

# Bring Legal Holds To Life

## Understanding The Legal Hold Framework

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## Legal Hold Is The Foundation Of Corporate eDiscovery Programs

“Legal hold” is the term used to describe a litigant’s common law duty to preserve information and things that may be relevant to litigation or reasonably anticipated litigation. The Legal Hold obligation has been in existence for decades, but the landmark 2003 decision in *Zubulake vs. UBS Warburg*<sup>1</sup> has brought the topic into the lime-light of litigation issues.

The *Zubulake* case drew attention to the fact that the shift from a paper world to a world in which technology dominates the way information is created, stored, transmitted, shared and otherwise dispositioned has added a great deal of complexity to the seemingly simple act of preserving information for legal hold.

While counsel may understand their legal hold obligations that does not necessarily translate to a good grasp on how to manage legal hold as it relates to eDiscovery. Many organizations continue to manage the process on a wing and a prayer, as evidenced by the numerous published opinions sanctioning parties for complete failure or inadequate legal hold.

### Recent Cases Sanctioning Parties For Inadequate Or Incomplete Failure To Issue Legal Holds

*Branhaven LLC v. Beeftek, Inc.*, 2013 WL 388429 (D. Md. Jan. 4, 2013); Defendant sanctioned for inadequate legal hold and improper certification under FRCP Rule 26(g)

*Carrillo v. Schneider Logistics, Inc.*, 2012 WL 4791614 (C.D. Cal. Oct. 5, 2012), Defendant sanctioned for inadequate legal hold

*Day v. LSI Corp.*, 2012 WL 6674434 (D. Ariz. Dec. 20, 2012), Defendant sanctioned for insufficient legal hold

*EEOC v. JP Morgan Chase Bank N.A.*, 2013 WL 765593 (S.D. Ohio Feb. 28, 2013); Defendant sanctioned for failing to preserve database data subject to purge after expiration of retention period

*EEOC v. New Breed Logistics*, 2012 WL 4361449 (W.D. Tenn. Sep. 25, 2012); Defendant sanctioned for failure to issue timely legal hold resulting in destruction of data

*E.E.O.C. v. Ventura Corp. Ltd.*, 2013 WL 550550 (D.P.R. Feb. 12, 2013); Defendant sanctioned for failure to preserve data lost as a result of system data migration and restructure

*Peerless Industries, Inc. v. Crimson Av. LLC*, 2013 WL 85378 (N.D. Ill. Jan. 8, 2013), Defendant sanctioned for failure to issue legal hold to third party that was under the control of Defendant

*Scentsy Inc. v. B.R. Chase LLC*, 2012 WL 4523112 (D. Idaho Oct. 2, 2012), Defendant sanctioned for failure to implement proper legal hold

Several factors drive the behavior that leads to these sanction-worthy circumstances:

- Lack of understanding of the complexity that technology introduces to the legal hold function, resulting in the failure to appreciate the requirements necessary to execute;

<sup>1</sup> 220 F.R.D. 212 (S.D.N.Y. 2003)

- Little or no eDiscovery education, resulting in insufficient processes;
- Technophobia that engenders a head-in-the-sand response;
- Extreme inertia because Counsel is overwhelmed by the thought of eDiscovery and is not sure where to start.

Directives from retained counsel may drive legal hold, however, much of the process itself is owned and managed by internal corporate resources. In-house counsel must become more familiar with the company's technology systems and practices in order to successfully deliver on legal hold obligations. Further, failing to proactively manage the legal hold process drives litigation costs out of control. This report lays out the framework for developing an effective legal hold program.

## Understanding The Legal Hold Framework

There are three core functions in a legal hold program:

1. Legal hold notice
2. In-place preservation of documents and data
3. Preservation by collection.

Legal hold can – but does not always – encompass physical collection of data for preservation. Conversely, legal hold can – but does not always, encompass notice to custodians of data. Legal hold may include any one or combination of (1), (2) and/or (3) as described herein. No matter the method selected, compliance should be monitored and efforts documented throughout the process.

### Legal Hold Notice

Legal hold notice is the process of alerting the appropriate people of the litigation (or impending litigation). Legal hold notices contain, at a minimum<sup>2</sup>:

- A description of the legal matter;
- Instructions on preservation obligations and actions;
- A description of the scope of documents and information subject to the preservation obligation (such as subject matter, types and date range); and
- Who to contact with questions.

