REDGRAVE LLP
INFORMATION MATTERS®

Legal Holds 2.0

Second Tuesdays Webinar
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Speakers

Gareth Evans

Tamara Karel

Christine Payne

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Agenda

Legal Holds 1.0

- Maturation of processes
- Common issues

Legal Holds 2.0

- Playbook
- Tiering
- Sources

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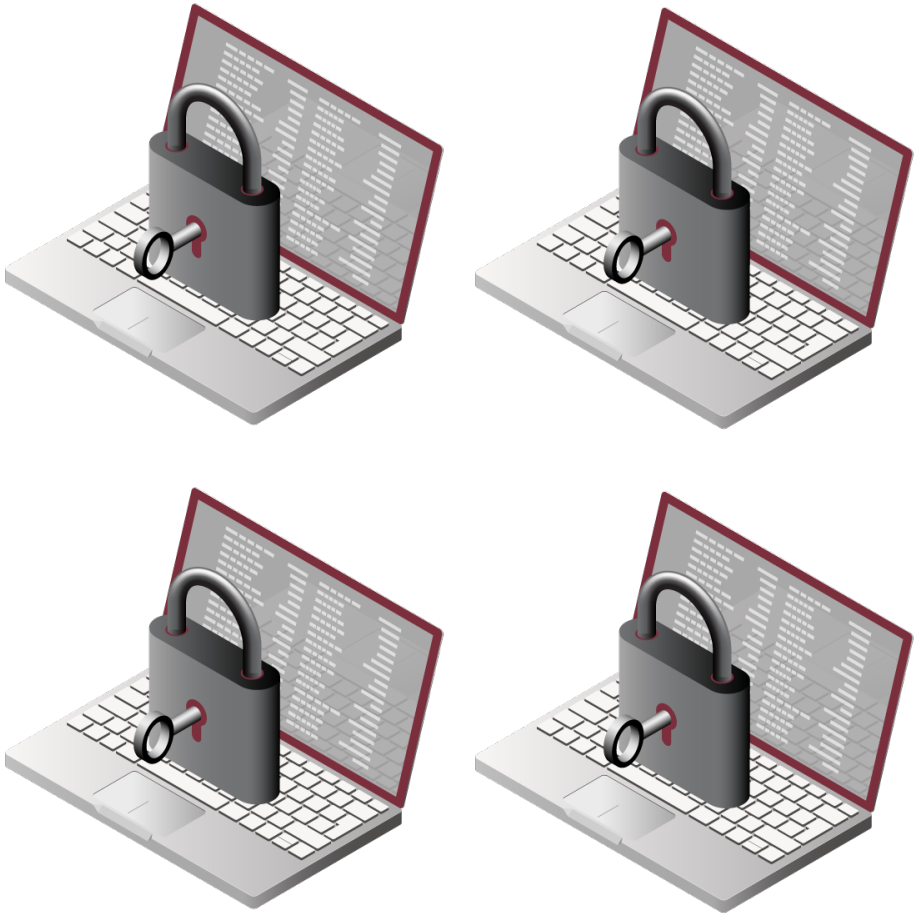
Legal Holds 1.0: General Features

- Notice + preservation
- All cases treated the same
- All custodians treated the same



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Legal Holds 1.0: Maturing Discovery Processes

Initial

- Ad hoc, inconsistent, and informal
- Not easily monitored or validated
- No questionnaires or custodian interviews
- No consideration of sources other than email
- No steps taken to implement legal hold other than notice
- No release of hold

Developing

- Customary practices in silos
- Trigger = lawsuit
- “Legalese” notices
- Ad hoc custodian interviews
- The “usual” sources
- Informal preservation in place
- Collect everything
- No scope revision
- Untimely releases

Performing

- Timely evaluation of trigger
- Effective legal hold notice
- Good legal hold hygiene
- Questionnaires and interviews
- Legal hold management software
- Reasonable investigation of sources
- Preserve: collect or in-place
- Revise scope
- Lift hold and release data

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Legal Holds 1.0: Common Issues

- Ad hoc implementation
  - No written, repeatable process or plan
  - No guidance for those responsible for hold
- Ineffective or non-existent templates
- Holds not sufficiently tailored to particular cases
  - No methodology for distinguishing between high-risk and low-risk cases
  - No differences in preservation process for high-risk and low-risk cases
  - No distinctions between key and peripheral custodians

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Legal Holds 1.0: Common Issues

