

Tool Kit for Communicating Legal Risk to Business and Finance Executives

Presenting the business case for legal hold and discovery workflow software to IT, business and finance execs is more productive when framed in familiar business — rather than legal — terms.



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Rising Discovery Expectations and Challenges

One of the biggest challenges legal executives face in addressing their duties to preserve and produce information is communicating the importance of these activities to other business executives who are less familiar with the issues and risks. This CGOC advisory helps in house counsel convey and present these risks and associated costs in ways that are relevant and compelling to executives without familiarity with the law to enable selection and acquisition of software to automate legal holds and discovery processes.

The situation counsel faces is challenging but straightforward:

- » The level of effort required to meet judicial expectations for legal holds and collection is very high
- » New standards of negligence established for failure provide a “road map” for opposing parties

Counsel is faced with difficult decisions:

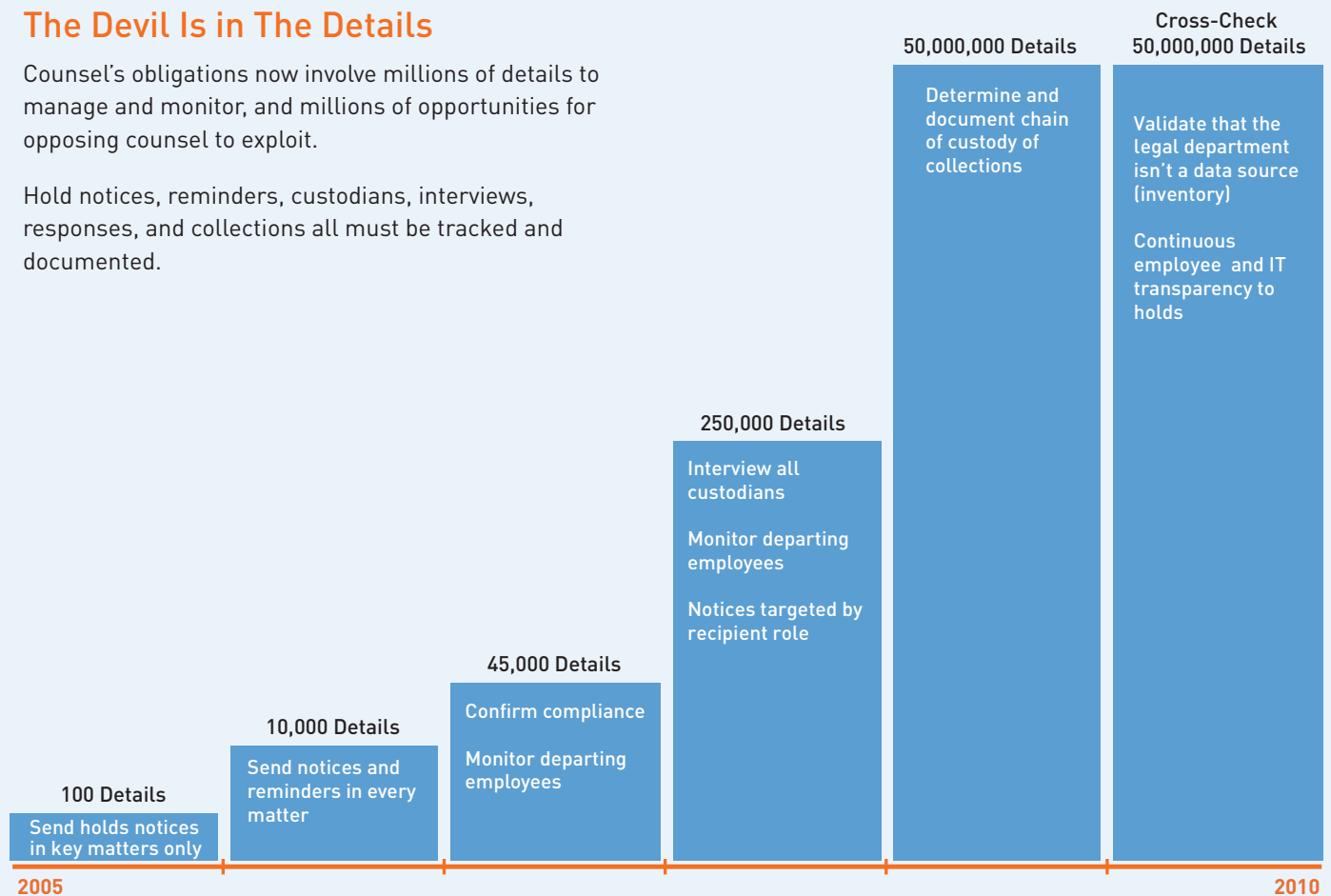
1. Ignore requirements and incur significant risk of sanctions, higher outside counsel fees, and brand exposure
2. Address requirements by adding staff and using more outside counsel
3. Address requirements with legal hold workflow software for a better process with less effort

Software can reduce the legal burden by more than 50% while mitigating virtually all of the risks.

