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## An IT Professional's Guide to
# In-House eDiscovery

It's Thursday at 3pm. An eDiscovery request lands on your desk. Litigation is pending and legal wants relevant documents as soon as possible, preferably by Monday morning.

Are you ready to respond? Do you know what questions to ask legal or what to tell your fellow IT colleagues? Will you act on an established plan or will you attempt to complete the request on the fly, causing project disruption, employee frustration, and long, chaotic, overtime hours? Or do you turn to outside help, immediately skyrocketing total litigation costs?

The hard truth is that many organizations simply don't know how to respond to eDiscovery requests, spending exorbitant time, money, and other resources with no guarantee of favorable results.

So what is eDiscovery and why does it wreak so much havoc? More importantly, how can you eliminate the chaos before it starts? Join us in the following pages as we show you how to avoid common eDiscovery problems with an organized in-house team and a repeatable, defensible process.

## A brief introduction to the challenges of eDiscovery

Identifying, preserving, and collecting electronically stored information (ESI) in response to pending litigation, regulatory mandates, or internal investigations is usually initiated by a company's legal team, however eDiscovery often relies heavily on IT and may involve Records Management, Human Resources, and Finance.

For litigation, eDiscovery typically begins when a law suit is anticipated. The legal team needs to coordinate with IT to help identify employees who may have control of relevant information for the case, custodians, and potential data locations. This information is then used to enact a legal hold to preserve active data by preventing automated or user-initiated deletions or modifications. Without proper legal holds, relevant ESI could be

> unintentionally destroyed, putting your organization at significant legal and financial risk.

> After criteria has been defined and a legal hold enacted, your organization will need to locate and collect all relevant ESI as the legal matter progresses. Determining which ESI to collect almost always requires pinpointing specific data using criteria that may include keywords, date ranges, file types, or employee groups from which results are delivered to inside or outside counsel for review.

>> So, why do so many organizations—and especially IT departments—dread eDiscovery? Well, for many reasons.

With the overwhelming abundance of ESI in today's organizations, eDiscovery has become increasingly complex and time-consuming. Worse yet, many organizations do not plan for litigation, assuming it only occurs in the largest of enterprises, although, in reality, all businesses may face litigation at some point. A lack of preparation causes delays and costly mistakes in an already high-risk, time-sensitive process. Even the smallest of errors can result in major fines, penalties, and, possibly, the loss of a case. Without a pre-existing plan, companies (and their IT teams) often don't even know where to start.

An additional difficulty of eDiscovery is the lack of shared knowledge and communication between IT and legal. Even if they do interact well, both teams should have access to shared eDiscovery tools during the iterative process of adjusting search directives and requirements. Without the proper resources, determining final search parameters requires many back and forth conversations across people and departments, therefore, increasing time and money spent on eDiscovery.

With all these challenges, outsourcing eDiscovery to IT consultants and law firms may seem like the obvious choice, but doing so comes at a very high cost, especially for the review process.

## A 7-step process for effective in-house eDiscovery

Here's the good news. With the right training and tools, you can utilize existing internal knowledge to effectively handle much of eDiscovery in-house as part of your standard information governance (IG) strategy. Bringing eDiscovery in-house has many advantages, including significant cost reductions and increased project control and efficiency. To realize these benefits, you'll need to start with the steps below.

### Step 1: Review current IG status

The first step in establishing an effective in-house eDiscovery system is to review the resources and policies you already have in place for data location, search, and collection in your organization. The goal is to determine the true cost of the current procedures while recognizing internal assets that can assist for more dependable eDiscovery endeavors.

This evaluation should include availability and expertise of personnel, software, and policy. Review the frequency of litigation, regulatory requests, or internal investigations and measure the disruptive impact they have on business needs. Take stock of how eDiscovery is currently conducted, by whom, and what kind of communication protocols are utilized. Determine whether or not an established plan is in place, what tools or other automation is available, and whether the entire process is defensible and repeatable.

## Step 2: Build an eDiscovery team

To make in-house eDiscovery a reality, you'll need to create a cross-disciplinary planning and response team with point people from both legal and IT. Any IT representative should have a detailed understanding of your current and historical data structure and IG policies. Also, while your team may only be a few individuals, it should include a stakeholder who can ensure buy-in for eDiscovery planning and get budget approval as needed.

