

The Sedona Conference Commentary on Legal Holds, Second Edition: (June 2019)

Information lies at the core of civil litigation and our civil discovery system. Accordingly, the law has developed rules regarding the way information should be treated in connection with litigation. One of the principal rules is that when an organization reasonably anticipates litigation (as either the initiator or the target of litigation), the organization has a duty to undertake reasonable actions to preserve paper documents, electronically stored information (ESI), and tangible items that are relevant to the parties' claims and defenses and proportional to the needs of the case. The same preservation principle applies when an investigation is reasonably anticipated. The use of a "legal hold" has become a common means by which organizations initiate meeting their preservation obligations.

This Commentary provides practical guidelines for determining (a) when the duty to preserve discoverable information arises, and (b) once that duty is triggered, what should be preserved and how the preservation process should be undertaken.

- Guideline 1:** A reasonable anticipation of litigation arises when an organization is on notice of a credible probability that it will become involved in litigation, seriously contemplates initiating litigation, or when it takes specific actions to commence litigation.
- Guideline 2:** Adopting and consistently following a policy governing an organization's preservation obligations are factors that may demonstrate reasonableness and good faith.
- Guideline 3:** Adopting a procedure for reporting information relating to possible litigation to a responsible decision maker may assist in demonstrating reasonableness and good faith.
- Guideline 4:** Determining whether litigation is or should be reasonably anticipated should be based on a good-faith and reasonable evaluation of relevant facts and circumstances.
- Guideline 5:** Evaluating an organization's preservation decisions should be based on the good faith and reasonableness of the decisions (including whether a legal hold is necessary and how it should be implemented) at the time they are made.

Guideline 6: Fulfilling the duty to preserve involves reasonable and good-faith efforts, taken as soon as is practicable and applied proportionately, to identify persons likely to have information relevant to the claims and defenses in the matter and, as necessary, notify them of their obligation to preserve that information.

Guideline 7: Factors that may be considered in determining the scope of information that should be preserved include the nature of the issues raised in the matter, the accessibility of the information, the probative value of the information, and the relative burdens and costs of the preservation effort.

Guideline 8: In circumstances where issuing a legal hold notice is appropriate, such a notice is most effective when the organization identifies the custodians and data stewards most likely to have discoverable information, and when the notice:

- (a) communicates in a manner that assists persons in taking actions that are, in good faith, intended to be effective;
- (b) is in an appropriate form, which may be written, and may be sent by email;
- (c) provides information on how preservation is to be undertaken, and identifies individuals who can answer questions about preservation;
- (d) includes a mechanism for the recipient to acknowledge that the notice has been received, read, and understood;
- (e) addresses features of discoverable information systems that may make preservation of discoverable information more complex (e.g., auto delete functionality that should be suspended, or small sections of elaborate accounting or operational databases);
- (f) is periodically reviewed and amended when necessary; and
- (g) is followed up by periodic reminder notices, so the legal hold stays fresh in the minds of the recipients.

Guideline 9: An organization should consider documenting the procedure of implementing the legal hold in a specific case when appropriate.

Guideline 10: Compliance with a legal hold should be regularly monitored.

Guideline 11: Any legal hold process should include provisions for releasing the hold upon the termination of the duty to preserve, so that the organization can resume adherence to policies for managing information through its useful life cycle in the absence of a legal hold.



Guideline 12: An organization should be mindful of local data protection laws and regulations when initiating a legal hold and planning a legal hold policy outside of the United States.

The full text of *The Sedona Conference Commentary on Legal Holds, Second Edition: The Trigger & The Process* is available free for individual download from The Sedona Conference website at https://thesedonaconference.org/publication/Commentary_on_Legal_Holds.

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