Legal hold notices may be sent to:

1. Legal hold custodians: Employees that counsel believes may have created and/or be in control of data subject to the preservation obligations;
2. Former employee legal hold custodians: Former employees that counsel believes may have created and/or been in control of data subject to the preservation obligation; the notice typically goes to the former employee's successor and/or supervisor;
3. Data stewards: Employees that are responsible for systems that counsel believes may contain data subject to legal hold. A data steward is usually not responsible for and may not have specific knowledge of the content created in the system. Rather, a data steward is responsible for the system itself (e.g., database administrator, email system administrator);
4. Executives and business unit leads: Courtesy, or FYI, copies may be sent to certain executives and/or managers of business units;
5. Third parties: Contractors, businesses and individuals that create and/or manage data on your behalf that

<sup>2</sup> The information herein should not be interpreted as legal advice; this information is provided for purposes of sharing the in-the-trenches experiences of a non-attorney eDiscovery professional.

counsel believes may be subject to legal hold;

6. Legal team members: Members of both in-house and retained counsel team members receive courtesy copies for their files.

## Preservation In Place

Preservation-in-place, as it sounds, refers to preserving information in its current location. There are two common methods for executing in-place preservation:

- Preservation via custodian/steward management: you are relying on individuals to ensure that data subject to legal hold is not deleted. The directive to preserve is delivered through the legal hold notice; additional processes may be put in place to ensure compliance.
- Preservation by data lock-down: requires you to physically lock down data within its storage location/system so that the data cannot be deleted by an end user. This method is system dependent and not all systems have a feature that allows one to “lock” data yet still allows a user to function as needed for business. Systems that have this type of functionality include archive and document management programs.

## Preservation By Collection

Preservation by collection requires collecting a copy of the data and maintaining it in a secure location. Collection should be carried out in a “defensibly sound” manner – meaning that metadata is intact and the collection is auditable, and a proper chain of custody is maintained. This requires tools designed for data collection and should be handled by experienced professionals.

