

The Sedona Conference[®] Commentary on Legal Holds: The Trigger & The Process

Information is the lifeblood of the modern world, a fact that is at the core of our litigation discovery system. The law has developed rules regarding the manner in which information is to be treated in connection with litigation. One of the principal rules is that whenever litigation is reasonably anticipated, threatened or pending against an organization that organization has a duty to preserve relevant information. This duty arises at the point in time when litigation is reasonably anticipated whether the organization is the initiator or the target of litigation.

The duty to preserve information includes an obligation to identify, locate, and maintain, information that is relevant to specific, predictable, and identifiable litigation. When preservation of electronically stored information (“ESI”) is required, the duty to preserve supersedes records management policies that would otherwise result in the destruction of ESI. A “legal hold” program defines the processes by which information is identified, preserved, and maintained when it has been determined that a duty to preserve has arisen.

The basic principle that an organization has a duty to preserve relevant information in anticipation of litigation is easy to articulate. However, the precise application of that duty can be elusive. Every day, organizations apply the basic principle to real-world circumstances, confronting the issue of when the obligation is triggered and, once triggered, what is the scope of the obligation. This 24-page Commentary, intended to provide guidance on those issues, is divided into two parts: The “trigger” and the “process.”

Part I addresses the trigger issue and provides practical guidelines for making a determination as to when the duty to preserve relevant information arises. What should be preserved and how the preservation process should be undertaken including the implementation of legal holds is addressed in Part II. The keys to addressing these issues are reasonableness and good faith. The guidelines are intended to facilitate reasonable and good faith compliance with preservation obligations. The guidelines are meant to provide the framework an organization can use to create its own preservation procedures. In addition to the guidelines, suggestions as to best practices are provided along with several illustrations as to how the guidelines and best practices might be applied under hypothetical factual situations.

Guideline 1: Reasonable anticipation of litigation arises when an organization is on notice of a credible threat it will become involved in litigation or anticipates taking action to initiate litigation.

Guideline 2: The adoption and consistent implementation of a policy defining a document retention decision-making process is one factor that demonstrates reasonableness and good faith in meeting preservation obligations.

Guideline 3: The use of established procedures for the reporting of information relating to a potential threat of litigation to a responsible decision maker is a factor that demonstrates reasonableness and good faith in meeting preservation obligations.

Guideline 4: The determination of whether litigation is reasonably anticipated should be based on good faith, reasonableness, a reasonable investigation and an evaluation of the relevant facts and circumstances.

Guideline 5: Judicial evaluation of a legal hold decision should be based on the good faith and reasonableness of the decision (including whether a legal hold is necessary and how the legal hold should be executed) at the time it was made.

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- Guideline 6:** When a duty to preserve arises, reasonable steps should be taken to identify and preserve relevant information as soon as is practicable. Depending on the circumstances, a written legal hold (including a preservation notice to persons likely to have relevant information) should be issued.
- Guideline 7:** In determining the scope of information that should be preserved, the nature of the issues raised in the matter, experience in similar circumstances and the amount in controversy are factors that may be considered.
- Guideline 8:** A legal hold is most effective when it:
- (a) Identifies the persons who are likely to have relevant information and communicates a preservation notice to those persons;
 - (b) Communicates the preservation notice in a manner that ensures the recipients will receive actual, comprehensible and effective notice of the requirement to preserve information;
 - (c) Is in written form;
 - (d) Clearly defines what information is to be preserved and how the preservation is to be undertaken;
 - (e) Is periodically reviewed and, when necessary, reissued in either its original or an amended form.
- Guideline 9:** The legal hold policy and process of implementing the legal hold in a specific case should be documented considering that both the policy and the process may be subject to scrutiny by the opposing party and review by the court.
- Guideline 10:** The implementation of a legal hold should be regularly monitored to ensure compliance.
- Guideline 11:** The legal hold process should include provisions for the release of the hold upon the termination of the matter at issue.

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