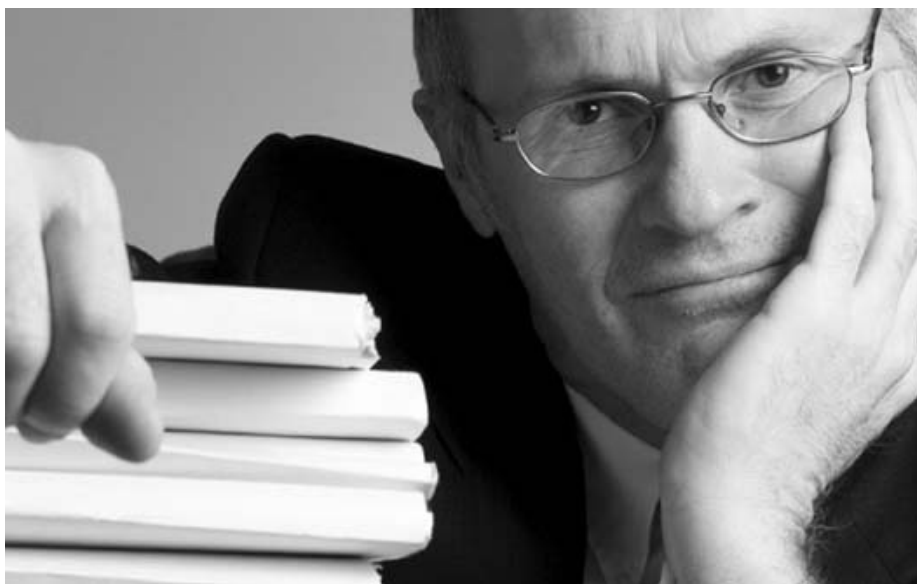


# Litigation or Legal Holds for Reasonably Anticipated or Actual Litigation

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# **LITIGATION OR LEGAL HOLDS FOR “REASONABLY ANTICIPATED” OR ACTUAL LITIGATION**

## **INTRODUCTION**

The litigation hold process is exactly that – it is a process. It has a starting point, a middle point, and an ending point. The start of this process is when an organization learns of, and investigates, a possible threat of litigation, audit, government investigation, administrative proceeding, or other such matter (the “Event”). The middle of this process is when, after investigating the possible Event, the organization concludes, or reasonably should conclude, that the Event is imminent, or is “reasonably anticipated.” At this point, the duty to preserve relevant and discoverable information immediately attaches and includes the obligation to identify, locate, and maintain documents or other materials that fall within the scope of the duty. Also included in this part of the process – but outside the scope of this paper – are the acts of collecting, reviewing, producing, etc. relevant and discoverable information. The middle part of this process typically requires the most involvement of an organization and any third parties it has engaged to assist it, and this part of the process continues until the end of the Event. Finally, the end of this process, which is also outside the scope of this paper, is when the Event is final, including any appeals.

The litigation hold process is very, very, very fact specific. Whether an organization needs to engage in the process at all, and, if so, the scope of the process will likely be different from situation to situation. An organization will need personnel to handle this process in a “hands on” manner, and it may need to engage appropriate third parties to assist it in this process, such as legal counsel, technological service providers, and the like. However, and understanding that there is simply no “one-size-fits-all” way to approach the litigation hold process, there are certain fundamental components to this process, which are discussed below.

## **THE STANDARD DUTY**

Whenever litigation, audit, government investigation, administrative proceeding, or other such matter is actually pending, is reasonably anticipated and/or credibly threatened against an organization, that organization has a duty to undertake reasonable and good faith actions to identify, preserve and retain all relevant and discoverable information and tangible evidence relating to that Event.

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For purposes of analyzing the elements of this duty, it is helpful to break it down into semi-discrete parts as follows:

Whenever . . .

[1] the Event is actually pending [against an organization],

OR

[2] [the Event is] reasonably anticipated and/or credibly threatened against an organization,

that organization has a duty . . .

[3] to undertake reasonable and good faith actions

[4] [in order to] identify, preserve and retain all relevant and discoverable information and tangible evidence relating to that Event.

