Legal Hold and Data Preservation Benchmark Survey 2015 Results

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Commentary by Brad Harris

Survey Conducted by The Steinberg Group LLC
Contents

Executive Summary
Page 2-4

Survey Methodology
About Steinberg Group LLC
Page 5

Part One: Survey Demographics
Pages 6-11

Part Two: The Burdens of Data Preservation
Pages 12-17

Part Three: Preservation Process Maturity
Pages 18-23

Part Four: Culture of Compliance
Pages 24-26

Part Five: Collections
Pages 27-30

What Next?
Page 31
Manual legal holds are tenaciously hanging on as the most prevalent process for managing litigation holds. In 2015, 46 percent are using automated software, up slightly to 44 percent in 2014 from 36 percent in 2013.

A majority of organizations issue legal holds in most pending litigation matters. This is based on respondents indicating the percentage of matters for which they issue litigation holds.

In assessing confidence levels, those using automated software are 3.5 times more likely to be “very confident” when compared with those on manual processes such as spreadsheets.

Overall, nearly three quarters of the participants said that they trust custodians to comply with the legal hold directive. This is a slight decrease over 2014 which was at 76 percent.

A slight increase over last year was shown in the participants who have had to defend their preservation. This is up 31 percent in 2014 and 22 percent in 2013 showing legal teams are continuing to see challenges with their litigation hold processes.
Key Preservation Indicators

80% Automated Users Rate Selves as "Above Avg"

When evaluating their own process compared to others, 80 percent of automated uses rated themselves above average, compared with less than 60 percent of those on manual processes.

Based on participants indication of the their role, we looked at them by which process they used. Surprisingly, records managers were lagging behind with 55 percent on manual processes which made them the category where the majority has not automated.

55% Records Managers Use Manual

Manual users, when compared with those on automated software, are 63 percent more likely to want to upgrade their preservation process.

65% 5+ Yrs of Hold Experience

In establishing a “culture of compliance,” we look at training in the area of legal holds. Three out of four participants offer some level of training, a noteworthy 12 percentage point increase over 2014.

75% Train Employees on Holds

The survey participants this year showed more experience than in the past. We have seen 9 percent year-over-year growth in this category, with nearly two thirds having 5 or more years of legal hold experience.
After preservation, 42 percent of participants said that they collect after “most” or “all” legal holds.

Self collection by custodians is to have custodians collect their own information – a practice that if not properly overseen by legal staff can have the potential for risk.

In assessing their current collection processes or technology, 46 percent of respondents indicated a desire to upgrade from their current situation.
Survey Methodology

The Legal Hold and Data Preservation Survey measures what the prevailing attitudes of participants were at the time of the survey. The survey was conducted from May 24, 2015 to June 30, 2015 using an online questionnaire.

The survey respondents consisted of legal professionals, including attorneys, litigation support managers, paralegals and non-legal professionals such as IT and records managers, from in-house legal teams at organizations.

While more than 800 individuals took the survey, the sample was further screened for those who currently issued legal hold notices because the survey’s objective is to ascertain current attitudes. The final sample was comprised of 421 respondents.

The margin of error is +/- 4.5%.

The Steinberg Group provides marketing research and marketing analysis services. With over 25 years experience in the market research and marketing fields, we offer each of our clients a customized approach to solving their marketing research challenges.

David Steinberg is the founding partner of The Steinberg Group, LLC. Mr. Steinberg has more than ten years of agency side marketing research and 15 years of corporate side marketing experience. He has designed and implemented over 500 survey research and focus group projects for consumer brand, education and government clients. Mr. Steinberg holds an M.B.A. from Pepperdine University and a B.A. in English Literature from the University of California at Los Angeles.

