



Tuesday, October 21
2:30 pm-4:00 pm

608 How to Excel at Litigation Holds

The Honorable Andre M. Davis
US District Court Judge
US District Court of the District of Maryland

Evan S. Stolove
Associate General Counsel
Fannie Mae

Ernest A. Tuckett
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Dupont Legal

Faculty Biographies

Evan Stolove

Evan Stolove is associate general counsel in the litigation group at Fannie Mae in Washington, DC, where he supervises a variety of commercial disputes and serves as the litigation group's preservation program and e-discovery manager. During his tenure, Mr. Stolove has also supervised various aspects of the company's response to investigations by the SEC, DOJ, OFHEO, Congress and the N.Y. Attorney General's Office, as well as related internal investigations and civil litigation.

Immediately prior to joining Fannie Mae, Mr. Stolove was a partner with Arent Fox PLLC, in its Washington, DC office, where he had an active commercial litigation practice with a concentration in the softer-side of IP (i.e., trademarks, copyrights, domain names, etc.). Before starting in private practice, Mr. Stolove clerked for Judge André M. Davis of the United States District Court for the District of Maryland, and for Judge John C. Eldridge of the Maryland Court of Appeals.

Mr. Stolove received a BA from the University of Michigan and is a graduate of the University of Maryland School of Law, where he was an articles editor for the Maryland Law Review.

Ernest A. Tuckett

Ernest A. Tuckett is corporate counsel, labor and employment, for DuPont Legal in Delaware. In this capacity, Mr. Tuckett serves as the labor lawyer for many of DuPont's plant sites and business platforms in the US. Mr. Tuckett is also the chair of the DuPont Minority Counsel Network, and he is project coordinator of DuPont Legal's Street Law Pipeline Diversity Project, which DuPont administers at Howard High School of Technology in Wilmington, DE.

Prior to joining DuPont, Mr. Tuckett was counsel at the law firm of Arent Fox, PLLC, in Washington, DC where he spent 11 years as part of the firm's employment and litigation practice groups. Over the course of his career, Mr. Tuckett has litigated many cases, including employment matters, contract disputes, fair housing cases, and trademark matters, and he has served as first and second chair at several trials.



What we will cover...

- When does a preservation hold obligation arise? And when does it abate?
- Initiating & managing hold obligations.
- Where it can go wrong & what happens when it does.
- Steps to take now.



Preservation Obligation Triggers

When does the duty to initiate a hold arise?

- **The duty to preserve documents is generally viewed as arising when the party has notice of a potential or actual litigation, examination or investigation.**
- “The future litigation must be ‘probable,’ which has been held to mean ‘more than a possibility.’” *In re Napster, Inc. Copyright Litig.*, 462 F. Supp.2d 1060, 1068 (N.D. Cal. 2006).
- “[A] duty to preserve is triggered only when an organization concludes, based on credible facts and circumstances, that litigation or a government inquiry is **likely to occur.**” *The Sedona Conference Commentary on Legal Holds*, at 5 (Aug. 2007 public comm. ver).



When does the duty arise ...

- Work-product doctrine is a “helpful analytical tool.”

Samsung Electronics Co. v. Rambus, Ltd., 439 F. Supp.2d 524, 542 (E.D. Va. 2006), *rev'd for lack of jurisdiction*, 523 F.3d 1374 (Fed. Cir. 2008), *per. for cert. filed*, No. 08-121 (July 28, 2008).

- Litigation “**need not be imminent or certain** in order to satisfy the anticipation-of-litigation prong,” rather ““at the very least some articulable claim, likely to lead to litigation, must have arisen,” such that litigation was “**fairly foreseeable at the time**’” *Hertzberg v. Veneman*, 273 F. Supp.2d 67, 75 (D.D.C. 2003)



When does the duty arise ...

- News article
- Demand – oral or written
- Cease & Desist letter
- Accident
- Study determines your product is unsafe
- Contemplating suit
- Deal goes sour
- Investigation initiated
- Related litigation filed against a third party



When does the duty arise ...