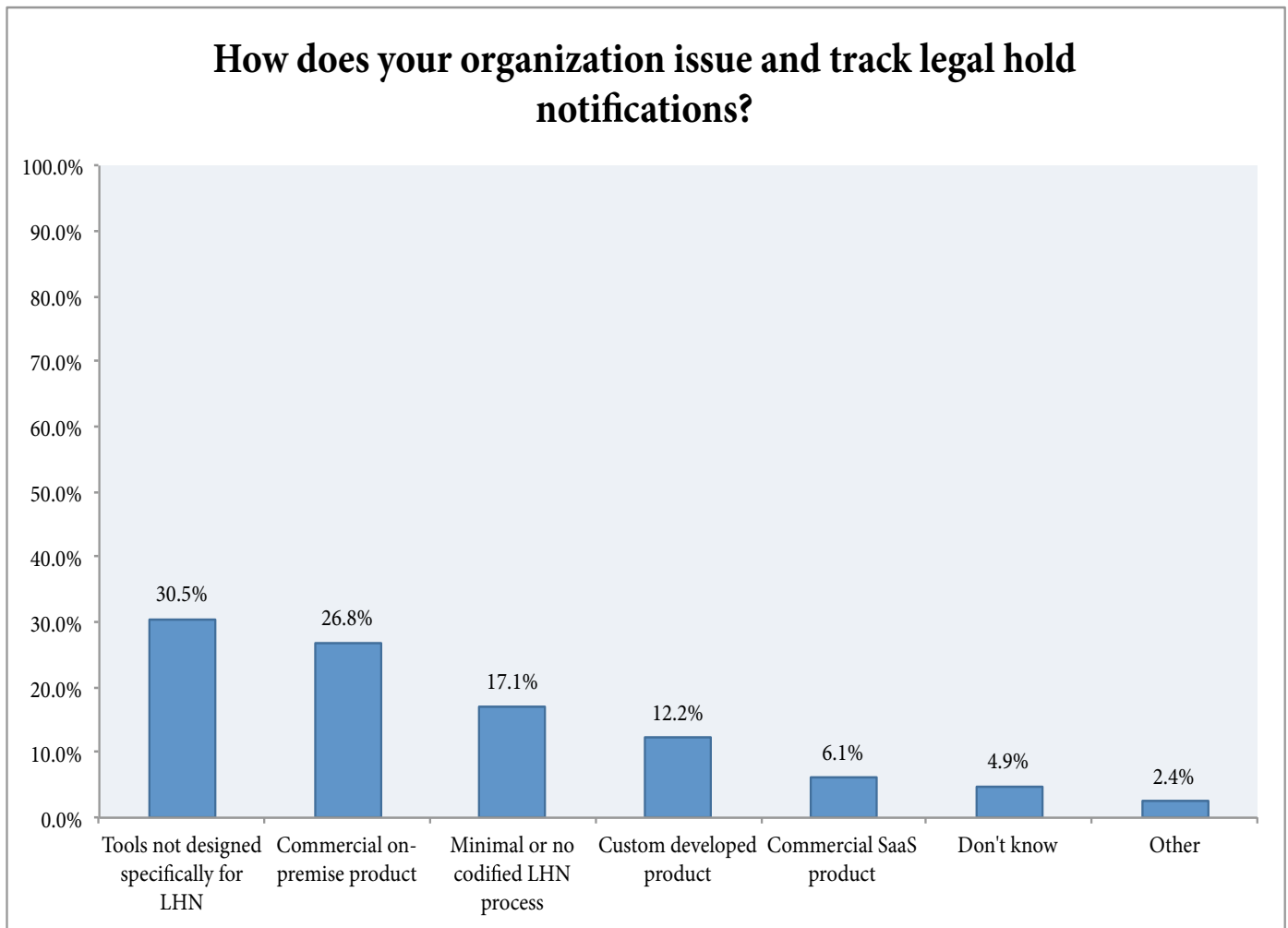
## Bringing Legal Holds To Life

There is not a one-size-fits all approach to Legal Hold, and a number of factors go into choosing the appropriate preservation technique. It is important to note that not all systems are created equal when it comes to the effort involved in executing Legal Holds. A preservation workflow designed for email may be quite different than a workflow designed for documents in a document management system.

When relying on custodians/stewards of data to manage preservation efforts, consider the level of guidance and monitoring necessary for your custodians and stewards to achieve compliance with the legal hold obligation.

There are software tools designed to manage the legal hold notice process. Some of these are installed behind the firewall, and some are offered as cloud solutions. As an alternative, the process may be managed using tools that an organization already has in its toolbox, but that are not specifically designed for legal hold notice (such as email, word processors, spreadsheets). Some organizations custom-develop their own tools.

## No Dominant Method For Legal Hold Notification Management Yet



Source: eDiscoveryJournal Legal Hold Notification Survey, March 2013, N = 84

There are advantages and disadvantages to each approach. Regardless of the method employed, consider the following components for inclusion in the program:

- A method for custodians to confirm receipt and acknowledge their responsibilities as legal hold custodians;
- A method for custodians to indicate others that may also be candidates for legal hold;
- A method for custodians to respond with information as to documents and data that may be subject to the hold (e.g., a “virtual interview”);
- A mechanism to manage multiple holds per custodian;
- A process to alert the legal department of a potential need for legal hold upon a triggering event;
- A systematic trigger to alert legal of the potential need to amend a legal hold when necessary (e.g., when an amended complaint is filed);
- A method to release lease holds;
- A method to audit legal holds. For example, an audit program might include the ability to test the following statements:
  1. Legal holds are issued and amended timely upon triggering events;
  2. Oversight of custodian acknowledgement of legal holds is managed;
  3. Alerts are issued a custodian’s employment has ended;
  4. Legal holds are released in a timely manner.

When selecting tools and/or service providers – whether for the legal hold notice function or the collection function – consider including formal Request for Information (“RFI”) and Proof of Concept (“POC”) phases in your project. When done properly, developing an RFI will force you to fully flesh out and document your needs. It is a tedious but worthwhile process. Committing the time and effort at the front end of the project – the RFI phase – will make the POC phase much easier because you will have already determined what your needs and priorities are. Thus, scripts/use-case scenarios to be used in the POC are essentially already developed.

## **Legal Hold Management: A Goal Within Reach**

Today’s world of rapidly evolving technology has completely changed the preservation game. Ad hoc, manual legal hold processes increase risk, stress levels and the costs of managing unsustainable procedures. Implementing a legal hold program that manageable and defensible is within reach. First, establish your requirements. Follow that with developing processes and workflows that work for your unique organization, then place or build technology around them. As you implement your legal hold program, remember that technology and litigation are evolutionary, not revolutionary. Your program will need to flex accordingly.

## **What This Means For Solution Providers**

Given organizations’ varying levels of readiness for legal hold management, there are ample opportunities for solution providers to generate sales. Some organizations will deploy very simple Legal Hold Notification management applications that make it easy to generate custodian notifications and track acknowledgement of those notifications. More mature organizations will manage legal hold notification along with workflow management, the actual lock-down (either in-place or by moving and copying) and collection of data, and even ECA. Vendors looking to achieve success in this market will need to eventually offer a robust platform to address the full spectrum of legal hold activities, while also offering modular solutions that can be scaled down to meet the needs of those organizations that are just dipping their toes into legal hold management, and/or have limited budget for such solutions. Expect some of the larger eDiscovery and IG platform vendors to potentially acquire legal hold notification pure-play solutions in the next 12-18 months.

## About The eDJ Group

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