

Consilio Institute: Practice Guide

HOLD ON: GET A GRIP ON CONDUCTING EFFECTIVE LEGAL HOLDS

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A LEGAL HOLD IS JUST A LETTER, WHAT COULD GO WRONG?

Legal holds remain a common source of issues for litigants, particularly with regard to the spoliation that can follow an ineffective or nonexistent legal hold and the question of whether reasonable efforts to preserve were taken. Some examples of the potential consequences include:

- ▶ Obstruction of justice charges
 - *United States v. Volkswagen AG*, No. 16-CR-20394 (USDC EDMI Jan. 11, 2017) ([Third Superseding Information](#) ¶¶ 22-25 and [Plea Agreement](#) at ¶¶ 73-82)¹
- ▶ \$2.7 million award of fees and costs
 - *Klipsch Group, Inc. v. ePRO E-Commerce Ltd.*, 880 F.3d 620 (2d Cir. Jan. 25, 2018)²
- ▶ Findings of failure to take reasonable steps to preserve in spoliation sanctions analyses
 - *Paisley Park Enter., Inc. v. Boxill*, 330 F.R.D. 226, (D. Minn. Mar. 5, 2019)³
 - *Cruz v. G-Star Inc.*, 2019 WL 2521299 (S.D.N.Y. June 19, 2019), modified by *Cruz v. G-Star Inc.*, 2019 WL 4805765 (S.D.N.Y. Sept. 30, 2019)⁴

From not covering the right materials, to not covering the right people, to not notifying the right third-party service providers, to not rolling the hold out properly – or at all, it’s clear that legal holds remain a minefield for litigants.



“Hold On, I’m Coming”

It’s true that legal holds do not preserve data themselves, but they are the critical first step in the preservation process, ensuring that materials survive in situ long enough for you and your team to go get them. You are literally saying to everyone – just as Sam & Dave sang in 1966: [“Hold On, I’m Coming”](#)⁵

But, as the examples above make clear, this is easier sung than done effectively. Today’s challenges include diversifying sources and source types (e.g., social media, collaboration tools), evolving custodian behavior (e.g., personal cloud storage, OTT messaging apps), and ever-increasing expectations (e.g., duties of competence extended to technology, new sources treated like old ones by judges).

¹ *United States v. Volkswagen AG*, No. 16-CR-20394 (USDC EDMI Jan. 11, 2017) (Third Superseding Information ¶¶ 22-25, available at <https://www.justice.gov/usao-edmi/page/file/930021/download>, and Plea Agreement at ¶¶ 73-82, available at <https://www.justice.gov/usao-edmi/page/file/930026/download>).

² *Klipsch Group, Inc. v. ePRO E-Commerce Ltd.*, 880 F.3d 620 (2d Cir. Jan. 25, 2018), available at <https://casetext.com/case/klipsch-grp-inc-v-e-pro-e-commerce-ltd-1>.

³ *Paisley Park Enter., Inc. v. Boxill*, 330 F.R.D. 226, (D. Minn. Mar. 5, 2019), available at <https://casetext.com/case/paisley-park-enters-inc-v-george-ian-boxill-rogue-music-alliance-llc-1>.

⁴ *Cruz v. G-Star Inc.*, 2019 WL 2521299 (S.D.N.Y. June 19, 2019), available at https://app.ediscoveryassistant.com/case_law/24556-cruz-v-g-star-inc, modified by *Cruz v. G-Star Inc.*, 2019 WL 4805765 (S.D.N.Y. Sept. 30, 2019), available at <https://casetext.com/case/cruz-v-g-star-inc-1>.

⁵ Sam & Dave, “Hold On, I’m Coming” (1966), available at <https://www.youtube.com/watch?v=AREppyQf5uw>.

WHAT MUST YOU PRESERVE, AND WHEN?

The Duty of Preservation

The duty of preservation is a foundational concept in our legal system that grows out of the common law concept of spoliation, which is [more than 200 years old](#)⁶:

- ▶ If courts exist to make determinations about disputed facts, and
- ▶ If the trier of fact must make those determinations using the available evidence,
 - Then, no litigant should be allowed to gain advantage in those determinations by destroying relevant evidence before the trier of fact can consider it

Additional discussion of the common law history of spoliation and preservation concepts is available in [The Sedona Conference Commentary on Legal Holds, Second Edition: The Trigger & The Process](#).⁷

Although this common law duty of preservation is not directly codified in the Federal Rules of Civil Procedure, it is dictated by implication in [Rule 26](#),⁸ [Rule 34](#),⁹ and [Rule 45](#).¹⁰ Together, these three rules define the potential scope of discovery for litigants and third parties, and anything the rules may require you to produce is, inherently, something you need to preserve.