Employment perspective

- **Termination** alone does not put an employer on notice of potential litigation, absent other factors.
- What if . . . ?
 - Employee tells the employer that s/he thinks the pending termination is discriminatory or retaliatory?
 - Employee threatens lawsuit on the way out the door? *Peskoff v. Faber*, 244 F.R.D. 54, 60 (D.D.C. 2007) (plaintiff told defendant of intent to sue during informal meeting; duty triggered as of that meeting).
 - Employee or his lawyer send letter complaining of unlawful termination? *Sampson v. City of Cambridge*, 2008 U.S. Dist. LEXIS 53003 (D. Md. Apr. 30, 2008) (finding employer on notice upon receipt of document preservation letter from employee’s attorney).



When does the duty arise ...

Employment perspective

- Employer’s conduct following termination or threat of lawsuit is instructive in determining notice.
 - *Zubulake v. UBS Warburg LLC (Zubulake IV)*, 220 F.R.D. 212 (S.D.N.Y. 2003):
 - Employer found to be on notice **before** EEOC charge was filed based on email traffic improperly labeled “attorney/client privilege” discussing employee’s termination, and all people associated with employee were copied on these emails.
 - Based on this conduct, the court determined that the employer (and all key employees) anticipated litigation four months before EEOC charge was filed.
 - *Peskoff*, 244 F.R.D. at 60 (court noted that defense counsel affirmed, in a letter following meeting, plaintiff’s verbal statement of intent to sue during that meeting).



When does the duty arise ...

Employment perspective

- Do in-house complaints of discrimination or harassment trigger duty? Depends on the facts.
 - *Broccoli v. Echostar Comm. Corp.*, 229 F.R.D. 506 (D. Md. 2005):
Employer was placed on notice by employee's verbal and email complaints of discrimination to supervisors and human resources before his termination. Also, employee's girlfriend sent a letter to company executives alleging his termination was discriminatory.
- When does a complaint of discrimination or harassment NOT give rise to reasonable notice of potential litigation?
 - What if your investigation finds the complaint has no merit? Does it matter?
 - What if the employee calls the "hotline" to complain the day before an expected negative evaluation?



When does the duty arise ...

Employment perspective

- Other internal complaints – e.g., failure to pay overtime?
- EEOC Charge. *Zabulake IV*, 220 F.R.D. 212.
- Complaint (formal or informal) to the NLRB, DOL or state labor agency, or inquiry from the agency seeking information?



Is there a "reasonable anticipation?"

- Consider:
 - * nature of claim - \$ involved, legal bases
 - * party making the claim – known litigant or known loon?
 - * relationship to the party
 - * directness of threat
 - * similar claims in the industry; within the company

– Decision should be made by an experienced person.

The Sedona Conference Commentary on Legal Holds, at 6, 9.



Is there a "reasonable anticipation?"

- *Stevenson v. Union Pac. R.R. Co.*, 354 F.3d 739 (8th Cir. 2004):
 - Held that defendant railroad knew that litigation frequently occurs in accidents involving serious injury or death and that the tapes would be important evidence.
 - Union Pacific's general knowledge "weighs heavier than its lack of actual knowledge that litigation was imminent."



Is there a “reasonable anticipation”...

- **No obligation if:**

- “a vague rumor or indefinite threat of litigation”
- “a threat of litigation that is not deemed to be reasonable”
- “a threat of litigation that is not deemed to be ... made in good faith”

The Sedona Conference Commentary on Legal Holds, at 6.



Is there a “reasonable anticipation”...

- **Held: Duty to Preserve Not Triggered:**

- *Cache La Poudre Feeds, LLC v. Land O'Lakes, Inc.*, 244 F.R.D. 614 (D. Colo. 2007) (no duty where letter “alluded to ... possible ‘exposure’” but “did not threaten litigation” and “hinted at the possibility of a non-litigious resolution”).



When is a corporate entity on notice?

