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LegalHold  
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White Paper

# MANAGING THE COSTS & RISKS OF LEGAL HOLD & DISCOVERY



WHITE PAPER

# INTRODUCTION

## Confronting Costs & Risks of the Legal Hold Process

Every organization has the duty to preserve relevant information when it learns of pending litigation or investigation. But traditional approaches to doing this are difficult, costly, and error-prone, leaving a corporation open to risk.

As corporations struggle to adhere to the Federal Rules of Civil Procedure (FRCP), which create a “duty to preserve” electronically stored information (ESI) in the discovery phase of a legal matter, the legal department’s methodology for placing holds on ESI must be demonstrably implemented as sound and repeatable under the threat of serious court penalties. Implementing legal holds, though, and the associated work of interviewing data custodians and collecting data, is a costly and error-prone aspect of the e-discovery process.

Legal holds can be a drag on the productivity of data custodians and the actual costs of inefficient legal holds may be difficult to detect if they are not conducted as part of a well-organized, technologically robust program. The challenge facing corporate legal departments is to reduce risk by establishing a strong legal hold process without spending too much or causing disruption to regular business.

The most appropriate approach to the risk and costs problem in legal hold is twofold:

1. Implement a dedicated legal hold solution that manages the end to end process with strong automation capabilities.
2. Connect the legal hold technology with the core enterprise legal management system.

Every step of the Electronic Discovery Reference Model (EDRM) has a critical link back to an originating legal matter. Legal department staff, who are ultimately responsible for the legal hold in most cases, can best manage the process and the associated costs – both hidden and known– if they can manage a legal hold as part of core legal matter that prompted the original e- discovery request. This “matter-centric” approach to legal hold reduces cost, complexity, and risk for the legal department.

An effective legal hold software solution must therefore give the legal department end-to-end management of the entire legal hold process in a defensible, consistent, and reportable manner. The solution must reduce the complexity involved in issuing legal holds, managing custodian interviews, and making the process of working with data custodians more streamlined, accurate and cost effective. The net effect of this automation and centralization is to provide the legal department with a robust mechanism to present defensible legal hold policies and actions in court.



# LEGAL HOLDS and their Attendant Risks

Following through on the duty to preserve involves a process known as “legal hold,” sometimes also referred to as “litigation hold.” A legal hold does not necessarily entail an actual lawsuit. In some cases, they arise from legal matters such as internal investigations, regulatory situations and the like. In a legal hold, the corporation must identify electronic information that is relevant to the legal matter and preserve it in a form that meets the criteria of the chain of evidence so that it can be seen in court as a legitimate source of information in the matter.

Federal rules demand that corporations keep tight controls on their electronically stored information. They have the duty to preserve all data related to a possible litigation or other impending events and they must be able to produce information on short notice. This requires corporations to put in tight controls and enforce procedures such as creating a repeatable process of notification to custodians of information. Data must be mapped out and sources identified.

The Legal department and IT must collaborate and all information in the process must be tracked. Failure to comply puts the corporation at risk for significant fines and sanctions. Corporations and other entities must have a solid legal hold policy as well as sound methodology and a repeatable process for hold order management to support that policy. The challenging process of managing the collection of relevant data over the life of a legal hold requires an understanding of what needs to be collected, from whom, by whom, where and when.

If, for some reason, electronic information that has been identified as relevant to a legal matter is destroyed or modified, the corporation can face serious sanctions and penalties in court. However, if the corporation can demonstrate that they have a strong, documented, proven, and repeatable methodology for legal holds, it can claim in court that the evidence was lost despite best efforts to preserve it. This is known as the principle of “Safe Harbor,” and it is a desirable position to be able to take in the event that an e-discovery process fails to yield the expected information.



# THE DISCOVERY Cost Program

In addition to exposing a corporation to the risk of sanctions in court if it is not managed properly, electronic discovery is extremely expensive. There are the well-known, high costs in e-discovery, including data collection, document review, and redaction. Other e-discovery costs may be hidden or difficult to foresee. Outside counsel billings on the matter that generated the discovery have the potential to rise rapidly if the scope of the legal hold grows to include a larger number of data custodians or data types than originally expected. A legal hold process that is overly reliant on manual or semi-automated work management is also likely to be inefficient and taxing on legal department staff. The actual task of identifying, contacting and interviewing custodians and collecting data can translate into high costs for labor, travel, shipping and phone service that are often invisibly absorbed into legal department operating budgets.

