopted the Federal e-Discovery Rules

Parties to the litigation have “new” (or at the very least “newly articulated”) responsibilities with respect to disclosure and discovery

## FRCP Overview | Continued

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The rules require early attention to the handling of Electronically Stored Information (“ESI”)

Must know the details of your computing environment **before** you meet and confer

Closely tied to discovery is the duty to preserve documents for disclosure or production

If you are a **Plaintiff** you must know what documents/ESI/systems are involved in the litigation before you file the complaint

If you are a **Defendant**, knowing what documents/ESI/systems are involved in the litigation is your first order of business upon receipt of the pleadings

# FRCP Overview | Continued

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Responsive documents, including ESI, need to be:

- Searched
- Preserved
- Identified
- Collected
- Reviewed
- Redacted/Withheld and logged
- Produced

Discovery issues (e.g., scope, form, extent, agreements, etc.) may involve Court orders, or less formal agreements

# “ESI” Electronically Stored Information

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- ESI is now the dominant method of storing human information
- Over 99% of new information stored in the United States is stored electronically
- ESI is different than paper
  - Persistent (“delete” is a misnomer)
  - Dynamic (susceptible of changes in ways predictable and mysterious)
  - Ubiquitous (copies can exist in many places at once: servers, e-mail, PDAs, backup media, hard drive, portable USB drives, almost anywhere on the Internet, and more!)
  - Difficult to establish an office of record
  - Difficult to establish a primary custodian



# Relevant Case Law

–“It is black letter law that computerized data is discoverable.” *Anti-Monopoly v. Hasbro*, 1995 WL 649934 (S.D. N.Y.)

–“. . . parties and their counsel are fully on notice of their responsibility to preserve and produce electronically stored information.” *Zubulake v. UBS Warburg L.L.C.*, 2004 WL 1620866, \*16 (S.D.N.Y. July 20, 2004) ( “Zubulake V”)

–“The duty to preserve material evidence arises not only during litigation but also extends to that period before the litigation when a party reasonably should know that the evidence may be relevant to anticipated litigation.” *Silvestri v. General Motors Corp.*, 271 F.3d 583, 591 (4thCir. 2001)

–"Much of present day discovery is contained on computers. It is both parties' duty to comply with the rules of discovery and court orders despite technical difficulties." *Shank v. Kitsap County, et al.*, 2005 WL 2099793 (W.D.Wash. Aug. 30, 2005)

–“Courts have found that obligation to preserve runs also to senior corporate officers...” *In re Prudential Ins. Co. of Am. Sales Practices*, 169 F.R.D. 598 (D.N.J. 1997)

# What Triggers a Legal Hold?

The following circumstances may cause the District to issue a legal hold:

**LITIGATION:** The District is sued, or brings suit, in a court of law

**SIGNIFICANT INCIDENT:** The District is involved in a significant incident involving personal injury, death, and/or significant economic, health, safety, or other loss/exposure

**GOVERNMENT INVESTIGATION:** The District becomes aware that a government, administrative, criminal, or civil investigation (formal or informal) is underway, has been scheduled, or is likely to be scheduled

**REQUEST FOR INFORMATION:** The District receives a request for information from a governmental authority

**OTHER CIRCUMSTANCES:** As determined by the Legal Department



## ADDITIONAL POINTS OF INTEREST

Triggering events are not always flashing red lights. There may be no advance warning.

Absent a trigger event, there is no duty to preserve records.



# What is a Legal Hold?

A “**legal hold**” is a directive issued by the Legal Department requiring employees who receive a Legal Hold Notice to **identify** and **preserve** defined **records**, **data**, and **information** within their custody or control during or in anticipation of litigation or regulatory inquiry.

A legal hold involves taking **proactive steps** to preserve records, data, and information and **suspend disposition** for those physical and electronic records which are described in the Legal Hold Notice.

You will be asked to **certify** that you have received the Legal Hold Notice, understand your obligations, and will comply with your responsibilities.

