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THE SEDONA CONFERENCE® COMMENTARY ON LEGAL HOLDS

The Trigger & The Process

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THE SEDONA COMMENTARY ON LEGAL HOLDS:
The Trigger and the Process

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Reasonable Anticipation of Litigation & Legal Holds

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[1] is reasonably anticipated, threatened or pending against an organization,[2] 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[3] ("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.[4]

The duty to preserve typically arises from the common law duty to avoid spoliation of relevant evidence for use at trial; the inherent power of courts; and court rules governing the imposition of sanctions. *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). Under Rule 37 of the Federal Rules of Civil Procedure, a party that violates a preservation order or an order to compel production, or otherwise fails to produce information, would be exposed to a range of sanctions.[5] However, Rule 37 also provides that "[a]bsent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide ESI lost as a result of the routine, good-faith operation of an electronic information system." The scope of this "safe harbor" and its impact on the duty to preserve relevant information remain to be seen as the rule only became effective on December 1, 2006.[6]

In addition to the common law duty to preserve relevant information in anticipation of litigation, preservation obligations may also be imposed by statutes or regulations. *See Byrnie v. Town of Cromwell Bd. of Education*, 243 F.3d 93, 108-09 (2d Cir. 2001) ("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."). *See also, e.g.,* 29 C.F.R. § 1602.14 ("Preservation of Records Made or Kept"); 18 C.F.R. § 125.2(l) ("[I]f a public utility or licensee is involved in pending litigation, complaint procedures, proceedings remanded by the court, or governmental proceedings, it must retain all relevant records."); 18 U.S.C. § 1519 (Sarbanes-Oxley Act § 802) ("Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within 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 title, imprisoned not more than twenty years, or both.").[7]

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[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] The proposed 2006 package of amendments to the Federal Rules of Civil Procedure were promulgated to address the discovery and production of "electronically stored information." While neither the amendments nor the accompanying Committee Notes explicitly define that phrase, it is understood to mean information created, manipulated, communicated, stored, and best utilized in digital form, requiring the use of computer hardware and software. Electronically stored information is distinguished from information derived from "conventional" media, such as writing or images on paper, photographic images, analog recordings, and microfilm. The distinctions between electronically stored information and conventional information are not based on the sophistication of the technology needed to create, present, or understand the information. After all, the creation and presentation of analog sound recordings or big-screen movies requires technology arguably as sophisticated as computers. The distinctions are in the unique ways digital information is created, modified, communicated, stored, and disposed of by computer systems. The distinctions are also in the ways that computer systems themselves have evolved and are continuing to evolve.

[4] Businesses and other entities must comply with a large number and wide variety of statutes and regulations that require the maintenance of various records in the ordinary course of business. For clarity, managing information where litigation is not involved will be referred to as "records management," while preserving information due to its relevance to litigation or governmental proceedings will be described as "preservation." In many instances the obligation to preserve relevant information will require the suspension of document destruction procedures set forth in records management policies.

[5] *See, e.g., William T. Thompson Co. v. General Nutrition Corp.*, 593 F. Supp. 1443, 1455 (C.D. Cal. 1984); *Danis v. USN Communications, Inc.*, No. 98 C 7482, 53 Fed. R. Serv. 3d (West) 828, 2000 WL 1694325, *1 (N.D. Ill. Oct. 23, 2000) ("fundamental to the duty of production of information is the threshold duty to preserve documents and other information that may be relevant in a case"). A few states also recognize the tort of spoliation. *See Fletcher v. Dorchester Mutual Ins. Co.*, No. 98497B,1999 WL 33579246 (Mass. Super. Dec. 10, 1999), affirmed, 773 N.E. 2d 420 (Mass. 2002) (reviewing state spoliation tort laws).

[6] The Committee Note acknowledges that a preservation obligation "may arise from many sources, including common law, statutes, regulations or a court order" and that when a party is under a duty to preserve, actions taken are aspects of "what is often called a 'litigation hold'."

