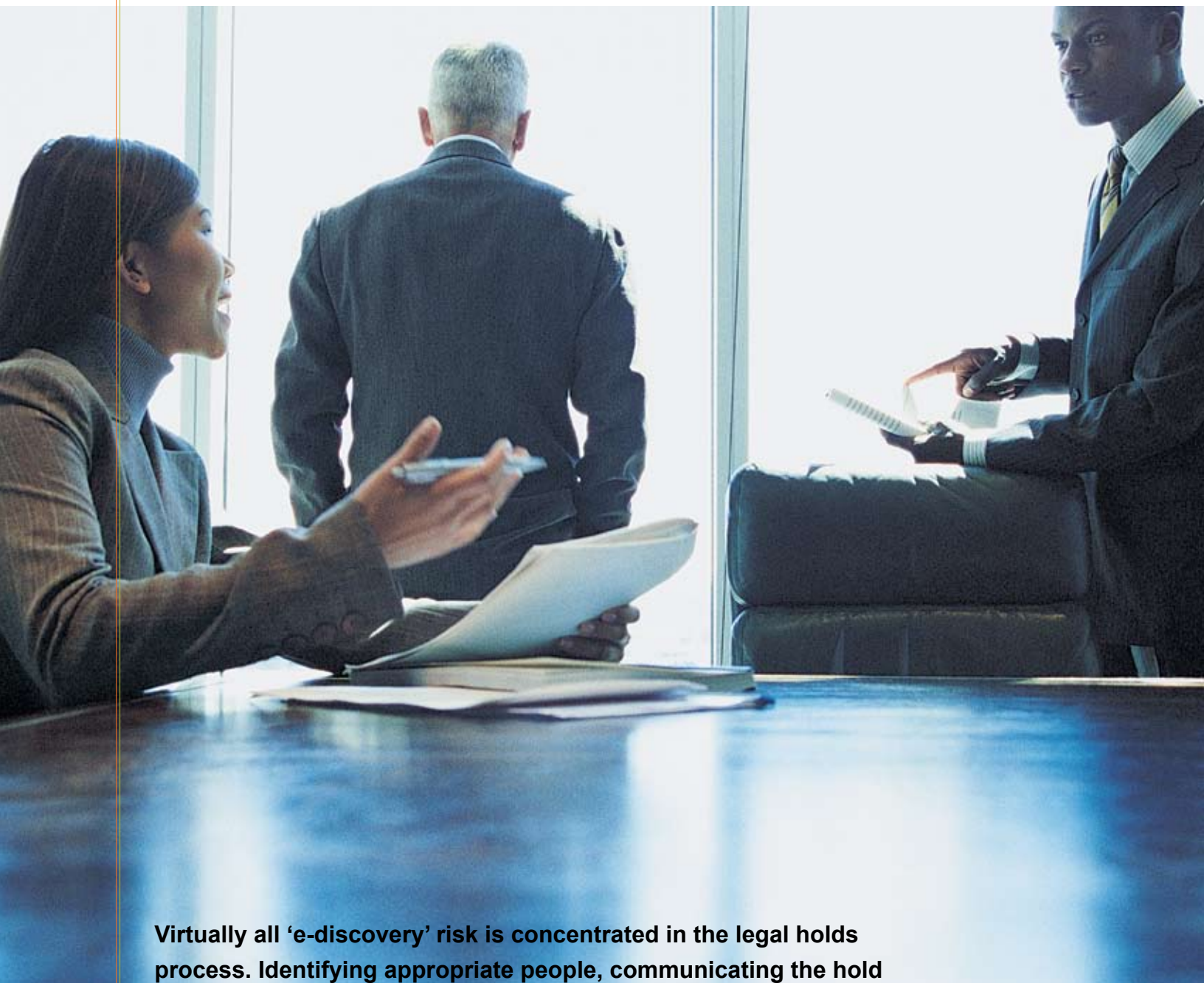


# Benchmark Survey on Prevailing Practices for Legal Holds in Global 1000 Companies

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**Virtually all ‘e-discovery’ risk is concentrated in the legal holds process. Identifying appropriate people, communicating the hold consistently, interviewing custodians and IT staff, conducting diligent inquiry on data sources, and complete and reliable collection methodologies are the points of failure. As a result, adversarial and judicial scrutiny is also concentrated in these areas — as attention and caution should be.**

## Foreword

I've been focused on holds and retention practices and have had a passion to improve them for nearly five years now. In that time, I've had the opportunity to talk to hundreds of companies in the United States and Europe on their practices, and have had the opportunity to work very closely with many as they improved their processes, reduced risk and lowered litigation costs. I started CGOC in 2004 to help companies learn from each other and from experts on the core issues of preservation and retention, and to benefit from knowledge gained by others. With fifteen events each year that bring together hundreds of corporate practitioners to exchange ideas and experience, CGOC is a tremendous source of information on standards of practice and the pace at which these standards change. To complement the many papers and events CGOC provides each year, this report provides a benchmark for legal holds in companies with over \$5 billion in revenue. It encapsulates the many related challenges and opportunities that are discussed so vigorously within the CGOC community — it is an invaluable reference for any company examining its process and options.



**Deidre Paknad**  
**Founder of CGOC**  
President and CEO, PSS Systems

The legal hold process has emerged as a top area of concern, particularly in the last three years, for those companies who have attempted to mitigate risk in their discovery process. Legal holds and preservation form the nexus of where the disciplines of records management and discovery meet and where companies have increasingly been forced to spend exorbitant amounts of time and money to protect the interests of the organization.

Managing legal holds well requires a synergy between Legal, IT, Compliance, RIM and affected business units that puts communication and process front and center on the company priority list. With the proliferation of electronic data, the emphasis on FRCP compliance and the complexity of systems storing and managing electronic data, this process has caught the attention of industries fraught with litigation and investigations. More and more, companies are realizing sound management of legal holds is necessary even if they are not facing litigation everyday and even if data does not reach subsequent phases of discovery.

We are proud to share and extend the results of some of our frequent work with corporate legal departments by publishing this benchmark report for companies to consider, learn and improve practices that will provide their respective businesses with sound legal hold management and enhanced business processes...and save tremendous amounts of money along the way.



**Jim Mitchell**  
Managing Director, Huron Consulting Group

## 1. Executive Summary

This research report compiles legal holds and litigation workflow data from Global 1000 companies and is the first of its kind to look closely at legal holds processes in corporations of this size since the December 2006 amendments to the Federal Rules of Civil Procedure. The report highlights the changes in processes and technology within these companies and the methodologies by which they issue and manage legal holds. Among other things, it reveals that:

- Companies are issuing far more holds and are issuing holds across a greater percentage of open matters and matter types.
- Reminders and confirmations of compliance have become routine and an integral component of a defensible legal hold process.
- Accurately scoping custodians is a common concern and requires improved standardized procedures. Custodian pools can be very large and may be increasing.
- 100% of respondent companies had improved their process and methodologies and had systematized aspects of it.
- The use of automated legal holds solutions plays a significant role and enables more thorough and consistent processes in those companies that employ them.
- Approximately 85% of companies surveyed use Atlas LCC software for legal holds, one developed its own system, and the remainder used Access databases and Excel spreadsheets.