- It is based on “the aggregate knowledge possessed by a party and its agents, servants, and employees.” *Testa v. Wal-Mart Stores*, 144 F.3d 173, 177-178 (1st Cir. 1998).
- “An agent’s knowledge is imputed to the corporation when the agent is acting within the scope of his authority and where the knowledge relates to matters within the scope of that authority.” *In re Hellenic, Inc.*, 252 F.3d 391, 395 (5th Cir. 2001).
- “[M]erely because one or two employees contemplate the possibility that a fellow employee might sue does not generally impose a firm-wide duty to preserve.” *Zubulake IV*, 220 F.R.D. 212.



When is a corporate entity on notice...

- Is counsel involved?
 - *ABC Home Health Servs. v. IBM Corp.*, 158 F.R.D. 180 (S.D. Ga. 1994) (triggered where defendant consulted in-house counsel)
 - *Cache La Poudre Feeds*, 244 F.R.D. 614 (outside counsel sent letter suggesting non-litigation resolution; duty not triggered)
- Have privilege legends been placed on internal documents?
 - *Samsung Elec. v. Rambus*, 439 F. Supp.2d 524 (E.D. Va. 2006) (invocation of work product on document triggered duty), *rev'd for lack of jurisdiction*, 523 F.3d 1374 (Fed. Cir.), *pet. for cert. filed*, No. 08-121 (July 28, 2008).
 - *Zubulake IV*, 220 F.R.D. 212 (email between employees but not including attorney that were labeled attorney-client privilege triggered duty)



Differences between Plaintiff v. Defendant

- Spoliation law applies to plaintiffs and defendants equally.
- Plaintiffs beware! Preserve all documents that may be relevant once you determine you may have a claim.
 - *Benton v. Dlorah, Inc.*, 2007 U.S. Dist. LEXIS 80503 (D. Kan. Oct. 30, 2007): Plaintiff has obligation to preserve relevant documents and emails on her home computer at least from the date of her internal complaint. Plaintiff failed to preserve emails after she filed EEOC charge.



Differences between Plaintiff v. Defendant...

- Issuance of a duty to preserve letter will trigger the plaintiff's duty to preserve relevant information, and may trigger defendant's duty to preserve relevant information. *Sampson*, 2008 U.S. Dist. LEXIS 53003.
 - *Defendants may want to consider using preservation letters against plaintiffs, especially when a potential plaintiff has counsel.*



Third-party Disputes

- The duty to preserve documents for litigation to which you are not a party does not generally arise simply from knowledge of the dispute.

Fletcher v. Dorchester Mut. Ins. Co., 773 N.E.2d 420, 424 (Mass. 2002).

- Duty is triggered upon receipt of a subpoena.

Id.; *In re Grand Casinos Sec. Litig.*, 988 F. Supp. 1270, 1271 (D. Minn. 1997).



Third-party Disputes ...

- Questions to ask:
 - Who is issuing/inquiring? Relationship to you?
 - Government? Third-party?
 - Is there a court order?
 - Is there a possible issue for the company?
 - Is there an operative rule or statute that creates a duty?



Issuing & Managing Holds

Preparing the Preservation Notice

1. **Review the Facts and Key Documents**
 - Pleadings, correspondence, agreements
2. **Identify Potential Custodians**
 - Key Document Custodians
 - Decision makers
 - Work Groups and Business Areas with pertinent information
 - **Care, Custody and Control**
 - Can you secure the documents upon demand?
 - Third parties (Agents, contractors, representatives, storage, etc.)
 - Documents outside of the U.S.
 - Parents and subsidiaries



Preparing the Preservation Notice...

3. **Determine more specifically what to retain**
 - “[W]hile officials and employees may have been reminded of the obligation to preserve responsive documents, they were left ‘to decide on their own what to retain without evidence of any written instruction or guidance from counsel on what is significant [or] material information in this complex action.’”

John B. v. Goetz, 531 F.3d 448, 459 (6th Cir. 2008). See also *Toussie v. County of Suffolk*, 2007 U.S. Dist. LEXIS 93988, at *21-22 (E.D.N.Y. 2007) (company failed to give key employees instructions on what to preserve); *Zubulake IV*, 220 F.R.D. at 216-18 (counsel is required to oversee compliance with the litigation hold and monitor the party's efforts to retain and produce relevant documents).