***It must be noted that the above standard relates to preservation duties ONLY and does not address the acts of collecting, reviewing, producing, etc. relevant and discoverable information. Actions relating to those items are also very, very, very fact specific, are critical in any litigation proceeding, and will depend on many variables. Generally speaking, these items are undertaken by an organization only after consultation and/or engagement of legal counsel.***

The ultimate purpose of the litigation hold process is to preserve all relevant and discoverable information, yet there are certain steps that must necessarily be undertaken before the act of preservation can be done. While this duty technically belongs to the organization, courts routinely hold that senior management cannot treat this duty lightly or delegate it to lower level management.

The initial inquiry is whether the organization has a duty to preserve. If an Event is pending, then the duty to preserve has attached and the organization should strongly consider undertaking the steps below or some variations thereof.

If the event is not pending, the organization will have to determine whether an Event is reasonably anticipated. This determination will likely begin with some level of investigation. As an organization engages in its investigation, it should document the entire process (e.g., how the facts giving rise to the investigation were learned, what those facts were, when they were learned, how the organization then proceeded, including who participated in managing and/or

conducting the investigation, when and who was interviewed, when and what documents/data were consulted, who made the final decision concerning the viability and/or credibility of the threat, the rational for that decision, etc.).

If, after conducting and documenting its investigation, the organization concludes that the threat is not viable and/or credible, then it may decide to refrain from instituting a formal litigation hold (discussed below), and the organization should maintain its documentation concerning the investigation pursuant to the organization's document/data retention policy. However, if the decision is made to institute a formal legal hold, various steps (as explained below) should be taken **without hesitation**.

**1. *Event is Pending:***

This is pretty straight-forward: the organization has been served with (or has knowledge of the filing of) a complaint, a government investigative inquiry notice, a subpoena, or the like. In essence, the organization knows an Event is afoot. In this situation, the organization's duty is to promptly undertake reasonable and good faith actions to identify, preserve and retain relevant and discoverable evidence and tangible things for the duration of the Event, including any appeals. When an Event is pending, and thus the organization's duty to preserve has arisen, it is recommended that the organization immediately (if it has not already done so) involve appropriate personnel to handle this process in a "hands on" manner, and to consider engaging appropriate third parties to assist it in this process, such as legal counsel, technological service providers, and the like.

**2. *Reasonable Anticipation***

How does or can an organization know whether it may be involved in an Event until the Event actually happens? This is the million dollar question (especially for a potential defendant or target of an Event), and the answer will depend on a timely and thorough analysis of many facts. This analysis may be conducted internally or with the assistance of outside legal counsel. However, and generally speaking, reasonable anticipation is "triggered" based on an event or series of events or signals leading an organization to thoughtfully consider whether it reasonably anticipates an Event. Making this determination requires, among other things, a thoughtful and thorough analysis utilizing judgment and experience, and may require the assistance of legal counsel.

The date that an organization concludes that a reasonable anticipation of an Event exists is the date that the preservation duty arises. Thus, relevant and discoverable information

created before the trigger date, and created thereafter throughout the duration of the Event, must be preserved.

**Potential Plaintiff**

This analysis is usually easier for an organization that is a potential plaintiff (the party filing suit) to a lawsuit. In this situation the organization will reasonably anticipate litigation when it takes specific and concrete steps indicating it is serious about pursuing litigation. Examples of such actions include (but are not limited to):

1. Drafting internal memoranda or other communications concerning potential legal claims against another party
2. Seeking advice of legal counsel for purposes of analyzing possible legal claims
3. Seeking advice of counsel for purposes of possibly filing a lawsuit
4. Sending a demand letter with the anticipation of following through with any threats of litigation asserted therein
5. Strategically, financially, or otherwise committing to filing a lawsuit
6. Any other specific steps taken towards commencing a lawsuit

**Potential Defendant or Target**

The analysis regarding whether and/or when a potential defendant or target reasonably anticipates an Event can be much more complex. However, and again generally speaking, a reasonable anticipation of an Event likely arises for a potential defendant or target when an organization is on notice of a credible probability that it will become involved in an Event. There are numerous facts that can signal this; some of them obvious, and some of them perhaps not. Examples of such signals that should be considered include (but are not limited to):

1. The, manner, nature and the specificity of the threat
2. The party making the claim or asserting the threat
3. The relationship between the organization and the accusing or threatening party
4. Whether the threat is direct, implied, or inferred
5. Whether the party making the claim or threat is known to be aggressive and litigious
6. The strength, scope, or value of a known or reasonably anticipated claim or threat
7. Whether the organization has learned of similar claims