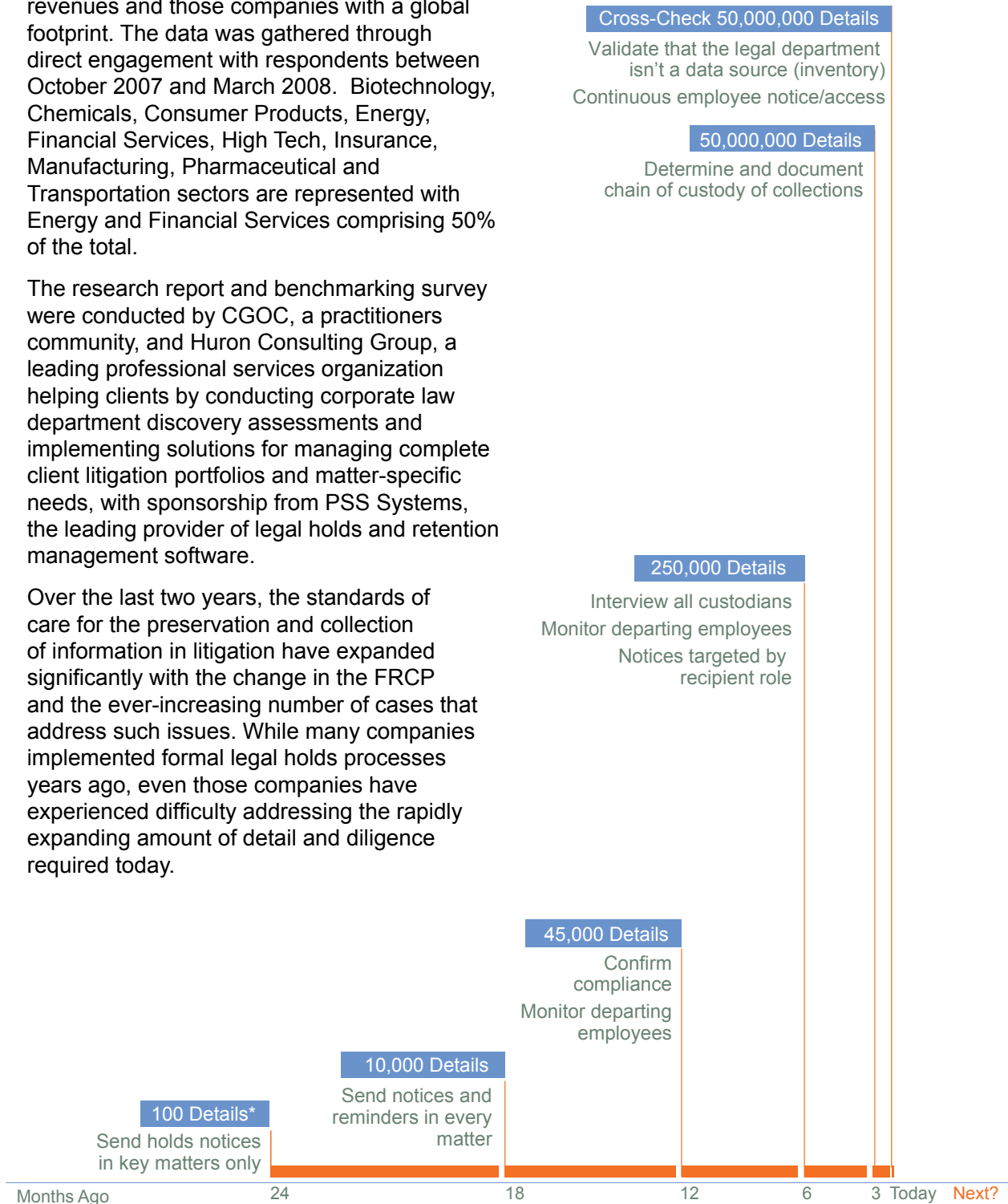


This report is an essential benchmarking tool for companies with over \$5 billion in revenues and those companies with a global footprint. The data was gathered through direct engagement with respondents between October 2007 and March 2008. Biotechnology, Chemicals, Consumer Products, Energy, Financial Services, High Tech, Insurance, Manufacturing, Pharmaceutical and Transportation sectors are represented with Energy and Financial Services comprising 50% of the total.

The research report and benchmarking survey were conducted by CGOC, a practitioners community, and Huron Consulting Group, a leading professional services organization helping clients by conducting corporate law department discovery assessments and implementing solutions for managing complete client litigation portfolios and matter-specific needs, with sponsorship from PSS Systems, the leading provider of legal holds and retention management software.

Over the last two years, the standards of care for the preservation and collection of information in litigation have expanded significantly with the change in the FRCP and the ever-increasing number of cases that address such issues. While many companies implemented formal legal holds processes years ago, even those companies have experienced difficulty addressing the rapidly expanding amount of detail and diligence required today.

### Rising Expectations and Challenges



\*Details include hold notices, reminders, custodians, interviews, responses, collections, etc.

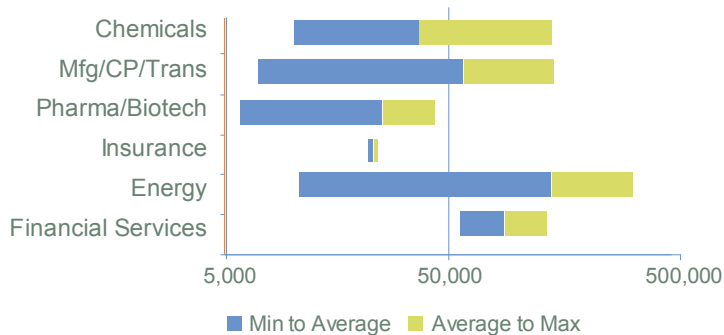


## 2. Company and Process Characteristics

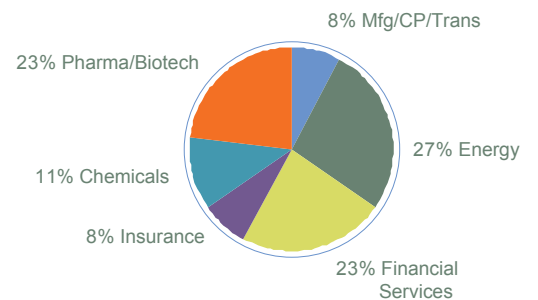
The benchmarking data was collected from corporations with revenue ranges from \$5 billion to well over \$150 billion in virtually all industry sectors. The survey researched 10 industries and this report will highlight findings in segments that represent the majority of the data.

