

# To Legal Hold or Not To Legal Hold?

## *Implementation, Management & Termination*

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# Roadmap for Legal Hold

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- Overview
- History
- Triggers
- Implementation
- Notice
- Management
- Production of Data
- Ending
- Checklist

# Legal Hold Basics

## What is a Legal Hold?

- An instruction within a business organization directing employees to preserve certain records and information (both paper and electronic) that may be relevant to the subject matter of a pending or anticipated lawsuit or investigation.
- The purpose is to prevent spoliation of evidence relevant to the pending (or anticipated) lawsuit or government investigation.
- The standard is not "100% perfect retention" of relevant materials, it is to take "reasonable steps" to preserve relevant information.



# What is a Legal Hold?

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A directive and ongoing process to preserve electronically stored documents (“ESI”), paper documents, or physical evidence that a party has a duty to preserve.

# History of Legal Holds

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- Common Law Duty
- *Zubulake v. UBS Warburg, LLC, et al.*  
\*220 F.R.D., 212 United District Court,  
S.D. New York (2003).
- 2006 ABA amended its Model Rules of Civil Procedure rules 26 & 37 to require early in a lawsuit the consideration of potential ESI production issues.
- The Sedona Conference



# What is a Triggering Event?

Some events will very obviously lead to litigation

- organization should immediately issue a legal hold and suspend their routine document-retention policies and preserve relevant documents so that they can easily be accessed.



# What is a Triggering Event?

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## Plaintiff vs. Defendant

- Plaintiff's Triggering Event often takes place before the Defendant's triggering event.
- Defendant's triggering event is when the company is on notice that it should reasonably anticipate litigation.

# What is a Triggering Event?

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Fact-specific and often contentious

- Judges appreciate:





# Implementation

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**Identify**

**Identify a Legal Hold Team**

**Develop**

**Develop a Reasonable Legal Hold Plan**

**Issue**

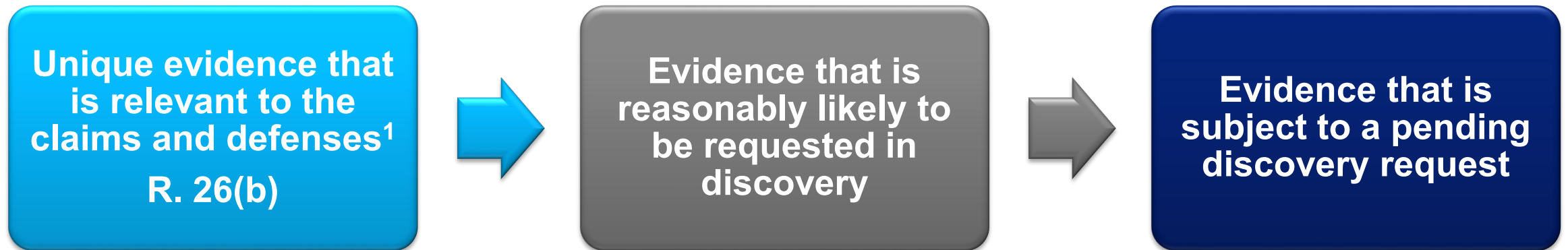
**Issue the Legal Hold Notice in Writing**