So, what is the scope defined by those rules?

The Scope of the Duty

The scope of potential discovery – and, therefore, of the duty to preserve – is deliberately broad, which is

ABOUT THIS PRACTICE GUIDE

This practice guide will provide you with information to help you meet those challenges and achieve effective, consistent, and well-documented legal holds for your organization. We will review the duty of preservation, the essential elements of an effective hold, the processes and policies you should consider, the tools for hold issuance and tracking, and other issues.

consistent with our court system's emphasis on truth-seeking over gamesmanship. As stated in [one decision](#)¹¹ involving discovery sanctions:

Litigation is not a game. It is the time-honored method of seeking the truth, finding the truth, and doing justice. When a corporation and its counsel refuse to produce directly relevant information an opposing party is entitled to receive, they have abandoned these basic principles in favor of their own interests.

In its simplest form, the scope of discovery and preservation for ESI has four elements:

1. Documents
2. In your possession, custody, or control
3. That are potentially relevant
4. And unique

Documents

The definition of “documents” provided by the Federal Rules of Civil Procedure is expansive enough to encompass almost any sort of material in any format. [Rule 34\(a\)\(1\)\(A\)](#)¹² states that it covers “documents and electronically stored information – including”:

. . . writings, drawings, graphs, charts, photographs, sound recordings, images, and

⁶ *Armory v Delamirie*, [1722] EWHC KB J94 (31 July 1722), available at <https://www.bailii.org/ew/cases/EWHC/1722/J94.html>.

⁷ The Sedona Conference, *Commentary on Legal Holds, Second Edition: The Trigger & The Process*, 20 Sedona Conf. J. 341 (2019), available at https://thesedonaconference.org/publication/Commentary_on_Legal_Holds.

⁸ Fed. R. Civ. P. 26, available at https://www.law.cornell.edu/rules/frcp/rule_26.

⁹ Fed. R. Civ. P. 34, available at https://www.law.cornell.edu/rules/frcp/rule_34.

¹⁰ Fed. R. Civ. P. 45, available at https://www.law.cornell.edu/rules/frcp/rule_45.

¹¹ *Haeger v. Goodyear Tire & Rubber Co.*, 813 F.3d 1233 (9th Cir. 2016), available at <https://casetext.com/case/haeger-v-goodyear-tire-rubber-co-3>.

¹² Fed. R. Civ. P. 34(a)(1)(A), available at https://www.law.cornell.edu/rules/frcp/rule_34.

other data or data compilations – stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form . . .

The [Committee Notes](#)¹³ on the rule emphasize the broadness again:

The rule covers – either as documents or as electronically stored information – information “stored in any medium,” to encompass future developments in computer technology. Rule 34(a)(1) is intended to be broad enough to cover all current types of computer-based information, and flexible enough to encompass future changes and developments.

References elsewhere in the rules to “electronically stored information” should be understood to invoke this expansive approach.

Thus, nothing can be overlooked based purely on its format or source type; everything is potentially subject to the duty.

Possession, Custody, or Control

In addition to defining the broad scope of “documents,” [Rule 34\(a\)\(1\)](#)¹⁴ also specifies that the scope of discovery and preservation extends to those documents within “the responding party’s possession, custody, or control.” This phrase means that you are responsible, not just for the materials you physically or electronically possess, but for any that you legally control. Thus, materials maintained by third parties on your behalf are treated the same way as the records you actually possess yourself. If you have the right (or, in some cases, the ability) to obtain it, you are responsible for preserving and producing it.

Unfortunately for parties, there is some variation from jurisdiction to jurisdiction in exactly how far

“possession, custody, or control” is deemed to extend. The three common standards – “Legal Right,” “Legal Right Plus Notification,” and “Practical Ability” – and their areas of applicability are broken down in detail in [The Sedona Conference Commentary on Rule 34 and Rule 45 Possession, Custody, Or Control](#).¹⁵

Potentially Relevant

Among the “documents” that are in your “possession, custody, or control,” the ones that may be discovered and must be preserved are those that are relevant.