[7] However, such record retention regulations do not necessarily create preservation obligations that are enforceable by private parties. Compare 17 C.F.R. § 240.17a-4 (SEC rule mandating retention of communications by members, brokers or dealers) with *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 322 n.70 (S.D.NY 2003) (plaintiff Zubulake held not to be an intended beneficiary of the records retention regulation at issue).

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 Article, intended to provide guidance on those issues, is divided into two parts: The "trigger" and the "legal hold."

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.[8] The guidelines are meant to provide the framework an organization can use to create its own preservation procedures. ***The guidelines are not intended and should not be used as a "checklist" or set of rules that are followed mechanically. Instead, they should guide entities in articulating a policy for implementing legal holds that is tailored to their individual needs.*** 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. These illustrations are not to be taken as "right answers" for the circumstances posed. Indeed, there may be other circumstances or the existence of other 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 as reasons for reaching a particular result.

[8] This article is in furtherance of and expands upon Principle 5 of The Sedona Principles: Best Practices, Recommendations & Principles for Addressing Electronic Document Production ("the Sedona Principles"), which emphasizes 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."

Guidelines

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.

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.

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 or 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."[9]

Determining when a duty to preserve is triggered is fact intensive and is not amenable to a one-size-fits-all or a checklist approach. A particular organization will likely not be able to resolve the question the same way each time it arises. In general, determining when the duty to preserve attaches will require an approach that considers a number of factors, including (but not necessarily limited to) the level of knowledge within the organization about the claim, the risk to the organization of the claim, the risk of losing information if a litigation hold is not implemented, and the number and complexity of sources where information is reasonably likely to be found. Weighing these factors will enable an organization to make a determination regarding when litigation is reasonably anticipated and when a duty to take affirmative steps to preserve relevant information has arisen.

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.

When the duty to preserve arises is often unambiguous. For example, the receipt of a summons or complaint; the filing of an EEOC charge by a current or former employee; formal notice that an organization is the target of a governmental investigation; receipt of a preservation notice letter from an opposing party; or receipt of a subpoena all can put an entity on notice that it has a duty to preserve relevant information.[10] On the plaintiff's side, a decision, for example, to send a cease and desist letter or to initiate litigation by filing a lawsuit triggers the plaintiff's duty to preserve. 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 duty to preserve may arise as to a third party when credible information is received that they possess relevant information that may be sought by one of the parties. However, there are circumstances when the threat of litigation is not credible and it would be unreasonable to anticipate litigation based on that threat. A mere possibility does not necessarily make litigation likely.[11] This Guideline suggests that 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.

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 which previously had not been reasonably anticipated (and consequently did not trigger a preservation obligation) is now 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 is practicable. *See, e.g.*, *Stevenson v. Union Pacific R.R. Co.*, 354 F.3d 739 (8th Cir. 2004).

To date, cases discussing pre-litigation preservation decisions have been fact-driven[12] and have not provided generalized guidance as to when and under what circumstances the pre-litigation duty actually arises. The recent amendments to the Federal Rules of Civil Procedure likewise have declined to directly address this issue.[13]

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[9] It has been suggested by some commentators that preservation obligations should not extend to the routine deletion of electronic documents until a discovery request or discovery order is pending. *See generally* Martin Redish, "Electronic Discovery and the Discovery Matrix," 51 Duke L.J. 561, 625-26 (2001) (arguing that the preservation obligation should be delayed because of the disruption caused by the need to engage in wholesale preservation of electronic documents). Such an approach recognizes that the costs of managing the information and reviewing the information for privilege can be significant, particularly when the claims are vague and have yet to be clearly defined by an opposing party. *See also* Rule 37(f), discussed *infra*, which restricts the imposition of sanctions under certain circumstances for the loss of electronic information due to the routine, good-faith operation of electronic information systems.

[10] *See Procter & Gamble Co. v. Haugen*, No. 1:95CV94 DAK, 2003 WL 22080734 (D. Utah Aug. 19, 2003).