8. The experience in the industry
9. Reputable press and/or industry coverage of the issue either directly pertaining to the organization or of complaints brought against someone similarly situated in the industry

*See The Sedona Conference Commentary of Legal Hold Holds: The Trigger & The Process*, 11 Sedona Conf. J. 265, 276 (2010). Other factors that may be indicative of a potential defendant or target reasonably anticipating an Event include: internal memoranda or communications regarding issues that are viewed as likely to concern an Event; internal fact investigations concerning issues that are viewed as likely to concern an Event; seeking advice of counsel concerning a particular matter; repeat litigation (*e.g.*, when the duty to preserve exists in one actual litigation, and a second, later threatened or filed litigation concerning similar issues (although not necessarily the same parties) arises); receipt of a preservation letter demanding, prior to any suit being filed or action initiated, that the organization preserve specific kinds of evidence for the Event; and similar factors.

Finally, an organization's determination that a reasonable anticipation of an Event exists, or that it does not exist, may change over time. For example, later learned information directly relating to the potential (or actual) Event may require an organization to reevaluate its previous determination. That is, new information may indicate that an Event previously not rising to the level of reasonable anticipation now does rise to that level, and thus triggers an organization's preservation obligations. The opposite is also true: new information may indicate that an organization's earlier determination that an Event rose to the level of reasonable anticipation no longer meets that threshold, and thus the organization no longer has a duty to preserve. Again, however, each situation is highly fact driven and must be analyzed carefully.

### **3. *Duty to Undertake Reasonable and Good Faith Actions***

An organization may demonstrate its satisfaction of this duty by having adopted, implemented, and consistently followed the organization's document/data retention policy, including that portion of the policy that includes a defined set of specific litigation hold procedures. A defined policy in this regard, and memorialized evidence of compliance with it, can provide strong support for a claim of reasonableness and good faith efforts. This is especially true if the organization is called upon to defend the preservation decisions it made and/or actions it took with respect to an actual or reasonably anticipated Event.

In addition, an organization's adoption, implementation, and consistent following of a process for reporting information relating to a possible Event to a responsible decision maker may further evidence reasonable and good faith actions relating to preservation obligations. If such a process is adopted, it should be simple and practical, and personnel within the organization should be trained on how to follow the process. The personnel so trained should also include, depending on the composition of the organization, departments such as information technology, human resources, and legal. Engaging legal counsel, consultants, and/or third-party vendors may also be appropriate to assist the organization in carrying out the litigation hold process.

Consider documenting all steps in the process – from “No” to “Go.” Knowing that any challenge to whether an organization's efforts were reasonable and in good faith will likely involve the organization having to demonstrate as much at a later date, the organization should strongly consider documenting its efforts enough to show that those efforts were reasonable, consistent, and in good faith.

If a good faith and reasonable investigation into a potential Event results in the organization deciding against the issuance of a litigation hold, document the facts and circumstances leading to that conclusion. Such documentation may include: facts and circumstances identifying the potential Event; the dates of the investigation; who was involved in the investigation; the scope of the investigation in terms of people interviewed and documents/data reviewed; the rationale for deciding against issuing a litigation hold; etc.

If a good faith and reasonable investigation of the potential Event results in the organization issuing a litigation hold, document the steps taken to get to that decision (*i.e.*, the investigatory steps above), and consider documenting the design, implementation, and audit protocols of the issued litigation hold. Such documentation in this situation may include: the date the hold was initiated; the initial scope of the preservation efforts in terms of personnel (custodians, information technology, human resources, legal, etc.) notified, and the documents/data and systems affected; who dictated that scope and why; what follow-up actions were taken (*e.g.*, acknowledgments, changes in the scope, reminders, compliance monitoring efforts, and the like); etc.

Documentation reflecting and memorializing these types of efforts will help show that the organization took its preservation duties seriously. In contrast, lack of such documentation (or haphazard and/or incomplete documentation) could show that the organization did not take its preservation obligations seriously.



#### **4. *Identify, Preserve and Retain Relevant Information***

Once an organization has determined that a duty to preserve exists, the organization must next determine (1) what to preserve, and (2) how to do it. Satisfying these steps will vary. It may require an organization to only locate and preserve a limited amount of relevant and discoverable information. However, it may instead require much more extensive efforts because the scope of the relevant and discoverable information is much broader, and the sources and locations of the information may be far flung. The organization may consider (if it has not already done so) engaging appropriate third parties to assist it in this process, such as legal counsel, technological service providers, and the like.