Corporate experience includes marketing and research roles in Insight Schools (a subsidiary of University of Phoenix and then Kaplan Education), Crayola (a Hallmark Company) and Knowledge Learning Corporation (home of the KinderCare brand and part of the Knowledge Universe organization).
PART ONE:
Survey Demographics
Litigation Support Staff Were a Slight Majority Over General Counsels/Attorneys

The survey sample only included individuals that affirmatively acknowledged that they are responsible for managing litigation hold processes. When looking at titles, the sample was distributed as follows:

- **17.5%** of participants were attorneys, with 8.0% self-identifying as General Counsels
- **29.7%** were litigation support or paralegals
- **36.5%** were records managers or IT professionals
- Remaining **16.3%** were non-legal staff responsible for administering legal holds
Manual Holds Are Still The Majority, But At Least Everyone Is Performing Some Form of Hold

Progress is being made on the way to maturing legal hold processes. In our third annual survey, we have seen the following:

- Automated hold processes have moved from 36.2 percent in 2013 to 45.7 percent in 2015.
- Manual processes continue to comprise a majority of hold processes, but this has been steadily decreasing to 50.8 percent from 57.2 percent since 2013.
- 2015 is the first survey in which no participant indicated “no process” in use, so by this measure we are seeing everyone taking the courts requirements seriously.

**Current Legal Hold Process**

- **50.8%** Automated Software System
- **45.7%** Manual Process
- **3.5%** Verbal Legal Holds
1 in 4 Respondents are Spending 15 Hours or More on Litigation Holds per Month

In 2015, the survey showed a marked increase in the number of respondents spending 15 hours or more per month on overseeing litigation holds. That category jumped by an astonishing 6 percentage points in one year.

Similarly, those spending more than 5 hours per month ramped up to 61 percent, from 56 percent last year and 52 percent in 2013. The trend is clear that legal teams are having to spend more time each year overseeing preservation efforts.
Process Maturity by Role

Legal Staff and Attorneys are Leading the Way, While Records Managers are Lagging in Maturing Processes

When looking at the use of automation software by role, the responses show notable differences:

- Litigation support staff are continuing to move to automation with a huge jump to 69 percent, up from 56 percent and 51 percent in 2014 and 2013 respectively.
- In-house attorneys’ increase was even larger, with a leap forward from 35 percent in 2014 to 54 percent – a 19 point jump in a single year.
- Records managers, measured for the first time in 2015, have adopted automation software at 45 percent.
Litigation Hold Volume

More than 1 in 5 Are Now ‘Power Preservers’

Volumes have continued to rise for survey participants. The group designated as “Power Preservers”, those who issue 6 or more legal holds per month, continued to grow and are now approximately 22 percent of the respondents. This is up from 15 percent two years ago and 19 percent last year. Nearly all of this growth has been from a corresponding reduction in those who issue less than 1 per month.

Legal Holds per Month

- **40.2%**
  - 1-5 Holds
- **38.1%**
  - Less than 1
- **21.6%**
  - Power Preservers (6+ holds)
PART TWO: The Burdens of Data Preservation
Process Based on Hold Volume

7 Out of 10 ‘Power Preservers’ Automate

While it is expected that those who do the most litigation holds would automate at a much higher rate – which is exactly what the data revealed. This occurred at twice the rate.

What is more noteworthy is the pace of change. In the Power Preservers category the survey showed that 69 percent use automated software. This is a dramatic 10 percentage point increase over the prior year and shows the awareness of the benefits of these systems is becoming more recognized.
Stark Contrast in Satisfaction Levels with Automated Users 3 Times More Likely to Be ‘Very Satisfied’

Satisfaction levels are revealing in their distribution across the five options. The trend lines in the bar charts show the automated group is strongly positive, while the downward slope for those using manual process suggests discontent.

Curiously, on the manual process, the top and bottom categories ended up being equal at 9.4 percent. Automated users selected the top rating nearly 20 times more than the bottom.
Twice as Likely to be ‘Very Confident’ with Automated Solution

This question asks participants to imagine a scenario in which their preservation efforts are challenged in a case and they had to defend it in court. In this hypothetical, how confident would they be?

Nearly three quarters of automated users have high confidence compared with just over half of manual users. Those on automated processes are more than twice as likely to be in the top category of “very confident.”
Desire to Upgrade Is Gaining Momentum Among Manual Users

We asked survey participants about their intention to upgrade their legal hold process. From 2014, we saw a significant jump of 53 percent to 62 percent among those using spreadsheets and other manual processes.

While less prevalent on the automated side, 4 out of 10 were seeking to upgrade which would indicate dissatisfaction with their current software solution. This was up 31 percent from 2014. Regardless of process, the desire to change is growing.
An Apparent Dichotomy—More than Half Issue Holds In Most Matters, One Third Do It in Very Few

This category is a tale of two approaches. In the current judicial environment, legal holds are expected, yet one out of three respondents issue them in “very few” matters that arise – an increase over 2014. A finding that is somewhat surprising given the case law that has developed in recent years.