[11] *See Cache la Poudre Fees v. Land O'Lakes*, Civ. No. 04-cv-00329-WYD-CBS, 2007 WL 684001 (March 2, 2007) (letter referencing potential "exposure" but not threatening litigation did not trigger obligation to preserve).

[12] *Compare Lewy v. Remington Arms*, 837 F.2d 1104, 1112 (8th Cir 1988) (particular circumstances created an ongoing obligation to preserve records that might become relevant in future) *with Concord Boat v. Brunswick*, No. LR-C-95-781, 1997 WL 33352759 (E.D. Ark. Aug. 29, 1997) (particular circumstances did not create an obligation to preserve pre-litigation email).

[13] The Advisory Committee on Civil Rules debated whether it could specify preservation obligations in the Federal Rules of Civil Procedure but ultimately decided it could not do so. Rather, the Committee opted to temper the impact of preservation obligations by protecting parties from the imposition of sanctions under the Rules for the failure to preserve certain materials in limited circumstances. *See* Committee Note, Rule 37(f) (reporting the Committee's views on what "good faith" obligations may require in terms of intervention in systems which routinely delete electronic information).

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 deemed to be reasonable or 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 founded or any of a number of similar facts. For example, the trigger point for a small dispute where the risk of litigation is minor might occur at a later point than for a dispute that is significant in terms of business risk or financial consequences.[14]

A reasoned analysis of all of the available facts and circumstances should precede a conclusion that litigation or a government inquiry is or is not "reasonably anticipated." That determination is, in the first instance, a fact-intensive evaluation that should be made by an experienced person in a position to 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 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."[15]

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 "threat." Whether an inquiry or detailed investigation is warranted will be fact driven and again 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 lacked credibility, the facts and circumstances may well suggest the prudence of making an inquiry or even conducting a reasonable investigation 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 v. UBS Warburg*, the court stated that UBS should have reasonably anticipated litigation *at the latest* when Ms. Zubulake filed a charge with the EEOC.[16] 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.[17]

In *Willard v. Caterpillar, Inc.*[18] the court examined a claim by a plaintiff repairman that the defendant tractor manufacturer should have preserved documents related to the design of the tractor, even though the model at issue had been out of production for twenty years and there had been "a negligible number" of accidents similar to the one that caused plaintiff's injury.[19] In concluding that Caterpillar did not engage in the tort of spoliation, the court observed that there is a "common understanding of society" regarding the wrongfulness of evidence destruction which is "tied to the temporal proximity between the destruction and the litigation interference and the foreseeability of the harm to the non-spoliating litigant resulting from the destruction."[20]

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[14] The likelihood of litigation when the dispute is small is reduced merely because the case is small. A dispute that has 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.

[15] *In re Hellenic, Inc.*, 252 F.3d 391, 395 (5th Cir. 2002).

[16] 220 F.R.D. 212, 216-17 (S.D.N.Y. 2003) ("Zubulake IV").

[17] It is also noted that 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.

[18] 40 Cal. App. 4th 892 (Cal. Ct. App. 1995),

[19] *Id.* at 895.

[20] Id. at 922, 923.

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.[21]

ILLUSTRATIONS

Illustration i: An organization receives a letter which 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. However, the duty to preserve on the part of the person who made the threat arose no later than the date the letter was sent.

Illustration ii: An organization receives a demand letter from an attorney which 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, 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 the letter was sent.

Illustration iii: An organization learns of a report in a reputable news media source that includes sufficient facts, consistent with information known to an organization, of an impending government investigation of a possible violation of law stemming from the backdating of stock options give 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.[22] 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 the letter was sent.

[21] *Id.* at 923.

