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THE SEDONA CONFERENCE® COMMENTARY ON LEGAL HOLDS: THE TRIGGER & THE PROCESS

*A Project of The Sedona Conference® Working Group on Electronic Document Retention & Production (WG1)**

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Preface

Welcome to the 2010 final post-public comment version of *The Sedona Conference® Commentary on Legal Holds: The Trigger & The Process.* This document contains numerous changes from the 2007 public comment version. The changes reflect the informal and formal suggestions and comments we received in the past 2+ years since initial publication.

In a nutshell, the edits take into consideration the continued evolution of law and best practices in the area over the past few years. Just as the awareness and consideration of issues involved in implementing legal holds evolved significantly since the founding of the Working Group in 2002 to the initial publication of this document, so too has the legal world evolved since 2007. The guidelines and accompanying text have been revised to harmonize the enhanced understanding of the technical, process, and legal issues that have emerged since we first issued this Commentary. Notably, our treatment of the issues in this revised edition expressly addresses the recent *Pension Committee* and *Rimkus* cases that have been widely disseminated and discussed in 2010, as well as recent cases addressing the application of Rule 37(e) of the Federal Rules of Civil Procedure that was added in 2006.

While we have no doubt this area will continue to evolve, we believe this document represents an accurate view of reasonable and defensible practices that organizations should consider in 2010 and going forward when addressing the issue of legal hold triggers and process.

While all Working Group members, as well as public commentators, played a role in the revisions and enhancements to this document, I would like to especially thank Thomas Y. Allman, Conor R. Crowley, Jonathan M. Redgrave, and Kenneth J. Withers for their efforts in shepherding the final review and editing process for this document.

Finally, although this document is now in its post-public comment version, we welcome additional input and involvement in this and other publications of The Sedona Conference.® Please reach out to us at our website at www.thesedonaconference.org or email me at rgb@sedonaconference.org.

Richard G. Braman
Executive Director
The Sedona Conference®
August 2010

PRESERVATION OBLIGATIONS AND LEGAL HOLDS

Information is the lifeblood of the modern world, a fact that is at the core of our civil discovery system. Accordingly, 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[1] is reasonably anticipated, threatened, or pending against an organization,[2] that organization has a duty to undertake reasonable and good faith actions to preserve relevant and discoverable information and tangible evidence. 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 requires a party to identify, locate, and maintain information and tangible evidence that is relevant to specific and identifiable litigation. It typically arises from the common law duty to avoid spoliation of relevant evidence for use at trial and is not explicitly defined in the Federal Rules of Civil Procedure. *See, e.g., Silvestri v. General Motors,* 271 F.3d 583 (4th Cir. 2001) (applying the "federal common law of spoliation"); *Chambers v. NASCO, Inc.,* 501 U.S. 32 (1991).

The concept of "legal holds" or "litigation holds"[3] has gained momentum in the last 10 years as part of common process by which organizations can begin to meet their preservation obligations. The use of a "litigation hold" as a means to satisfy preservation obligations was popularized by the 2003 decision in *Zubulake v. UBS Warburg* ("*Zubulake IV*").[4] The court suggested that "[o]nce a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a 'litigation hold.'"[5] In a subsequent decision in 2010 in *Pension Committee v. Bank of America Securities, LLC*,[6] the same court held that "the failure to issue a written litigation hold constitutes gross negligence." However, not all courts require a written legal hold. For example, in *Kinnally v. Rogers Corporation*,[7] a district court held that sanctions do not lie merely because of the "absence of a *written* litigation hold"[8] when a party has taken "the appropriate actions to preserve evidence."[9]

The 2006 Amendments

The 2006 Amendments to the Federal Rules of Civil Procedure ("the 2006 Amendments" or "the Amendments") did not define preservation obligations given the difficulty in drafting an appropriate Rule.[10] The use of a "litigation hold" as a method of implementation was referenced, however, in the Note to Rule 37(f), which was subsequently renumbered as Rule 37(e).[11]

1 Throughout this Commentary, the term "litigation" is used to refer primarily to civil litigation. However, the principles apply with equal force to regulatory investigations and proceedings.
2 Where appropriate, the term "organization" should be understood to include natural persons.
3 Throughout this Commentary we use the term "legal hold" rather than "litigation hold" to reflect that the duties and processes may apply in circumstances where there is no litigation. (e.g., pre-litigation or investigation).
4 220 F.R.D. 212 (S.D.N.Y. 2003).
5 *Id.* at 218.
6 2010 WL 184312 (S.D.N.Y. Jan. 15, 2010). The opinion was subtitled "*Zubulake* Revisited: Six Years Later."
7 2008 WL 4850116, at *7 (D. Ariz. Nov. 7, 2008).
8 *Id.* *6 ("the absence of a written litigation hold . . . does not in itself establish [a violation]" (emphasis in original).
9 *Id.* at *7 (noting use of a verbal litigation hold).
10 ADVISORY COMMITTEE MINUTES, Apr. 14-15, 2005, at p. 39-40 ("the Committee has concluded that the difficulties of drafting a good rule would be so great that there is no occasion even to consider the question whether a preservation rule would be an authorized or wise exercise of Enabling Act authority."); copy available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CRAC0405.pdf.
11 FED R. CIV. P. 37(f), Committee Note observes that "[w]hen a party is under a duty to preserve information because of pending or reasonably anticipated litigation, intervention in the routine operation of an information system is one aspect of what is often called a 'litigation hold.'" (2006).

The primary focus in the Amendments was on process improvements designed to encourage early party agreements while providing guidance for courts facing losses due to preservation failures. Thus, Rule 26(f) now requires discussion of "issues about preserving discoverable information" at the "meet and confer" held prior to the Scheduling Conference required by Rule 16(b). The Committee hoped that by encouraging early discussion, parties would reach agreement on "reasonable preservation steps." However, the requirement to discuss preservation "does not imply" that courts should routinely enter preservation orders.[12] In addition, Rule 37(e) provides that "[a]bsent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system."

The Duty to Preserve

In enforcing the duty to preserve through spoliation sanctions, courts primarily rely upon their inherent powers, although Rule 37 also plays a limited role where a court order has been violated. A party that violates a preservation order or an order to compel production, or otherwise fails to preserve and produce information, may be exposed to a range of sanctions.[13]

Preservation obligations may also be acknowledged and enforced because of statutes or regulations that are deemed to apply under the circumstances at issue.[14] *See Byrnie v. Town of Cromwell Board of Education*[15] ("Several courts have held that the destruction of evidence in violation of a regulation that requires its retention can give rise to an inference of spoliation."). Criminal penalties at the federal and state level may also be invoked in specific cases within the coverage of those laws. *See, e.g.,* 18 U.S.C. § 1519 (Sarbanes-Oxley Act § 802).