##### **Identifying**

In determining what to preserve and how to do it, an organization should consider initially focusing on the:

1. Key players (*i.e.*, those people with the most direct knowledge and information regarding the Event, and the sources which may have information/data relating to the Event)
2. Data stewards (*i.e.*, individuals responsible for the organization's data content, context, and associated business rules)
3. Data custodians (*i.e.*, individuals responsible for the organization's technical environment and database structure)

Prompt and thorough interviews with these personnel regarding facts relating to the Event and various facets of the relevant and discoverable information should be conducted. Interviews with the data stewards and custodians may indicate that the organization would benefit from drafting a "data map," which generally is an illustration of the inventory of the organization's electronic data that provides an understanding of the relevant information technology architecture and computer systems.

The organization must also know where the relevant and discoverable information is located and/or resides. The organization should know:

1. Who the personnel (or third parties) are that are most likely to have this information (and/or know who else might have it)
2. Who has access to this information
3. What computer programs were used to create this information

4. Where within the organization's information technology infrastructure such information is located
5. Where within the organization's paper document storage facilities are the documents/information located

Prompt and thorough interviews with personnel having knowledge of the above items, and very knowledgeable information technology personnel, is a good start on this point. A data map may also assist in identifying where the relevant and discoverable information is located.

In addition to, or in conjunction with, interviewing all of the above personnel (*i.e.*, from the key players to other identified personnel), an organization should strongly consider employing a questionnaire specifically designed to, among other things: (a) identify where any possible relevant information/data may reside (including with third parties); (b) obtain a description of any data that is at risk of alteration or destruction (*e.g.*, emails with short deletion cycle, documents on the cusp of being destroyed according to the organization's document/data retention policy, hardware or software scheduled for upgrade, replacement, or disposal, etc.); (c) gain an understanding of the identity of third parties (*e.g.*, SaaS providers, independent contractors, former employees, etc.) possibly possessing information/data that must be preserved; (d) understanding the organization's backup practices; (e) understanding the status of archived data, including on legacy systems; (f) identifying locations of relevant paper documents or other tangible evidence; (g) and similar items. An example of a questionnaire covering a broad spectrum on this issue is attached.

### **Preserving and Retaining**

Initiating preservation efforts typically occurs by the issuance of a "Legal Hold Notice". The Legal Hold Notice is an ongoing directive to identify and preserve information/data pertaining to an Event. As with most situations in the legal hold process, there is no "one-size-fits-all" type of Legal Hold Notice. At this point in the process, the organization should strongly consider (if it has not already done so) engaging legal counsel to get involved in the process so that such counsel can provide advice and counsel that should be protected by the attorney-client or other applicable privilege.

The duty to preserve the information identified by the organization as being relevant to the Event obligates the organization to promptly refrain from destroying, deleting, altering, or the like, for any reason, any information/data that is relevant to issues involved or relating to an Event. This duty requires the organization to immediately suspend its ordinary information/data destruction practices and procedures (*e.g.*, disable any automatic email

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deletion protocols, suspend any document destruction procedures, etc.) as they relate to relevant and discoverable information.

This duty also likely obligates the organization to promptly take steps to ensure that third parties over whom the organization has some level of control refrain from destroying, deleting, altering, or the like, for any reason, any information/data that is relevant to issues involved or relating to an Event. Possible third parties could include subsidiaries and affiliates, former employees who may have retained relevant information, independent contractors over whom an organization has some level of control, third parties (*e.g.*, cloud based services) with whom an organization has contractually agreed to a certain level of control (*e.g.*, maintaining ownership of the data, access rights to the data, etc.), and even current and former counsel. These personnel and/or third parties should be directed to take immediate steps to preserve relevant and discoverable information and help prevent losses for any reason, including any routine business operations (*e.g.*, email automatic deletion protocols, hardware maintenance/rotation protocols, etc.).