- Over-preservation
  - With no guidance or plan, err on the side of preserve everything
  - Peripheral custodians treated the same as key custodians
  - No culling of relevant information from sources
- Under-preservation
  - Focus on MS Office (email, Word, PowerPoint, Excel)
  - Frequent failure to consider mobile devices, texts, IMs, collaboration apps, shared drives, other Enterprise apps
  - Holds often not implemented on non-custodial sources
  - Third parties not included (possession, custody or control issues)
- Not effectively lifted

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Legal Holds 2.0

- Use a playbook
- Update templates
- Tiering
- Consider non-MS office sources
- Address new technologies
- Timely and effective scoping and release

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Legal Holds 2.0: The Playbook

Goal:	Goal Sample Language
Explain why the Legal Hold is being issued	As you may know [Company name] is enga including potential litigation. There is a possibility of litigation relating to c post-petition transactions. You have been id relevant information. Out of an abundance c information identified below. Effective imme
Include a clear stateme re required actions	

Preservation

In most jurisdictions, a party is required to take ***reasonable steps*** to preserve potentially relevant data and documents as soon as it anticipates litigation, or reasonably should do so. Failure to appropriately preserve can result in significant sanctions, including monetary fees and merits-altering penalties, such as ***adverse inferences*** and case dismissal/default judgment. Additionally, preservation-related disputes can be both expensive and distracting for a client. For these reasons, it is critical to consider the proper scope and timing of preservation. Here are some guidelines:

Before litigation is anticipated. There is no litigation-related duty of preservation before a party anticipates litigation (or reasonably should do so), but	☐ Board Materials: Find out how the client and individual board members manage board communications and materials. If done internally or on an otherwise ad-hoc basis, consider recommending the immediate implementation of a board-materials-tracking software

What is it?

- Roles defined
- Processes clearly explained
- Consistent and repeatable
- From trigger to release
- Customized
- Standard templates and forms

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Why have one?

- Efficiency
- Defensibility
- Risk reduction
- Quality control
- Reduce cost
- Educated counsel

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Legal Holds 2.0: The Playbook

A Playbook provides direction for your case teams and outside counsel:

- How to evaluate legal hold triggering events
- How to identify custodial and non-custodial sources of relevant evidence
- How to identify custodians and system owners
- How to design strategies for preservation appropriate for the risk profile of the case
- How to issue legal hold notices and preservation instructions
- How to execute upon preservation instructions
- How to define collection strategies
- How to coordinate with IT and business
- How to deal with new technologies
- How to release hold

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Legal Holds 2.0: The Playbook

A Complete eDiscovery Playbook may involve as many as 40 component parts that serve as templates and tools for enabling the organization's approaches, including:

- Legal backgrounders for trigger, scope, possession, custody or control, inaccessible sources, etc.
- Considerations for identifying custodians and systems
- Guidance on legal hold notices, reminders, and releases for custodians, IT, and third parties
- Model "Day One" letter, ESI and form of production protocol, Rule 502(d) protective order, and cover letter for subpoena productions
- Case-assessment and documentation forms
- Collection-tracking documents
- Standard processing specifications
- Data privacy and sensitivity evaluation
- Other enabling documents and processes
- Considerations for departed employees/contractors
- Defensibility binder
- Vendor management and coordination
- Expectations of outside counsel

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Legal Holds 2.0: Legal Hold Templates

For Custodians

- Legal hold notice
- Legal hold instructions
- Acknowledgment
- Short questionnaire
- Long questionnaire
- Interview outline
- Reminder
- Release and release acknowledgment
- Transparency, privacy, and transfer notices

For IT System Owners

- Legal hold notice
  - Legal custodial data
  - Non-custodial data
- Hold instructions
- Acknowledgment
- Questionnaire
- Interview outline
- Reminder
- Release and release acknowledgment

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Legal Holds 2.0: Other Templates

- Third-party preservation request
- Legal hold FAQs
- “Day One” letter
- Meet-and-confer worksheet
- Rule 26(f) conference checklist
- Legal hold checklist

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Other Defensibility Tools

- Legal hold and collection software
- Legal hold training
- eDiscovery stakeholders across company departments
- Processes for consideration of prior matters
- Policies in place for
  - Acceptable use of computing devices
  - Record management and retention schedule
  - Email, mobile device, and social media
  - Legal holds