A duty to preserve may arise or be "triggered" before commencement of litigation. The duty "arise[s] not only during litigation but also extends to that period before the litigation when a party reasonably should know that the evidence may be relevant to anticipated litigation."[16] Once it arises, a party must take reasonable steps to preserve "what it knows, or reasonably should know is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery and/or is the subject of a pending discovery request."[17] In some states, including federal courts sitting in diversity, an independent action in tort may lie for violation of a duty to preserve.[18]

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,

12 FED. R. CIV. P. 26, Committee Note, Subdivision (f) (2006).
13 The preservation obligation typically applies only to parties, although service of a subpoena can trigger a duty as to non-parties. *See, e.g., Caston v. Hoaglin*, 2009 WL 1687927 (S.D. Ohio June 12, 2009) (subpoenas issued for the purposes of requiring preservation of relevant information).
14 Some record retention regulations that create preservation obligations are not necessarily enforceable for the benefit of private parties. *See* 17 C.F.R. § 240.17a-4 (SEC rule mandating retention of communications by members, brokers, or dealers), as discussed in *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 322 n.70 (S.D.N.Y. 2003) (plaintiff was not an intended beneficiary of the records retention regulation at issue).
15 243 F.3d 93, 108-09 (2d Cir. 2001).
16 *Silvestri v. General Motors,* 271 F.3d 583, 591 (4th Cir. 2001).
17 *Wm T. Thompson Co. v. General Nutrition Corp.,* 593 F. Supp. 1443 (C.D. Cal. 1984).
18 *See, e.g., Kearney v. Foley & Lardner,* 582 F.3d 396 (9th Cir. 2009) (dismissing state claim because of other viable remedies).

once triggered, what is the scope of the obligation. Principle 5 of *The Sedona Principles: Best Practices, Recommendations & Principles for Addressing Electronic Document Production* ("*The Sedona Principles*") (2d ed. 2007), suggests that preservation obligations require "reasonable and good faith efforts," but that it is "unreasonable to expect parties to take every conceivable step to preserve potentially relevant data."

This Commentary is intended to provide pragmatic suggestions and guidance in carrying out preservation obligations. For ease of analysis, the Commentary is divided into two parts: The "trigger" and the "legal hold." Part I addresses the "trigger" issue and provides practical guidelines for determining 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," are addressed in Part II.

The keys to addressing these issues, as with all discovery issues, are reasonableness and good faith. Where ESI is involved, there are also practical limitations due to the inaccessibility of sources[19] as well as the volume, complexity and nature of electronic information, which necessarily implicates the proportionality principles, found in Rule 26(b)(2)(C)(iii).[20]

The Guidelines in this Commentary are intended to facilitate compliance by providing a framework an organization can use to create its own preservation procedures. *The Guidelines are not intended and should not be used as an all-encompassing "checklist" or set of rules that are followed mechanically.* Instead, they should guide organizations in articulating a policy for implementing legal holds that is tailored to their individual needs. In addition to the Guidelines, suggestions and illustrations are included under hypothetical factual situations. These illustrations are not to be taken as "right answers" for the circumstances posed. Indeed, there may be other circumstances or facts that could well result in a different analysis and result. As such, the illustrations are intended to impart understanding of the analytical framework to be applied and not to be considered as reasons for reaching a particular result.

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 or practice governing an organization's preservation obligations are factors that may demonstrate reasonableness and good faith.

Guideline 3
Adopting a process for reporting information relating to a probable threat of litigation to a responsible decision maker may assist in demonstrating reasonableness and good faith.

19 FED. R. CIV. P. 26(b)(2)(B) provides that information stored in sources that are not reasonable accessible because of undue burden or cost are not initially discoverable, but the fact that they may become so if "good cause" is shown prompts them to be a subject of consideration for possible preservation.

20 The Hon. Paul W. Grimm et al., *Proportionality in the Post-Hoc Analysis of Pre-Litigation Preservation Decisions,* 37 U. BALT. L. REV 381, 388 (2008) (it would be "anomalous to sanction a party" for failure to preserve information that is later determined by the court not to be discoverable under FED. R. CIV. P. 26(b)(2)(C)).

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 undertaken (including whether a legal hold is necessary and how it should be executed) at the time they are made.

Guideline 6
The duty to preserve involves reasonable and good faith efforts, taken as soon as is practicable and applied proportionately, to identify and, as necessary, notify persons likely to have relevant information to preserve the 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 relevant 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
(c) Provides information on how preservation is to be undertaken
(d) Is periodically reviewed and, when necessary, reissued in either its original or an amended form, and
(e) Addresses features of relevant information systems that may prevent retention of potentially discoverable information.

Guideline 9
An organization should consider documenting the legal hold policy, and, when appropriate, the process of implementing the hold in a specific case, considering that both the policy and the process may be subject to scrutiny by opposing parties and review by the court.

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

Guideline 11
Any legal hold policy, procedure, or practice should include provisions for releasing the hold upon the termination of the matter at issue so that the organization can adhere to policies for managing information through its useful lifecycle in the absence of a legal hold.

PART 1: TRIGGERING THE DUTY OF PRESERVATION

The duty to preserve relevant information arises when litigation is "reasonably anticipated." The duty to preserve relevant information is certainly triggered when a complaint is served, a governmental proceeding is initiated, or a subpoena is received. However, the duty to preserve could well arise before a complaint is served or a subpoena is received and regardless of whether the organization is bringing the action, is the target of the action, or is a third party possessing relevant evidence. The touchstone is "reasonable anticipation."

Determining whether a duty to preserve is triggered is fact-intensive and is not amenable to a one-size-fits-all or a checklist approach. An organization will likely not be able to resolve the question the same way each time it arises. In general, determining whether the duty to preserve attaches will require an approach that considers a number of factors, including the level of knowledge within the organization about the claim, and the risk to the organization of the claim. Weighing these factors will enable an organization to decide when litigation is reasonably anticipated and when a duty to take affirmative steps to preserve relevant information has arisen.

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.

When the duty to preserve arises is often unambiguous. For example, the receipt of a summons or complaint, receipt of a subpoena, or formal notice that an organization is the target of a governmental investigation puts an organization on notice that it has a duty to preserve relevant information. However, other events may trigger a duty to preserve only when considered in the context of the entity's history and experience, or the particular facts of the case. For instance, an insurer's receipt of a claim from an insured often will not indicate the probability of litigation, as the insurer is in the business of paying claims often without litigation. On the other hand, the filing of an EEOC charge by a current or former employee may or may not, in the experience of the employer, indicate a probability of litigation. Similarly, the receipt of a preservation notice letter from an opposing party may or may not give rise to a credible probability of litigation, depending on the circumstances.

On the plaintiff's side, seeking advice of counsel, sending a cease and desist letter or taking specific steps to commence litigation may trigger the duty to preserve. In both *Pension Committee*[21] and *Rimkus Consulting v. Cammarata,*[22] the activities of the plaintiffs prior to litigation came under close examination. The test of the timing of the trigger is often based on when the party "determine[d] [that] legal action is appropriate."[23]

On the defendant's side, credible information that it is the target of legal action may be sufficient to trigger the duty to preserve. The degree to which anticipated litigation must be clear and certain is debatable. In *Goodman v. Praxair Services*,[24] the court refused to require an unequivocal notice of impending litigation. In *Phillip M. Adams & Associates v.*

21 2010 WL 184312 (S.D.N.Y. Jan. 15, 2010).
22 2010 WL 645353 (S.D. Tex. Feb. 19, 2010).
23 *Milenkamp v. Davisco Foods Int'l*, 562 F.3d 971, 981 (9th Cir. 2009) (no duty to preserve since destruction of evidence occurred "by the time" that plaintiffs determined legal action was appropriate).
24 632 F. Supp. 2d 494, 494 at n. 7 (D. Md. 2009).

Dell, Inc.,[25] the duty to preserve was held to have been triggered many years before suit was filed because of mere awareness of the dispute by others in the industry. However, there are circumstances when the threat of litigation is not credible and it would be unreasonable to anticipate litigation based on that threat. In *Cache LaPoudre Fees v. Land O'Lakes*,[26] for example, a letter referencing potential "exposure" did not trigger the obligation to preserve since a mere possibility of litigation does not necessarily make it likely and the letter referred to the possibility of amicable resolution.