## Step 3: Establish shared knowledge

Once you have built a team and secured leadership support, you'll need to educate each other on your areas of expertise, so that everyone shares key foundational knowledge. For example, your legal representative should cover basic eDiscovery concepts and terminology, relevant company obligations, and current legal hold and eDiscovery procedures. Similarly, your IT representatives should describe your current data infrastructure (what data exists, its volume and where it is located) as well as any software and policies used to manage this data. Areas that are difficult to access or challenging to query (e.g. back up tapes, cloud based stores, mainframe systems etc.) should also be noted.

## Step 4: Implement best practices

Next, working on the knowledge gained in previous steps, the team can define a clear set of policies to define roles, timelines and processes. This includes implementing a strong eDiscovery plan to determine and document individual roles and actions to take at specific times. Both IT and legal should agree to the timing and definition of each step. (Don't worry—the coming sections explore what's included during a legal hold and search and collection!) At this time, you'll also want to consider how technology can help you to eliminate manual errors and increase process repeatability, ultimately deciding on what eDiscovery software is the best fit for both teams.

Following IG best practices, you should always maintain a current data inventory (also known as a data map). Being able to produce an accurate data inventory upon request, alongside a comprehensive IG plan, will greatly reduce your litigation response time. This will also drastically lower the eDiscovery disruptions to your team's day-to-day work, because you'll already have a handle on where data lives and how it is managed.

By regularly monitoring your data, you can identify and delete redundant, outdated, and trivial (ROT) information through a defensible deletion policy. Such policies save storage space and resources, as well as lessen the total ESI you'll need to preserve, search and sort during eDiscovery.

If you're not currently monitoring your ESI, software can automate much of the inventory and reporting process after some initial work from your team. When conducting an inventory, look for data hiding in the cloud, local hard drives, USBs attached storage, mobile devices, and personal computers, as well as the more obvious servers and common repositories. Ask department heads about software, data usage and storage that may be outside of central IT control. If you don't find and properly manage all of your organization's data now, you'll leave yourself open to increased litigation risk and extend the time and effort required to analyze this data during eDiscovery.

## Step 5: Test and retest your plan

Only by testing your plan will you know what works—and what doesn't. Doing a run through with the eDiscovery team of all processes will enable you to find holes earlier rather than later. By having a thoroughly tested plan, you're also increasing overall defensibility for your organization.

## Step 6: Implement a company-wide education plan

When you are satisfied with your policies and processes, your next step should be to develop a training program so that people across your organization will know basic company expectations before litigation arises. Make sure to think beyond educating your current employees, and create a plan for training new employees. Provide information publicly on your intranet, employee handbook, or wherever it can be easily found by employees. By doing so, you lower risk for your entire business.

## Step 7: Meet and communicate on a consistent basis

Your eDiscovery team should continue to meet to reexamine and audit your policies regularly. Any changes to systems or policies should be discussed and approved by the entire eDiscovery team, followed by proper documentation and employee communication.

## How to create a defensible plan for preservation

In the case of pending litigation, it is essential to prevent evidence spoliation which is the deletion, or modification of relevant data that is required to be produced unchanged as part of a legally mandated 'duty to preserve'. The key to this preservation of data is a prompt and effective legal hold. The trigger to preserve data is usually defined by the legal team, but usually comes from anticipated litigation or an actual preservation order from legal proceedings.

In some cases, preservation is handled by the legal team notifying the ESI owners - custodians - of their obligations for protecting relevant data using a legal hold notification. This includes instructions to deal with targeted data while the legal team gathers and tracks custodian acknowledgements of these notices. At other times, automated processes are implemented to prevent the destruction of relevant ESI.  Specialized software may be used to preserve data in-place, move a copy to a secure location, or the IT department might step in to suspend the normal disposition of data (e.g. retention policies or back up tape recycling).  These steps are not mutually exclusive and it is essential that the preferred methods of preservation are defined as part of a comprehensive eDiscovery plan.

As with all aspects of eDiscovery, proactive planning is the best way to ensure compliance, efficiency and efficacy with a legal hold. It is essential that the eDiscovery team members communicate with each other to define roles – who is responsible for what tasks - once the process is triggered.  Be sure to consider the following areas that can cause particular difficulty:

- Creation or modification of both ESI and paper documents while under legal hold
- Data management in case of a custodian's termination, resignation, or other status change
- Management of simultaneous legal holds with overlapping data and custodians

The following details will also be helpful in planning for the preservation, notification, and acknowledgement stages of a legal hold.