## Directive Issued by Legal

### Identify

- **Records**
- **Data**
- **Information**

### Pro-activeness to suspend disposition

### Duty to Preserve

### Certify understanding of obligations/ responsibilities

# What are the CRO's Responsibilities?

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- Confer with the Attorney(s)
  - Discuss legal matter
  - Identify key custodians
  - Identify potential relevant information
- Enter legal matter into the Legal database
- Generate Legal Hold Notification and Certificate of Preservation documentation
- Generate Email and transmit Legal Hold documentation
- Contact key custodians and advise of Legal Hold

# What are the CRO's Responsibilities?

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- Schedule a Scoping Meeting with key custodians
  - Document custodial information, location, volume, format, and other
- Coordinate secure storage on network share drives
- Coordinate hard drive manifest updates
- Maintain all Legal Hold documentation
- Perform period audits to ensure preservation compliance
- Issue Legal Hold Release notice upon closure of Legal Hold

## Legal Hold Notification

To Custodian  
From The LVVWD General Counsel  
Date [Enter Date]  
Subject [Enter Matter Name]

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The Las Vegas Valley Water District was served with a lawsuit for damages concerning [Enter Matter Description]. Therefore, LVVWD is issuing a legal hold request to preserve all documents, electronically stored information (ESI) and other materials related to this matter.

You have been identified as a potential information custodian or "key player" in connection with the above-described matter.

If you know of anyone who may have any of the documents, electronically stored information (ESI) regarding this matter, please notify Terri Robertson, Corporate Records Officer. If you need to advise others under your supervision please contact Terri Robertson. Do NOT forward this Preservation Notice without the prior approval of Terri Robertson.

EFFECTIVE IMMEDIATELY and until further notice, the General Counsel directs you to PRESERVE ALL documents, electronically stored information (ESI), and other materials that relate to this matter.

DO NOT destroy, delete, or alter any documents, ESI, or other materials that are or could be relevant to this matter. Failure to preserve these could result in harsh penalties or sanctions from courts or other governmental authorities.

*Preservation includes taking reasonable steps to prevent the partial or full destruction, alteration, deletion, shredding, incineration, wiping, relocation, migration, theft, or mutation of such material, as well as negligent or intentional handling that would make the material incomplete or inaccessible.*

You MUST immediately suspend all procedures automated or manual that you control that could delete, destroy or alter documents, ESI, or other materials that pertain to this matter. You MUST also ensure that anyone who keeps your files (administrative staff, offsite storage, etc.) is aware of and adheres to these instructions.

If suspending these procedures is not operationally feasible, immediately contact Terri Robertson, CRO who will, along with the Legal IT Liaison identify and approve an alternative method for preserving the records, data or information.

### Scope

For purposes of compliance, you should interpret this Legal Hold Notice to encompass as broad a range of documents, ESI, and other materials as possible.

The term "documents" includes records, non-records, and other information potentially relevant to this matter, regardless of format, storage media, or storage location. Therefore, the term "documents" includes any written, recorded, filmed, electronic, or graphic matter, whether in hard or soft copy. Examples of types of documents would include letters, memoranda, email, notes, minutes, records, case files, computer files or disks, video tapes, audio tapes, graphs, maps, data, charts, spreadsheets, plans, drawing plans, statements, notebooks, handwritten notes, applications, agreements, books pamphlets, periodicals, appointment calendars, and work papers.

### Locating Electronic Documents, Data, and Information

Each employee should review all possible locations for applicable records, data, information and documents including, but not limited to, physical files repositories (e.g., desk drawers, file cabinets, shared spaces, storage rooms/facilities, etc.), Enterprise data repositories / systems / servers, work computers and / or laptop hard drives, home computers and / or laptop hard drives, network share drives or personal network drives, CDs, DVDs, thumb drives, floppy disks, etc. Potentially relevant information may currently be stored on computer systems as electronic files, emails, calendar events, Word documents, Excel spreadsheets, text files, graphic or image files, GIS data, CAD files, video, databases, etc. Potentially relevant materials may also include website content and document location on the network.

If you are not the Record Owner of the original document, electronically stored information (ESI) or other material, but maintain copies whether it is a draft, final version, or a copy which differs in any way from a draft or final version (contains handwritten notations, receipt stamp, distribution list, etc.), please apply the same preservation procedures.

### Updates and Additional Obligations

This Notice may be updated, supplemented, or otherwise modified as necessary to capture new or revised document preservation or collection demands.

### Resources

Detailed information is provided in the attached document to assist you with your record, data, and information search procedures.

### Certification of Preservation

You MUST complete the attached Certificate of Preservation after conducting a reasonable search regardless of whether you possess any responsive material. Please sign, and return to

### Employee Certification of Preservation to Legal Department

*This certification must be completed, signed, and returned to Terri Robertson, Corporate Records Officer at mailstop 480, after a reasonable search has been performed regardless of whether you possess any responsive materials.*

Legal Hold for: **[ENTER MATTER NAME HERE]**

1. I certify that I have read and understand the attached Legal Hold Notification on the \_\_\_ day of \_\_\_, 2014.
2. I certify that I have conducted a reasonable search for any responsive records or material as it relates to this matter.