- Biotechnology
- Chemicals
- Consumer Products (CP)
- Energy
- Financial Services
- High Tech
- Insurance
- Manufacturing (Mfg)
- Pharmaceutical
- Transportation (Trans)

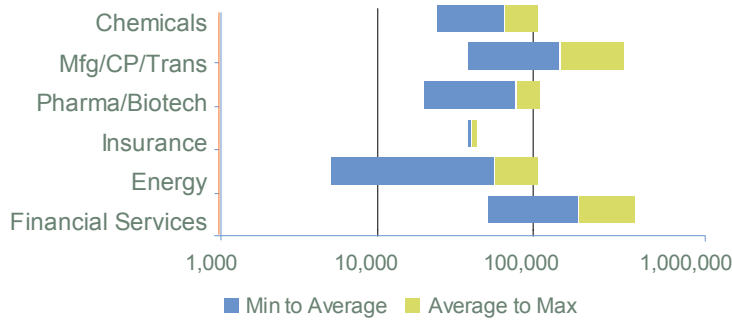
Revenue Range per Industry (in millions)



Industry Overview % of Surveyed Companies by Vertical



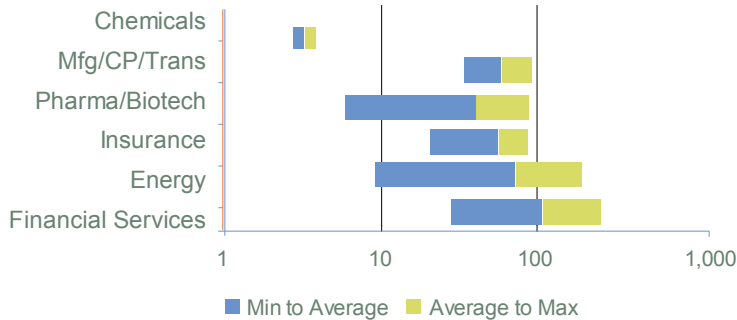
### Employee Count Range per Industry



The companies manage a wide range of legal matters and legal holds.

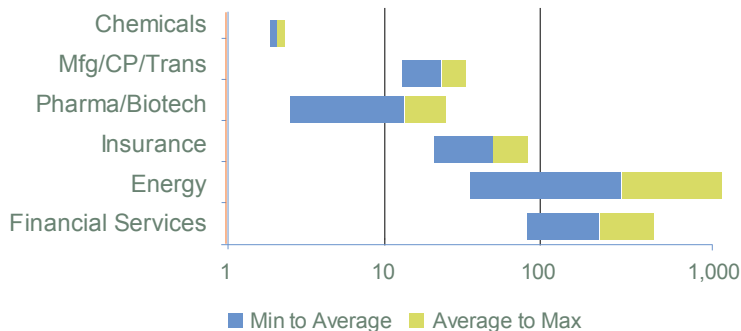
- Matter types include commercial litigation, government investigations and inquiries, intellectual property disputes, government contract disputes, investigations, subpoenas, EEOC claims, employee “slip-and-falls” and mass tort litigation.
- While a few companies had only two dozen new matters per year, the majority of companies surveyed had far more new matters each year. The average was 980 new matters initiated each year, with an average of 5,100 open matters at any given time across all industries.
- 80% of the companies issued legal holds for every matter, while 20% used early case assessments of various factors to determine which matters required associated legal holds.

### Total Active Matters per \$B in Revenue



Average across all industries was 5,100 open matters at any given time.

### Total Active Matters per 1,000 Employees



From an operational perspective, the companies surveyed differed around:

- Level of ownership and participation among Legal, Records Management and IT staff in the legal hold process.
- Review and approval of hold notices prior to issuance.
- Use of cascading holds and reliance on business staff to determine additional recipients.
- Use of imprecise, undifferentiated blanket holds.
- Who documents the lists of recipients and how such documentation is captured.
- Centralized legal hold management and the number of attorneys and paralegals participating in drafting and issuing notices.

Virtually all of the respondents considered the legal hold notice privileged attorney-client communication. Most companies issued the notices from the legal department to ensure the privilege and marked the notices as “attorney-client communication”.

### 3. Benchmarking Results by Process Area

The survey sought to capture how companies addressed the steps in the preservation process from trigger of the duty to preserve to ongoing management and monitoring of legal holds, through collection of evidence and chain of custody.



Companies’ legal holds practices directly correlate to e-discovery risk. In virtually every landmark e-discovery case, fault can be traced to failure in scoping custodians and systems, notifying individuals, interviewing individuals, collecting their data, or reconciling the changes in custodians, data sources, and facts over the long course of litigation. Sanctions or significant negative outcomes seldom stem from fault or risk in the analysis, or review or production of data.

In *Zubulake v. UBS Warburg*, the seminal legal holds case, failure to notify all employees of the hold, monitor their ongoing compliance, and conduct thorough interviews to determine data in the custody of the various custodians fatigued the Court’s patience and led to sanctions. Judge Schiendlin outlined very clearly what inside and outside counsels’ responsibilities are for preserving information, laying out a process that is now a widely-held standard.

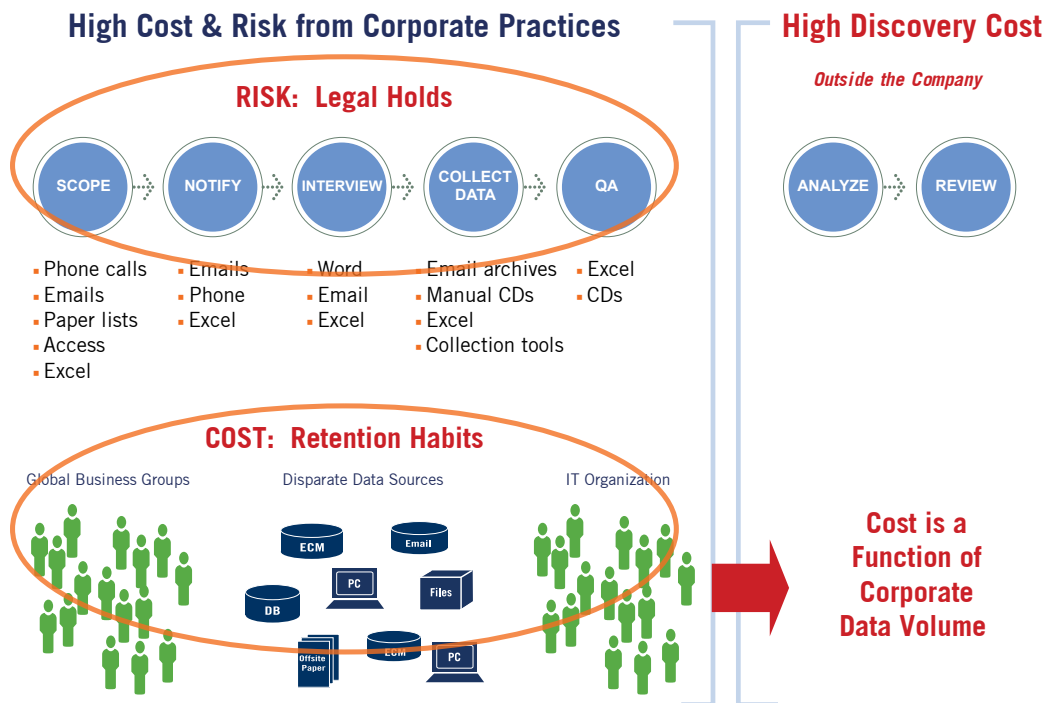
In *Coleman v. Morgan Stanley*, collection instructions issued by the legal department to IT staff and the surrounding process weren’t adequately monitored to ensure timely and thorough completion; lack of transparency internally and with the Court led to severe outcomes.