## 1. Data preservation

One of the most crucial obligations for IT in eDiscovery planning is to prevent critical data from being altered or destroyed. Before instituting a legal hold, your organization needs to decide the methodology of preserving relevant data.   There are two general options for preserving data for a legal hold: in-place or segregated. Choose which method works best to preserve data for the current matter in your organization's unique environment.

**In-place:** In-place preservation means protecting data without moving or copying it to another location or data store. The most effective in-place legal holds are dependent on specialized functionality embedded in storage systems (e.g. Microsoft Exchange's In Place Legal Hold). When the in-place legal holds are not automated, the suspension of deletion mechanisms and sending of legal hold notifications to custodians must be undertaken as soon as possible (see sections below for descriptions of custodian notifications and acknowledgements).

**Segregated:** Another preservation option is to extract and store relevant ESI in a separate, controlled repository. Your eDiscovery policy must provide for any new or modified data if it falls under the scope of the matter.  Segregated data preservation does require the expense of additional storage space. You must also plan for lengthy processing times and additional procedures to manage the data stored in the segregated legal hold repository. If you have multiple ongoing matters, segregated preservation may become a necessity.  Each legal matter will need a unique location to store ESI to avoid confusing multiple sets of data.

Regardless of preservation type, make sure that data preserved in a legal hold can be searched and collected efficiently.  The biggest challenge of placing information on hold is that most organizational ESI is stored in a variety of locations making it difficult to control. Emails, files and other data are produced, modified, and disposed of regularly on file shares, email servers, web based repositories, user desktops, and backup mediums. Some of this storage is physical, some virtual, some in the cloud.  If a preservation order requires data to be collected from multiple or obscure systems, safeguarding relevant data can become tricky.  It is essential that IT informs legal of data stores that are reasonably accessible (and those that are not) as soon as possible.  This information can be used to craft effective meet-and-confer strategies aimed at reducing collection obligations.  Regardless, plans must be made for preservation of likely data stores, especially communications like email and remote repositories like desktops well in advance of actual litigation.

## 2. Custodian identification

In this stage, custodians are identified aided by data maps and legal department feedback from early case research.  You can also use attributes such as title or department to determine how likely an employee was, is or will be (in the past, the present or in the future), to access or control data relevant to the matter.

## 3. Custodian notification and acknowledgement

Depending on the type of preservation policy established in your organization, after you identify current and potential custodians, they may need to be notified of their duty to preserve relevant data.  EDiscovery software can help you or the legal team create, coordinate and distribute these notifications.  Automation is very helpful for auditing and defensibility and, critical, to expedite the legal hold process.  The quicker the legal holds are in place, the less likely data will be lost to spoliation.

### Notification

To help deliver clear and comprehensive messages quickly, counsel should write as much of the notification language as possible in advance. Many software systems, including Sherpa's Altitude IG platform, allow you to save multiple email templates with built-in acknowledgement features, so that you can simply select a template, edit the language, create custodian groups, and send your notification. Using templates greatly reduces the potential for manual errors and increases repeatability—a key component of defensible policies.

To collect more information about the matter, some notifications may also include a questionnaire. At a minimum, notifications should include:
- A description of the legal matter
- The scope of data involved, including subject matter, specific dates, and data types
- Actions to complete or avoid for both ESI and paper documents
- A contact to answer questions and provide more information
- A way to acknowledge and accept instructions

To ensure ongoing data integrity throughout a legal hold, custodians should also receive periodic reminders and updates, which software can help you to schedule.

### Acknowledgement

Once a custodian receives a legal hold or update notification, you need the custodians to acknowledge and agree to comply with the stated instructions. This is best achieved with simple automation such as clicking a link within the legal hold email notification that then automatically records the custodian name and the date.

It is essential that all acknowledgements are tracked and anyone who does not respond is contacted. Anytime the need arises, the team should be able to report on what notifications have been sent and who has acknowledged them. Without this information, defensibility is weakened and risk of spoliation is increased. Often, you can use eDiscovery software to automate the manual process of following up with custodians who do not acknowledge notifications. Beyond that, software can also immensely simplify how you search and track sent notifications, acknowledgements, and even survey responses.

Without automation, many businesses resort to tracking this information in large, complex spreadsheets. These tend to be time-intensive to maintain while also being confusing and unreliable, which, in turn, leads to misunderstandings, wasted resources, and increased risk. When you are managing multiple legal holds with overlapping custodians, such spreadsheets can expand at an impressive pace.