Preparing the Preservation Notice...

4. Suspend Backup Tape Recycling?

“As a general rule, [a] litigation hold does not apply to inaccessible backup tapes (e.g., those typically maintained solely for the purpose of disaster recovery), which may continue to be recycled on the schedule set forth in the company's policy. On the other hand, if backup tapes are accessible (i.e., actively used for information retrieval), then such tapes *would* likely be subject to the litigation hold.”

Zubulake IV, 220 F.R.D. at 218; see also *Covsol. Aluminum Corp. v. Alina, Inc.*, 244 F.R.D. 335, 339 (M.D. La. 2006) (quoting *Zubulake*).

“[I]ntervention in the routine operation of an information system is one aspect of what is often called a ‘litigation hold.’” Advisory Notes to FRCP 37.



Preparing the Preservation Notice...

5. **Do you instruct custodians to hold documents in place or do you collect them?**
 - Hard Copy
 - Electronic Files and E-mail
6. **Forward Looking and Retrospective Preservation?**
 - Pre-litigation hold orders
 - Litigation discovery requests will cover many documents created after the hold order is issued.



Contents of the Notice

- Should be written & come from recognizable person of authority
- Identify the dispute
- Explain duty to preserve – immediacy & ongoing
- Identify what needs to be preserved
- Suspension of deletion practices
- Relevant timeframe
- Identify lawyer contact (and IT contact)
- Be over-inclusive?



Continuing Obligations to Monitor Hold

- Documentation – certifications/confirmations?
- Chain of custody logs
- Issue reminders and supplements
- Alert new employees
- Monitor migrating employees



What Can Go Wrong?

- Advisory Committee Note to FRCP 34(a): “Rule 34(a)(1) is expansive and includes any type of data that is stored electronically.”
- Consider potentially overlooked sources of data, e.g.:
 - Legacy and Retired Media
 - Audio Recordings, Including Voicemail
 - Pagers, Cell Phones and PDAs
 - Instant Messaging
 - Internal wikis and blogs
 - Removable Media
 - Facsimile and Copy Machines
 - Offsite documents & documents in the hands of parents, subsidiaries, agents, contractors and representatives



What Can Go Wrong...

- Recycling of media
- Disappearing applications
- Hardware/software failures
- Departing/migrating employees
- New employees
- Human error/natural disaster
- Standard processes that might modify documents (incl. metadata):
 - Software/hardware upgrades
 - Virus scanning/defragmenting



Sanctions

What standards govern when sanctions issue?

1. The party having control over evidence had an obligation to preserve it when it was destroyed or altered;
2. The destruction or loss was accompanied by “a culpable state of mind;” and
3. The evidence destroyed or altered was “relevant” to the claims or defenses of the party that sought the discovery of the spoliated evidence.

Zubulake IV, 220 F.R.D. at 220 (citing *Byrnie v. Town of Cromwell*, 243 F.3d 93, 107-12 (2d Cir. 2001)).

This standard applies when a party is seeking any form of sanctions for spoliation, not just an adverse jury instruction.



What standards govern...

- Some courts hold “culpable state of mind” can be: (1) bad faith destruction; (2) gross negligence (recklessness); or (3) simple negligence.

Zubulake IV, 220 F.R.D. at 218.

- Others require at least some willfulness, bad faith, evil intent, or a desire to suppress the truth, to demonstrate culpable state of mind.

Consolidated Aluminum, 244 F.R.D. at 344 (citing *Concord Boat Corp. v. Brunswick Corp.*, 1997 U.S. Dist. LEXIS 24068 (E.D. Ark. 1997)).



Types of Sanctions for Spoliation

Fed. R. Civ. P. 37(b) provides the courts with discretion to sanction a party for failure to comply with a discovery order resulting in spoliation:

1. Dismissing the action or entering default judgment;
2. Striking of pleading or staying proceedings;
3. Refusing to allow disobedient party to support or oppose claims or defenses;
4. Ordering matters subject to discovery order taken as established [**negative inference jury instruction**];
5. Holding party in contempt of court; or
6. Awarding of reasonable expenses.