[22] *See, e.g., Stevenson v. Union Pacific Ry.*, 354 F.3d 739 (8th Cir. 2004) (railroad reasonably knew that fatal crashes usually lead to litigation); *cf. Wal-Mart v. Johnson*, 106 S.W.3d 718 (Tex. 2003) (holding that, despite an investigation of customer injured by reindeer statues falling from shelf, Wal-Mart did not reasonably anticipate litigation as customer indicated no serious injuries upon leaving the store).

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

A policy setting forth a process for determining whether the duty to preserve information has attached can help ensure that whoever is charged with making that decision does so in a defensible manner. As stated in *The Sedona Principles*, Comment 1.a., "By following an objective, preexisting policy, an organization can formulate its responses to electronic discovery not by expediency, but by reasoned consideration."

While the particulars of the policy will necessarily be driven by the structure and culture of the organization, the key is to have a deliberative process that is followed. The steps taken to follow that deliberative process should be memorialized in a manner that the organization can readily defend the process and 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.

ILLUSTRATIONS

> ***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 in the threat, 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 memo to the file. In a subsequent challenge, the corporation is able to demonstrate that it had a policy and that it followed that policy in assessing the potential threat.

Guideline 3: The adoption of a process for the reporting a threat of litigation to a responsible decision maker is a factor that demonstrates reasonableness and good faith.

In any organization – but particularly in large organizations – there will be instances in which individuals within the organization 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 best to ensure that information relating to potential litigation is communicated to those charged with evaluating the threat and, if warranted, instituting 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 website accessible to all of its employees; the website allows employees to submit information they have regarding potential lawsuits against the company. The information 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 website and instructed that they should use it to report any relevant information. Westerberg Products can use these procedures to demonstrate its good faith effort to ensure that it is aware of litigation that it should reasonably

anticipate.

Illustration ii: Stinson Software is a small software developer with eight employees. Every day, all eight employees attend a staff meeting. A regular topic for discussion is whether any employee is aware of any threats of 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 procedures to demonstrate its good faith effort to ensure that it is aware of litigation that it should reasonably anticipate.

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

Making a determination as to whether litigation is reasonably anticipated requires consideration of many different factors. Depending on the nature of the organization making the analysis 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 position of 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 potential claim;
- The likelihood that data relating to a claim will be lost or destroyed;
- The significance of the data to the known or reasonably anticipated issues;
- Whether the company has learned of similar claims;
- The experience of the industry;
- Whether the relevant records are being retained for some other reason; and
- 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.

The preceding list of factors is not exhaustive; they and any other considerations must be weighed reasonably and in good faith in the context of what steps are reasonable and practicable as well as the scope and burden of an anticipated litigation hold.

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 and the relatively small effort it would take to preserve relevant information are considerations that may lead to the reasonable anticipation of litigation on the part of the music publisher.

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 concludes that litigation is not reasonably anticipated.

Guideline 5: Judicial evaluation of an organization's legal hold decision should be based on the good faith and reasonableness of the decision (including whether a legal hold is necessary and how the legal hold should be executed) at the time it was made.[23]

The reasonableness of an organization's determination 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 a decision is made. An organization seeking to make a determination whether it can reasonably anticipate litigation has no choice but to rely on the information available to it; consequently, whether that determination was reasonable should turn on that knowledge, and not other circumstances of which the organization was unaware.

ILLUSTRATIONS

***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.

[23] 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.

PART TWO: IMPLEMENTING THE LEGAL HOLD

Once the duty to preserve information arises, an organization must decide what to preserve and how to accomplish that preservation. In some circumstances, the duty to preserve requires only that a limited number of known historical documents be located and preserved. In other circumstances, the scope of the information is larger and the sources of the information may not be known to counsel.

The identification and preservation of potentially relevant information can be a complex undertaking that requires trained people, processes, and technology, particularly when ESI is at issue. This may include creating a legal hold team to identify the sources and custodians of potentially relevant information within the organization and define what needs to be preserved.