Twenty five percent of participants indicate holds in all matters. Another quarter indicate holds in most matters. This is approximately the same as 2014 with a slight increase in the “all” category.
PART THREE: Preservation Process Maturity
8 Out of 10 Automated Users Rate Themselves Above Average

We asked survey takers to consider how their process compares to their peers when it comes to meeting the current legal standard on a scale of 1-5 with 5 being “Better than Most.”

- Those with automated processes rated themselves highly, with 80 percent at “4” and above.
- Manual process users trended more to the middle of the range, with the biggest group rating a “3 out of 5.”
62 Percent of Automated Users Perceive Risk as Low

Survey takers rated their perceived risk from legal holds, with those saying “medium” and “high” being considered as “At Risk.”

- When comparing those on automated processes versus those on manual, the manual users were more than 10 percentage points higher in the “at risk” categories – totaling just under half.
- More than 6 out of 10 automated users were in the “low” category and were less than half as likely to rate in the “high” compared with manual users.


<table>
<thead>
<tr>
<th>Risk Level</th>
<th>Automated</th>
<th>Manual</th>
</tr>
</thead>
<tbody>
<tr>
<td>Low Risk</td>
<td>61.6%</td>
<td>51.3%</td>
</tr>
<tr>
<td>Medium Risk</td>
<td>32.3%</td>
<td>35.3%</td>
</tr>
<tr>
<td>High Risk</td>
<td>6.1%</td>
<td>13.4%</td>
</tr>
</tbody>
</table>
Defending Preservation Practices

Approximately 1 in 3 Had to Defend Preservation Efforts in 2015

It has become common practice in commercial litigation for opposing sides to challenge each other’s preservation efforts. There are two categories in this area: those that have defended preservation and those that will.

The number showed quite a jump from 2013 to this year with it increasing by 10 percentage points from 21 to 31 percent.

Have you Had to Defend Your Preservation Process?
Automating Hold Processes Improves Performance In Key Categories By 22 Percent

Achieving the current legal standard of good faith and reasonableness is challenging. The survey looked at eight key processes that are considered integral to having an adequate hold process. In four key tasks, automated users reported greater than 90 percent implementation.

The greatest gaps between automated and manual users are in periodic reminders and employee training, both with a gap of 32 percentage points.
While More Than Half Issue Holds In Most Matters, Less Than 6 Percent Go To Trial At Same Rate

The chart shows how probabilities change as a matter progresses through the e-discovery process from litigation hold to collections and on to trial.

The ratios show that for those which show that 52 percent of the time one issues a hold most or all of the time, this drops to 42 percent doing collections at the same rate and below 6 percent at trial. The conclusion we can draw is that while respondents collect more than 80 percent of the time. These result in trial just about 12 percent of the time.

<table>
<thead>
<tr>
<th>Proportion of Matters that Progress Through E-Discovery</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Legal Holds</strong></td>
</tr>
<tr>
<td>None/Very Few</td>
</tr>
<tr>
<td>36.4%</td>
</tr>
<tr>
<td><strong>Collections</strong></td>
</tr>
<tr>
<td>None/Very Few</td>
</tr>
<tr>
<td>36.2%</td>
</tr>
<tr>
<td><strong>Trial</strong></td>
</tr>
<tr>
<td>None/Very Few</td>
</tr>
<tr>
<td>83.1%</td>
</tr>
</tbody>
</table>
PART FOUR: Culture of Compliance
Employee Training and IG/Document Retention Policies

Significant Year-over-Year Increase in Organizations Conducting Employee Training

Two questions in the survey examine internal processes that indicate preservation readiness. The first looks at training efforts and the second on information management initiatives.

- 75 percent show that employees are being trained which is a 12 percentage point uptick year-over-year. The trend of including these orientation and compliance programs is gaining ground.
- The trend on Information Governance and Document Retention policies and training efforts are moving in a positive direction. They are at nearly the same level of 75 percent.

Does Organization Train Employees on Legal Holds?