Relevance is defined broadly by [Federal Rule of Evidence 401](#).¹⁶ That rule dictates that evidence is relevant if “it has any tendency to make a fact more or less probable than it would be without the evidence” and “the fact is of consequence in determining the action.” The [Committee Notes](#)¹⁷ to the rule state explicitly that this is an intentionally low bar because “[a]ny more stringent requirement is unworkable and unrealistic.”

Thus, any documents in your possession, custody, or control that have any tendency to make any fact of consequence more or less likely are relevant, potentially discoverable, and required to be preserved.

Unique

Finally, the scope of potential discovery and required preservation is limited to materials meeting the above criteria that are also unique. As specified by [Rule 26\(b\)\(2\)\(C\)](#),¹⁸ discovery is not meant to be “unreasonably cumulative or duplicative.” For ESI in particular, this is important, as it is in the nature of electronic systems to create numerous identical copies of materials, both for operation and for backup. Generally, there will be no additional evidentiary value to preserving numerous identical copies of the same materials.

¹³ Fed. R. Civ. P. 34 advisory committee’s note, available at https://www.law.cornell.edu/rules/frcp/rule_34.

¹⁴ Fed. R. Civ. P. 34(a)(1), available at https://www.law.cornell.edu/rules/frcp/rule_34.

¹⁵ The Sedona Conference, *The Sedona Conference Commentary on Rule 34 and Rule 45 “Possession, Custody, or Control,”* 17 Sedona Conf. J. 468, 482 (2016), available at https://thesedonaconference.org/publication/Commentary_on_Rule_34_and_Rule_45_Possession_Custody_or_Control.

¹⁶ Fed. R. Evid. 401, available at https://www.law.cornell.edu/rules/fre/rule_401.

¹⁷ Fed. R. Evid. 401 advisory committee’s note, available at https://www.law.cornell.edu/rules/fre/rule_401.

¹⁸ Fed. R. Civ. P. 26(b)(2)(C), available at https://www.law.cornell.edu/rules/frcp/rule_26.

Other Limitations

Beyond those four elements, there are two additional potential limitations on the scope of discovery that are less relevant to the question of preservation scope:

- ▶ First, as specified in [Rule 26\(b\)\(1\)](#),¹⁹ the scope of discovery is limited to that which is “proportional to the needs of the case.” Because any disputes over proportionality cannot be identified and resolved by the court until the matter is already underway, parties should not be quick to assume disproportionality and skip preservation.
- ▶ Second, as specified in [Rule 26\(b\)\(2\)\(B\)](#),²⁰ “[a] party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost.” This is another type of proportionality requirement, specifically for electronically stored information, which recognizes that data recovery from some obsolete or challenging systems can be costly and burdensome. As with the general proportionality requirement, any disputes over proportionality cannot be identified and resolved by the court until the matter is already underway.

Preservation can always be stopped if it's later determined to be unnecessary, but lost data can never be recovered if it's later determined to have been necessary after all.

Triggers for the Duty

The duty to preserve documents often arises before a case is actually filed or commenced, because the duty arises not when there is litigation but when there is reasonable anticipation of litigation (or agency action, etc.). As explained in “Guideline 1” of [The Sedona Conference Commentary on Legal Holds](#)²¹:

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.

Examples of triggering events include discovery of a legal or regulatory violation by an employee, receipt of a legal hold notice from a regulatory agency, hearing a terminated employee threaten suit, receipt of an actual complaint or subpoena, and many more.



¹⁹ Fed R. Civ. P. 26(b)(1), available at https://www.law.cornell.edu/rules/frcp/rule_26.

²⁰ Fed R. Civ. P. 26(b)(2)(B), available at https://www.law.cornell.edu/rules/frcp/rule_26.

²¹ The Sedona Conference, *Commentary on Legal Holds, Second Edition: The Trigger & The Process*, 20 Sedona Conf. J. 341 (2019), available at https://thesedonaconference.org/publication/Commentary_on_Legal_Holds.

WHAT SHOULD BE IN THE HOLD?

Evolution of Expectations

Formal, written legal holds became the focus of much attention in eDiscovery after the [Zubulake V](#)²² ruling in 2004, in which a party was sanctioned for failing to issue a hold or take other necessary steps to ensure the preservation of relevant materials. In [subsequent years](#),²³ this decision was cited in numerous others, and written legal holds became central to an effective eDiscovery preservation process.