In *re NTL Securities*, inadequate hold scope left out key servers managed by third parties, and lack of hold and reminder communications led to disposal of data in systems that were retired or removed from service over the five-year litigation span. The judge deemed these inadequacies “at least grossly negligent” and pointedly told the defendant, “you should, by now, be aware of *Zubulake*.”

In *Mosaid v. Samsung*, failure to issue legal holds gave the judge basis for issuing an adverse inference instruction, and awarding the plaintiff monetary sanctions.

In fact, *In re Metro. Opera Association, MasterCard International, Inc. v. Moulton, Samsung Electronics Co v. Rambus, United States v. Philip Morris, In re Intel Microprocessor Antitrust Litigation*, and many other cases demonstrate the high concentration of legal risk in the legal holds process. The risks and costly outcomes stem from process breakdowns, such as failure to:

- Identify appropriate custodians including both people and systems with custody of information.
- Communicate the duty to preserve to those custodians and related IT Staff.
- Remind custodians of their ongoing duties to preserve information.
- Conduct diligent interviews of custodians to determine the scope of potentially relevant information, including adequate follow up on facts determined in interviews.
- Address and scope external sources of information, such as third-party technology services, and to communicate preservation duties to them.
- Manage ongoing collection and holds tasks between the legal department and IT such that automatic disposal is suspended and data is collected in a timely manner.
- Ensure that identified custodians received proper communications and relevant data was collected from them.



While searching for relief from this complex problem, companies became aware of multiple options available to address the issue. Of the companies surveyed, all but 2% had or were implementing software to manage their legal holds process. 14% had developed their own system or used Access databases and Excel spreadsheets and 84% had Atlas LCC from PSS Systems. Of those using home-grown systems, 66% were planning to move to commercially available legal holds

software. Although the surveyed companies had a range of matter volumes, revenues, and employee bases, there was no correlation between the number of matters under management, custodians under holds, or revenues and the purchase of legal holds software. These results and the responses to the process-related questions suggest that reduced risk, increased reliability, and consistency were driving factors in the decision to purchase legal holds software.

## Organizational Dynamics

There were several approaches to addressing and managing legal holds observed across the responding companies. In some cases, a “legal holds coordinator” or team served as the clearing house for issuing and monitoring all legal holds. In others, each attorney and paralegal team managed their own holds and collections activities. Collections responsibilities were either concentrated in a dedicated technical team in IT or an operational group, or were coordinated through a discovery liaison or leader in the legal department. The model and process ownership at any one company generally reflects the culture and business environment. To succeed, any process model must be well-suited to the people who participate in it and to the tools that enable or sustain it – these conditions vary greatly from one company to the next.

When new processes are introduced to organizations, change management and change leadership are critical success factors. Companies may elect to initially concentrate the legal hold and collection activity within a core group to refine or perfect it, and once it becomes routine, then distribute responsibility to a broader group of people in the flow of their day-to-day processes so that it is permanently institutionalized in the ordinary course of business activity.

## 4. Hold Trigger

It is now well established that companies have a duty to take affirmative steps to preserve potentially relevant information when they reasonably anticipate specific litigation (or government investigation) or are notified of a credible claim or demand. The determination of what constitutes “reasonable anticipation” is a significant challenge and has been discussed by the CGOC faculty in various meetings and papers\*. At the 2008 CGOC Summit, substantial attention was devoted to the burden on the plaintiff to address the triggering event when bringing a claim against another party, and several recent cases highlight the hazards to the plaintiff when its legal hold process was insufficient in its timing, scope, or integrity.

Determining the trigger for a litigation hold is not something that can be defined in a standard policy; it must reflect the particular facts and circumstances of a matter, and a company’s unique business and litigation environment. Plaintiffs should take special care to institute holds as they determine litigation is warranted and develop their litigation strategies.

It is now well established that companies have a duty to take affirmative steps to preserve potentially relevant information when they reasonably anticipate specific litigation (or government investigation) or are notified of a credible claim or demand.

\*Lahiff, Thomas M., Jr. “Getting Demand Letters Right.” Weblog entry. 13 Nov. 2007. *Retention and Preservation*. <<http://www.cgocouncil.com/blog/?p=10>>.

Hedges, Ronald J. “Discovery of Digital Information”. N.p.: CGOC, 2006.

Brady, Kevin. “Evaluating Your Record Retention Program When Your Company “Reasonably Anticipates” Filing Litigation.” N.p.: CGOC, n.d.

Cohen, Matthew I., Deidre Paknad. “A Framework for Addressing Legacy Data.” N.p.: CGOC, 2008.

Tom Lahiff, CGOC faculty and blog author, and former assistant general counsel at Citigroup, in presenting with Tom Lidbury, CGOC faculty and litigation partner at Mayer Brown, on the duty to preserve and litigation triggers at the 2008 CGOC summit, outlined the duty to preserve and its scope.

**The duty to preserve is broader than the duty to produce.**

Courts have broadly interpreted the duty to preserve to accomplish the goal of maintaining the integrity of all tangible things, documents, and data reasonably anticipated to be subject to discovery.

- **Rule 26(b)(1) provides for the discovery of any nonprivileged matter that is relevant to any party's claim or defense.**  
Relevant information need not be admissible at trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.
- A party has a duty to preserve information when the party is placed on notice or **reasonably anticipates** that the information is relevant or may be relevant to future litigation.

A well-accepted, reasonable method of preserving information is through the issuance of legal hold notices to employees who may have potentially relevant information. (See *Zubulake V, In re NTL Securities and others*) The duty to preserve information may also be satisfied by collecting it, but given the diversity of information forms and sources, it is rarely possible to satisfy this duty without communicating the obligation to employees and monitoring their compliance over time. Litigants clearly have a duty to actively discharge their preservation duties. This requires process, diligence, follow through and accountability.

Litigants clearly have a duty to actively discharge their preservation duties. This requires process, diligence, follow through and accountability.

Companies continue to struggle with standardizing trigger events.

The great diversity of business matters, business units and groups, and disputes that arise among them makes standardization difficult. For most survey participants, the opening of a matter was seen as the trigger for any necessary legal hold. Some participants used opening a matter in a matter management system as a standardized “checkpoint” to evaluate a matter for a legal hold. This approach closed gaps and improved consistency. However, the surveyed companies differed on whether it was valuable to document the reasons for when a hold was or was not issued. Some companies require this audit trail of justification; others saw it as a legal liability.

Consistency is the watch word. CGOC faculty members Kevin Brady, and Matthew I. Cohen, in their article from *The National Law Journal*, July, 2005, highlight the importance of issuing legal holds consistently:

In *Mosaic Technologies Inc. v. Samsung Electronics Co.*, 348F. Supp. 2d 332 (D.N.J. 2004), the court found that the defendant, Samsung, did not meet its obligation to preserve and produce potentially relevant e-mails, and awarded the plaintiff monetary sanctions. Further, the court determined that it would issue an adverse-inference instruction to jurors, permitting them to find that the spoliated evidence would have been unfavorable to Samsung.