The IT department, which is typically the actual expediter of the legal hold, can experience unnecessarily high costs from e-discovery if it is not organized and equipped to handle the process effectively. In regard to legal hold, the IT department can easily overspend by preserving data after a hold has been released if they have not been notified of the release. Shifts in IT department personnel and unclear hold instructions also contribute to resource drain and drag on productivity for IT.

The data custodians themselves can suffer from a loss of productivity in the legal hold process.

The intuitiveness and ease of use for both administrators and custodians in any legal hold process is important. If the legal hold process is run using email and other non-automated workflows, the custodian can lose more productive job time on scheduling, interviews, follow up, and travel than might actually be required. As Table 1 shows, in an e-discovery situation with 2.5 million pages to review and 100 data custodians - not at all an uncommon scenario - the hidden costs can easily exceed a million dollars.

<b>Pages to be reviewed</b>	<b>2,500,000</b>
<b>Number of data custodians</b>	<b>100</b>
<b>Cost Breakdown</b>	
<b>Outside Counsel billing rate</b>	<b>375</b>
<b>Outside counsel inquiry per 1000 pages</b>	<b>1</b>
<b>Average inquiry in billable hours</b>	<b>0.5</b>
<b>Total outside counsel cost on document inquiries</b>	<b>\$468,750</b>
<b>Data custodian time spent per page (Hours)</b>	<b>0.0001</b>
<b>Admin time spent on lit hold, collection, and interviews, per custodian (related to document load)</b>	<b>26.00</b>
<b>Fully burdened cost of data custodian time and admin time</b>	<b>\$60</b>
<b>Sub-total-custodian time value for e-discovery</b>	<b>\$15,000</b>
<b>Sub-total-admin time value for e-discovery</b>	<b>\$156,000</b>
<b>Total data custodian and admin time value spent on e-discovery case</b>	<b>\$171,000</b>
<b>Legal department- staff attorney time spent on matter per 1000 documents</b>	<b>0.75</b>
<b>Legal department- paralegal time spent on matter per 1000 documents</b>	<b>1</b>
<b>Legal department- staff attorney hourly salary fully burdened</b>	<b>\$236</b>
<b>Legal department- paralegal hourly salary - fully burdened</b>	<b>\$75</b>
<b>Total legal department cost for e-discovery</b>	<b>\$630,000</b>
<b>Total hidden costs for e-discovery case</b>	<b>\$1,269,750</b>
<b>Admin time factor for lit hold, collections, interviews (per page)</b>	<b>0.00001</b>
<b>Standard in-house attorney salary per year (industry averages)</b>	<b>\$236,000</b>
<b>Standard in-house paralegal salary per year (Industry averages)</b>	<b>\$75,000</b>

**Table 1:** Hidden costs in an e-discovery process that is overly reliant on manual workflows

# TACKLING THE RISK AND COST PROBLEMS

An integrated legal hold software solution allows the legal department to get on top of the risks and cost challenges inherent in legal hold by delivering powerful, automated hold management tools that are directly linked to the core legal matter that originated the hold. This makes far more sense from an operational standpoint than originating legal hold from an e-Discovery system. Why? Because every legal matter has a corresponding record in a matter management system. There may be many manners that require a legal hold, but only some of those will ever escalate into full blown e-Discovery efforts. Matter management solutions are the single source of truth for all legal operations, e-Discovery systems are not.

From the perspective of cost control, such a platform's robust matter management and electronic billing (e-billing) functionality, coupled with automation tools, can drive increased awareness and efficiency in data collection, litigation holds, and custodial interviews. To manage legal hold and e-discovery risk, such a solution or platform provides the legal department with a defensible methodology for determining and maintaining the scope of a legal hold and consistent delivery of messages in legal hold notices.

The product should enable auditable adherence to hold notices, reminders and escalation policies, quick and effective interviews of data custodians, and a data collection process managed through collaboration and documentation. Sophisticated reporting capabilities give stakeholders a real time overview of the entire legal hold portfolio, spanning multiple matters, defense budgets, and custodians.



# TACKLING THE RISK AND COST PROBLEMS

## Matter-Centric Legal Hold Management

Legal hold requests almost universally arise from a legal matter. Whether the request comes from an actual lawsuit, a threatened lawsuit, an internal investigation, or a regulatory compliance process, the legal department is typically the point of origination for the legal hold and manages it from inception through release.

As a result of the essential connection between the legal matter and the legal hold, the legal department should be the central point of contact and control for the legal hold, data custodian interviews, and data collection for both custodial and non-custodial data sources. If the department is not in this position, then it is likely to be in an inefficient parallel management role for the legal hold with other stakeholders, such as IT, who also may not be fully in control of the process. The value is that increased visibility into all aspects of a matter from a single source of truth enables assessment and quick execution of a legal hold earlier in the matter lifecycle - reducing litigation risk and ultimately improving legal costs and outcomes.