This Guideline suggests that a duty to preserve is triggered *only* when an organization concludes (or should have concluded), based on credible facts and circumstances, that litigation or a government inquiry is probable. Whether litigation can be reasonably anticipated should be based on a good faith and reasonable evaluation of the facts and circumstances as they are known at the time. Of course, later information may require an organization to reevaluate its determination and may result in a conclusion that litigation that previously had not been reasonably anticipated (and consequently did not trigger a preservation obligation) is then reasonably anticipated. Conversely, new information may enable an organization to determine that it should no longer reasonably anticipate a particular litigation, and that it is consequently no longer subject to a preservation obligation. A party that obtains new information, after the initial decision is made, should reevaluate the situation as soon as practicable. *See, e.g., Stevenson v. Union Pacific RR Co.,* 354 F.3d 739 (8th Cir. 2004).

Consequently, to help understand when the duty to preserve arises, one should consider when the duty does *not* arise. For example, a vague rumor or indefinite threat of litigation does not trigger the duty; nor does a threat of litigation that is not credible or not made in good faith. A lack of credibility may arise from the nature of the threat itself or from past experience regarding the type of threat, the person who made the threat, the legal bases upon which the threat is purportedly founded, or any of a number of similar facts. In addition, the trigger point for a small dispute, where the stakes are minor, might occur at a later point than for a dispute that is significant in terms of business risk or financial consequences.[27]

A reasoned analysis of the available facts and circumstances is necessary to conclude whether litigation or a government inquiry is or is not "reasonably anticipated." That determination is fact-intensive and should be made by an experienced person who can make a reasoned judgment.

Another issue to be considered is what constitutes notice to the organization. For corporations this can be a complicated issue. If one employee or agent of the organization learns of facts that might lead one to reasonably believe litigation will be forthcoming, should that knowledge be imputed to the organization as a whole, thereby triggering its preservation obligations? Often, the answer will depend on the nature of the knowledge, the potential litigation, and the agent. Generally, "[a]n agent's knowledge is imputed to the corporation where the agent is acting within the scope of his authority and where the knowledge relates to matters within the scope of that authority."[28]

25 621 F. Supp. 2d 1173 (D. Utah 2009).
26 244 F.R.D. 614, 623, 623 (D. Colo. 2007).
27 A dispute that may have significant consequences will be more likely to result in litigation because the entity potentially asserting the claim is more likely to be willing to bear the costs of litigation. Thus, such a dispute is more likely to result in a reasonable anticipation of litigation.
28 *In re Hellenic, Inc.*, 252 F.3d 391, 395 (5th Cir. 2002).

Organizations that become aware of a credible threat from which litigation might arise may have a duty to make reasonable inquiry or possibly undertake a more detailed investigation regarding the facts related to that "threat." Whether an inquiry or detailed investigation is warranted will be fact-driven and based on reasonableness and good faith. Thus, while there may be no duty to affirmatively disprove allegations associated with a threat before concluding that a threat lacks credibility, the facts and circumstances may suggest the prudence of making an inquiry before reaching such a conclusion.

The case law as to when an organization should reasonably anticipate litigation varies widely from jurisdiction to jurisdiction. In *Zubulake IV*,[29] the court stated that UBS should have reasonably anticipated litigation *at the latest* when Ms. Zubulake filed a charge with the EEOC. However, the court found that UBS reasonably anticipated litigation—thereby triggering the duty to preserve—five months before the filing of the EEOC charge, based on the emails of several employees revealing that they knew that plaintiff intended to sue.[30]

In *Willard v. Caterpillar, Inc.*,[31] the court rejected a claim that the defendant tractor manufacturer should have preserved documents related to the design of the tractor, where the model at issue had been out of production for 20 years. The court noted that:

> There is a tendency to impose greater responsibility on the defendant when spoliation will clearly interfere with the plaintiff's prospective lawsuit and to impose less responsibility when the interference is less predictable. Therefore, if Caterpillar destroyed documents which were routinely requested in ongoing or clearly foreseeable products liability lawsuits involving the D7-C tractor and claims similar to Willard's, its conduct might be characterized as unfair to foreseeable future plaintiffs. However, the document destruction at issue began more than ten years before Willard was injured, and the evidence disclosed only one other accident involving on-track starting and none involving the wet clutch. In our opinion, such remote pre-litigation document destruction would not be commonly understood by society as unfair or immoral.

ILLUSTRATIONS

Illustration i: An organization receives a letter that contains a vague threat of a trade secret misappropriation claim. The letter does not specifically identify the trade secret. Based on readily available information, it appears that the information claimed to be the misappropriated trade secret had actually been publicly known for many years. Furthermore, the person making the threat had made previous threats without initiating litigation. Given these facts, the recipient of the threat could reasonably conclude that there was no credible threat of litigation, and the entity had no duty to initiate preservation efforts.

Illustration ii: An organization receives a demand letter from an attorney that contains a specific threat of a trade secret misappropriation claim. Furthermore, the organization is aware that others have been sued by this same plaintiff on similar claims. Given these facts,

29 220 F.R.D. 212, 216-17 (S.D.N.Y. 2003).
30 The scope of that duty to preserve seems to have been quite limited encompassing a small number of emails over a limited period of time suggesting that even though the duty to preserve had arisen, the scope of the preservation obligations may have been quite modest.
31 40 Cal. App. 4th 892 (1995).

there is a credible threat of litigation, and the organization has a duty to preserve relevant information. The duty to preserve on the part of the potential plaintiff arises no later than the date of the decision to send the letter, and, in some circumstances, may arise earlier.

Illustration iii: An organization learns of a report in a reputable news media source that includes sufficient facts, consistent with information known to the organization, of an impending government investigation of a possible violation of law by the organization stemming from the backdating of stock options given to executives. Under these circumstances, a government investigation (and possibly litigation) can reasonably be anticipated and a preservation obligation has arisen.

Illustration iv: An event occurs which, in the experience of the organization, typically results in litigation. Examples of such events may include a plant explosion with severe injuries, an airplane crash, or an employment discrimination claim. The experience of the organization when these claims arose in the past would be sufficient to give rise to a reasonable anticipation of litigation.

Illustration v: A cease-and-desist letter for misuse of a trademark is received by a business. The recipient replies with an agreement to comply with the demand and, in fact, does comply with the demand. The recipient does not have a reasonable basis to anticipate litigation and does not have an obligation to preserve relevant information. However, the duty to preserve on the part of the sender arises no later than the date of the decision to send the letter.

Guideline 2. Adopting and consistently following a policy or practice governing an organization's preservation obligations is one factor that may demonstrate reasonableness and good faith.

A policy or practice setting forth a process for determining whether the duty to preserve information has attached can help ensure that the decision is made in a defensible manner. As stated in *The Sedona Principles*,[32] "[b]y following an objective, preexisting policy, an organization can formulate its responses to electronic discovery not by expediency, but by reasoned consideration."[33] Thus, any policies that provide for management of ESI should include provisions for implementing procedures to preserve documents and electronically stored information related to ongoing or reasonably anticipated litigation, government investigations or audits. *Id.* However, "[t]he nomenclature (e.g., 'litigation hold') is not important; the important factor is that the organization has a means to comply with its legal obligations to preserve relevant information in the event of actual or reasonably anticipated litigation or investigation." [34]

While the particulars of the policy or practice will necessarily be driven by the structure and culture of the organization, the key is to have a process that is followed. In cases where the preservation efforts are likely to be challenged, it can be helpful to memorialize the steps taken to follow that process so the organization can demonstrate its compliance with the process. A defined policy and memorialized evidence of compliance should provide strong support if the organization is called upon to prove the reasonableness of the decision-making process.

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32 The Sedona Conference,® THE SEDONA PRINCIPLES (2d ed. 2007) at Comment 1.b.
33 Principle 1 of *The Sedona Principles* provides, in relevant part, that "[o]rganizations must properly preserve electronically stored information that can reasonably be anticipated to be relevant to litigation."
34 *Id.* at n. 36.