In granting these sanctions, the court focused on the fact that “Samsung never placed a ‘litigation hold’ or ‘off switch’ on its document retention policy concerning e-mail ... [which automatically] allowed e-mails to be deleted, or at least to become inaccessible, on a rolling basis.” *Mosaic*, 348 F. Supp. 2d at 333. The court noted the fact that Samsung

“knew how to institute a ‘litigation hold’ and stop the spoliation of e-mails, having done so in one of its divisions in another litigation.” *Id.* at 338. The court concluded by stating that “when the duty to preserve is triggered, it cannot be a defense to a spoliation claim that the party inadvertently failed to [institute] a ‘litigation hold’.” *Id.* at 339.

## 5. Hold Scope

Determining the scope of people and information that may be involved in any one matter is particularly complex for legal departments in large companies. The size of the organization, its rate of employee change, the geographic distribution of both people and information, and the array of information types and sources are mind boggling. From testimony on the then-proposed revisions to the Federal Rules of Civil Procedure, a litigation executive from a large energy company eloquently described the challenge:

“I’m from a company that has 15,000 active litigations. In the year 2004, which was a slow year, we got new litigations at the rate of 225 a month.

A few other numbers. We operate in 200 countries in the world. We have 306 offices around the world, 70 of them in the U.S. We generate 5.2 million e-mails a day, about half of that in the U.S. We have 65,000 desktop computers around the world and 30,000 laptop computers. These are for our employees, about half of those in the U.S.

We have, in addition to the 65,000 desktops and 30,000 laptops, we have between 15,000 and 20,000 Blackberries and PDAs around the world. We have 7,000 servers worldwide, 4,000 of them in the U.S. We have 1,000 to 2,000 networks worldwide, about half of those in the U.S. We have 3,750 e-collaboration rooms. I assume that they’re chat room type things, for people to be working on documents simultaneously. About 3,000 of those are in the U.S.

We have 3,000 databases; 2,000 of those in the U.S. Our total storage of information that we now have is 800 terabytes; 500 terabytes in the U.S. One terabyte equals 500 million pages. 500 terabytes equals 250 billion pages. 800 terabytes equals 400 billion pages.

I don’t have worldwide figures on the disaster recovery system. The latest figures I have on the disaster recovery systems in the U.S. is that we generate 121,000 backup tapes for disaster recovery purposes. If we were ever to get an order, and we never have, that told us that we would have to stop all of our backup tapes, just the replacement of the backup tapes would cost 1.98 million dollars a month. That’s over 20 — that’s about 24 million dollars a year.”

*Source: Public Hearing on Proposed Amendments to the Federal Rules of Civil Procedure (testimony of Chuck Beach) January 28, 2005.*

Clearly, with this volume and diversity, determining the finite universe of people and information that may be in the scope of a given matter is not an easy – nor an immediate – determination. Legal judgment and iteration are necessary, and tracking and documentation are complicating factors. Over-scoping legal holds quickly leads to operational paralysis in the business groups and massive over-retention of irrelevant information – which itself leads to greater likelihood of overlooking information in future litigation based on sheer volume. Under-scoping may lead to spoliation, increased discovery costs, or production delays. As a result, precision and documentation are essential to an efficient and defensible process.

Surveyed companies determined the custodians in their matters using a combination of methods including organization charts, interviews, address books, and existing knowledge in the legal team.

The challenges cited included:

1. **Information received in a typical complaint or triggering event is insufficient** to effectively identify all potential custodians in the first few days. Lack of complete information, historical context, the completeness of the complaint itself, and the nature of the issue in dispute all make it very difficult to reach a perfected list of custodians immediately.
2. **Low accuracy of address books and organizations charts that are available to the litigation team.** For companies without legal holds software that mirrors the corporate HR data for the legal team, it is often difficult to determine the current employee base in any particular department. It is far more difficult to quickly or reliably determine who may have worked in an area at a historical point in time without such systems.
3. **Relying on “tribal knowledge” that may be outdated and unreliable.** One company noted an example where paralegals routinely targeted the same 30 custodians in a specific matter type for many years and, after implementing legal holds software that provided an accurate organization view, learned that as many as 300 custodians should be scoped in such matters.
4. **Managing the master list of custodians over time as people are added to scope or removed.** Another company cited an example where compiling a report of all custodians ever involved in a three-year-old matter by their name, organizational affiliation, point of inclusion and exclusion, and their notice status took over 20 hours. Various spreadsheets, email lists, and records had been kept during the three-year period and a full record didn’t exist in any one place. This company noted that since its implementation of legal holds software, this kind of report is instantly available and accurate for all of its matters.
5. **Employee transitions and terminations that occur over the life of the matter.** These scope changes are very difficult to monitor for the legal department. For companies without legal holds software, this required manual processes and protocols with HR and IT staff to ensure that as employees departed, legal staff were notified. This manual method is complicated in large companies where many people in HR and IT may be involved in employee departure procedures and where hundreds of attorneys manage a variety of matters. For surveyed companies with legal holds systems integrated with corporate HR data, this monitoring is significantly easier because the software alerts all legal staff of matters that involved the departing or transferring employees.

While legal holds software integrated with HR systems substantially improved the ability to scope custodians involved in holds, interviews, accident or incident reports, product teams, and other research mechanisms were also used to establish the initial list of custodians. 75% of the surveyed companies routinely or consistently asked custodians to identify other employees to further refine the scope of custodian involvement. For those companies with legal holds software, online interview capabilities facilitated and accelerated the determination of custodians via broader interviews and systematic follow up.

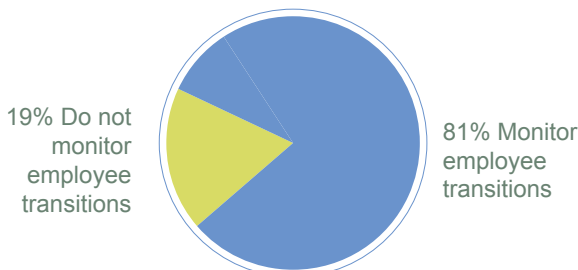
In the surveyed companies, paralegals and attorneys generally initiated and managed the scoping and recipient lists. 33% of the companies also involved records coordinators across the business to assist in identifying custodians. Managing counsel and outside counsel reviewed the initial list of custodians prior to notice distribution in almost 60% of the surveyed companies.

Not coincidentally, companies using legal holds software monitored employee transitions. It was not clear if the need to monitor led to software use or the ability to automatically monitor using software led to monitoring.

## 6. Notice Management

### Authoring and Issuing the Notice

#### Monitoring Employee Transitions



In virtually every company surveyed, paralegals or holds coordinators drafted the initial notice and all companies have an approval process prior to publishing the hold notice. 26% had outside counsel approve notices prior to distribution. The companies surveyed were unable to identify a consistent turn-around time from trigger to notice issuance. Those with automated systems had just begun to monitor this turn-around time.

All companies surveyed considered the notices attorney-client communications. A minority of companies distributed notices via records management staff and one used a cascade method where key business records contacts received the hold order, reviewed and then further distributed the notice to other employees within their respective business units.