Factors Considered by the Court

1. Degree of fault;
3. Degree of prejudice; and
3. Availability of lesser sanctions.

Shepherd v. Am. Broad. Cos., 62 F.3d 1469, 1478-79 (D.C. Cir. 1995); *Schmid v. Milwaukee Elec. Tool Corp.*, 13 F.3d 76, 78 (3d Cir. 1994); *Telectron v. Overhead Door Corp.*, 116 F.R.D. 107, 109-10 (S.D. Fla. 1987). See also, *Cashe La Poudre Foods*, 244 F.R.D. at 621.



Factors Considered by the Court...

Prejudice a paramount concern? “[T]he history of the spoliation doctrine suggests that it was not designed solely to punish those who consciously destroy inculpatory documents, but also to address the manifest unfairness inherent in the loss of relevant sanctions.”

United Med. Supply Co., Inc. v. United States, 77 Fed. Cl. 257, 269 (2007).

The *United Medical* Court also noted a modern trend of less focus on being punitive and more focus on curing the harm produced by the spoliation.

A survey of the cases, however, shows that willfulness/bad faith has been the primary basis for sanctions, followed closely by prejudice.

See Shira A. Scheindlin & Kanchana Wangkeo, *Electronic Discovery Sanctions in the Twenty-First Century*, 11 Mich. Telecom. Tech. L. Rev. 71, 77 (2004).



Types of Sanctions for Spoliation...

- Dismissal/Default Judgment** - *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583 (4th Cir. 2001) (dismissal sanction); *Computer Assoc. Int'l, Inc. v. American Fundware, Inc.*, 133 F.R.D. 166 (D. Colo. 1990) (default judgment entered).
- Monetary Sanctions** - *In re Spt. 11th Liah. Ins. Coverage Cases*, 243 F.R.D. 114 (S.D.N.Y. 2007) (court held party and its counsel liable for \$500,000 in Rule 37 sanctions to deter repetition of conduct).
- Discovery Cost-Shifting/Cost-Sharing** - *Zubulake IV*, 220 F.R.D. at 222 (ordering defendant to pay costs of additional depositions needed due to spoliation).
- Attorneys' Fees** - *DaimlerChrysler Motors v. Bill Davis racing, inc.*, 2005 U.S. Dist. LEXIS 38162 (E.D. Mich. Dec. 22, 2005) (defendant negligently failed to suspend normal document destruction, magistrate recommended adverse inference jury instruction and attorney's fees related to motion for sanctions).
- Limitation or Exclusion of Evidence** - *United Med. Supply Co.*, 77 Fed. Cl. 257 (defendant prohibited from cross-examining plaintiff's experts; attorneys' fees for discovery costs also awarded).



Types of Sanctions for Spoliation...

1. Negative Inference Jury Instruction – Circuit split:

- Ordinary or gross negligence.**

Zubulake IV, 220 F.R.D. at 220 (citing *Residential Funding Corp. v. D'George Fin. Corp.*, 306 F.3d 99, 108 (2d Cir. 2002)); *Troll v. Volkswagen of Am., Inc.*, 187 F.3d 88, 95 (1st Cir. 1999); *DaimlerChrysler Motors v. Bill Davis racing, inc.*, 2005 U.S. Dist. LEXIS 38162 (E.D. Mich. Dec. 22, 2005).

- Willful or intentional destruction (or “bad faith”).**

Bruce v. Quaker State Oil Refining Corp., 72 F.3d 326, 334 (3d Cir. 1995) (spoliation requires intentional or willful destruction); *Insulars v. United Parcel Servs., Inc.*, 2006 WL 41189, *11-12 n.9 (6th Cir. Jan. 9, 2006) (noting in dicta that inference instruction not wholly dependent on bad faith, but mental state is relevant); *Cuthbert v. Nat'l Steel Corp.*, 261 F.3d 715, 721 (7th Cir. 2001) (bad faith); *Basler v. Amtrak*, 119 F.3d 929, 931 (11th Cir. 1997) (bad faith); *Consolidated Aluminum Corp. v. Alcoa, Inc.*, 244 F.R.D. at 344 n.14 (bad faith or intentional); *Jinks-United v. England*, 2005 U.S. Dist. LEXIS 34547 (D.D.C. Dec. 7, 2005) (“evil intent, bad faith, or willfulness”).