ILLUSTRATION

Illustration i: Upon receipt of an anonymous threat sent to a corporation's ombudsman, the ombudsman consults the legal hold policy. That policy provides criteria for an assessment of the threat and whether the issues raised by information, including the circumstances surrounding its receipt, indicate the potential for litigation or governmental investigation. It also provides for a preliminary evaluation of the allegations before determining whether a hold should be implemented. Based on the policy, the ombudsman concludes that the corporation does not reasonably anticipate litigation and memorializes that decision in a memorandum to the file. In a subsequent challenge, the corporation is able to demonstrate that it exercised reasonableness and good faith.

Guideline 3. Adopting a process for reporting information relating to a probable threat of litigation to a responsible decision maker may assist in demonstrating reasonableness and good faith.

In any organization—but particularly in large organizations—individuals within the organization may have information that indicates a threat of litigation that the decision makers for the organization do not have. An organization formulating a legal hold policy should consider how to enable that information to be communicated to persons charged with evaluating the threat and, if warranted, instituting legal holds. The particulars of how this process is implemented will vary from organization to organization, based on the way the business is conducted and the culture of the organization. However, to be effective, the procedure should be simple and practical, and individuals within the organization should be trained on how to follow the procedure.

ILLUSTRATIONS

Illustration i: Westerberg Products is a large corporation with tens of thousands of employees and offices throughout the United States. Westerberg Products establishes an internal compliance "help line" or Web site that allows employees to submit information they have regarding matters of concern, including potential claims against the company. The information received is forwarded to the legal department of Westerberg Products, which is charged with determining whether and when to implement a legal hold. Each employee is trained on how to use the help line or Web site and instructed that they should use it to report any relevant information. Westerberg Products can use these procedures to demonstrate its good faith efforts to ensure it is aware of information indicating a threat of litigation.

Illustration ii: Stinson Software is a small software developer with eight employees. Every month, all eight employees attend a staff meeting and a regular topic of discussion is whether any employee is aware of any ongoing threats to the company, including possible claims or demands that might result in litigation against the company. Stinson Software's Chief Operations Officer follows up on any tips with Stinson Software's outside counsel. Stinson Software can use these practices to demonstrate its good faith effort to ensure it is aware of information indicating a threat of litigation.

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.

Determining whether litigation is or should be reasonably anticipated requires considering many different factors. Depending on the nature of the organization and the nature of the litigation, factors that might be pertinent to consider could include:

- The nature and specificity of the complaint or threat;
- The party making the claim
- The business relationship between the accused and accusing parties;
- Whether the threat is direct, implied, or inferred
- Whether the party making the claim is known to be aggressive or litigious
- Whether a party who could assert a claim is aware of the claim
- The strength, scope, or value of a known or reasonably anticipated claim
- Whether the company has learned of similar claims
- The experience of the industry, and
- Reputable press and/or industry coverage of the issue either directly pertaining to the client or of complaints brought against someone similarly situated in the industry.

These factors are not exhaustive. They and other considerations must be weighed reasonably and in good faith in the context of what steps are reasonable and practicable.

ILLUSTRATIONS

Illustration i: A musician writes a song that sounds very similar to a famous song. Immediately there are critical reviews and radio DJs calling the song a "blatant rip-off." Although the copyright owners of the original song have not yet made any claim, the high profile nature of the criticism is a consideration that may lead a determination by the music publisher that a preservation obligation has arisen.

Illustration ii: A restaurant chain's central management office receives a series of anonymous emails purporting to be from customers claiming food poisoning after the much-publicized introduction of a new dish. In the absence of any corroborating reports from the restaurants and with no specific details on which to act, the chain's counsel reasonably concludes that litigation is not reasonably anticipated.

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 executed) at the time they were made.[35]

The reasonableness of an organization's preservation decisions, such as whether to implement a legal hold, can only be made in light of the facts and circumstances reasonably known to it at the time of its decision, and not on the basis of hindsight or information acquired after the decisions are made. An organization seeking to determine whether a preservation obligation has arisen has no choice but to rely on the information available to it; consequently, whether decisions made were reasonable should turn on that knowledge, and not other circumstances of which the organization was unaware.

35 Similarly, judicial evaluation of an organization's legal hold implementation should be based on the good faith and reasonableness of the implementation at the time the hold was implemented. In doing so, proportionality considerations may become relevant.

ILLUSTRATION

Illustration i: Joey Music Co. manufactures music compact discs using a state-of-the-art process it licenses from D.D. Electronics. D.D. Electronics also licenses the process to Johnny Computing, which uses the process to manufacture CD-ROMs. In January, Johnny Computing receives reports that many of the compact discs it has sold are defective. After investigating, Johnny Computing determines that the defect is caused by the process it licenses from D.D. Electronics. The news of this discovery is kept out of the media, and the class action case brought by Johnny Computing's customers is quickly settled out of court by March. In April, Joey Music, who had no knowledge of the suit against Johnny Computing or the subsequent settlements, disposes of certain documents relating to its use of the D.D. Electronics process. In May, Joey Music begins receiving complaints from its customers. Because Joey Music had no knowledge of the concerns with the process it licenses from D.D. Electronics, its decision to dispose of documents in April was reasonable, particularly if done in compliance with an existing records and information management policy.

PART 2: IMPLEMENTING THE LEGAL HOLD

Once the duty to preserve information arises, an organization must decide what to preserve and how to do it. In some circumstances, the duty to preserve requires only locating and preserving a limited number of documents. In other circumstances, the scope of the information is larger and the sources of the information may not be known to counsel.

The typical legal hold process focuses on key custodians and data stewards,[36] who are asked to take steps to preserve relevant information and help prevent losses due to routine business operations. The effort involves discoverable material, i.e., usually that "relevant to a claim or defense.[37] As noted by one court, there is no broad requirement to preserve information that is not relevant: "[m]ust a corporation, upon recognizing the threat of litigation, preserve every shred of paper, every email or electronic document, and every backup tape? The answer is clearly, 'no.' Such a rule would cripple large corporations."[38]

Identifying and preserving potentially relevant information can be complex and may require trained people, processes, and technology, particularly when ESI is at issue. This may include creating teams to identify the sources, custodians, and data stewards of potentially relevant information within the organization, and to define what needs to be preserved and to coordinate with outside counsel. It is often advisable to maintain sources of ESI in their native formats with metadata[39] to preserve the ability to make production in some variant of a native file format, if necessary. In the case of *In re Priceline.Com Inc. Securities Litigation*,[40] a court approved an agreement that the original data would be maintained in its original file format for the duration of the litigation. The need to produce metadata is also recognized in Principle

36 Of course, while the focus is on key custodians and data stewards, sometimes referred to as "key players," there may be other individuals who are asked to take preservation steps. Notably, the efforts undertaken for key custodians may be different from other custodians.

37 FED. R. CIV. P. 26(b)(1). In some cases, the rule states, "for good cause" the court may order discovery of any matter relevant to the subject matter involved in the action. Logically, the duty to preserve information relevant to the broader scope would not attach until at least the motion or order to expand the scope: before that, discovery under the broader scope would not be reasonably likely.

38 *Zubulake v. UBS Warburg*, 220 F.R.D. 212, 217 (S.D.N.Y. 2003).

39 *Compare U.S. v. O'Keefe*, 2008 WL 449729 (D.D.C. Feb. 18, 2008) (court applying amended Rule 34(b) as persuasive authority in the criminal discovery context ordered preservation of ESI in its native format with metadata until ruling regarding production).

40 233 F.R.D. 88 (D. Conn. 2005).