Legal hold software accurately captures this information with little to no maintenance required, storing it in a central location where it can be easily accessed and searched by stakeholders across departments.

### 4. Ending your legal hold

When litigation is over, your company should instruct all custodians and technology managers to resume standard IG policies and systems, including disposing of data preserved for litigation that would otherwise have been deleted per your regular policies. However, always be sure that the data released from one legal hold is not relevant to other ongoing holds.

## How to simplify eDiscovery search and collection

With reports showing that data review and analysis can consume over 94% of litigation costs, it is important to use efficient methods to pinpoint relevant, responsive data during the searching and collection of ESI. The goal is to create a targeted search that will limit results to those that are both responsive (match the criteria) and relevant to the case. Luckily, using eDiscovery search and collect software can streamline processes and reduce the time and money spent by automating tasks, eliminating over-collection, and enabling all teams to work together in one platform. Depending on the software and systems in place in your organization, searching and collection can be done by the legal or IT department, or both working together.

Once legal becomes aware of pending litigation, notifying IT should be among their first actions. Although legal will be the first to propose initial ESI search criteria and keywords, both teams should discuss the proposed search terms and any related concerns, working together to finalize criteria and options to avoid superfluous results. For example, you want to address whether data should be deduplicated, or whether searches should be limited to user-created data. To help streamline the process, sample searches should be run on small, representative data sets to determine if the criteria is too broad or too limited.

Using role-based access control, software systems like can let IT collaborate with legal to refine search terms and share information across teams. Such software can also empower legal or litigation support teams to build their own search requests, pre-review results to eliminate unnecessary ESI before the data is collected.

EDiscovery software can quickly search organizational ESI utilizing a variety of criteria from simple keyword and date ranges to very specific properties (addresses, classifications) or complex search expressions such as social security and credit card patterns. In addition, eDiscovery software can run recurring, scheduled searches while automating otherwise time-consuming tasks such as deduplicating results across or within custodians. These filtering steps will ensure there will be less ESI to collect and review.

Specialized tools can also allow your internal legal team to easily sort and analyze relevant data, enabling them to identify and report on key details from data sets before sending it to outside vendors. With the right tools, legal will be able to present a clear picture of evidence right from the start, drastically cutting litigation costs and helping to determine case strategy.

An additional benefit of eDiscovery software is the ability to provide defensibility to your process by producing comprehensive audit trails of case activities at any time, so that you always have documented, defensible proof of your actions and a chain of custody for the responsive data.

While building out your search and collection plan, ensure that legal knows what types of criteria and data formats are supported by your preferred technology as well as the typical duration of searches based on the expected volume. Plan in advance for instances when results may be needed at a faster pace. This may be accomplished by instituting a rolling production where you can provide initial results for review while continuing to search additional data, or spinning up multiple instances of your automated process.

In addition, your relevant responsive ESI data may be spread out across many different data silos. The data may span from email systems to PST files to file shares to SharePoint to desktop files. Be sure to create your data map and know if your eDiscovery software can access these repositories to search and collect relevant ESI.

## How Sherpa's Altitude IG can support your eDiscovery needs.

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## How Sherpa Software can support your eDiscovery needs

Sherpa Software's Altitude IG® is a SaaS-based platform, featuring a set of integrated modules (including eDiscovery, policy, and reports and analytics) that together provide a complete, cost-effective solution to the eDiscovery and IG challenges you face as an IT professional.

When it comes to eDiscovery, the Altitude IG platform will equip your IT team to confidently take on tasks in a fast, defensible and repeatable manner. You'll be able to automate the eDiscovery process from a single platform to reduce the time and cost in implementing legal holds, conducting searches, culling results and providing a concise, responsive data set. In addition to eDiscovery, Altitude IG will support your day-to-day IG policies, automating the identification, inventorying and management of your ESI, and ensuring that you reduce your organizational risk by implementing automated auditable and repeatable policies to eliminate redundant, outdated, and trivial information that will better prepare your organization for pending eDiscovery requirements. Altitude IG keeps everything organized and running smoothly by providing a single place for your IT team to collaborate with legal. When combined with a well-planned and tested process, you'll be completing eDiscovery requests and ongoing IG policy enforcement and returning to your routine work in record time.

To learn more about how Sherpa Software can help you, visit sherpasoftware.com, or contact us at information@sherpasoftware.com or **800-255-5155** for a consultation.