When implementing a legal hold, it is important to recognize that the duty to preserve extends only to relevant information. While relevance is broadly defined under the Federal Rules of Civil Procedure (*see* Fed. R. Civ. P. 26(b)(1)), it is not without limits. As noted by one court, there is no broad requirement to preserve information that is not relevant: "Must a corporation, upon recognizing the threat of litigation, preserve every shred of paper, every e-mail or electronic document, and every backup tape? The answer is clearly, 'no.' Such a rule would cripple large corporations."[24]

For large preservation efforts, a process that is planned, systemized and scalable is ideal, while an *ad hoc*, disjointed and/or manual process can result in undue burden and expense. An example of an inefficient process involves collecting immense amounts of information from every custodian, server and restored back-up tape without 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 finally processed and searched.

To develop an appropriate process for a large organization, business units, including legal, IT, and records management personnel, should be trained on the organization's legal hold policies and their responsibilities thereunder. Preservation and collection plans and protocols appropriate to the type of data and the manner in which it is maintained should be developed. These will necessarily vary based on the unique aspects of the systems and the data. Obtaining input from key members of the organization's IT staff in the design and implementation of the preservation protocol is important to establishing an effective process. This allows for a more complete and efficient collection of potentially relevant information. 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. Recent case law suggests that counsel (both in-house and outside) should work closely with the organization's IT and records management staff to ensure the effective preservation and collection of relevant ESI.[25]

The following guidelines are intended to help organizations formulate litigation hold procedures that are effective in ensuring that information subject to a preservation obligation is, in fact, preserved. As with the triggers of the legal hold, there is no one-size-fits-all answer to implementation of the legal hold. Rather, organizations must approach implementation of a legal hold in light of the particular documents and information in their possession, the nature of the litigation in which they expect to be involved, and the culture of the organization.

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[24] *Zubulake IV*, 220 F.R.D. at 217.

[25] *Zubulake V*, 229 F.R.D. at 422.

Guideline 6: When a duty to preserve arises, reasonable steps should be taken to identify and preserve relevant information as soon as is practicable. Depending on the circumstances, a written legal hold (including a preservation notice to persons likely to have relevant information) may be issued.

Once the determination has been made that there is a duty to preserve, the organization should identify what information should be preserved. The obligation to preserve electronic data and documents requires reasonableness and good faith efforts, but it is "unreasonable to expect parties to take every conceivable step to preserve all potentially relevant data."[26] The organization should consider all sources of information within its "possession, custody, and control," as defined by Fed. R. Civ. P. 34 and its state equivalents, that are likely to include relevant, unique information. The most obvious of these sources is information which the organization physically has in its possession or custody – for example, the file cabinets of documents in its office, the e-mails that reside on its servers located in its corporate headquarters — but also includes sources such as thumb drives and PDAs used by employees.

Other sources of information may include those within the physical possession or custody of third parties but, pursuant to contractual or other relationships, within the control of the organization. Examples include information held by outsourced service providers, storage facilities operators, and Application Service Providers (ASPs). With respect to those sources, the organization should consider providing a preservation notice to third parties that, based on reasonable inquiry, have possession and custody of unique information that is in the control of the organization and that is likely to be relevant.[27]

Courts may consider the actions taken by counsel to ensure compliance with a party's preservation obligation. The court in *Zubulake V* set forth three steps that counsel should take:

> *First*, counsel must issue a "litigation hold" at the outset of litigation or whenever litigation is reasonably anticipated. The litigation hold should be periodically re-issued so that new employees are aware of it, and so that it is fresh in the minds of all employees.
>
> *Second*, counsel should communicate directly with the "key players" in the litigation, i.e., the people identified in a party's initial disclosure and any subsequent supplementation thereto.
>
> * * * * *
>
> *Finally*, counsel should instruct all employees to produce electronic copies of their relevant active files. Counsel must also make sure that all backup media which the party is required to retain is identified and stored in a safe place.[28]

ILLUSTRATIONS

> ***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 ten years old. Strummer Holdings reasonably anticipates litigation relating to events that occurred nine years ago such that its preservation

[26] *See* Sedona Principle 5, *The Sedona Principles* (Second Edition 2007), *available at* www.thesedonaconference.org; *accord, Miller v. Holzman*, CA No. 95-01231 (RCL/JMF), 2007 WL 172327 (Jan. 17, 2007) (applying Sedona Principle 5 in context of Department of Justice failure to notify agency to retain information).