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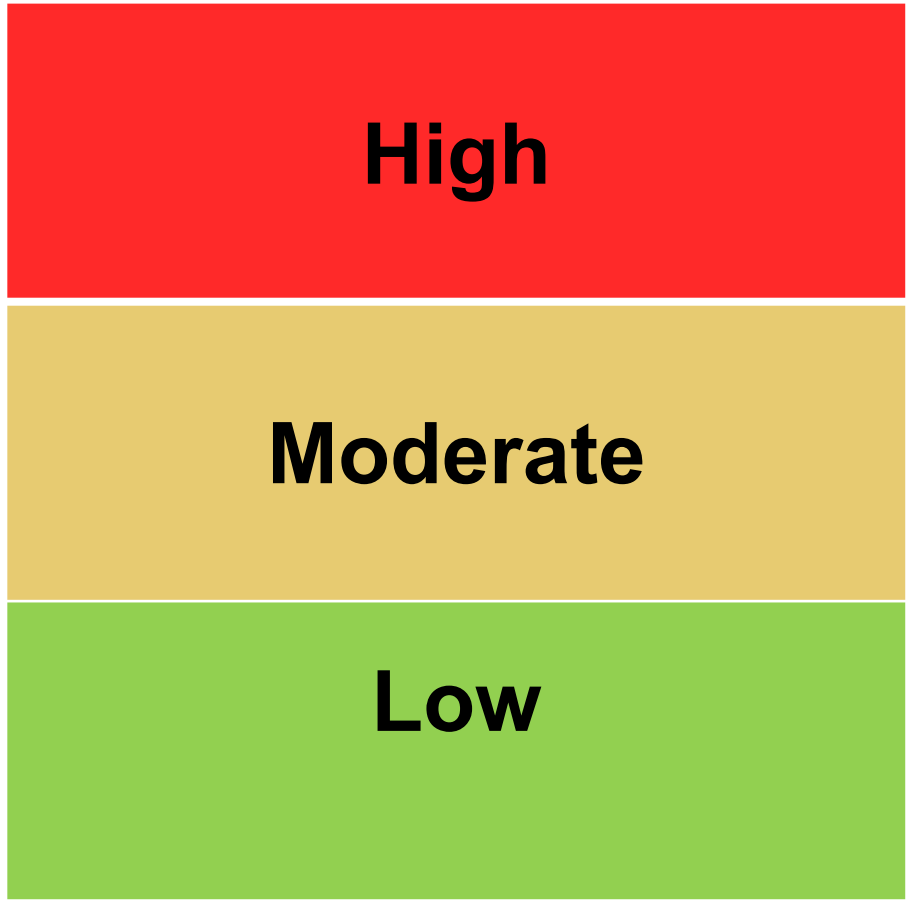
Legal Holds 2.0: Matter Tiering

- Matters tiered according to the needs of the case
  - Monetary risk
  - Reputational risk
  - Importance and novelty of issues
  - Anticipated complexity of discovery
  - Anticipated level of discovery disputes
  - Case-specific considerations
  - Venue-specific considerations



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Legal Holds 2.0: People Tiering

Primary or Key	Secondary	Relevance Unclear
Central role in events or transactions at issue	Involvement in events or transactions at issue	No direct involvement in events or transactions at issue
Direct connection to subject matter	Indirect connection to subject matter (e.g., supervisor of primary custodian)	No connection with subject matter, but communicated/interacted with primary or secondary custodians (e.g., copied on relevant emails)
Likely to be deposition and trial witness	Likely to be a deposition witness	Unlikely to be a witness at deposition or trial
Likely to be focus of opponent's discovery efforts	Likely to be within scope of opponent's discovery efforts	Unlikely to be focus of opponent's discovery efforts
Certain to have relevant information	Likely to have relevant information	May have relevant information
Likely to have unique relevant information	Unlikely to have unique relevant information	Highly unlikely to have unique relevant information

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Legal Holds 2.0: Preservation Tiers

High Priority Matter

	Primary Custodian	Secondary Custodian	Relevance Unclear
Hold Notice	High priority for follow up with custodian on hold notice	Medium priority for follow up with custodian on hold notice	Lower priority for follow up on custodian for hold notice
Email	Suspend auto-delete and collect from server	suspend auto-delete and collect from server	Preservation in place by custodian
Computers Hard Drives	Forensic image of device storage	Forensically sound copies of relevant data	Preservation in place by custodian
Mobile Devices	Forensic image of entire device	Forensically sound copies of relevant data	Preservation in place by custodian
Network/Shared Drives Collaboration Apps	Suspend backup recycling Collect backups Suspend auto-delete	Forensically sound copies of relevant data	Preservation in place by custodian
Hard Copy	Review and collect relevant hard copy docs	Collect relevant hard copies identified by custodian	Preservation in place by custodian