For a time, the failure to issue a written legal hold was [treated as per se gross negligence](#).²⁴ That absolute requirement for a hold in writing was softened by subsequent cases, however, which allowed for the possibility of circumstances in which oral holds or other approaches to preservation may be appropriate. See, e.g., [Chin v. Port Auth. of N.Y. & N.J., 685 F. 3d 135 \(2nd. Cir. July 10, 2012\)](#).²⁵

Six Essential Elements of Holds

Despite the allowances for such circumstances, the issuance of a written legal hold (whether in paper or via email) is still considered best practice and the standard first step in any preservation process. Those legal holds can take a variety of forms and include a variety of optional content.

At root, though, all written legal holds should contain six essential elements. Each of these elements needs to be explained clearly and specifically:

1. First, the written hold should explain the legal obligations associated with the hold. This should include some explanation of the duty to preserve, the legal consequences for the organization if it is not fulfilled, and any internal consequences for employees who violate it. It is often helpful to point out that a request for individuals to preserve materials is a common legal step and not an indication that recipients are in any trouble.
2. Second, the written hold should explain the substantive scope of what must be

preserved. This may include describing the underlying events, the relevant individuals inside and outside the organization with whom communication may have taken place, and more. This should also include the applicable time range, if any, and whether the hold applies going forward to newly created materials as well.

3. Third, the written hold should explain the types of materials that need to be preserved. This should include lists of relevant devices (e.g., laptops, phones, thumb drives), of relevant file types (e.g., email, spreadsheets, text messages), and of expected kinds of documents (e.g., internal financial reports, deal negotiation messages, annotated contract drafts, etc.).
4. Fourth, the written hold should explain the process that will be used for preserving and collecting the subject materials. These are the specific instructions the recipients of the hold are to follow for handling the materials they possess that are subject to the hold. Should

²² *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422 (S.D.N.Y. 2004), available at <https://casetext.com/case/zubulake-v-ubs-warburg-llc-3>.

²³ Victor Li, "Looking back on Zubulake, 10 Years Later," ABA Journal (Sept. 1, 2014), available at http://www.abajournal.com/magazine/article/looking_back_on_zubulake_10_years_later.

²⁴ Rachel S. Fendell, *Impact Of Chin Decision On Pension Committee*, Mondaq, <https://www.mondaq.com/unitedstates/disclosure-electronic-discovery-privilege/190306/impact-of-chin-decision-on-pension-committee> (Aug. 6, 2012).

²⁵ *Chin v. Port Auth. of N.Y. & N.J.*, 685 F. 3d 135 (2nd. Cir. July 10, 2012), available at https://scholar.google.com/scholar_case?case=11269039069845908318.

they preserve them in place? Segregate them in some way? Take other steps? When and how will they be contacted about collection of those materials?

5. Fifth, the written hold should explain how and with whom the recipients may communicate about the hold. This should include both any prohibitions on communication about the hold or the underlying matter with peers, as well as instructions for who should be contacted with any questions about scope or process. This is especially important if you wish to treat the hold as a privileged communication.
6. Sixth and finally, the written hold should request some type of confirmation from the recipient that they have received the hold, reviewed the hold, and will abide by the hold. This confirmation of receipt and compliance may take the form of a sheet that is signed and returned, an email response, on online form, or some other mechanism.

It is important to remember that the hold must cover not only the devices and materials of individual custodians, but also departmental and enterprise systems and any automated janitorial functions that may be running on them. We will discuss this further below.

Other Components to Consider

In addition to the essential elements described above, there are a variety of optional elements you can include to accomplish more with the distribution of your legal hold. The two most commonly included additions are:

Custodian Surveys for Collection

Many organizations also use the distribution of the written legal hold as an opportunity to begin gathering details for collection planning. They distribute some form of custodian questionnaire with the hold and require its completion as well. These may be created

as paper questionnaires, electronic forms, or online surveys, and they can take the place of initial interviews for many custodians.

Frequently Asked Questions

Employees of an organization who have not been through a legal hold process before typically have little familiarity the process or its role in discovery and litigation. Questions about it are common, as are questions about scope and process. To aid employees in their understanding, many organizations draft an FAQ (Frequently Asked Questions) for distribution with the hold.

This FAQ typically restates much of the information from the hold in a less formal way and attempts to anticipate and answer the likely questions about context, scope, and process.