[27] *See*, *Keir v. UnumProvident*, No. 02 Civ 8781, 2003 WL 21997747 (S.D. N.Y. Aug. 22, 2003) (finding that defendant had failed to promptly notify manager of its electronic storage system of need to preserve ESI).

[28] *Id.* at 433-34 (internal citations omitted).

> obligations are triggered. If Strummer Holdings does not take steps to ensure that the relevant documents it has stored at Jones Storage are preserved, Strummer Holdings may be subject to sanctions for spoliation if any of those documents are destroyed.

An organization should consider whether a written legal hold notice is necessary to effectively implement the hold and preserve the requisite information. One factor to consider is whether the organization is a potential defendant, non-party witness or records custodian. Although a notice is likely to be necessary in many, if not most, instances, there are circumstances where a notice may not be necessary and, in fact, may be an encumbrance or source of confusion. Examples include situations in which all sources of likely relevant information are subject to permanent retention pursuant to the organization's record retention policy; and situations in which all sources of the information can be immediately secured without requiring preservation actions by employees.

In drafting a legal hold notice, special attention should be paid, where necessary, to information that is held in locations 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 transportation of information to the United States for discovery purposes. *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.

Guideline 7: In determining the scope of information that should be preserved, the nature of the issues raised in the matter, experience in similar circumstances and the accessibility of the information are factors that may be considered.

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." [29] The court explained that:

> In recognition of the fact that there are many ways to manage electronic data, litigants are free to choose how this task is accomplished. For example, a litigant could choose to retain 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 to catalog any later-created documents in a separate electronic file. That, along with a mirror-image of the computer system taken at the time the duty to preserve attaches (to preserve documents in the state they existed at that time), creates a complete set of relevant documents. Presumably there are a multitude of other ways to achieve the same result.[30]

Consideration should be given to the need to preserve the application software necessary to view documents where there is a likelihood such application software may not be available when the information needs to be produced at some later time.[31]

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[29] 220 F.R.D. at 218.

[30] *Id.* at 218.

[31] If it is determined to necessary to preserve information itself, then prudence would dictate the preservation of the software necessary to access that information.

There are several factors that can be weighed in balancing the benefits and burdens of the scope of a particular hold. These include the cost to preserve and potentially restore information; the number of individual custodians involved in the matter; the type and kind of information involved; and whether the hold is on active data, historical data, or future data, because the litigation involves future or ongoing business activities.

Accessibility of data is also a factor to be considered determining the scope of information to be preserved. Organizations should be cautious in determining whether to preserve inaccessible data; the Federal Rules Advisory Committee has stated that "[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."[32] This caution should be read in conjunction with Rule 37(f), 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.

Accessibility can include both technical and business process factors. For example, historical electronic data from legacy computer systems may be considered not reasonably accessible. Likewise, transient data that is not kept in the ordinary course of business, and which the organization has no means to preserve (e.g., voicemail and instant messaging) may also be considered not reasonably accessible.[33]

In instances where there are a large number of custodians or where there is ongoing business information subject to the legal hold (or both in combination), *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.

In instances in which collection of data at an initial stage is not warranted, reasonable, or feasible, communications and monitoring processes can 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 litigation hold compliance can be a useful tool to foster effectiveness of litigation holds.

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) **periodically reviewed and, when necessary, reissued in either its original or an amended form.**

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

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[32] Fed. R. Civ. P. 26(b)(2)(B) (2006 Committee Note).