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Legal Holds 2.0: Preservation Tiers

EXAMPLE

Moderate Priority Matter

	Primary Custodian	Secondary Custodian	Relevance Unclear (if determined necessary)
Hold Notice	Medium priority for follow up with custodian on hold notice	Low priority for follow up with custodian on hold notice	No planned follow up with custodian on hold notice
Email	Suspend auto-delete and collect from server	Suspend auto-delete. Preservation in place by custodian.	Preservation in place by custodian
Computers Hard Drives	Forensically sound copies of relevant data	Preservation in place by custodian	Preservation in place by custodian
Mobile Devices	Forensically sound copies of relevant data	Preservation in place by custodian	Preservation in place by custodian
Network/Shared Drives Collaboration Apps	Suspend auto-delete of relevant data sources Backup recycling continued	Forensically sound copies of relevant data	Preservation in place by custodian
Hard Copy	Collect relevant hard copies identified by custodian	Preservation in place by custodian	Preservation in place by custodian

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Legal Holds 2.0: Preservation Tiers

Low Priority Matter

	Primary Custodian	Secondary Custodian	Relevance Unclear (if determined necessary)
Hold Notice	Low priority for follow up with custodian on hold notice	No planned follow up with custodian on hold notice	No planned follow up with custodian on hold notice
Email	Suspend auto-delete	Suspend auto-delete	Preservation in place by custodian
Computers Hard Drives	Preservation in place by custodian	Preservation in place by custodian	Preservation in place by custodian
Mobile Devices	Preservation in place by custodian	Preservation in place by custodian	Preservation in place by custodian
Network/Shared Drives Collaboration Apps	Preservation in place by custodian	Preservation in place by custodian	Preservation in place by custodian
Hard Copy	Preservation in place by custodian	Preservation in place by custodian	Preservation in place by custodian

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Legal Holds 2.0 – Source Considerations

- Custodial sources:
  - Mobile device content
  - External storage devices
  - Texts, IMs
  - Ephemeral messaging
- Non-custodial sources:
  - Shared sources – group email, file shares
  - Collaboration applications – MS Teams, Slack, SharePoint/ERoom
  - Systems
- New technologies implemented by IT
  - Office 365
  - G-Suite

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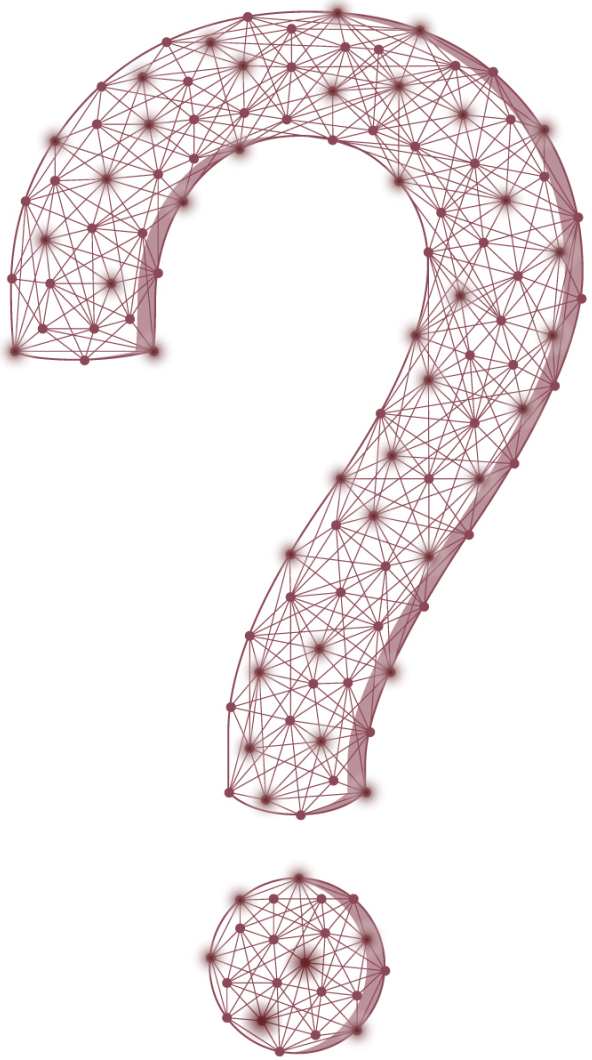

QUESTIONS?