The outcome of my search has resulted in the following: (initial as applicable)

\_\_\_\_\_ I have responsive material and I understand my obligation to comply with the Legal Hold Notification requirements to Preserve all documents, electronically stored information, and other material, as it relates to this matter.

\_\_\_\_\_ Based on a reasonable search, I have no documents, electronically stored information, or other material as it relates to this matter.

\_\_\_\_\_  
Department

\_\_\_\_\_  
Print Name

\_\_\_\_\_  
Sign/Date

# What's Covered by a Legal Hold?

The term “records” refers to any recorded information that provides evidence of the District’s related activities, events, and transactions, and is retained according to ongoing business, legal, compliance, operational, and historical value. Information created or received during business transactions.

## *More information:*

- ***All documents, or non-records and other information regardless of format, storage media, or storage location.***
- ***The term “documents” include without limitation, any written, recorded, filmed, electronic, or graphic matter, whether in paper or electronic form***

# What's Covered by a Legal Hold?

## Examples of records, data, and information .

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- Letters
- Memos
- Email
- Notes
- Minutes
- Case Files
- Computer Files or Disks
- Videotapes
- Audio Tapes
- Handwritten Notes
- Work Papers
- Appt Calendars



# Does the Legal Hold Apply to Me?

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- If you receive a Legal Hold Notice and Certificate of Attestation, you have an obligation to comply!
- If you receive a Legal Hold Notice, you will also receive detailed instructions regarding your responsibilities, and how to comply with the Legal Hold Notice..

## *REMEMBER:*

*Failure to comply may result in monetary sanctions against the company, the legal staff, or the individual employee. . .*



## What Should I do??

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**Don't delay!!!!!!** The longer you wait after notification, to preserve records, data, electronically stored information ("ESI"), or other materials, the greater the risk to inadvertently delete, lose, or destroy the material!!!!

Tick Tock

Tick Tock

Tick Tock!!!!



# Employee Responsibilities. . . .

## Paper Documents

- Identify whether you (or your department) are the custodian of any potentially relevant paper records. Check your personal files, central filing area, and off-site storage

## Duplicates

- Even minor variations in characteristics, like notes, highlighting, or other marks count as differences for these purposes.
- Printed emails, different recipients (such as “bcc’s”) or other differences in email strings, makes it a new email.
- When in doubt, err on the side of preserving all versions or iterations



# Employee Responsibilities | Continued

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## Electronic Stored Information

- *Potentially* relevant information may be stored on computer systems, such as electronic files, emails, calendar events, Word documents, Excel spreadsheets, text files, graphic or image files, GIS data, CAD files, video, audio, databases, and other
- Each Legal Hold Notice recipient should consider whether information covered by the Legal Hold Notice may be contained in:
  - Work computer and/or laptop hard drives
  - Home computer and/or laptop hard drives,
  - Network shared drives, or personal network removable media, including CDs, DVDs, thumb drives, floppy disks, and other

Support is a  
phone call  
away. . . !!



Work with Legal  
and IT to help  
identify your e-  
records, and assist  
in securing the files

# How Do I Find Out if I Have Information Subject to the Legal Hold?

## Physical documents and other materials

Physical documents should be identified as potentially relevant to the legal hold and their destruction prohibited, but no collection efforts should be undertaken unless contacted by Legal.

You may be asked to gather the potentially responsive materials and hold them separately from your regular files, but please do not take this step unless Legal asks you to.

*If requested by Legal, retain all copies of any document that falls under the guidelines of the legal hold in a dedicated box at your desk.*

# How Do I Find Out if I Have Information Subject to the Legal Hold? | Continued

## Electronically stored information:

Do **NOT** move your electronic files to a separate electronic folder unless directed by Legal.

- *By merely **opening** an electronic file, a user may alter information about that file.*
- *Custodians should locate relevant ESI such as Word documents, Excel spreadsheets, and PowerPoint presentations by utilizing the native search capacity of Windows Explorer.*

Metadata  
may be  
relevant!!!!

# How Do I Find Out if I Have Information Subject to the Legal Hold? |Continued

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## Messaging (email)

The search feature within the email system may be used to locate relevant message content, however, email is often organized in folders that relate to projects, people, or dates, making search more intuitive and less reliant on the use of search terms.