The Devil Is in The Details

Counsel’s obligations now involve millions of details to manage and monitor, and millions of opportunities for opposing counsel to exploit.

Hold notices, reminders, custodians, interviews, responses, and collections all must be tracked and documented.



These escalating requirements combined with massive, diverse information environments typical in companies today make manual tracking of hold communications, collection requests and fulfillment, and custodian interviews virtually impossible to do well.

To fully manage all the details and properly protect the company, the legal department would typically have to add legal and administrative staff. Using a process maturity model first introduced at the 2010 CGOC Summit, just 40 new holds per year would take the equivalent of two full-time staff members to meet the standards established in *Zubulake*, *Pension Committee*, *NTL* and many other benchmark cases. The high burden, excessive legal risk and likelihood of failure in the absence of proper

resources and controls, and the very high cost to recover from a failure make a manual approach to legal hold and discovery management untenable for many companies.

Fortunately, legal holds and discovery software can eliminate most of the risk and burden without the need to scale staff and pay additional annual salaries and overhead. Unfortunately, counsel often struggles to make the business case for such tools because it requires communication risk. Risk heat maps and cost comparisons are two communication tools that counsel can use. Risk heat maps are frequently used by finance and business leaders to assess scenarios and characterize risk; they are common in *Sarbanes Oxley* analyses and market risk analyses.

2010 Legal Holds Guidelines



The Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities, LLC, 05 Civ 9016 (S.D.N.Y. Jan. 15, 2010)

In an 86 page opinion, Judge Scheindlin imposed sanctions because “the plaintiffs failed to timely institute written legal holds.” She defined in great detail the concepts of negligence, gross negligence and willfulness in the preservation, collection and review of information.

Expectations of Counsel

- » Issue written legal holds in all matters to all custodians (not just “key players”)
- » Issue reminders and get affirmative response from custodians
- » Conduct fact finding on custodian data habits
- » Ensure those that conduct collection are trained and actively monitor the collection of data
- » Ensure that data from all custodians, including departed employees is preserved
- » Enable 30(b)6 witnesses to describe the steps taken to issue holds, monitor for compliance, fact find, conduct and monitor collections

Process Implications

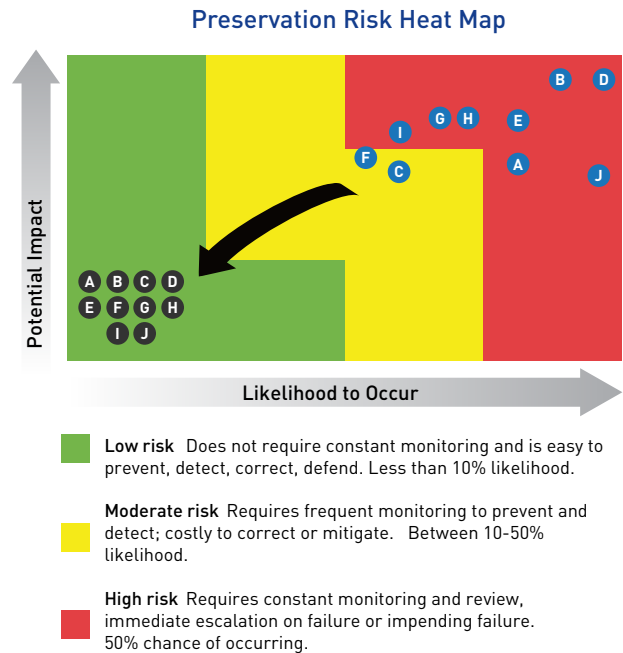
- » Hold communications, fact finding and collection must be rigorous and documentation is an essential process defense
- » Lack of notices, confirmations and reminders will be difficult to defend (and impossible in SDNY) given the extent of case law
- » Interview custodians and ensure that preservation and collection encompass potentially relevant information
- » Carefully track and monitor collections for each custodian
- » Legal hold and collection workflow software ensures a rigorous process without placing an onerous burden on counsel and company

Failure to issue a written litigation hold constitutes gross negligence.

Characterizing Risks Associated with Legal Hold and Discovery Failures

Although attorneys are often loathe to document risk, a risk heat map is a powerful way of identifying failure points and, more importantly, comparing the costs of risk mitigation. Characterizing risk does not mean it is unaddressed; it provides a mechanism for describing the importance of addressing risks and enables a business conversation on mitigation alternatives.