12 of *The Sedona Principles* which recognizes "the need to produce reasonably accessible metadata that will enable the receiving party to have the same ability to access, search, and display the information as the producing party where appropriate or necessary in light of the nature of the information and the needs of the case."

For large preservation efforts, a process that is planned, systemized, and scalable is useful, although *ad hoc* manual processes are often appropriate for cases involving relatively small numbers of key custodians and identifiable issues. It is usually inefficient to collect information from every custodian, server, or other source of active data without making any initial effort to identify relevant information. With no means to triage the information and to filter out irrelevant ESI, the collection may be overbroad, with a great deal of irrelevant information aggregated into a central repository where it is then further processed and searched.

There is a growing consensus that the proportionality principle must be applied in assessing preservation issues. In *Rimkus Consulting*, the court noted that "[w]hether preservation or discovery conduct is acceptable in a case depends on what is *reasonable,* and that in turn depends on whether what was done—or not done—was *proportional* to that case and consistent with clearly established applicable standards."[41] (emphasis in original). Similarly, the Seventh Circuit Pilot Program on E-Discovery (2009)[42] provides, in Principle 2.04 (Scope of Preservation), that "every party to litigation and its counsel are responsible for taking reasonable and proportionate steps to preserve relevant and discoverable ESI within its possession, custody or control."

To develop an appropriate process for a large organization, the responsible business and functional units, including legal, IT, and records management personnel, should be trained on the organization's legal hold policies and practices and their responsibilities. Plans and protocols appropriate to the type of data and the manner in which it is maintained should be developed. Consultants and vendors can also play a valuable role by helping to design efficient and systemized processes that are executed by IT personnel and/or consultants. For smaller cases, or for entities without internal resources, outside counsel may provide the services on a case-by -case basis and may be deeply involved in drafting the initial preservation notices and in collecting documents and ESI.

While the traditional role of counsel is to "inform the client of its duty to preserve potentially relevant documents in the client's custody or control and of the possible consequences of failing to do so,"[43] some decisions hold that counsel also owes an independent duty to actively supervise a party's compliance with the duty to preserve.[44] In *Zubulake V*,[45] the court went further and suggested that "counsel must issue a 'litigation hold' at the outset of litigation or whenever litigation is reasonably anticipated, communicate directly with the 'key players,' instruct all employees to produce electronic copies of their relevant active files," and secure unique backup media that should be retained.[46]

41 2010 WL 645353 at *6 (S.D. Tex. Feb. 19, 2010).
42 SEVENTH CIRCUIT ELECTRONIC DISCOVERY PILOT PROGRAM (Oct. 2009) at 21, *available at* http://www.ilcd.uscourts.gov/Statement%20-%20Phase%20One.pdf.
43 Standard 10, ABA CIVIL DISCOVERY STANDARDS (Aug. 2004) ("This Standard is . . . an admonition to counsel that it is counsel's responsibility to advise the client as to whatever duty exists, to avoid spoliation issues.") *See Turner v. Hudson Transit Lines*, 142 F.R.D. 68, 73 (S.D.N.Y. 1991) (the preservation obligation runs first to counsel, who has a duty to advise, with "corporate managers" having the responsibility to convey that information to the relevant employees).
44 *Phoenix Four, Inc. v. Strategic Resources Corp.,* 2006 WL 1409413 (S.D.N.Y. May 23, 2006).
45 229 F.R.D. 422 (S.D.N.Y. 2004).
46 Counsel was not sanctioned for their preservation failures in *Zubulake* since a party on notice of its obligations "acts at its own peril." *Id.* at 434; *cf. Green v. McClendon,* 262 F.R.D. 284, 290 (S.D.N.Y. 2009) (monetary sanctions imposed on *both* counsel and client for failure to institute a timely legal hold).

The following Guidelines are intended to help organizations create legal hold procedures that are effective in preserving necessary information in a manner consistent with the requirements of the situation at hand. As with the triggers of the legal hold, there is no one-size-fits-all answer to implementing a legal hold. Rather, organizations must approach implementing a legal hold in light of the particular documents and information in their possession, the nature of the matter, and the culture of the organization.

Guideline 6. The duty to preserve involves reasonable and good faith efforts, taken as soon as is practicable and applied proportionately, to identify and, as necessary, notify persons likely to have relevant information to preserve the information.

After determining it has a duty to preserve, the organization should begin to identify information to be preserved. The obligation to preserve ESI requires reasonableness and good faith efforts, but it is "unreasonable to expect parties to take every conceivable step to preserve all potentially relevant data."[47] The organization should consider the sources of information within its "possession, custody, and control"[48] that are likely to include relevant, unique information. The most obvious of these sources are those that the organization physically has in its possession or custody—for example, the file cabinets of documents in its office, the emails that reside on its servers located in its corporate headquarters — but also may include sources such as thumb drives, company furnished laptops, and PDAs used by employees for business purposes.

Some sources of information under the control of third parties may also be deemed to be within the control of the organization because of contractual or other relationships. Examples include information held by outsourced service providers, storage facilities operators, and application service providers (ASPs).[49] With respect to those sources, the organization should consider providing appropriate notice concerning the need to preserve material that is likely to be relevant.

In executing preservation obligations, special attention should be paid, where necessary, to information that is held outside of the United States. Many such locations have laws that potentially conflict with United Sates discovery requirements. Such laws include those that limit the retention of certain types of information and those that limit the processing or transfer of information to the United States for discovery purposes.[50]

It must be noted that a mere delay in implementing a legal hold is not necessarily fatal. In *Rahman v. The Smith & Wollensky Restaurant Group*,[51] the court concluded that "even assuming there was, in fact, no litigation hold" until late in the litigation, the plaintiff had failed to establish that there was "any gap" in production which was "attributable to the

47 *See* Principle 5, THE SEDONA PRINCIPLES (2d ed. 2007).

48 *See* FED. R. CIV. P. 34 and its state equivalents; *see also In re NTL, Inc., Sec. Litig.,* 244 F.R.D. 179 (S.D.N.Y. 2007) (party had access to records held by third party).

49 Notably, the advent of "cloud computing" will, over time, likely increase the number of organizations using third parties to host, manage, store, and retrieve electronic information in the course of business.

50 *See, e.g.*, The European Directive 95/46/EC (the "Directive"), effective October 1998. The Directive governs the processing and use of personal data for all EU Member States, and identifies eight data protection principles. These include the principle that personal data shall not be kept for longer than is necessary for the purposes for which it is processed and the principle that personal data shall not be transferred to a country or territory outside the EU, unless that country or territory ensures an "adequate" level of protection for the rights and freedom of data subjects in relation to the processing of personal data. At this time, the United States is not considered by the EU to ensure an "adequate" level of protection and data may be transferred only if the transfer meets a particular exception found in the Directive or if certain steps are taken to qualify for the European Commission's Safe Harbor status or to adopt the European Commission's model contractual clauses for Data Transfer and Data Processing or Binding Corporate Rules. One exception to the Directive that may apply in certain cases is when the transfer is required for the exercise or defense of legal claims.

51 2009 WL 773344 (S.D.N.Y. Mar. 18, 2009).

failure to institute [a] litigation hold at an earlier date."[52] The test is what was reasonable under the circumstances, with an eye towards the ultimate end goal (e.g., whether relevant information was preserved). Thus, there is no per se negligence rule and if the organization otherwise preserved the information then there is no violation of the duty to preserve.[53]

ILLUSTRATION

Illustration i: Strummer Holdings is a large corporation that sends many of its historic documents to an offsite storage facility managed by Jones Storage. Typically, documents older than five years are sent to Jones Storage. At all times, Strummer Holdings retains all legal rights with respect to the documents, and has the right to require their return from Jones Storage at any time. Jones Storage has standing instructions from Strummer Holdings to automatically destroy certain documents when they are 10 years old. Strummer Holdings reasonably anticipates litigation relating to events that occurred nine years ago such that its preservation obligations are triggered. If Strummer Holdings does not take steps to ensure that the relevant documents it has stored at Jones Storage (if any) are preserved, Strummer Holdings may be subject to sanctions for spoliation if any relevant documents are destroyed.