Six Elements

Written legal holds should generally contain six essential elements: legal obligations, substantive scope, materials to be preserved, preservation process, communication instructions, and a compliance confirmation.



I LEGAL HOLD PROCESSES AND POLICIES

Documentation, Consistency, and Defensibility

To consistently execute effective legal holds, there are five key activities for which reliable processes need to be in place, and if possible, they should each also be addressed by a written hold policy. Consistency is key to defensibility, and documentation is key to consistency. As [The Sedona Conference Commentary on Legal Holds](#)²⁶ states clearly in its guidelines:

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 9

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

The five key activities to address in this way are hold initiation, hold drafting, recipient identification, compliance monitoring, and hold release.

Initiation: The Holding Hour Is Upon Us

We have already discussed the potential range of triggering events for the duty to preserve, but what happens when one occurs? How does word filter to the appropriate individual? Who is the individual responsible for taking action? What actions do they take to initiate the process? Are the initial steps

internal, or executed with outside counsel? On what timeline do they act?

Establishing a consistent, reliable process and policy for hold initiation requires that each of these questions be addressed. Many organizations establish three components to address this activity:

²⁶ The Sedona Conference, *Commentary on Legal Holds, Second Edition: The Trigger & The Process*, 20 Sedona Conf. J. 341 (2019), available at https://thesedonaconference.org/publication/Commentary_on_Legal_Holds.

1. An organizational policy dictating when legal holds should be implemented
2. A legal department process for initiating legal hold creation and issuance
3. An employee handbook policy describing employees' duty to report certain incidents

Together, these three components can go a long way towards demonstrating reasonableness and good faith in your efforts. As [The Sedona Conference Commentary on Legal Holds](#)²⁷ states in Guideline 3: "Adopting a procedure for reporting information relating to possible litigation to a responsible decision maker may assist in demonstrating reasonableness and good faith."

Drafting: Get It in Writing

The next activity that can benefit greatly from a standardized process and a documented policy is the drafting of the hold to be issued. Once the responsible individual has identified a triggering event and started down the road to hold issuance, who will actually be responsible for drafting? Who will contribute to the legal substance? Who will address technical questions about subject source types or affected enterprise systems? Who will address any cross-border or data privacy concerns?

Ultimate responsibility for the contents of the legal hold typically rests with an organization's general counsel and the lead outside counsel for the matter, which is typically documented in the organization's overall legal hold policy. Additionally, it is common for a legal department to have a documented process for drafting to help ensure consistency and completeness. Common topics addressed include:

- ▶ People to Involve
 - Inside and outside counsel, IT/IS, RM/KM, compliance, data protection officer, discovery service providers, etc.

- ▶ Potential Sources to Flag
 - Potential custodian devices and files, departmental systems and files, enterprise systems, backup systems, third-party service providers, etc.
- ▶ Collection Methods to Specify
 - Techniques and providers approved for organizational use from which to choose
- ▶ Other Potential Issues to Consider
 - Cross-border implications, data privacy implications, employee turnover issues
- ▶ Standardized Templates to Use
 - Legally vetted templates for a standard hold and for any recurrent matter types

Having a consistent process that includes input from the right individuals, consideration of all common issues, and the use of predefined approaches and templates can go a long way towards both ensuring effectiveness and demonstrating reasonableness and good faith in your efforts.

Identification: All Key Players, Please Step Forward

The next activity for which a repeatable process is essential is identification of the appropriate hold recipients. Even a timely and well-written hold will not be effective if it does not reach everyone it needs to reach. So, who does it need to reach? Does it need to go to the entire company? To a particular department? To specific individuals? What about executive management? Who is responsible for relevant enterprise information systems? Are there outside, third-party recipients that need to be added too?

Since [Zubulake V](#)²⁸ in 2004, the phrase "key players" has been used to describe the essential recipients of a legal hold within an organization. Key players are those with the direct knowledge of the underlying events or those

²⁷ The Sedona Conference, *Commentary on Legal Holds, Second Edition: The Trigger & The Process*, 20 Sedona Conf. J. 341 (2019), available at https://thesedonaconference.org/publication/Commentary_on_Legal_Holds.

²⁸ *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422 (S.D.N.Y. 2004), available at <https://casetext.com/case/zubulake-v-ubs-warburg-llc-3>.

most likely to have relevant information or materials. This is often, but not always, managers and executives.