Discovery risk is heavily concentrated in the legal hold process. The table below identifies the sources of potential failure and the potential risk mitigation from automation†. The heat map shows the potential impact of the risk and its likelihood of occurrence. Good risk management practice (well understood by senior executives) is to mitigate those risks that are both very likely to occur and which have high potential impact. While the cost of risk is hard to quantify, the heat map provides a well-understood mechanism for expressing risk.



Typical Preservation Risk Scenarios

	Sources of Failure Risk in Manual Process	Current Rating		Risk Mitigation Achieved with Software
		I	L	
A	Legal scopes the wrong employees, those employees terminate or transfer mid-matter and data subject to hold is lost.			Legal can reliably scope custodians by current and historical organization hierarchy and automatically detect terms and transfers.
B	Legal fails to identify sources of data managed by IT staff and data subject to hold is destroyed.			Legal can reliably and accurately scope data and information managed by IT and RIM staff source
C	IT migrates, retires or modifies data subject to hold.			Legal holds can be automated on data in place and IT and RIM staff are systematically alerted; they have continuous visibility to holds on systems and records.
D	Legal fails to identify or follow through on information gleaned in thousands of interviews.			Interviews are conducted online, results automatically compiled and follow up action items trigger alerts and exceptions
E	Data isn't collected because of a missing data source, departing employee, incomplete prior collection inventory, and communication and tracking errors.			Information inventory workflow and tracking link legal with RIM, business and IT information owners for transparency, automated collections and tracking.
F	Unable to assemble, understand or defend the audit trail of discovery activities.			Hold and collection audit trails are generated automatically to eliminate double record keeping, errors and risk.
G	Retention schedules are not followed and/or the validity of the current schedule is hard to defend.			Business specific schedules can be easily and sustainably managed and automated.
H	IT saves all data because they fear disposing of the wrong data, increasing discoverable mass and confusion.			IT saves only data of value or that which is subject to legal obligation, and performs routine, defensible disposal.
I	IT disposes of data subject to legal obligation.			IT saves and manages data commensurate with its value
J	Internal compliance audit failures on records and legal holds expose the company in discovery or unable to respond to regulators.			Predictable audit compliance and highly defensible legal holds and disposition.

Characterizing the Costs of Legal Holds and Discovery

There are three significant aspects of legal hold and discovery cost that are relevant to business executives if a durable, defensible process is the objective. Some or all of these costs may be costs the company is currently incurring, which enables counsel to articulate savings rather than costs associated with a legal hold software investment.

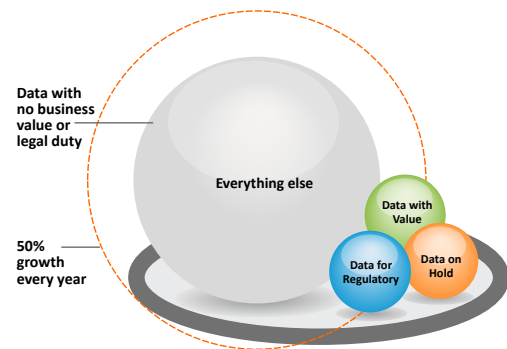
The three sources of compressible cost are:

1. Additional legal staff to do and document the additional activities required for rigorous compliance. These costs can be assessed with a straightforward calculation of time to complete the tasks and related documentation multiplied by the number of current matters and anticipated increases in matter volume. The fully-loaded staff cost of that time is the annual legal staff cost of compliance with legal holds and collection requirements.
2. Managing additional data build up as a result of limited or no data disposition (including servers, storage, tapes, departing employee drives, and application data).
3. Discovering and reviewing additional data accumulated through insufficient hold communication, the disruption of IT's ability to defensibly dispose or if retaining all data is the legal risk mitigation strategy.

Software can dramatically compress all three of these costs and can actually drive tremendous savings when considered beyond the legal department. It can:

1. Reduce or totally eliminate the need to add staff.
2. Provide the rigor, consistency and transparency necessary to enable IT to routinely disposition data.
3. Reduce the pool of data being collected and reviewed and improve predictability of discovery costs.

Most legal counsel will find that IT executives are quite receptive to any opportunity to improve the efficiency of their data management operation and managing less data is the most efficient of all; they may also be surprised by how much data is held hostage by the absence of transparency to what is actually on hold – a problem that legal hold software immediately solves for IT.