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.

Executing preservation obligations typically involves an initial focus on documents and ESI available in accessible or "active" sources. Rule 26(f) provides parties in litigation with the opportunity at the "meet and confer" stage to discuss and evaluate potential discovery and agree on a reasonable preservation scope. The emphasis in the Rules is on cooperative action, as promoted by The Sedona Conference® *Cooperation Proclamation*.[54] Parties are admonished to pay particular attention "to [maintaining] the balance between the competing needs to preserve relevant evidence and to continue routine operations critical to ongoing activities."[55]

Unfortunately, it is not always feasible to secure prior agreement on preservation steps to be undertaken.[56] This is particularly true when preservation decisions must be made in the pre-litigation context, but it also is a problem after commencement of litigation. Parties are often in the position of having to make unilateral preservation decisions based on their best judgment.

There are numerous factors to be weighed in determining the scope of a particular hold. Some factors include the cost to preserve and potentially restore information; the number of individual custodians involved in the matter; the type of information involved; and whether the hold is on active data, historical data, or future data because the litigation

52 *Id.* at *6 & n. 9 (emphasizing that the proof is directed at the destruction of relevant evidence, not, per se, institution of a legal hold).
53 *Rimkus Consulting Grp. v. Cammarata*, 2010 U.S. Dist. LEXIS 14573 (S.D. Tex. Feb. 19, 2010); *cf. Pension Comm. v. Banc of Am. Sec., LLC,* 2010 WL 184312 (S.D.N.Y. Jan. 15, 2010).
54 *See* The Sedona Conference,® THE SEDONA CONFERENCE JOURNAL® SUPPLEMENT, 10 SEDONA CONF. J. 331 (Fall 2009) (calling for cooperative action by participants in relation to the discovery process).
55 FED. R. CIV. P. 26, Committee Note, Subdivision (f) (2006).
56 Kenneth J. Withers, *"Ephemeral Data" and the Duty To Preserve Discoverable Electronically Stored Information*, 37 U. BALT. L. REV. 349, 377 (Spring 2008) ("By the time the parties sit down at the Rule 26(f) conference, the preservation issues surrounding ephemeral data may be moot and the fate of the responding party may already be sealed, if sanctions are later found to be warranted.")

involves future or ongoing business activities. The court in *Zubulake IV* indicated that a "party or anticipated party must retain all relevant documents (but not multiple identical copies) in existence at the time the duty to preserve attaches, and any relevant documents created thereafter."[57] The court also explained that "[i]n recognition of the fact that there are many ways to manage electronic data, litigants are free to choose how this task is accomplished."[58]

Another key factor involves the accessibility of the information, especially when ESI is involved. While "[a] party's identification of sources of ESI as not reasonably accessible does not relieve the party of its common-law or statutory duties to preserve evidence,"[59] this observation should be read in conjunction with Rule 37(e), which provides that where data is lost as a result of good-faith, routine operations of electronic systems, no sanctions under the Federal Rules may be levied.[60] The Sedona Conference® *Commentary on Preservation, Management and Identification of Sources of Information That Are Not Reasonably Accessible*[61] suggests that in the absence of agreement, it is often "reasonable to decline to preserve" inaccessible sources if the party concludes that the "burdens and costs of preservation are disproportionate to the potential value of the source of data."[62]

For example, *Zubulake IV,* also concluded that "as a general rule,"[63] a "litigation hold does not apply to inaccessible backup tapes" which "may continue to be recycled." It also established an exception when the producing party could identify "the tapes storing the documents of 'key players'."[64] *The Sedona Principles* are in accord with this view.[65] Principle 8[66] also cautions against the assumption that there is an automatic need to preserve backup media. Thus, in *Escobar v. City of Houston*,[67] the fact that other relevant information had been preserved and was available mitigated concern about the failure to preserve audio tapes. Notably, the reasoning behind the general rule excluding inaccessible data (such as back up tapes) from preservation is not based simply on costs as the expense of saving a tape in isolation is relatively slight, but instead it is based upon a broader view of the need for preservation in the context of other sources of evidence and also balanced against the ultimate cost of later restoring data sources and culling them for particular content.

Likewise, transient or ephemeral data that is not kept in the ordinary course of business and that the organization may have no means to preserve may not need to be preserved. In *Columbia Pictures v. Bunnell*,[68] a court refused to find a duty to preserve information temporarily stored in RAM where the producing party had no reason to

57 220 F.R.D. 212, 218 (S.D.N.Y. 2003).
58 The court gave as an example, the retention of "all then-existing backup tapes for the relevant personnel (if such tapes store data by individual or the contents can be identified in good faith and through reasonable effort)," and noted that the party could "catalog any later-created documents in a separate electronic file." *Id.* at 218.
59 FED. R. CIV. P. 26, Committee Note, Subdivision (b)(2) (2006).
60 *Olson v. Sax,* 2010 WL 2639853 at *2 (E.D. Wis. June 25, 2010).
61 10 SEDONA CONF. J. 281 (2009) (in determining accessibility, a combination of "media based factors" and "data complexity factors" should be used); copy also available at http://www.thesedonaconference.org.
62 *Id*. (proposing a "decision tree" form of analysis under which the burdens and costs of accessing and preserving are balanced against the "reasonably anticipated need and significance of the information").
63 220 F.R.D. 212 at 217, n. 22.
64 220 F.R.D. 212 at 218, 220, n. 17 ("Litigants are now on notice, at least in this court, that [key player] backup tapes "must be preserved"). *See also Pension Comm. v. Bank of Am. Sec., LLC*, 2010 WL 184312 at *27 (S.D.N.Y. Jan. 15, 2010) ("I am not requiring that *all* backup tapes must be preserved. Rather, if such tapes are the *sole* source of relevant information (e.g., the active files of key players are no longer available), then such backup tapes should be segregated and preserved. When accessible data satisfies the requirement to search for and produce relevant information, there is no need to save or search backup tapes."); *Forest v. Caraco***,** 2009 WL 998402 (E.D. Mich. Apr. 14, 2009) (announcing proceedings limited to assessing *Zubulake* exception on delayed decision to cease recycling backup media).
65 Comment 5.h., THE SEDONA PRINCIPLES (2d ed. 2007) ("[a]bsent specific circumstances, preservation obligations should not extend to disaster recovery backup tapes created in the ordinary course of business.")
66 Comment 8.a., THE SEDONA PRINCIPLES (2d ed. 2007) ("The mere suspicion that a source may contain potentially relevant information is not sufficient to demand [its] preservation.")
67 2007 WL 2900581 (S.D. Tex. Sept. 29, 2007).
68 2007 WL 2080419 at *3-6 (C.D. Cal. May 29, 2007), *motion to review denied*, 245 F.R.D. 443 (2007).

anticipate that it would be sought and the requesting party first asserted a duty to preserve in a motion for sanctions.[69] Absent a special showing of need, Principle 9 of *The Sedona Principles* suggests that it is not ordinarily required to "preserve, review, or produce deleted, shadowed, fragmented, or residual [ESI]." Similarly, many organizations have made a good faith decision to not retain information such as instant messaging, chats, or voicemail messages in the ordinary course of business so that, absent compelling circumstance or an order of the court, there should be no expectation of preserving and producing information from such sources.