- Intent without bad faith.**

Buckley v. Mackay, No. 07-1195, slip op. at 25 (4th Cir. Aug. 20, 2008) (“the district court appears to have committed an error of law by equating the intentional conduct necessary for such an instruction with bad faith, thereby deeming non-bad faith conduct to be negligent conduct.”). See also, *Sampson* 2008 U.S. Dist. LEXIS 53003, at *23-24 (citing *Vadusek v. Bayliner Marine Corp.*, 71 F.3d 148 (4th Cir. 1995)) (willful).



Obstruction of Justice

- 18 U.S.C. §1519 - Knowingly altering, destroying or mutilating documents “with intent to impeded, obstruct, or influence investigation or proper administration of any matter with the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this titled, imprisoned not more than twenty years, or both.”



Releasing the Hold

- After litigation is completed, be sure to release the litigation hold to avoid unnecessary retention of documents.
- What if no litigation is filed after hold order is issued? Pay attention to applicable statutes of limitations for the potential claims.
 - In Title VII context, there is a short window for filing of EEOC charge and to file lawsuit after EEOC right to sue. BUT, beware of state EEO statutes and other federal EEO laws that are governed by other statutes of limitations.
- Send a similar notice releasing the hold to the recipients who received the hold order notice(s).

The Sedona Conference Commentary on Legal Holds at 17 (Aug. 2007 pub. comm. ver.).



Additional Resources

- *The Sedona Conference Commentary on Legal Holds* (Aug. 2007 pub. comm. ver.), available at www.thosedonaconference.org/content/miscFiles/Legal_holds.pdf
- www.kenwithers.com
- www.krollontrack.com
- www.ediscoverylaw.com
- Shira A. Scheindlin & Kanchana Wangkeo, *Electronic Discovery Sanctions in the Twenty-First Century*, 11 Mich. Telecomm. Tech. L. Rev. 71 (2004), available at www.mttr.org/voleleven/scheindlin.pdf
- Virtual Library on www.acc.com – InfoPacks, *Docket* articles and presentations
- Retention & Preservation Blog, www.cgoc.com/blog/retention



Mitigating the Risk

What can you do to mitigate risk?

- Create a litigation hold policy and procedure & train employees
- Keep document retention policies simple
- Talk more & limit writings
- Don't abuse the privilege
- Map data
- Take out the trash – don't keep what the business doesn't need and is not required to hold onto
- Develop relationships with IT
- Negotiate with opposing counsel early

**PRESERVATION NOTICE
YOUR URGENT ATTENTION & RESPONSE IS REQUIRED**

From: [General Counsel]

To:

RE: IMPORTANT – Your Obligation to Preserve Documents, Electronically Stored Information ("ESI") and Other Materials

MATTER NAME:	Doe v. Company
MATTER NO:	
DATE ISSUED:	
DATE REVISED:	
DATE LIFTED:	
REGION/COUNTRY:	

Action Required

Please review this Notice carefully. You are personally required as soon as practicable to acknowledge receipt. After you have reviewed this Notice, please use the link at the bottom of this Notice to confirm.

Summary

On January 2007, Doe, a vendor that provided Company with services filed a lawsuit against the Company and certain current and former Company employees. Doe alleges that the

At the direction of the Office of the General Counsel, effective immediately and until further notice, you must NOT destroy, delete or alter any documents, electronically-stored information ("ESI") or other materials that are or could be relevant to this litigation. This means that for the period beginning **January 1, 2005 and continuing until further notice**, we must PRESERVE ALL documents, ESI or other materials that relate to the following as described below:

- 1) All documents pertaining to the Company's relationship with Doe and the work performed for the Company by Doe, including:
 - a) All documents concerning the scope of work to be performed or actual performed by Doe
 - b) All documents concerning monies paid to Doe, including requests for reimbursement, invoices, and wire transfers
 - c) All copies of the product delivered to the Company by Doe
- 2) The computers or network space assigned to Doe within Company's environment.