Typical Legal Staff and Counsel Costs of a Full Process

Our Litigation Portfolio

No. of Cases _____

Average Custodians _____

Hourly Rate _____
(fully Loaded)

Paralegal \$ _____

Inside counsel \$ _____

Outside counsel \$ _____

	Manual Process		Automated Process [†]	
Hold - Scope Custodians	paralegal	hrs/custodian	0.5	0.25
	inside counsel	hrs/matter	8	2
Hold - Scope Information	paralegal	hrs/matter	20	10
	inside counsel	hrs/matter	8	1
Hold - Publish	paralegal	hrs/matter	16	0.5
	inside counsel	hrs/matter	2	0.25
	outside counsel	hrs/matter	2	0.25
Hold - Interview	paralegal	hrs/custodian	1	6
	inside counsel	hrs/matter	4	0.5
	outside counsel	hrs/custodian	1	10
Collect	paralegal	hrs/custodian	0.5	0.01
	inside counsel	hrs/matter	8	0.4
	outside counsel	hrs/custodian	0.25	0.01

[†]Software benchmarked for this analysis is the Atlas solution from PSS Systems. Not all legal hold software was designed to mitigate these risks or automate this range of tasks. Alternatives should be carefully evaluated to ensure they provide the desired risk & cost reduction benefits.

Netting It Out

According to leading IT analyst Gartner, both legal and IT “know that if there were less [information] and if it were better organized, or even if they could simply find whether or not a certain information set existed, their lives would be less complicated and their company’s bills would be smaller.”

Presenting the business case for legal hold and discovery workflow software to IT, business and finance executives is more productive when you can frame the need and value in terms that are understood without being a legal expert. Using a risk heat map of the failure points and impact and demonstrating the cost of alternative approaches to compliance make a very compelling case for automation in most companies.

Resources

The following resources can found at www.cgoc.com:

[Information Governance Process Maturity Model and Self Assessment Guide](#) (PSS Systems Tool, 2009)

[Judge Scheindlin’s Recent Pension Decision — Guidance for Corporate Counsel](#) (PwC and PSS Systems 2010)

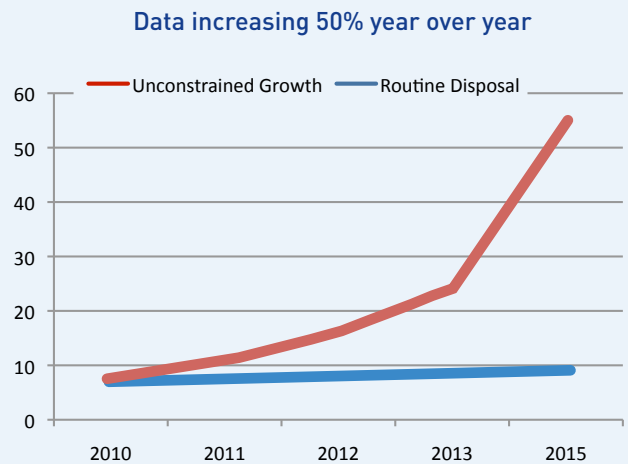
[Benchmark Survey on Prevailing Practices for Legal Holds in Global 1000 Companies](#) (CGOC Publication 2008)

[5 Considerations for IT in the Selection of Legal Holds Software](#) (CGOC Advisory Publication, 2010)

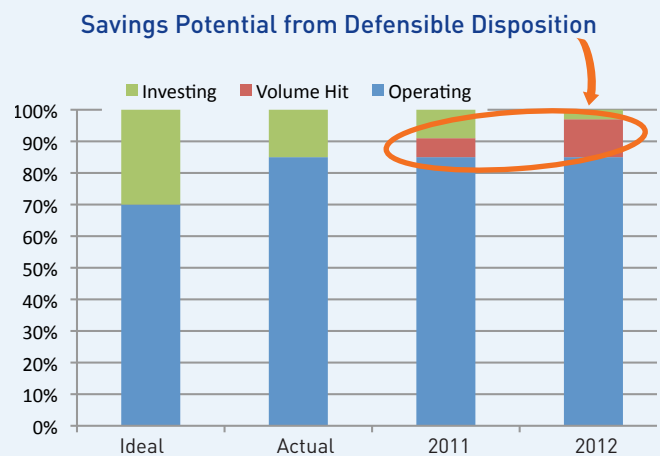
About CGOC

CGOC (Compliance, Governance and Oversight Council) is a corporate practitioners’ community that brings legal, IT, records and information management professionals together to discuss current and best practices in discovery, information governance, privacy and data management. Founded in 2004, CGOC has a broad and active user community that shares experience — good and bad — to advance business practices in these key areas.

Data Growth Cannibalizes Strategic IT Investment Capacity in Flat Budget Environment



Unmanageable growth curve creates cost and risk.



Strategic investment is a critical business success factor