Parties sometimes seek to compel creation of a "mirror image" of hard drives to preserve data pending forensic examinations.[70] As part of the 2006 Amendments, the right to "test or sample" with reference to ESI was added to Rule 34(a). That amendment does not, however, create a "routine right of direct access" for such purposes.[71] Instead, such access is granted on a proper showing and perhaps with certain defined conditions.[72]

In some cases, parties may wish to affirmatively create "snapshots" of data as a defensive measure.[73] For example, the ability to access the hard drives of laptops issued to key employees upon their departure may be useful if it is the sole source of deleted information.[74]

If there are many custodians or if there is ongoing business information subject to the legal hold, *collecting* data at the outset of the legal hold may not be feasible. Sequestering the data can be disruptive to the business or technically unworkable in such circumstances. As a result, it is important to distinguish between preserving information and collecting and sequestering it.

If collecting data at an initial stage is not warranted, reasonable, or feasible, communications and monitoring processes become more important. It is critical that recipients of hold notices understand their duty to preserve information and how to meet that duty. Training sessions on legal hold compliance can be a useful tool to foster the effectiveness of legal holds.

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 relevant 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**

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69 The magistrate judge held that "the defendants failure to retain the server log data in RAM was based on a good faith belief that preservation of data temporarily stored only in RAM was not legally required" because, *inter alia*, there had been "no specific request by the defendants to preserve server log data present solely in RAM." *Id.* at *14.

70 *Bank of Mongolia v. M&P Global Fin. Servs.,* 258 F.R.D. 514 (S.D. Fla. 2009) (expert appointed to "retrieve any deleted responsive files" in light of production of responsive documents from third party sources).

71 FED. R. CIV. P. 34, Committee Note, Subdivision (a) (2006).

72 *See id., and Covad Communications v. Revonet, Inc.,* 258 F.R.D. 5 (D.D.C. 2009) where the court ordered forensic imaging of email servers for purposes of "preserving information as it currently exists."

73 It should be noted that forensic collection is not, nor should it be, the default method of collection and preservation. Instead, the duty to collect and preserve forensically only arises if: 1) the facts known to the preserving party or which the party should reasonably know would establish the need; or, 2) the requesting party has specifically requested it and the producing party has either agreed or notified the requesting party upon receiving the request that it will not comply, at which point the requesting party seeks judicial intervention an obtains an order compelling such preservation and collection. *See* Comment 8.c., THE SEDONA PRINCIPLES (2d ed. 2007) ("While [forensic data acquisition] is clearly appropriate in some circumstances, it should not be required unless exceptional circumstances warrant the extraordinary cost and burden;" also noting the need for careful protocols to address such collections).

74 *See, e.g., Cache La Poudre Feeds v. Land O'Lakes, supra,* 244 F.R.D. 614 (D. Colo. 2007) (failure to refrain from "expunging" hard drives of former key employees sanctioned where backup tapes were no longer available for use in seeking deleted email).

(c) Provides information on how preservation is to be undertaken
(d) Is periodically reviewed and, when necessary, reissued in either its original or an amended form, and
(e) Addresses features of relevant information systems that may prevent retention of potentially discoverable information.

When designing a legal hold it is particularly important that it be understandable by different groups within an organization. Counsel should review relevant pleadings or other documents and then describe the litigation in a way that will be understood by those with responsibility for preserving documents.

The initial and subsequent hold notices and reminders should describe the matter at issue, provide specific examples of the types of information at issue, identify potential sources of information, and inform recipients of their legal obligations to preserve information, and include reference to the potential consequences to the individual and the organization of noncompliance.[75] It should be in a form, which may include email, written hard copy or, in some cases, oral notice, which is appropriate to the circumstances. The notice should also inform recipients whom they should contact if they have questions or need additional information. Again, each case must be evaluated based on its own individual facts and a preservation notice adapted to conform to the facts and circumstances unique to that case.

Because of the distributed nature of ESI, it may be appropriate to communicate a legal hold notice not only to relevant data-generating or –receiving custodians, but also to appropriate data stewards, records management personnel, information technology (IT) personnel, and other potentially knowledgeable personnel.

Organizations should consider requiring confirmations of compliance with such hold notices as a means of verifying that recipients understand their preservation duties and obligations. *See* Guideline 10. Appropriate responses to hold notices and the organization's expectations for compliance with them should be included in organization's compliance programs.

Importantly, while the use of a written legal hold is often appropriate, it is simply one method of executing preservation obligations, not the only one. An organization should consider whether a written notice is necessary to effectively implement the hold and preserve the requisite information. In many instances, a written notice may not be necessary and, in fact, may be an encumbrance or source of confusion. Examples include situations in which sources of likely relevant information are subject to retention for sufficiently long periods pursuant to the organization's information management or record retention policy such that they will be held without a formal legal hold for the duration of the litigation. In addition, there may be situations in which sources of relevant information can be immediately secured without requiring preservation actions by employees. A read-only system of record for all pertinent research-and-development and product-quality information harnessed by a document management system would be one such example. There are other circumstances where the collection of information prior to any notice may be prudent in light of the risk that a custodian is the subject of the investigation or litigation and there is reason to believe that he or she might take steps to delete or destroy relevant information if aware of the circumstances.

75 The organization "must inform its officers and employees of the actual or anticipated litigation, and identify for them the kinds of documents that are thought to be relevant to it." *Samsung Electronics Co., Ltd., v. Rambus, Inc.*, 439 F. Supp. 2d 524, 565 (E.D. Va. 2006).

ILLUSTRATIONS

Illustration i: Lydon Enterprises obtains information that makes it reasonably anticipate litigation. Lydon Enterprises issues a written legal hold notice to certain of its employees. The document clearly identifies the recipients of the notice and explains in easily understandable terms which documents fall within the scope of the employees' preservation duties. The notice also explains how employees are expected to gather and preserve relevant documents. Whenever new information is obtained regarding the litigation that could affect the scope of the legal hold, in-house counsel for Lydon Enterprises reviews the notice. The notice is revised and reissued as necessary, and a periodic reminder is issued to all employees with preservation obligations. Compliance with the notice is regularly evaluated. This legal hold is likely to be considered effective or reasonable.

Illustration ii: Jones, Inc., obtains information that makes it reasonably anticipate litigation. In-house counsel for Jones identifies 40 people who she thinks might have relevant documents and instructs her secretary to call them and tell them to hold onto any documents relevant to the potential litigation, which she describes in general terms. The secretary calls the employees, but is unable to answer many of their questions. In-house counsel does not follow up on any of the employee questions. No written hold notice is ever issued. Litigation does not actually occur until 18 months later; at that point, in-house counsel begins collecting the relevant documents. This approach may or may not be effective, depending upon the circumstances, including the prejudice, if any, caused by the failure to issue a legal hold.

Illustration iii: Qualum Industries owns various properties, completes its financial accounting for 2008, and files its tax returns. Under its record retention policy and supporting schedules, tax-related papers are held for five years or until that tax year's audit is complete (whichever occurs later), and documentation supporting its financial reports are held for eight years. In 2010, Qualum was audited by the IRS, and questions were raised about Qualum's valuation of certain of its properties, but no litigation was filed. If Qualum reasonably concludes that the information needed to respond to questions during the audit are being retained pursuant to the company's information management and retention policy, Qualum need not issue a formal legal hold. If, however, litigation is later filed – either by the government or by Qualum for a refund after an adverse agency determination, and it is reasonably likely that information beyond the parameters of the retained records may be necessary to address claims or defenses in the action, Qualum would then be well-advised to issue a legal hold.