[Even plant-level employees have been deemed key players when they had relevant knowledge.](#)²⁹

It is not always possible to identify all key players in the abstract; you may need to communicate with some or all of the key players and ask for referrals to others. Depending on the sequence of events, this may mean sending the hold to additional recipients after the initial distribution, as you learn new details. Other common pitfalls include:

- ▶ **Enterprise and departmental systems** – organizations may have any number of enterprise systems (e.g., email, backup, or document management) and departmental systems (e.g., benefits, payroll, research, or compliance), each with different owners and their own automated janitorial functions (or tape recycling schedules) continually deleting older files, which will need to be suspended if any relevant materials are at risk
 - *Each owner responsible for systems containing relevant information will need to be a recipient of the hold to ensure those mechanisms of deletion are halted*
- ▶ **Third-party providers** – organizations very commonly outsource one or more business functions, like payroll or benefits (or even email), to specialized third-party providers, and the data they possess on your organization's behalf is subject to the same duty to preserve, as we discussed above
 - *Third-party service providers in possession of potentially-relevant materials will need to be recipients of the legal hold as well, and your service contracts with them may specify particular notice procedures to follow for each provider*
- ▶ **Employee turnover** – employee departure is a common occurrence in organizations

of almost any size, and many organizations wipe and reissue employee devices when that happens (and deactivate email accounts, CRM accounts, etc.), which is a problem if the individual was subject to a legal hold and unique, relevant materials are lost in the process

- *Whoever in HR or IT typically handles these steps also needs to be a recipient of the hold and be generally kept informed about active holds that should change normal device recycling steps, account deactivation steps, etc.*

Monitoring: Once Is Never Enough

Ongoing compliance monitoring after hold issuance is the activity for which it is most important to have a consistent, documented process. As has been made clear in case after case, failure to check if individuals are actually complying, or failure to remind them as needed, can be just as consequential as failure to issue the hold in the first place.³⁰

Common steps to ensure ongoing compliance with the hold include:

- ▶ **Receipt and compliance verification** – having employees sign a document or electronic form, or send an email, confirming that they have received the hold, understood the hold, and will comply with the hold; this is typically covered as part of the hold itself, as discussed above
 - The same can be applied to those responsible for suspending janitorial functions on enterprise or departmental systems, including backup systems and tapes
- ▶ **Spot checking** – it also advisable to establish a regular schedule for checking in with at least a sampling of the subject custodians (checking everyone may not be feasible) to check that they are in fact complying and materials are being preserved

²⁹ See, e.g., *Consolidated Aluminum Corp. v. Alcoa, Inc.*, 244 F.R.D. 335 (M.D. La. 2006), available at <https://casetext.com/case/consolidated-aluminum-corporation-v-alcoa>

³⁰ See, e.g., *Pension Committee of University of Montreal Pension Plan v. Banc of America Securities*, 685 F. Supp. 2d 456 (S.D.N.Y. Jan 15, 2010), available at <https://www.courtlistener.com/opinion/1881971/univ-of-montreal-pension-plan-v-banc-of-am-sec/>; *Chin v. Port Auth. of N.Y. & N.J.*, 685 F. 3d 135 (2nd. Cir. July 10, 2012), available at https://scholar.google.com/scholar_case?case=11269039069845908318.

- ▶ **Reissuance** – since legal matters and the holds associated with them can continue for months or years, it is also advisable to establish a schedule for periodic reissuance of the hold as a reminder to those it covers (quarterly is common); the specific scope of the hold may also need to be revised as a legal matter evolves and more is learned

As we noted at the beginning, a legal hold is not itself preservation, and if it is not followed by the other steps necessary to ensure actual preservation takes place – like ongoing compliance monitoring, then whether or not a hold was issued doesn't really matter.

Release: When All Is Said and Done

Finally, it is valuable to have a standardized process, documented in a policy, for the release of legal holds after a matter has concluded. [The Sedona Conference Commentary on Legal Holds](#)³¹ includes this in Guideline 11:

Trust But Verify

Ongoing compliance monitoring is the activity for which it is most important to have a documented process. Failure to monitor compliance, can be just as consequential as failure to issue a hold in the first place.