# What Should Be Preserved?



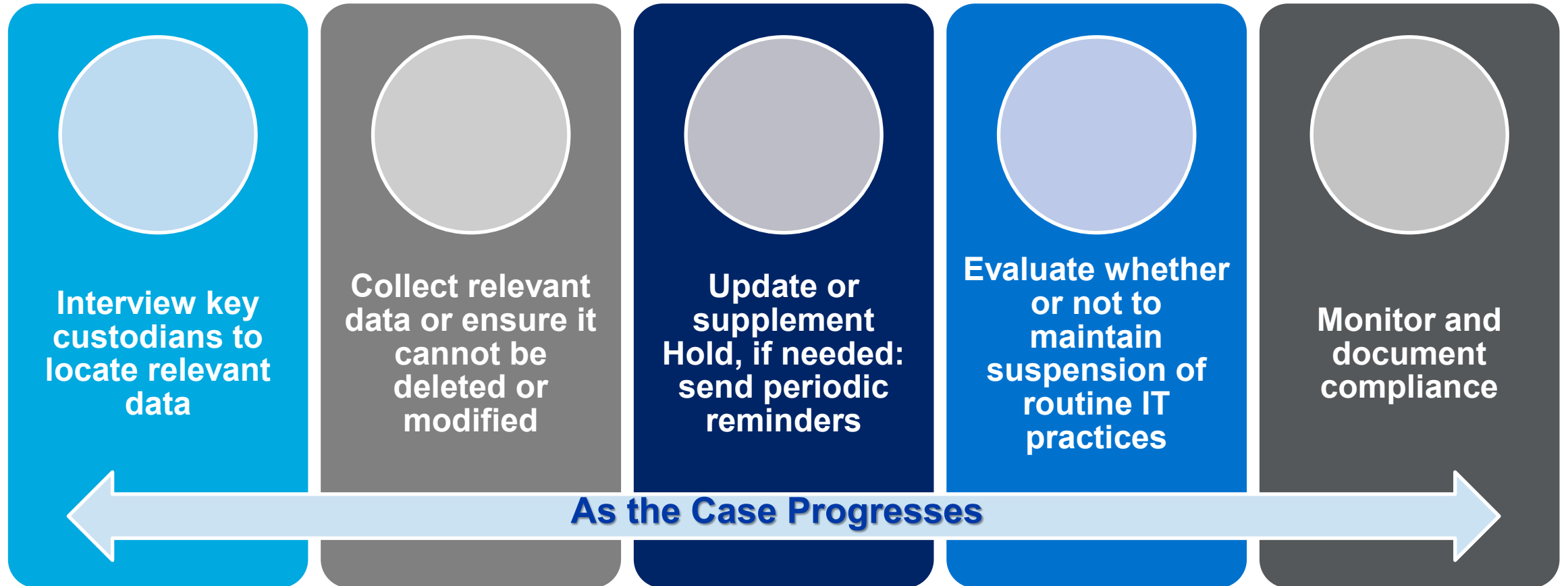
# What Should Be Preserved?

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<sup>1</sup> “AND proportional to the needs of the case considering the amount in controversy, the importance of the issues at stake in the action, the parties’ resources, the importance of the discovery in resolving issues, and whether the burden of expenses of the proposed discovery outweighs its likely benefit.”

# Litigation Hold Practices



# Scope of Hold – What sources of data / information must be considered for preservation?

- Fed. R. Civ. P. 34 – “possession, custody, and control.”
- “Practical ability to control”
  - agents, outside law firms, outside accounting companies, vendors, independent contractors
- Third parties known only to you (even if not an agent)





# Discoverability of Litigation Hold Notices & Processes



- Written Notice
  - By in-house counsel or outside counsel
    - Generally > No
    - If opponent makes *prima facie* case of spoliation > Yes
- Facts Regarding Preservation Process > presume discoverable

# Who is Responsible for the Legal Hold Process?

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Fed. R. Civ. P. 26



**Outside  
Counsel**

**In-House  
Counsel**

**Client**

# Fed R. Civ. P 37(e) –12/2015 Amendment

## Failure to Preserve Electronically Stored Information

If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party *failed to take reasonable steps* to preserve it, and it cannot be restored or replaced through additional discovery, the court:

- (1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or
- (2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:
  - (A) presume that the lost information was unfavorable to the party;
  - (B) instruct the jury that it may or must presume the information was unfavorable to the party; or
  - (C) dismiss the action or enter a default judgment.



# California Discovery Sanctions

## CCP §2023.030

### Failure to Preserve Electronically Stored Information

- Monetary sanctions
- Issue Sanctions
- Evidence Sanctions
- Terminating Sanctions



# Contents of the Legal Hold Notice

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- Summary of the dispute
- Instructions not to destroy or modify relevant records
- Topics and materials subject to preservation requirement
- Document format
- Time frame
- Suspension of document retention policies
- Inform employees that the legal hold supersedes any existing policies
- Answering questions
- Legal hold is ongoing
- Require confirmation

# Who Should Receive the Legal Hold?

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- Communicate and distribute the written legal hold notice to:
  - Current employees
  - Employees departing the company
  - Individuals re-hired by the company
  - Employees on leave
  - The company's records department
  - The company's IT department
  - Any cloud-storage providers and other third parties that may hold relevant information, and
  - Vendors handling the collection of relevant documents



# What Does Not Need to be Preserved

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- Backup tapes (*for disaster recovery*)
- Browser cookies
- Computer cache
- Websites visited
- Duplicative data
- Data designed to be copied over and over again
- "Slack space" (unused hard drive space)

# Sample IT Legal Hold Notice Letter

**I. Relevant Custodians (Current Employees):** The following individuals are a part of this Legal Hold: [REDACTED]. Please complete these documents and return them to General Counsel by [REDACTED].

**F. Notice of Survival:** Please note that the Company's obligation is continuing, and you should not restart the automatic destruction programs for any of the above described documents and data until you receive written notice from General Counsel that we are no longer under a duty imposed by the court to preserve these records.