Legal departments generally use matter management software to establish workflows, tasks, key contacts, and outside counsel assignments for legal matters. When combined with spend management and e-billing solutions, matter management software provides legal department managers accurate and real time information on the budget status of matters with regard to outside counsel spending and settlements. With this comprehensive overview of matters available, it is a natural extension of matter management to control legal holds in tandem with their originating legal matter. This is known as “matter-centric” legal hold management.

By managing legal holds, interviews and collections through enhanced matter management tools, legal department staff and management can exercise strong control over the process while gaining accurate and up to date views on spending related to the hold by automating the flow of information from the matter to the Legalhold application.

At the same time, the increased control and automation of the legal hold process reduces the risk of sanctions and penalties in court. Better awareness of outside counsel billings on the core matter enables improved budget forecasting capability for e-discovery outside counsel costs and improved ability to budget and track outside counsel costs related to legal hold and e-discovery in general.





# DEFENSIBLE METHODOLOGY

## for Determining and Maintaining Scope

A dedicated legal hold software solution should, first and foremost, establish a defensible and repeatable methodology for one of the most challenging aspects of the legal hold process: defining and maintaining the scope. The scope of a legal hold is measured by the number of data custodians required to act on the hold request, and the amount of data that is affected by the hold. The larger the scope, the more people and resources are involved in its execution. To keep costs down and maintain an efficient legal hold program, gauging scope is a necessary and important activity.

A legal hold software solution should help scope the hold by connecting users with interfaces to HR and Active Directory. These interfaces allow users to select the proper pool of custodians for the hold. Then, they can reliably select custodians based on their HR organizational data from the On-line Organizational chart. Users can easily identify large groups of custodians simply by selecting their organizational criteria.

Collections Tracking feature of such a legal hold software solutions should let the legal department issue collection requests for active Legal Holds and monitor the progress of collection of potential evidence from both custodians and non-custodial data sources. System Owners for internal systems and custodial data sources should automatically be added to each collection request.

People come and go in any organization, and it is quite common for a custodian identified in a hold to leave the company during the lifetime of the hold. Without proper legal hold management tools, a custodian's departure could easily lead to a lapse in the duty to preserve ESI. It is necessary, therefore, to maintain the scope of the hold continually, tracking the custodians as they enter and leave their custodial positions. A best-of-breed legal hold software solution should continually maintain the scope of active holds by identifying and alerting users automatically when employees who are on active legal holds leave the company or are terminated. This will ensure that IT does not delete any potential evidence residing on the data sources for the departing employee.



# DELIVER CONSISTENT MESSAGING IN LEGAL HOLD NOTICES

Notices are the primary communication vehicles of the legal hold process. Good legal hold software provides collaborative tools to insure repeatable and consistent notice content with version control. A full-featured text editor, for example, allows for the creation of well-crafted notices for the custodians and data stewards that follow the organization's standard, precise format and wording. Replaceable fields automatically pull information from the legal matter to the notice. This is one advantage of integration between legal hold administration and matter management. It also provides for proper oversight and review of content and notices prior to issuance.

A full-featured legal hold software solution should establish the basis for proven adherence to notices, reminders and escalation policies – each of which is core to conducting a repeatable, defensible legal hold process. Custodians subject to a hold must be continually reminded of their obligation to preserve information. Escalation for those that do not acknowledge their responsibilities must also be in effect. The software will, ideally, also provide functionality to meet and provide detailed documentation for these important requirements.

Another vital capability? Allowing users to consistently set reminder and escalation frequencies. Reminder frequencies and escalation policies should be able to be defined, and for C Level and other folks they should be allowed to be disabled. The system should reliably transmit notices to custodians and record responses. Notices should be emailed to affected parties; and with a click, recipients should be able to record their answers via the solution's custodian portal. Responses should be immediately transmitted from the portal to the software's user interface/dashboard. Recipients should benefit from seeing a list of all the hold notices they have been issued at the portal with all details and their responses at any time for both their active and released holds.

For Internal investigations the system should allow to add "silent" custodians to LegalHold where the custodians data can be collected behind the scenes without the custodians knowing they are on Legal Holds.

Periodic custodian and non-respondent reminders should be automatically sent to members subject to a legal hold, and there should be an automatic escalation to management for custodians that do not respond. The workflow automation features bring non-respondent information to the attention of the administrator through an email digest. The software should also generate a full audit trail of notices and responses.