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

Having a consistent standard and a defined process for the review of when to release a legal hold can do a lot to demonstrate good faith in your preservation efforts. The three key factors to consider before deciding to release a legal hold are:

1. Whether there are any remaining court or agency orders requiring retention
2. Whether there is a possibility of related future litigation (e.g., appeal, new suit)
3. Whether the materials being preserved are potentially relevant to any other matters

If there are no applicable orders, no reasonably foreseeable future litigation, and no reason to preserve for other matters, then a hold can be released and an organization can revert to its default management, retention, destruction, and recycling policies for documents and devices.

³¹ The Sedona Conference, *Commentary on Legal Holds, Second Edition: The Trigger & The Process*, 20 Sedona Conf. J. 341 (2019), available at https://thesedonaconference.org/publication/Commentary_on_Legal_Holds.

I METHODS FOR DISTRIBUTING LEGAL HOLDS

Paper

The first and simplest tool available for legal holds is, of course, paper. Before the advent of the options discussed below, paper holds, signed paper confirmations, and paper reminders were the norm, and for smaller organizations (e.g., those in a single office location), paper may still be a good choice. It is simple and inexpensive to create, distribute, and document holds in this fashion. For larger or more geographically-distributed organizations, paper can quickly become logistically cumbersome and time consuming, however.

Email

As consistent, universal email usage became typical, the same processes were executed using messages in the body of emails – holds distributed as emails, confirmation responses done as reply emails, etc. This is also a suitable approach for small or medium organizations, and email lets you easily extend the simple approach of paper beyond a single office location. For larger organizations, however, manually tracking the number of emails back and forth that will be required can become just as logistically cumbersome as distributing and collecting paper.

Electronic Forms

For medium or large organizations, it is now common to create and use electronic forms rather than just paper or emails. These are forms with defined fields that allow recipients to electronically “sign” the forms and then fill out any other requested information (e.g., preliminary custodian survey information). Standard field entries make the aggregation and tracking of the responses much easier than it is with loose paper or emails. These types of forms are most often created

as [Adobe PDF files](#)³² or as [Microsoft Excel files](#).³³

Each has advantages and disadvantages, but the current trend seems to be toward PDF forms, which are arguably easier to build and which look more like traditional paper forms to recipients.

Purpose-Built Tools

Today, there are also a variety of purpose-built tools specifically for creating, distributing, and managing legal holds. There are more than a dozen offerings of this type in the marketplace, and more are sure to appear as the industry continues to grow. Some of these are standalone applications, some are SaaS solutions, and some are modules integrated into larger litigation management or eDiscovery software suites. All of them provide a measure of automation and standardization for the creation, distribution, tracking, and refreshing activities, allowing an organization to centrally manage the numerous simultaneous holds common to large organizations.

Scale to Fit

For mid-size organizations, it is common to use electronic forms rather than paper or emails, and for large organizations, a variety of purpose-built tools are available.

³²Create and distribute PDF forms,” Adobe Support (Sept. 7, 2022), available at <https://helpx.adobe.com/acrobat/using/creating-distributing-pdf-forms.html>.

³³Overview of forms, Form controls, and ActiveX controls on a worksheet,” Microsoft Support, available at <https://support.office.com/en-us/article/Overview-of-forms-Form-controls-and-ActiveX-controls-on-a-worksheet-15ba7e28-8d7f-42ab-9470-ffb9ab94e7c2>.

I WHAT ABOUT PRIVILEGE?

In most situations, legal hold notices are communications from an in-house counsel or an outside counsel to employees of an organization, which brief them on a legal situation and the need to hold materials for it. As such, legal hold notices are typically considered both privileged attorney-client communications (because they are the communication of legal guidance) and protected attorney work product (because they reveal the attorney's thinking about the matter).

This general principle can be seen applied in numerous cases. For example, [*Gibson v. Ford Motor Co.*, 510 F. Supp. 2d 1116 \(N.D. Ga. 2007\)](#)³⁴ includes the following passage discussing a request for the production of legal hold notices issued by the Defendants:

Plaintiffs request the document sent to Defendant's employees instructing them not to destruct certain kinds of documents required to be maintained as a result of this litigation. . . . In the Court's experience, these instructions are often, if not always, drafted by counsel, involve their work product, are often overly inclusive, and the documents they list do not necessarily bear a reasonable relationship to the issues in litigation. This is not a document relating to the Defendant's business. Rather, the document relates exclusively to this litigation, was apparently created after this dispute arose, and exists for the sole purpose of assuring compliance with discovery that may be required in this litigation. Not only is the document likely to constitute attorney work-product, but its compelled production could dissuade other businesses from issuing such instructions in the event of litigation. Instructions like the one that appears to have been issued here insure the availability of information during litigation. Parties should be encouraged, not discouraged, to issue such directives. Defendants are not required to produce these materials.