Given the significant increase in holds issued and custodians under hold, the best practice for issuing notices includes not only e-mail-based hold notices, but:

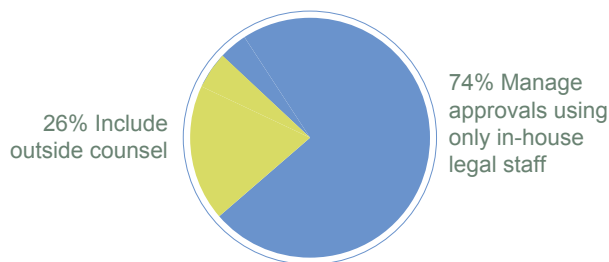
1. Making current notices available to each employee on an Intranet or employee portal site on a continuous basis.
2. Targeting notices to the recipient’s role and preservation responsibilities; IT staff have a different context than other employees – tailored notice language improved compliance.

### Notification Recordkeeping

Tracking custodians, notices issued and responses received are important but difficult steps. However, all companies surveyed tracked the first notice issuance and 75% required

- Paralegals typically authorized
- 100% attorney-client communications
- 88% issued by legal department
- 90% issued reminders

#### Approval of Notice Language



**State of the Art:** Employee self-service portal to look up current holds on demand

*For a complete list of State of the Art Process Hallmarks see page 25.*

employees to affirmatively respond to the notice. In this instance, the volume of litigation and size of company were material – the number of custodian occurrences increased with company size and so, too, did the number of notices and responses requiring tracking.

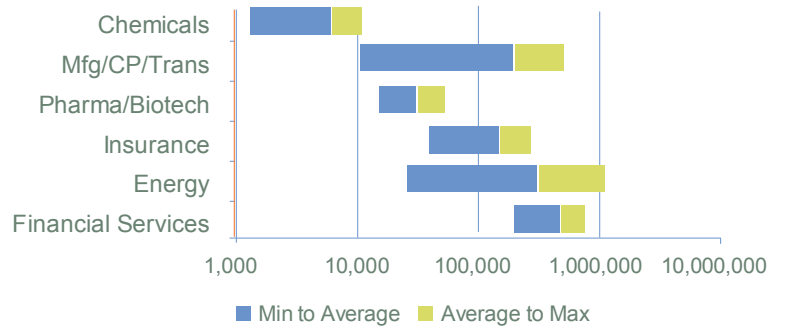
A frequent concern of those companies that did not require affirmative responses from custodians was the likelihood of failure to identify and follow up on notices to non-responders. As a result, these companies either did not ask custodians to respond or used alternate means to ensure preservation (including reliance on back-up tape media, pre-emptive collection and other costly approaches).

- 100% tracked distribution of initial notice
- 75% always required custodian confirmation
- 72% followed up on “no” responses

**State of the Art:**

- Automatic tracking of send, response, reminders and follow up
- Notices sent, responses received, outstanding reminder automation and escalation

**Total Number of Custodian Occurrences Across all Matters**



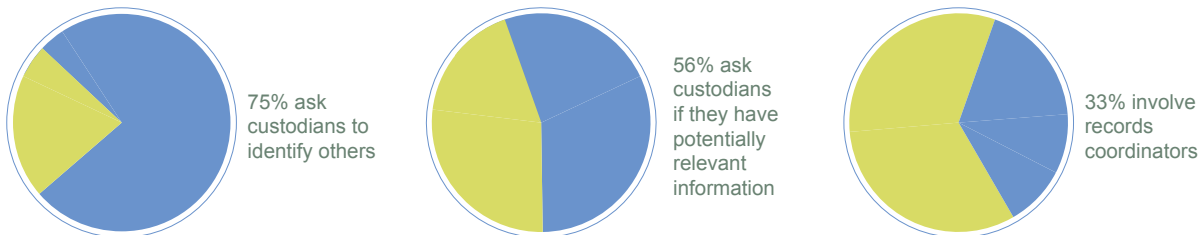
More cautious but proactive companies used multi-part responses from custodians, asking them to respond affirmatively to multiple questions in each hold notice – considering email, local files, information at home, thumb drives and so on – to ensure more authentic consideration and response. All companies tracking notice issuance and response manually are currently evaluating software to automate the process. The hours required to perform the full due diligence and follow-up to track the confirmations and non-responders often serves as a primary economic driver to justify the cost of a system versus hiring employees. Additionally, the improved automation and reduced error rates when compared to a more manual process further provide justification.

## 7. Interviewing Custodians and IT Staff

Several companies conducted detailed interviews using comprehensive questionnaires created by their outside counsel or e-discovery counsel; others used simpler or less comprehensive versions. Most asked custodians to assist in validating the scope of the matter by answering questions related to potential custodians, information timeline, locations of data, information and data habits, and related facts. Similar to hold notice responses, following up on custodian responses was cited as a concern for those managing the process manually – fear of missing a custodian answer or key fact were considered valid reasons for not asking the questions. Many companies used online interviews to issue questions and tally and track responses to their full outcome; sophisticated companies issued specific questionnaires to IT personnel as well as general employee custodians.

## 8. Collecting Data

Methods and approaches to data collection varied across companies and within them. All companies tailored the collection tool, technology, and level of expert assigned to data collection



**State of the Art:** Online questionnaires that automatically tally and capture custodian responses and alert legal staff

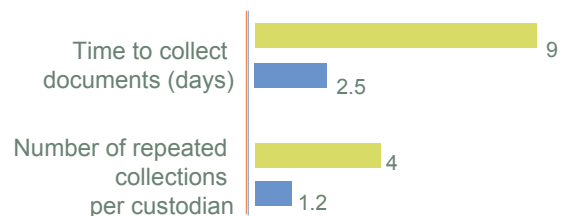
to the facts of a given matter. Over a third of companies asked employees to self-identify and directly provide potentially relevant information in some matters. All companies conducted at least some of their own collections using in-house staff.

In the financial services industry, collections tended to be completed by dedicated technical staff and often involved transactional data. In other companies, smaller dedicated teams with both legal and technical expertise managed collections and in some, collection instructions were issued to IT personnel to complete. Internal investigation teams were often called upon when forensic collections were warranted.

Over the past several years, the scope and magnitude of information collected by in-house teams has increased considerably. This is partly due to the increase in internal dedicated teams that conduct routine data collection and partly due to the increase in the volume of data and litigation among respondent companies.

- 100% had hybrid approach to collections
- 36% relied on custodians to self-collect in matters
- 12% of data sources collected accounted for 75% of the data exported for downstream processing

### Collection Statistics



**State of the Art:** Automatic inventory of data that the legal department has collected with custodian and content tracking to avoid creating more “legacy data”

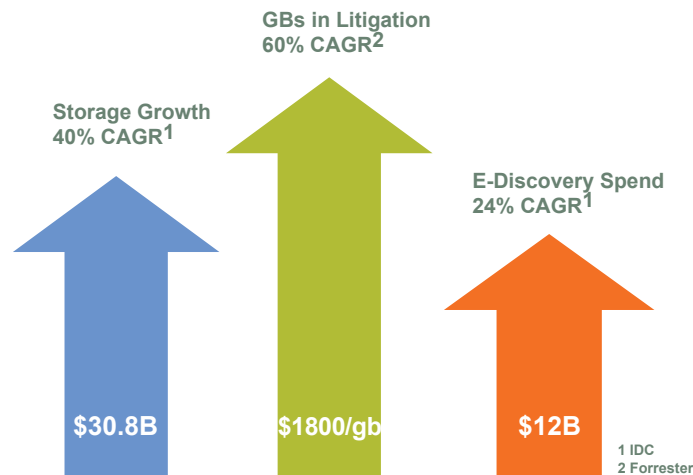
In any case, this increase in data collected at the instruction of the legal department also led to growing pools of matter data *within* the legal department – often in the hands of a single attorney or paralegal stored in a shared drive. This accumulation has proven hazardous to several responding attorneys in that they were unable to determine in subsequent matters whether other members of the legal team had potentially relevant information. To address this issue, these companies had specifically deployed legal holds systems that automatically inventoried data collected across all matters by matter, custodian, and content and which provided a full chain of custody for the data automatically from purpose for collection to delivery to outside counsel.