For hold administrators, legal department users and other key stakeholders, the software's dashboard should present up-to-date real time status information on recipient responses, allowing the administrators to easily gauge progress and determine appropriate follow up.





# QUICKLY AND EFFECTIVELY

## Interview Key Players

A sound legal hold methodology requires that data custodians be interviewed about their responsibility to preserve ESI. A legal hold software solution should provide tools to facilitate, document and track the entire interview process. It should also enable users to craft their own questions using templates which maintain consistency and reduce the need for second and third interviews. Interviews may be conducted online via the software's response portal to aid in speed and analysis of the responses.

Overall, these interview automation and facilitation functions translate into reduced loss of productive work time by custodians, less administrative burden for the legal department, and lower phone and travel costs.

### Manage the Collection Process Through Collaboration and Documentation

While such a legal hold software product does not perform the physical data collection, best-of-breed examples handle the more challenging process of managing the collection of relevant digital data over the life of a legal hold.

This management process requires an understanding of what needs to be collected.

This supports the entire collection management process by enabling consistent collections, allowing users to create their own collection plans, and setting up dynamic workflow approvals before collection begins to ensure the quality of the collection plan. Centralizing information reduces duplicate collection efforts, while fast and simple responsibility tracking streamlines the collection process. Users can easily manage assignments of collectors. Notifications and reminders for collectors and data stewards are sent automatically. Better monitoring and recording of the collection progress with dashboard statistics and reports make for straightforward tracking and progress monitoring.

Ultimately, users can view a complete history of collections as an extension of matter management functionality. Legal department users have the ability to manage legal holds directly from the same system they use to manage the legal matter that originated the hold request. If the ELM has spend management and e-billing capabilities, it will enable users to have a real-time view of spend budgets on each matter that is associated with a legal hold.

# QUICK & PRECISE REPORTING

For users as well as legal department managers and other key stakeholders, up-to-date intelligence and insight about the state of legal holds are absolute requirements for maintaining the kind of repeatable, defensible program that every organization needs. A legal hold software solution should permit its users to generate matter-specific reports, legal holds and notice history, a master recipient list, reports, and collection history.

Reports should also give visibility for the preservation history of each hold, notice exceptions (all non-respondents by hold), and also the response rates for each hold. The collection status reports should also be available so users can be sure that all collections requests for all active legal holds have been completed. All reports should be allowed to be exported into multiple formats.



# CONCLUSION



E-discovery is a complex, challenging and expensive proposition for most corporations. While there is no magic bullet that will make all the challenges go away, the development of a sound, repeatable, and defensible legal hold process will go a long way to getting the entire e-discovery program in good shape.

Best-in-class SaaS legal hold software solutions offer corporations this capability, giving the legal department the ability to automate key aspects of legal hold issuance, notification, and release. It streamlines the interview and data collection process and ties the whole effort to the underlying legal matter, with a resulting improvement in staff productivity and costs. Ultimately this enables the legal department to reduce both risk and cost in the e-discovery process.

# LEGALHOLD FROM MITRATECH

Mitratech offers a state-of-the-art LegalHold product that was built in partnership with 40 of our current ELM clients. It's a modern, intuitive, comprehensive and feature-rich solution.

LegalHold is a SaaS-based offering, meaning users bypass all the setup and upgrade headaches associated with non-hosted solutions. Everyone gets the latest and greatest features and functionality without delay. Our product also seamlessly integrates with our TeamConnect and eCounsel ELM solutions, which means you can access and track your entire legal hold management process from within your matter management console without having to log in to a separate application. If you have a different matter management solution, we also have open APIs available to use for integrations.

LegalHold is a comprehensive solution that, when used with an ELM product, can start the legal hold process immediately after the creation of a legal matter and track its entire life cycle through hold management and collections tracking until its release. All aspects of a hold management process are easily trackable, auditable and reportable.

## ABOUT MITRATECH

Mitratech is a proven global technology partner for corporate legal, risk & compliance, and HR professionals seeking to maximize productivity, control expense, and mitigate risk by deepening operational alignment, increasing visibility, and spurring collaboration across their organization.

With Mitratech's proven portfolio of end-to-end solutions, organizations worldwide are able to implement best practices and standardize processes across all lines of business to manage risk and ensure business continuity.

Mitratech serves over 1,500 organizations worldwide, including 30% of the Fortune 500 and over 500,000 users in 160 countries.

For more info, visit: [www.mitratech.com](http://www.mitratech.com)

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