The best practice is for a Legal Hold Notice to be issued in writing. While at least one prominent court has ruled that a litigation hold must be in writing (to do otherwise is gross negligence, according to that court), most other courts have declined to be so absolute. However, even those courts accepting an oral legal hold notice premise that willingness on the party having taken the appropriate actions to preserve evidence, and say that issuing an oral hold is done at the issuer's peril. The potential peril is real because organizations relying on oral litigation holds may face considerable difficulties when, years after an oral preservation notice is given, no evidence of the preservation notice exists beyond the issuer's and the recipients' often less than perfect memories, thus leaving the organization hard-pressed to demonstrate that it took appropriate actions to preserve the evidence at issue. Thus, it is strongly recommended that organizations issue written Legal Hold Notices.

Because of the seriousness of a Legal Hold Notice, the notice should be sent from high level officers, or at least high level senior management, of the organization. Each Legal Hold Notice should be thoughtfully and carefully crafted, and will depend on, among other things, the circumstances and facts that are unique to the Event and the organization. It should also be noted that although courts recognize that Legal Hold Notices are likely protected from discovery by the attorney-client privilege (assuming it, and its contents, were the result of attorney-client communications), there is a growing trend among the courts to find the attorney-client privilege has been lost when spoliation occurs. However, at the end of the day,

the Legal Hold Notice should be designed, drafted, and distributed in a way that achieves the goal of preservation.

The Legal Hold Notice should be:

1. Issued promptly
2. Sent to those identified as the most likely to have, and have access to, relevant information, and should almost always include appropriate information technology people
3. Easy to understand in terms of all of the requirements of the legal hold (*i.e.*, preservation and retention), and may include
  - a. a brief description of the matter
  - b. the recipients' obligations to preserve (and consequences for failing to do so)
  - c. the types of information that should be preserved
  - d. how to preserve the information
    - i. it is generally recommended that the Legal Hold Notice instruct the recipients not to take any actions on their own to "collect" (*e.g.*, moving or copying) any information/data that is subject to the legal hold; instead they should be instructed to preserve the data in place – ensuring the data is not moved, copied, deleted, etc. such as by locking it down within its storage location/system.
  - e. contact information for the personnel responsible and available to answer any questions relating to the Legal Hold Notice

As part of issuing a Legal Hold Notice, the organization should consider utilizing a mechanism by which the recipient of the Legal Hold Notice can acknowledge their receipt and understanding of, and obligations to comply with, the notice. The organization should also consider monitoring or auditing that the requirements of the Legal Hold Notice are being complied with. In addition, because Legal Hold Notices may remain in effect for extended periods of time, an organization should periodically remind personnel of their ongoing preservation obligations. Finally, the organization should periodically review the viability of the initial Legal Hold Notice (because of, for example, new developments in the case, newly hired personnel, changes in positions of personnel, etc.), and reissue it again in either its original form, or an amended form.

There are many ways an organization can address the mechanics and details of a Legal Hold Notice, depending on the circumstances of the Event and the composition and culture of the organization. There are low-tech options such as manually managing the flow of the

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process with standard office software, such as spreadsheets, email, presentation, and word processing tools. There are also high-tech options, such as off-the-shelf legal hold notification software tools (either installed locally or hosted as a service), or there are numerous third-party SaaS providers offering their tools and/or expertise.

## **CONCLUSION**

The best time to prepare for the litigation hold process and the preservation duty is when the organization is not in the middle of a crisis. Best practices include proactively establishing information governance protocols, putting response teams in place, documenting policies, and training employees.

Consider establishing a discovery team. That team should consist of key stakeholders from different disciplines such as legal (or outside counsel), human resources, information technology, records management, and others, all of whom may be called on to assist in the event of a potential Event. That team should have protocols in place to help promptly establish and define the scope of a legal hold, including identifying potential responsive data sources, custodians, third parties, etc. and to ensure suspension of routine document destruction procedures, etc.

Document the organization's document/data retention policy. Ensure that such policy is followed and consistently applied. Ensure the organization's retention policy includes detailed procedures for issuing, reissuing, and terminating legal holds.

Train personnel about preservation responsibilities. This training should include teaching what preservation responsibilities exist, briefly explain the possible consequences to the organization for failing to comply with its preservation obligations (and possible consequences for non-complying employees), and how employees may identify potential trigger events and who to notify about those trigger events.

If issued, write a Legal Hold Notice in language that is simple and clear to non-legal trained recipients, clearly identifying the types of documents/data that must be preserved and provide detailed instructions on preservation efforts; include a description of the legal claims and issues in enough detail (but not too much) so that the recipient will get an informed sense of what types of information may be relevant and where such information may be located.