<table>
<thead>
<tr>
<th>Year</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>2014</td>
<td>63.4%</td>
</tr>
<tr>
<td>2015</td>
<td>75%</td>
</tr>
</tbody>
</table>

Does Organization Have Detailed Process for Information Governance and/or Document Retention?

<table>
<thead>
<tr>
<th>Year</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>2014</td>
<td>71.4%</td>
</tr>
<tr>
<td>2015</td>
<td>74.9%</td>
</tr>
</tbody>
</table>
The intent of a litigation hold is to inform employees about a new obligation to retain information in response to a potential matter. It is critical to have confidence that they will comply.

- The confidence level overall dropped by 3.3 percentage points from 76.2 percent in 2014 to 72.9 percent in 2015.
- When comparing those using automated systems versus manual processes, the difference is almost 10 percentage points.
- The use of audits to verify compliance is somewhat lower with 2 out of 3 automated users employing that validation, with 6 out 10 for manual users.

Confident that Employees will Follow Through

Automated: 79.8%
Manual: 70%

Use Audit and Policies to Enforce Preservation

Automated: 66.3%
Manual: 60.2%
PART FIVE: Collections
In-house Legal Oversees Collections Most Often, Just Ahead of Custodian Self Collection

Following the preservation notice, the next step is to collect potentially responsive information. Organizations have approaches that range from asking custodians to perform their own collection to applying dedicated legal or IT staff, or using outside experts.

- Just over half of the respondents use in-house staff from the legal or IT teams to oversee collections.
- At 42 percent, the second most common option is to have custodians collect their own information – a practice that if not properly overseen by legal staff can have the potential for risk.

Oversight of Collections

- 51% In-House Collection Expert
- 42% Self Collect
- 7% Outside Collection Expert
We inquired about overall satisfaction levels with collections – either technology or process. Forty two percent were in the top two categories, with 26 percent in the bottom two categories.

- When comparing respondents based on their use of automated software and manual processes for preservation, there was a substantial separation of 26 percentage points. 59 percent are satisfied among the automated category and only 33 percent with manual processes.
- 33 percent of manual users also fell into the dissatisfied rankings, compared to 14 percent for automated users.

1 Out of 4 Are Dissatisfied with Current Collections Process
Intention to Upgrade Collection Process

Overall Most Are Not Planning to Upgrade, But Different A Picture Emerges for Those Using Manual Process

When assessing the intent to upgrade collections process, the overall response was that 54 percent were not planning to upgrade.

- When examining the responses by whether the users are on an automated or manual preservation process, the answers diverge dramatically. Of those on automated processes, just over one third are looking to upgrade, compared with more than half on manual processes.
- The 20 percentage point gap between would indicate that those who have invested in automated software also have better tools for overseeing this process.

Automated Collections Process

64% Not Upgrading
36% Upgrading

Manual Collections Process

44% Not Upgrading
56% Upgrading
Now that the results are in for the 2015 Legal Hold and Data Preservation Benchmark Survey, what are the key takeaways for practitioners? Based on what we’ve learned, the following are several recommendations:

1. **SEE HOW YOU MEASURE UP**

   The landscape continues to evolve, and so should your processes. Use the results of the survey to learn in what areas you may excel and where you may fall short of the industry standard. There are endless ways we can improve, so this is useful as a touchstone.

2. **ASPIRE TO BEST PRACTICES, BUT DO ‘BETTER PRACTICES’ IF THAT’S ALL YOU CAN DO**

   If you are doing verbal holds, then work toward written holds even if you track them manually. The courts will likely look kindly on any good faith efforts to preserve information. However, if you are further along, then strive to improve reminders, releasing holds, real-time monitoring, etc. Ask yourself, “What can we do to feel more confident in our data preservation?”

3. **INVEST IN BUILDING A CULTURE OF COMPLIANCE**

   Every employee is responsible for preservation, not just Legal. Involve HR in building awareness into new employee orientations and standard compliance and security trainings – including C-level buy-in. Build relationships with IT to ensure they know what their role is, so as they look to purchase new technology or retire legacy systems they know there are legal ramifications.

4. **TAKE OWNERSHIP OF COLLECTIONS**

   Data collection is an area that is becoming increasingly challenging. Educate yourself about what is being done today – and by whom. Explore ways through process and technology to become more active in this critical phase of e-discovery.
Start your Smarter Legal Hold and Collections Strategies Today >>

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