More data collected by the legal department has turned legal into an important data source for subsequent matters and has occasionally resulted in excess cost and embarrassment.

## 9. From Risk Reduction to Cost Reduction

Over half of the companies surveyed had or were initiating retention management programs to attack the root cause of high discovery costs – excessive and unorganized information. Correspondingly, there is an emerging trend to shift retention policy leadership into the general counsel's office. By synchronizing legal holds and retention procedures, the general counsel's office can give clear, precise guidance to both the business groups and IT on what information to keep and what to dispose of to meet legal obligations. Unlike traditional records management efforts designed to sequester records for adequate periods of time, such initiatives today are being undertaken to ensure routine, reliable disposal of information to reduce cost and risk.

Another third of the companies were automating aspects of collections and information indexing to reduce the costs of data collection and to streamline the process from legal decision to data collection.





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## Conclusion

The duty to preserve potentially relevant information is long-standing and its reach to all forms of information is now indisputable. The inherent difficulties, and corresponding risk, in preservation are far greater today due to 1) the vast array and diversity of data, 2) the ever-increasing volumes of it, and 3) increased scrutiny from adversaries. Furthermore, there is a fundamental but silent expectation that large corporations both can and should be capable of managing their data effectively and without fail – a difficult standard to meet for global companies.

Corporations are faced with limited and difficult choices:

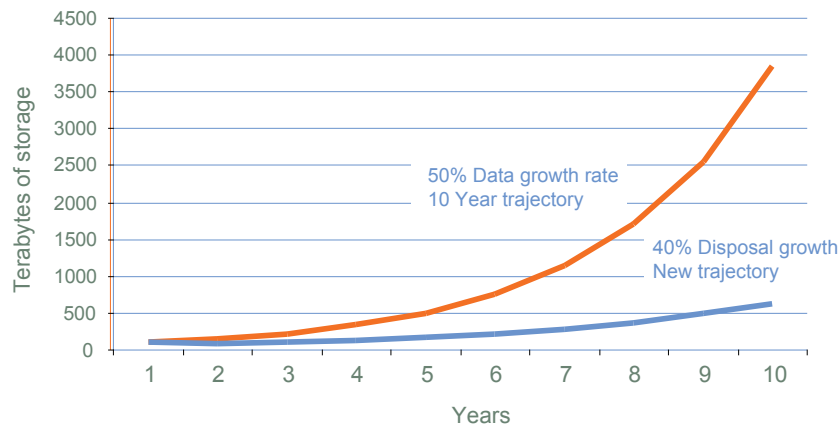
### 1. Keep everything and rely on permanent data retention to meet preservation obligations.

This approach theoretically allows for undocumented or less articulated legal holds processes because it presumes the data is being implicitly held through lack of disposal processes. However, it puts tremendous dependence on IT to:

- a. Understand the totality of their environment
- b. Have reliable, sufficient methodologies for tracking the location and sources of data (essentially inventorying it as a basis for confidence in its preservation and production)
- c. Collect large volumes of data in a timely and effective manner

This practice leads to massive, ever-escalating data accumulation which creates a greater pool of data to preserve and produce, greater likelihood of missing information as that pool grows and becomes less manageable, and substantial additional operating and discovery cost associated with the larger data pool.

The orange line on the chart below shows the information growth on a “keep everything” trajectory. 100 terabytes of data compounds to 4 petabytes of data over the course of 10 years. By contrast, the blue line shows the “keep what you need” trajectory reflecting at least a 40% disposal rate. Because information volume can increase 50% each year, operating and discovery costs – if not risks – will rise on a similar path.



Ironically, while the legal team may want the ability to shift the burden of preservation management to the IT team, the burden still falls on the company. For the IT organization to satisfactorily retain all information in a manner suited to defending preservation and complete production, a substantial and thorough inventory of all data, data sources, data management procedures, and aging data must be kept. The *Coleman v. Morgan Stanley* situation highlights these hazards – for lack of knowledge of the vast diversity of back-up tapes, their many locations, and the related data management procedures, neither the attorneys nor the IT team could assert when collection and production were complete and a series of unpleasant surprises ensued.

By improving their process with an active inventory of all holds obligations, these legal departments were able to use their improved transparency and controls to improve overall company operations – in other words, by running a better litigation process, they reduced their cost footprint on the company.

Several companies surveyed had transitioned from a “keep everything” governance model to a more precise approach. These companies cited rising frustration from line of business and IT executives and increasing perception that the root causes of these high costs were lack of process and transparency in the legal department itself. By improving their process with an active inventory of all holds obligations, these legal departments were able to use their increased transparency and controls to improve overall company operations – in other words, by running a better litigation process, they reduced their cost footprint on the company. Litigation executives who have this transparency and control are clearly better business partners to their corporations.

**2. Institutionalize a legal holds process for reliable, routine preservation of information.**

Companies that determine a consistent process is warranted implement standardized documentation and record keeping practices, institute common notice standards, and develop monitors and controls to ensure steps are completed reliably. For companies that have determined process consistency, transparency and integrity are required, the volume of details, custodians and tasks to manage quickly becomes overwhelming. In fact, documenting the process often competes or conflicts with managing the process.



**Level of documentation for 200 matters with 75 custodians each for one year.**

<i>Task</i>	<i>Burden</i>
Initial notice and quarterly reminders	60,000 tasks
Affirmative responses from custodians	60,000 tasks
Manual and phone follow up — 25% of custodians	15,000 follow ups
Collection of 1,000 files (email, desktop) per custodian — 50% of custodians	7,500,000 files
Manual and phone follow up — 25% of collections	1,875 follow ups
In-house tracking per notice, custodian, follow up	2.5 people or 5,250 hours
Tracking with collections included	5 people or 9,963 hours