General Counsel and do not delete any files from your computers. The Company's obligation is continuing, and you should not restart the automatic destruction programs for any of the above described documents and data until you receive written notice from General Counsel that we are no longer under a duty imposed by the court to preserve these records.

identified individuals. Do not delete any files from your computers. The Company's obligation is continuing, and you should not restart the automatic destruction programs for any of the above described documents and data until you receive written notice from General Counsel that we are no longer under a duty imposed by the court to preserve these records.

and you receive specific instructions as to what information was deleted and provide that information to General Counsel.

**B. Copy each of the following items:** Copy each of the following items: [REDACTED]. Determine if the former employee data could be stored on any backup tapes. Please complete and return the following documents to General Counsel.

1. Certification (included below);
2. Chain of Custody Form (included below, but duplicate and attach to each piece of media delivered to Husch Blackwell)

**D. Please not delete any files from your computers that may be planned that may be deleted.** **Husch Blackwell LLP**

| Inventory and Custody Form for Electronic Data |  | Client# | Matter# |
|--|--|---------|---------|
| [REDACTED]                                     |  |         |         |

**JOE [REDACTED]**

To: General Counsel

From: [REDACTED]

Dated: [REDACTED]

|   |            |
|---|------------|
| Client Name:  | [REDACTED] |
| Writing on Label/Serial Number:                               | [REDACTED] |
| Media Type:<br><i>(i.e., flash/thumb drive or hard drive,</i> | [REDACTED] |

# Sample Custodian Legal Hold Notice Letter

## Why

You have been identified as a custodian of records. You may also have relevant documents, tangible things pertaining to voice mail, texts, Instant Presentations, images, photographs, content, and tangible objects on computer drives or stored on CDs/DVDs, thumb drives, or the like. This hold also includes all relevant communications stored in social media accounts. You must not delete, discard, or alter any such documents, data, or objects, even though you might otherwise not normally retain them. Additionally, please be aware that The Company's routine document retention policies/practices have been suspended regarding all documents and data pertaining to this matter.

## How to Comply With This Legal Hold Notice

To comply with this Legal Hold Notice, please take the following steps:

1. Do not delete any relevant texts. To ensure that your texts are not automatically deleted after a certain age, or lost accidentally, please do the following:

**Relevant Topics:** You are required to preserve all documents related to JOHN DOE's allegations. At this early stage, it is often difficult to foresee exactly what issues will become relevant, so we are asking that you preserve all documents potentially related to the allegations in this matter. The categories of documents and data to be preserved include, but are not limited to, the following:

### PRESERVATION OF RELEVANT DOCUMENTS AND DATA

**DATE:** August 24, 2022

**Please complete and sign the following acknowledgement form for this Legal Hold and return it to General Counsel by \_\_\_\_\_.**

Outside counsel will you have any immediate questions not listed on the distribution list then please call General Counsel at \_\_\_\_\_

**PLEASE KEEP THE LEGAL HOLD NOTICE MEMO FOR FURTHER REFERENCE**

**RETURN THIS PAGE ONLY TO \_\_\_\_\_**

**(matter name) \_\_\_\_\_ Legal Hold Response Form**

**I HAVE READ AND UNDERSTAND THE ABOVE AND FOREGOING DIRECTIVES AND I AGREE TO ABIDE BY THEM.**



# Managing the Hold

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- Counsel has a responsibility to take reasonable and appropriate measures to assure that the client actually preserves the data (*Bratka v. Anheuser-Busch Co.*, 164 F.R.D. 448 (S.D. Ohio 1995)).
- Interview Custodian to find out what's out there.
- “Ghost IT”

# Managing the Hold

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- Locating Records
- Monitor and Enforce Compliance
- Modify the Legal Hold when Necessary
- Send Reminder and Update the Legal Hold Notice
- Failure to Manage Consequences



# Unplanned Costs of eDiscovery

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Sanctions

- Precluding evidence, presentation to jury, monetary sanctions, attorney fees

Disputes

- Company sanctioned for \$130,000, but spent \$1M on dispute/motion

Increased Settlement Value

- Company valued case at \$100,000 or less, settled for millions because of discovery issues

Inefficiencies

- Different firms/people re-learning client information

# Producing the Data for Discovery

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- Factors Determining Scope
- Recall vs. Precision
- Technology Assisted Review (TAR)
- Documentation





# Ending the Hold



- The hold must remain in place until the matter is resolved.
- Issue Lift Notice to Terminate the Hold



# Checklist

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- ✓ Duty to Preserve Triggered
- ✓ Issue Litigation Hold
- ✓ Stop Document Destruction
- ✓ Consider all locations where relevant information may exist
- ✓ Preserve Relevant Information
- ✓ Remind Recipients about litigation hold
- ✓ Track Progress of Litigation Hold
- ✓ Lift Hold When the Matter Concludes

CASE IN POINT

by Tom Fishburne



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