[33] *See Convolve, Inc. v. Compaq*, 223 F.R.D. 162 (S.D.N.Y. 2004) (oscilloscope readings considered as ephemeral and not susceptible to recording and preservation in the ordinary course of business). *But compare Columbia Pictures Industries v. Justin Bunnel*, Case No. CV 06-1093 FMC (Jcx), 2007 U.S. Dist. LEXIS 46364 (May 29, 2007) (duty to preserve may extend to transitory information temporarily stored in RAM).

The legal hold notice and subsequent 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, including the potential penalties for noncompliance.[34] A legal hold notice should inform recipients who they should contact if they have questions or need additional information. Appendix B is a sample recipient preservation procedure document that includes detailed step by step instructions for a legal hold recipient to follow when responding. It includes a section for preserving e-mail and user documents that are potentially relevant to matter at hand. While this sample may be appropriate for some cases, it is not intended to be a "form" nor would the procedure set out in that sample be an appropriate procedure for every case. Again, each case must be evaluated based on its own individual facts and a preservation procedure adopted to conform to the facts and circumstance unique to that case.

Because of the distributed nature of ESI, a legal hold notice should be communicated to data users, records management personnel, Information Technology (IT) personnel, and other potentially knowledgeable personnel in addition to those who are identified as document custodians. Organizations should consider requiring confirmations of compliance with legal 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.

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 the relevant documents. Whenever new information is obtained regarding the litigation, 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 forty 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. She 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 ever issues. Litigation does not actually occur until eighteen months later; at that point, in-house counsel begins collecting the relevant documents. This legal hold is unlikely to be considered effective.

Guideline 9: The legal hold policy, and the process of implementing the legal hold in a specific case, should be documented considering that both the policy and the process may be subject to scrutiny by the opposing party and review by the court.

An organization should document both the general legal hold policy and the steps taken to ensure the effective implementation of specific legal 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. Such documentation for a specific legal hold may include:

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[34] 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).

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;

Notices and reminders sent, confirmations of compliance received (if any) and handling of exceptions;

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 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.

Another reason to document the legal hold process and the implementation of it is to 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. With the changes to the Federal Rules, sanctions may be avoided 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(f) 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." This provision places a premium on the legal hold process, which may include the ability to communicate legal 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: The implementation of a legal hold should be regularly monitored to ensure compliance.

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, negative consequences for noncompliance, and audit and sampling procedures. Organizations may also consider employing technological tools, such as legal hold automation software and dedicated "legal hold" servers to facilitate employee compliance with the legal hold and to track compliance.

Organizations should consider designating one or more individuals within the legal department who is responsible for dissemination of the legal hold notice, answering questions employees may have, and ensuring ongoing compliance with the legal hold notice. For smaller companies, outside counsel may be retained to perform this oversight function.

Compliance by affected employees, key custodians and outside counsel with the legal hold is an ongoing process throughout litigation. Essential steps include distribution of periodic reminders of the legal hold and consider 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 expands due to changes in the legal hold scope or in the workforce, it is important that the organization ensure that the expanded list of recommended recipients receive proper notification.

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 consider auditing compliance with the legal hold, particularly in circumstances where the legal hold requires individual employees to preserve categories of information that may not be subject to preservation in the ordinary course of their work. A typical preservation procedure will also include a certification of completion that must be signed by the person responding to the legal hold. For legal holds involving ongoing business activities and future data, organizations may consider a periodic certification program to ensure ongoing compliance. A sample certification can be in Appendix C. It is important to note that the "locations to search for potentially responsive material" is not a complete list, but simply an example.

Guideline 11: The legal hold process should include provisions for release of the hold upon the termination of the matter at issue.

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

When the organization is satisfied that the information is not subject to other preservation obligations, notice that the legal hold has been terminated should be provided to all recipients of the original legal hold notice (and any modifications or updated notices), and to records management, IT, and other relevant personnel. Organizations may wish to conduct periodic audits to ensure that information no longer subject to preservation obligations is not unnecessarily retained.

Appendix A: Summary of Guidelines

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.

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.