In some situations, these protections may not be afforded, however. For example: if the hold notice is sent by a non-lawyer executive rather than counsel; if the hold notice specifies that it is not confidential and should be shared with co-workers; or, if spoliation has taken place, requiring further discovery about the reasonableness of preservation efforts.

“Not only is the document likely to constitute attorney work-product, but its compelled production could dissuade other businesses from issuing such instructions in the event of litigation.”

³⁴ *Gibson v. Ford Motor Co.*, 510 F. Supp. 2d 1116 (N.D. Ga. 2007), available at https://scholar.google.com/scholar_case?case=17383954170793254828.

I EVOLUTION IS ENDLESS

We have touched a few times on the diverse range of potential sources that now exist and that must be considered for coverage by the hold. In addition to remembering to think about newer source types like OTT messaging applications and collaboration tools, the deliberately-expansive definition of “documents” used by the rules means that you must also account for the fact that technology and your custodians’ use of it is constantly evolving.

Because of this reality, your list of sources and source types to consider must evolve over time too. Your

documented processes should include periodic review of your potential source lists (e.g., annually) to see if they need to be updated with newly acquired enterprise tools, new kinds of employee devices, or emerging technologies (e.g., apps, cloud services) being adopted by your custodians. To do this effectively, you will need to consult with your enterprise IT resources, who can provide updates on the organization, and your forensic collection service providers, who can provide updates on global usage trends and evolving industry expectations.



KEY TAKEAWAYS

There are eight key takeaways from this white paper to remember:

- 1 Failures to implement effective legal holds can carry serious consequences.**
Failure to implement an effective legal hold can lead to determinations that reasonable steps to preserve were not taken, to adverse inferences and other sanctions, or even to criminal obstruction charges.
- 2 The scope extends to all potentially-relevant documents within your control.**
The scope of the duty of preservation extends to all unique, potentially-relevant documents or ESI – of any type – in your possession, custody, or control (which includes materials held by third-party service providers).
- 3 The duty is triggered whenever there is a reasonable anticipation of litigation.**
The duty of preservation is triggered whenever there is a reasonable anticipation of litigation (or agency action, etc.), which can happen well before a case is filed.
- 4 There are six essential elements that should be included in a legal hold.**
An effective legal hold should include information regarding: (1) the legal obligations associated with the hold; (2) the substantive scope of what must be preserved; (3) the types of materials that must be preserved; (4) the process that is to be used for preservation and collection; (5) how and with whom recipients may communicate about the hold; and, (6) a receipt and compliance confirmation mechanism. Additionally, you may consider including custodian surveys for collection or frequently asked questions.
- 5 Documented, consistent processes are more reliable and more defensible.**
Consistent processes are more defensible than ad hoc ones, and documented processes are more defensible still. Ideally, both overall written policies and project-by-project process documentation should be created and maintained.
- 6 There are five core hold activities for which such processes should be developed.**
Hold initiation, hold drafting, recipient identification, compliance monitoring, and hold release are the key activities for which consistent, documented processes should be created. In particular, ongoing monitoring of hold compliance is crucial to success.
- 7 Available tools include paper, email, electronic forms, and purpose-built tools.**
Your options for hold implementation tools range from paper to purpose-built software, and the right choice will depend heavily on the size of your organization, the size (or number) of your matter(s), and other situation-specific considerations (e.g., compatibility with existing enterprise systems or eDiscovery tools).
- 8 Technology is always evolving, and we must evolve with it.**
Your lists and plans must be periodically reviewed and updated to reflect new enterprise tools, new employee devices, and new communication technologies in the marketplace.

ABOUT THE AUTHOR

Matthew Verga is an attorney, consultant, and eDiscovery expert proficient at leveraging his legal experience, his technical knowledge, and his communication skills to make complex eDiscovery topics accessible to diverse audiences. A fifteen-year industry veteran, Matthew has worked across every phase of the EDRM and at every level, from the project trenches to enterprise program design. As Director of Education for Consilio, he leverages this background to produce engaging educational content to empower practitioners at all levels with knowledge they can use to improve their projects, their careers, and their organizations.



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