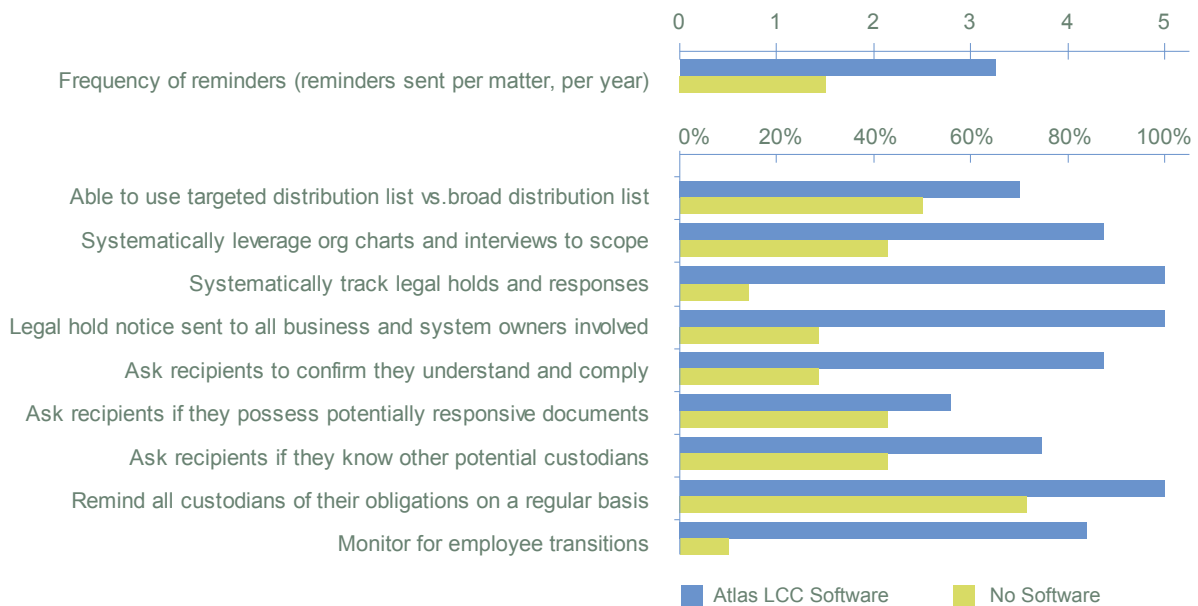
Paralegals who participated in the survey cited the intense pressure to provide accurate and immediate information on custodians in a matter, their notice status and other facts. They underscored attorney expectations for transparency and immediacy of this information. One company analyzed the cost and time it took to re-assemble this kind of information after the fact and found that it took no less than 20 hours to recreate and as much as 40 hours to achieve a high level of certainty on the information assembled for a single matter. (Note that professional dynamics may be such that paralegals may not raise workload issues that have or will compromise the company for fear they may fall on deaf ears or reflect badly on their performance.)

As a result of these challenges, companies that determined a precise, reliable process was warranted typically elected to purchase software to consistently meet their process integrity standards and lower the burden of doing so. The survey demonstrated the direct process advantages of software – companies with legal holds software were able to scope more quickly, track respondents more completely, follow up more thoroughly, and implement more automated monitoring.

Moreover, most companies with legal holds software had or were in the process of:

- Completing inventories of all their legal holds and all custodians involved
- Establishing process metrics
- Revamping their approach to forecasting future discovery costs and burdens using the data readily available from their processes
- Attacking legacy data stock piles based on the inventory of holds
- Modernizing retention programs to reduce overall data volume through end-of-life procedures

### Comparison of Practices



Companies with reliable and sustainable legal holds processes have several advantages over their litigation adversaries and their marketplace competitors. They tend to have lower operating and discovery costs because they retain and process less unnecessary data, which provides significant financial advantages. Moreover, they have greater litigation flexibility whether in their claims or defenses; plaintiffs can pursue their litigation targets without a “weak flank” and defendants need not alter their strategy for fear of exploitation of weaknesses on preservation issues.

### Quick References

*Lahiff, Thomas M. Jr., “Getting Demand Letters Right.” Weblog entry. 13 Nov. 2007. Retention and Preservation <<http://www.cgocouncil.com/blog/?p=10>>.*

*Hedges, Ronald J. “Discovery of Digital Information”. N.p.: CGOC, 2006.*

*Brady, Kevin F., “Evaluating Your Record Retention Program When Your Company “Reasonably Anticipates” Filing Litigation.” N.p.: CGOC, n.d.*

*Cohen, Matthew I., Paknad, Deidre, “A Framework for Addressing Legacy Data.” N.p.: CGOC, 2008.*

*Public Hearing on Proposed Amendments to the Federal Rules of Civil Procedure (testimony of Chuck Beach) January 28, 2005.*

*“The Sedona Conference Commentary on Legal Holds: The Trigger and the Process.” The Sedona Conference Working Group on Electronic Document Retention & Production, August 2007.*

*U.S. District Court for the District of Maryland, Suggested Protocol For Discovery Of Electronically Stored Information (2007)*

*Brady, Kevin F., Pileggi, Francis G.X., E-Discovery Default Standards Revised for Del. Federal Court. N.p.: ALM, 2007.*

*Brady, Kevin F., Partner, Connolly Bove Lodge & Hutz LLP, and Cohen, Matthew I., Director, AlixPartners, Achieving a Useful Litigation Hold, The National Law Journal, July, 2005*

### Key Cases

*Zubulake v. UBS Warburg*

*Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co. Inc.*

*In re NTL, Inc. Securities Litigation*

*Mosaid Technologies Inc. v. Samsung Electronics Co.*

*In re Metro. Opera Association, MasterCard International, Inc. v. Moulton, Samsung Electronics Co v. Rambus, Unite.*

*In re Intel Corp. Microprocessor Antitrust Litigation*

## State of the Art Process Hallmarks

### Scoping:

- Legal holds software synchronized with corporate HR systems to enable more accurate scoping of employees and automatic monitoring of employee transitions
- Iterative scoping using online questionnaires and response tracking to determine custodians, data sources and data habits
- Inclusion of records coordinator staff to identify sources of business information
- Systematic management of master custodian and master data source lists with cross-reference of preservation and collection activities by custodian and data source

### Hold Notices:

- Track all outbound notices and inbound responses by custodian and matter systematically
- Require confirmations of understanding with follow up on non-responders
- Legal holds software to automatically document notices for each custodian, automatically send reminders, capture all responses and escalate activities on unresponsive custodians
- Employee self-service portal or intranet site to enable custodians to look up their current holds at any time

### Interviewing Custodians:

- Interview employees familiar with the matter, records coordinators familiar with the departmental information flow, and IT staff tasked with managing related systems
- Response management is essential for the interview process to reduce risk
- Online questionnaire features in legal holds software automatically tracks and correlates responses and issues action items and alerts to the legal team where necessary
- Periodic interviews can be used to refresh the data source inventories and data management procedures

### Collections:

- Tailor the collection methodology to the matter and data type for efficiency and effectiveness
- Capture chain of custody information on data collected automatically
- Inventory of collections to enable the legal department to determine if it has potentially relevant information in subsequent matters; legal holds software automatically inventories collected data by matter, content, and custodian and allows members of the legal team to check their own inventory

### European Union Practice Variations:

- Use questionnaire to determine if employee has relevant information and consents to participating in process
- Enable employees to look up holds and withdraw consent via the Web
- Avoid asking employees to name others who may have relevant information
- Avoid exposing notice recipient names to all recipients or to other parties
- Carefully manage custodian master list to protect identity, especially of employees who decline consent
- Guided self-collection to collect employee email, desktop and shared drive; search of employee data is prohibited
- Work with Workers Council in Germany, and similar organizations in other countries, to establish process and safeguards



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