

Anticipation of Litigation and Legal Holds

The Sedona Conference® Commentary on Legal Holds: The Trigger & The Process
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Part I: Triggering The Duty of Preservation

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 compliance with a policy defining a preservation decision-making process is one factor that demonstrates reasonableness and good faith in meeting preservation obligations.
Guideline 3	The adoption of a process for the reporting of a threat of litigation to a responsible decision-maker is a factor that demonstrates reasonableness and good faith.
Guideline 4	The determination of whether litigation is reasonably anticipated should be based on a good faith and reasonable evaluation of relevant facts and circumstances.
Guideline 5	Judicial evaluation of an organization's 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.

Part II: Implementing the Legal Hold

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) may 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 accessibility of the information are factors that may be considered.
Guideline 8	A legal hold is most effective when it: <ul style="list-style-type: none">• Identifies the persons who are likely to have relevant information and communicates a preservation notice to those persons;• Communicates the preservation notice in a matter that ensures the recipients will receive actual, comprehensible and effective notice of the requirement to preserve information;• Is in written form;• Clearly defines what information is to be preserved and how the preservation is to be undertaken;• Is periodically reviewed and, when necessary, reissued in either its original or an amended form.
Guideline 9	The legal hold policy, and the 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 release of the hold upon the termination of the matter at issue.