- 3) All documents received or prepared in connection with any incidents or investigations involving Doe or any of its employees.
- 4) Computer files concerning log on and log off times for Doe employees, who are listed below by name.
- 5) Key swipe data for Doe employees.
- 6) All documents concerning the decision to hire Doe
- 7) All documents concerning the decision to terminate Doe
- 8) All correspondence with Doe for the relevant timeframe regardless of subject matter
- 9) Etc...

You should interpret your obligations under this Notice in the broadest possible sense.

You must immediately suspend any procedures that you control that could delete, destroy or alter any documents, ESI or other materials that may pertain to the above.

You must also ensure that anyone who keeps your files (AAs, off-site storage, etc.) is aware of and adheres to these instructions.

After reviewing this notice, if you have any questions or concerns please contact: Amy Lawyer, xxx-xxx-xxx.

Scope

For purposes of compliance, you should interpret this Preservation Notice to encompass as broad a range of documents, ESI and other materials as possible.

The term "**documents**" includes Records, Non-Records and other documents potentially relevant to the above matter, regardless of format, storage media or storage location. That is, the term "documents" includes any written, recorded, filmed, electronic, or graphic matter, whether in hard or soft copy. Examples of the types of documents would include letters, memoranda, e-mail, notes, minutes, records, case files, computer files or disks, videotapes, audio tapes, graphs, charts, spreadsheets, statements, notebooks, handwritten notes, applications, agreements, books, pamphlets, periodicals, appointment calendars, and work papers.

It also includes voicemail, handwritten notes, web site content and documents located on the network.

Please maintain all copies of a particular document in your possession, whether it is a draft, a final version, or a copy which differs in any way from a draft or final version (due to handwritten notations, receipt stamp, distribution list, etc.).

Each employee should review all possible locations for applicable documents including, but not limited to, work computer and/or laptop hard drives, home computer and/or laptop hard drives, company/plant servers, CDs, DVDs, thumb drives, PDAs and floppy disks.

Your duty to preserve is ongoing. Therefore, you must continue to comply with the directives in this Notice until you receive word from the Office of General Counsel that this Preservation Notice is terminated.

Guidelines for Protection of Documents, ESI or Other Materials

1. Don't Delay: The longer you wait to preserve documents, ESI or other materials, the greater the risk that they could inadvertently be lost or destroyed.
2. Hard Copy Documents: Identify whether you (or your Business Unit) are the custodian of any potentially relevant hard copy Records, Non-Records or other tangible things. Check your personal files, as well as shared filing areas and offsite storage.
3. Duplicates: Even minor variations in characteristics, like notes, highlighting, different or additional recipients (such as "bcc's"), differences in e-mail strings and "last modified" information, makes one copy not identical to another. When in doubt about whether something is a duplicate, err on the side of preserving all versions or iterations.
4. **[If metadata is important.]** Ongoing Preservation/Work in Progress: Unless and until otherwise notified in writing, you are required to preserve any and all newly created or received documents, ESI or other materials related to this matter. If you have ESI subject to this Notice that you anticipate needing for business purposes to modify while this Notice is in effect, please contact Joe IT at xxx-xxx-xxxx immediately for assistance.
5. Updates and Additional Obligations: This Notice may be updated, supplemented or otherwise modified as necessary to capture new or revised document preservation or collection demands.

If you know of anyone who is not listed below that may have any documents or information falling into the above categories, notify Susie Q, Corporate Paralegal, at xxx-xxx-xxxx. Please do not forward this Preservation Notice without approval of Amy Lawyer.

Drew Carey
 Pamela Anderson
 Diane Lane
 William J. Clinton
 Timothy Leary
 Lenny Kravitz
 Malcolm X

Certification

You must complete the accompanying Certificate of Preservation as soon as practicable. Please click the link below to complete the certification form and click open when the dialog box appears:

[Complete Certification Form.](#)

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.

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

- 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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