Appendix B: Sample Certification of Completion

CERTIFICATION TO THE GENERAL COUNSEL'S OFFICE

(This certification must be returned to [legal assistant] via e-mail, even if you do not have any responsive material)

I have read the above memorandum and have conducted a reasonable search for any responsive documents. I certify that since receiving notice from the General Counsel's Office regarding [**XYZ, Inc.**], I have not altered, discarded or destroyed any responsive documents in either paper or electronic form.

I further certify that I have searched the following locations for responsive documents *(Please check all boxes, as appropriate):*

Search Completed	LOCATION
	Local Area Server for my office
	Personal Share or Personal Folders on Server
	Dedicated Server for [**XYZ, Inc.**]
	Laptop and/or Office Computer
	Home Computer, Blackberry and/or PDA
	E-mail, including archived e-mail and sent e-mail
	E-mail Trash Bin, Desktop Recycle Bin
	Removable Storage Media, such as disks, CDs, DVDs, memory sticks, and thumb drives
	Office Files
	Personal Desk Files
	Files of any Administrative Personnel working for me
	Files located in my home

The result of my search is indicated below *(mark any items applicable)*:

_____ I have responsive material and have forwarded that material to the General Counsel's Office.

_____ Based on a reasonable search, I have no responsive material.

_____ _____ _____

Name *Office* *Date*

Appendix C: The Sedona Conference® Working Group Series & WGS℠ Membership Program

The Sedona Conference® Working Group Series ("WGS℠") represents the evolution of The Sedona Conference® from a forum for advanced dialogue to an open think-tank confronting some of the most challenging issues faced by our legal system today.

Working Groups in the WGS℠ begin with the same high caliber of participants as our regular season conferences. The total, active group, however, is limited to 30-35 instead of 60. Further, in lieu of finished papers being posted on the website in advance of the Conference, thought pieces and other ideas are exchanged ahead of time, and the Working Group meeting becomes the opportunity to create a set of recommendations, guidelines or other position piece designed to be of immediate benefit to the bench and bar, and to move the law forward in a reasoned and just way. Working Group output, when complete, is then put through a peer review process, including where possible critique at one of our regular season conferences, hopefully resulting in authoritative, meaningful and balanced final papers for publication and distribution.

The first Working Group was convened in October 2002, and was dedicated to the development of guidelines for electronic document retention and production. The impact of its first (draft) publication—*The Sedona Principles; Best Practices Recommendations and Principles Addressing Electronic Document Production* (March 2003 version)—was immediate and substantial. *The Principles* was cited in the Advisory Committee on Civil Rules Discovery Subcommittee Report on Electronic Discovery less than a month after the publication of the "public comment" draft, and was cited in a seminal e-discovery decision of the SDNY less than a month after that. As noted in the June 2003 issue of Pike & Fischer's *Digital Discovery and E-Evidence, "The Principles*...influence is already becoming evident."

The WGS℠ Membership Program was established to provide a vehicle to allow any interested jurist, attorney, academic or consultant to participate in Working Group activities. Membership provides access to advance drafts of Working Group output with the opportunity for early input, and to a Bulletin Board where reference materials are posted and current news and other matters of interest can be discussed. Members may also indicate their willingness to volunteer for special Project Team assignment, and a Member's Roster is included in Working Group publications. The annual cost of membership is only $295, and includes access to the Member's Only area for one Working Group; additional Working Groups can be joined for $295/Group.

We currently have active Working Groups in the areas of 1) electronic document retention and production; and 2) protective orders, confidentiality, and public access; 3) the role of economics in antitrust; 4) the intersection of the patent and antitrust laws; (5) *Markman* hearings and claim construction in patent litigation; (6) international issues in e-disclosure and privacy; and (7) Sedona Canada—electronic document production in Canada. *See* the "Working Group Series" area of our website for further details on our Working Group Series and the Membership Program.

> "DIALOGUE DESIGNED TO MOVE THE LAW FORWARD IN A REASONED AND JUST WAY."