## Removable media

Removable electronic storage media containing potentially responsive information must also be preserved

Do not re-use, (or re-write over), media containing potentially responsive information Contact IT or Legal if you have any questions regarding the use or re-use of existing removable media

# I Searched For Responsive Information, Now What Do I Do?

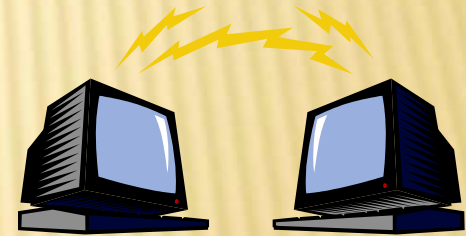
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## Communicate your findings:

If your search reveals that you have potentially responsive information in your custody, you **MUST** notify Legal immediately.

Legal will need to know, in general, what types, volume, and storage location of the information in your custody or control.

Complete the Legal Hold Attestation document, and return to Legal within 14 days of your receipt of Notice.



# Do I Need to Send the Information to Legal?

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## Collection:

- **NO** collection efforts should be undertaken unless contacted by Legal.
- If Legal determines that the collection of potentially responsive materials is necessary, they will contact you and make arrangements for collection and /or duplication of those materials.





# What Else Should I Know?

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## System maintenance:

Running compression, disk defragmentation, or other computer optimization or automated maintenance programs should be deferred until ESI has been collected.

*If you have questions about whether or not you should perform system operations on your computing equipment, please contact the CRO Legal.*



# What If I Need to Work with the Information or Files Subject to Legal Hold?

## Access to information subject to legal hold . . . .

If you have electronically stored information that is subject to the legal hold that you anticipate needing for business purposes, or will need to modify while the legal hold is in effect, contact Legal for assistance.

*Legal will work with you to develop a legally defensible approach to using the files in order to get your work done.*



# Is My Legal Hold Obligation Complete Now?

## Ongoing preservation/Work in progress!!!!

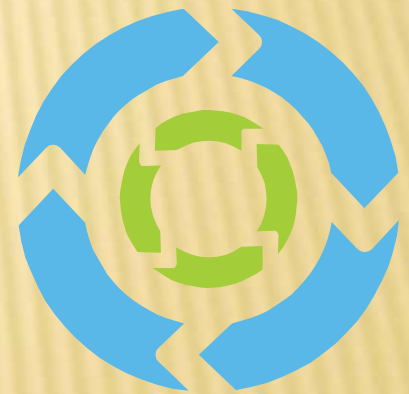
### **Preservation is an ongoing obligation.**

Unless and until otherwise notified in writing, you are required to preserve any and all newly created or received documents, ESI, or other materials related to the legal hold that come into your possession, custody, or control.

You must continue to comply with the directives in the Legal Hold Notice until you receive word from Legal that the Legal Hold Notice is released.

### **Updates and additional obligations**

The legal hold may be updated, supplemented, or otherwise modified as necessary to capture new or revised document preservation or collection demands.

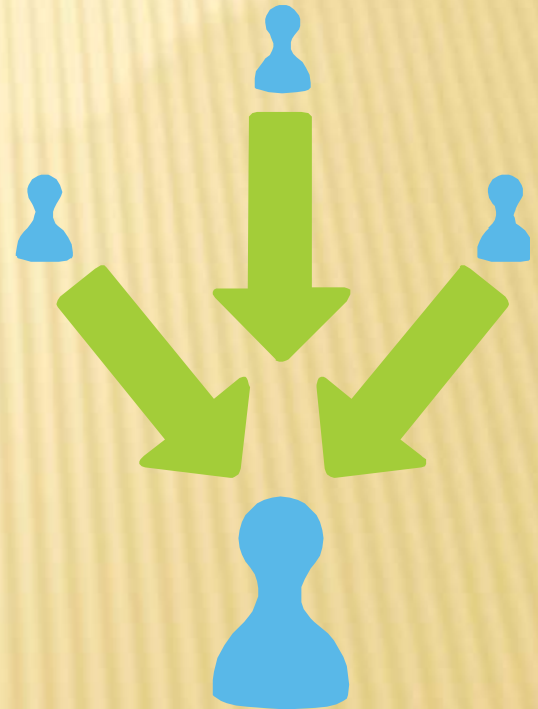


# Whom Do I Contact with Questions?

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Each Legal Hold Notice will contain detailed contact information so that you will always have a point of contact for your questions, and to assist in your compliance with the terms of the Notice.

You can ALWAYS contact Terri Robertson, Corporate Records Officer@ ext. 7264 for any questions, concerns, or issues that may arise in connection with a legal hold.



**Questions. . . . ?????**