

Getting a Hold on Legal Holds



By Eric Sinrod,

Especially since the late-2006 e-discovery amendments to the Federal Rules of Civil Procedure, companies are grappling with the appropriate scope of legal holds and the methods to identify, retain and harvest information that reasonably may be relevant to actual or potential litigation. Appropriate to the times, CGOC and the Huron Consulting Group have just released the results of a survey on legal holds and the e-discovery practices of 1,000 global companies. While software solutions appear to help when it comes to the increasing burdens of legal holds, companies should not let the human assistance of counsel get lost in the shuffle.

The survey, which goes by the title "Benchmark Survey on Practices for Legal Holds in Global 1000 Companies," primarily centers on practices for preserving information for litigation, identifying data custodians, communicating legal holds, interviewing custodians of information, and harvesting potentially relevant data. The survey focuses on relatively large companies, as their average annual revenues range from \$5 billion to in excess of \$150 billion. The companies fall within the high-tech, financial services, insurance, biotechnology, chemical, energy, manufacturing and pharmaceutical sectors.

In reflecting on the survey results, Jim Mitchell, a Managing Director of Huron, notes that the "the vast majority of e-discovery risk can be linked to the legal hold process." Indeed, he elaborates that "corporations and their law departments continue to work to mitigate risk and reduce costs while at the same time they must manage their data effectively and accurately." Nevertheless, he adds, "difficulties in preservation continue to increase due to the diversity, ever-increasing volume, and scrutiny of data - corporations are telling us they can't afford not to address this process."

With the e-discovery amendments to the Federal Rules of Civil Procedure and recent court decisions, companies more and more are formalizing the process behind legal holds and increasingly are sending out legal holds with respect to legal disputes. Of course, this has led to an increase in the sheer number of open legal holds, which has had a corresponding effect on corporate data management practices, as information relevant to legal disputes must be tracked and actively managed - at times for years. In fact, a majority of the surveyed companies have reported an average of as many as 980 new matters opened each year that could require legal holds. And what must be preserved will differ case by case.

Salient findings of the survey include the following: companies are issuing far more holds across a greater number of open matters and matter types over time; reminders and compliance confirmations are implemented regularly as part of the hold process; identifying the people and systems that control relevant data is complex and difficult at the outset of a hold; surveyed companies are improving their legal hold processes and methodologies; as many as 80% of surveyed companies issue legal holds for every matter, while 20% use risk and case analysis to decide which matters truly deserve holds; and the use of automated legal holds can implement consistent legal hold processes.

The survey is sobering in demonstrating that even for companies that have implemented legal holds for a number of years, they still have trouble dealing with the growing duties and magnitude of legal holds. Only two years ago, the management of legal holds in an average surveyed company addressed just several matters with a few custodians and hardly any electronic data. Now, of course, the management of legal holds can involve numerous matters, with many custodians and great amounts of electronic data.

Because of the increased responsibilities and workload of litigation holds, the survey points out that some companies use legal hold software to issue and manage legal holds and to harvest the relevant data. Atlas LCC legal hold software was used by 85% of surveyed companies, while 14% used Access databases and Excel spreadsheets, with 1% implementing their own systems.

While software very well may be beneficial, it is the humble opinion of this author that any solution must be used in conjunction with the advice of counsel working on a particular matter. It is counsel who can help determine whether particular information is potentially relevant under the law for a given case, and in so doing, counsel can help map out the custodians, databases, key words and other tools that should be used to identify, hold and harvest information. Counsel also needs to be on the scene to work through confidentiality, privilege and various other production issues.

Eric Sinrod is a partner in the San Francisco office of Duane Morris LLP (<http://www.duanemorris.com>) where he focuses on litigation matters of various types, including information technology and intellectual property disputes. His Web site is <http://www.sinrodlaw.com> and he can be reached at esinrod@duanemorris.com. To receive a weekly email link to Mr. Sinrod's columns, please send an email to him with Subscribe in the Subject line.

This column is prepared and published for informational purposes only and should not be construed as legal advice. The views expressed in this column are those of the author and do not necessarily reflect the views of the author's law firm or its individual partners.