Guideline 9. An organization should consider documenting the legal hold policy and, when appropriate, the process of implementing the hold in a specific case, considering that both the policy and the process may be subject to scrutiny by opposing parties and review by the court.

An organization should consider documenting both the legal hold policy and, when appropriate, the steps taken to ensure the effective implementation of specific holds. Considering issues regarding work product and attorney-client privilege, the documentation need not disclose strategy or legal analysis. However, sufficient documentation should be included to demonstrate to opposing parties and the court that the legal hold was implemented in a reasonable, consistent, and good faith manner should there be a need to defend the process. In most cases, the process of issuing and implementing the legal hold

and following up to preserve the data will provide sufficient documentation. If documentation of the legal hold process is deemed appropriate, it may include:

- The date and by whom the hold was initiated and possibly the triggering event
- The initial scope of information, custodians, sources, and systems involved
- Subsequent scope changes as new custodians or data are identified or initial sources are eliminated, and
- Notices and reminders sent, confirmations of compliance received (if any), and handling of exceptions.

In addition, in certain cases it may be appropriate to further document the process of how a specific legal hold was implemented. Examples may include:

- Description as to the collection protocol, persons contacted, and the date information was collected
- Notes (at least as to procedural matters) from any interviews conducted with employees to determine additional sources of information, and
- Master list of custodians, data stewards, and systems involved in the preservation effort.

While it may never be necessary to disclose this information, or disclosure may be made only to the court *in camera* to preserve privileged legal advice and work product information, the availability of documentation will preserve the option of the party to disclose the information in the event a challenge to the preservation efforts is raised and may provide a valuable resource when responding to discovery requests.

One reason to document the legal hold process and the implementation of it is to help avoid possible sanctions for the loss of relevant information. It can be very difficult for organizations to implement the legal hold and suspend or terminate routine operations of their large information systems to preserve relevant information before that information is deleted or overwritten in the normal course of operations.

Sanctions may be avoided under the Federal Rules if an organization can show that the information was lost by the routine operation of the information systems before a legal hold was instituted. Rule 37(e) provides that "absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide ESI lost as a result of routine, good-faith operation of an electronic information system." Thus, while the Rule "does not set preservation obligations," it does tell judges that a spoliation claim involving ESI "cannot be analyzed in the same way as similar claims involving static information."[76]

Effective invocation of Rule 37(e) will require parties, as part of their legal hold implementation, to take good faith steps to suspend ordinary destruction processes or auto-

76 Lee H. Rosenthal, *A Few Thoughts on Electronic Discovery After December 1, 2006,* 116 YALE L. J. 167, 174 (Supp. 2006).

delete functionality of systems.[77] There is a split in authority, however, on the issue of whether the existence of a preservation obligation per se excludes the application of Rule 37(e).

Accordingly, effective use of Rule 37(e) places a premium on the use of the legal hold process, which may include the ability to communicate such holds promptly and repeatedly and to monitor compliance with them. Without a defined process, the safe harbor will be difficult to invoke and may offer little safety at all.

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

Organizations should develop ways to regularly monitor a legal hold to ensure compliance. Some tools to accomplish this may include requiring ongoing certifications from custodians and data stewards, negative consequences for noncompliance, and audit and sampling procedures. Organizations may also consider employing technological tools, such as automated solutions and dedicated "legal hold" servers to facilitate and track employee compliance.

Organizations could also consider designating one or more individuals within the legal department to be responsible for issuing the legal hold notice, answering employee questions, and ensuring ongoing compliance with the notice. For smaller companies, outside counsel may be retained to perform this oversight function.

The effort to ensure compliance by affected employees is an ongoing process throughout litigation. This may include distributing periodic reminders of the legal hold and requiring employee confirmations, as well as issuing updated legal hold notices reflecting developments in the litigation itself or changes in the scope of the legal hold. As the number of custodians or other recommended recipients of the legal hold notice changes, it is important that the organization ensure that the expanded list of recommended recipients receives proper notification. Additional or revised notices should be promptly issued to persons who are added to the distribution.[78]

The argument is sometimes made that reliance on individuals to comply with preservation notices is unreasonable.[79] For example, a special master in a case involving a massive legal hold questioned the efficacy of preservation requirements that relied on recipients to move emails to avoid automatic deletion.[80] Another court expressed the view that "it is *not* sufficient to notify all employees of legal hold and expect that the party will then retain and produce all relevant information."[81] In *Pension Committee,*[82] the same court noted that "not every employee will require hands-on supervision from an attorney [but] attorney oversight of the process, including the ability to review, sample, or spot-check the collection efforts is important."[83]

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77 *Compare, e.g., KCH Servs. v. Vanaire*, 2009 WL 2216601 at *1 (W.D. Ky. July 22, 2009) (oral instruction to delete software that might evidence violation of law "falls beyond the scope of 'routine, good faith operation'" of Rule 37(e)) *with Southeastern Mechanical Servs. v. Brody,* 2009 WL 2242395 at *3 (M.D. Fla. July 24, 2009) (declining to impose sanctions where losses covered were not intentionally caused in bad faith). *Cf.* remarks of Judge Shira Scheindlin, Panel Discussion, *Sanctions in Electronic Discovery Cases: Views from the Judges,* 78 FORDHAM L. REV.1, 30-31 (Oct. 2009) ("[Rule 37(e)] says if you don't put in a litigation hold when you should there's going to be no excuse if you lose information.").

78 This parallels Guideline 8, Illustration i, on communicating changes in the scope of the legal hold.

79 *Treppel v. Biovail ("Treppel V"),* 249 F.R.D. 111, 115-118 (S.D.N.Y. 2008) (noting inadequacies of mere notification to employees of a legal hold).

80 *In re Intel,* 258 F.R.D. 280 (D. Del. 2008).

81 *Zubulake V, supra,* 229 F.R.D. 422 at 432 (S.D.N.Y. 2004).

82 2010 WL 184312 (S.D.N.Y. Jan. 15, 2010).

83 *Id*. at n. 68.

However, in most cases, a careful combination of notification, collection, and individual action should enable parties to rely on the good faith actions of their employees. In an analogous context in *Concord Boat v. Brunswick*,[84] the court held that "[t]he fact that Defendant allowed individual employees to use discretion whether to retain e-mail is simply not indicative of bad faith."

If the legal hold applies to information created on a going-forward basis and pertains to a matter that represents substantial benefits or risks to an organization, the organization may wish to consider alternative means of auditing compliance. For example, the process could include a certification requirement that must be signed by the person responding to the legal hold. For holds involving ongoing business activities and future data, organizations may consider a periodic certification program to ensure ongoing compliance.

Guideline 11. Any legal hold policy, procedure, or practice should include provisions for releasing the hold upon the termination of the matter at issue so that the organization can adhere to policies for managing information through its useful lifecycle in the absence of a legal hold.

An organization creating a legal hold process should include procedures for releasing the holds once that organization is no longer obligated to preserve the information that was subject to a legal hold. These release procedures should include a process for conducting a custodian and data cross check so the organization can determine whether the information to be released is subject to any other ongoing preservation obligations. Organizations may consider using automation software that can perform custodian, system, and data cross checking and provide for efficient legal hold management.

When the organization is satisfied that the information is not subject to other preservation obligations, notice that the hold has been terminated should be provided to the recipients of the original notice (and any modifications or updated notices), and to records management, IT, and other relevant personnel, as well as any third parties notified of their obligation to preserve. Organizations may wish to conduct periodic audits to ensure that information no longer subject to preservation obligations is not unnecessarily retained and is being appropriately disposed of in accordance with the organization's records and information management policy.

84 1997 WL 33352759 at *6 (E.D. Ark. Aug. 29, 1997).