

# Draft Outline: Commentary on Managing, Modifying, and Lifting Legal Holds

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**The Sedona Conference WG1 Drafting Team:  
Managing, Modifying, and Lifting Legal Holds**

**I. INTRODUCTION & CHARTER**

- A. After months of discussion and evaluation, a Sedona Conference Working Group 6 Brainstorming Group recommended a Commentary on Managing, Modifying, and Lifting Legal Holds. The Working Group 6 Steering Committee evaluated the recommendation and underlying work of the Brainstorming Group and ultimately determined that the paper was better aligned with the charter and initiatives of Sedona Conference Working Group 1. Accordingly, the recommendation was moved from Working Group 6 to Working Group 1, and this Drafting Team was formed.
- B. There is quite a bit of thought leadership and case law about when the duty to preserve is triggered, when legal holds must be implemented, and what the appropriate scope is for legal holds. There is, however, a dearth of guidance regarding when legal holds can or should be modified, or released entirely. Increasingly, organizations are preserving large volumes of data beyond established retention periods, not only to meet preservation obligations, but also to avoid spoliation claims and the potential for sanctions. Litigation and investigation-related demands to preserve may lead to overpreservation of electronically stored information, which in turn results in increased data volumes that can raise storage costs, degrade system operating performance, increase cybersecurity risks, and expand the cost of litigation. Moreover, preserving and/or using personal information beyond established retention periods heightens the risk of potential conflicts with rapidly changing data minimization and purpose limitation requirements under the privacy laws in U.S. jurisdictions such as California and Virginia, as well as foreign data privacy laws like the GDPR. While organizations must balance the burdens of maintaining large volumes of data with considerations of corporate, data privacy, and compliance regulations, data security concerns, and potential spoliation sanctions, they grapple with how to avoid premature or inadvertent release of legal holds, including the pressure to narrow the scope of legal holds to reduce the expense and risk associated with maintaining and ensuring compliance with them.
- C. CHARTER: Drawing on existing rules, statutes, regulatory actions, and case law, the Drafting Team is tasked with developing a Sedona Conference Commentary that: (i) addresses proportionality considerations in relation to preservation obligations, data disposition requirements, and data privacy regulations; (ii) provides guidelines and proposed best practices for modifying legal holds prior to formal commencement of proceedings or during pending litigation or investigation; (iii) provides guidelines and proposed best practices for releasing legal holds when a potential adversary fails to timely commence

proceedings or after the close of litigation or investigation; (iv) evaluates document retention and production obligations pursuant to government inquiries and third-party subpoenas; (v) assists organizations in navigating potential conflicts between U.S. and international data preservation requirements and U.S. and international privacy and data protection laws; and (iv) suggests a framework for courts, government agencies, data protection authorities, and other regulators to evaluate compliance with preservation, minimization, and/or disposition obligations in light of cybersecurity, privacy, data protection, and proportionality considerations.

## II. INTENDED AUDIENCE: WHO NEEDS THIS WORK PRODUCT, AND WHY DO THEY NEED IT

### A. Who Needs It

1. Personnel with litigation, internal investigation, eDiscovery, and legal-hold responsibilities, including outside counsel, in-house counsel, eDiscovery specialists and technical experts, corporate/government officers and regulators.
  - (a) Outside counsel (for both Requesting and Responding Parties) who face significant challenges in light of limited guidance from legal sources, perceived ambiguity with the rules of various jurisdictions, rapidly evolving privacy laws and obligations, and past spoliation decisions that received significant press coverage.
  - (b) Inside counsel who are, at times, under pressure to revise and narrow the scope of legal holds due to the expense and risk associated with maintaining large-scale legal holds and who must not only ensure that the organization complies with its legal retention obligations, but also must balance the potential liability with maintaining large volumes of employee data, in view of corporate, data privacy, and compliance regulations, data retention directives, data security concerns, and potential spoliation sanctions.
  - (c) Government agencies/employees (e.g., attorneys, regulators, or investigators with entities like the DOJ, AG, EEOC, SEC, EBA, ESM, FINRA, FCA, MAS, FSA, CBIRC) that are seeking information from organizations without the benefit of understanding the impact of data volumes, cybersecurity, privacy, and proportionality considerations on data retention and preservation.
  - (d) eDiscovery specialists and technical experts who may not be decision-makers regarding managing and lifting legal holds but

who may be involved in their implementation, data minimization responsibilities, and urging a company to release data from a hold without undermining the company's legal posture.

- (e) Data Protection Authorities and other regulators who may need to assess parties' compliance with their data retention, minimization, or disposition efforts under data protection, legal, regulatory, or other requirements.
- 2. Judges, with the goal of providing a practical framework for evaluating the reasonableness and proportionality of required preservation efforts as defined by the Federal Rules of Civil Procedure and balanced by parties' data retention and minimization requirements under various local and federal laws and the cost of maintaining large volumes of data.
- 3. Legislators and Rules Committees that may be faced with making law with the goal of providing practical considerations for implementing guidelines for releasing data under hold.

#### B. Why Do They Need It

- 1. To provide specific guidance within the paradigm of the overarching proportionality standard itself as to factors for evaluating when a legal hold can or should be lifted or modified.
- 2. Parties subject to preservation obligations are often reticent to reduce the scope of a hold once issued for fear of spoliation claims and the potential for judicial sanctions – placing them squarely in conflict with proportionality, data minimization requirements and privacy considerations.
- 3. While changes to Rule 26(b)(1) were implemented to limit costly discovery, the Rule fails to address when it is appropriate to lift legal holds at the resolution of a matter.
- 4. To provide a practical and defensible framework for lifting and modifying legal holds and destroying data to attempt to ensure transparency and consistency in practice.
- 5. To avoid improper, premature, or inadvertent release of legal holds.
- 6. Parties subject to preservation obligations are often reticent to reduce the scope of a hold once issued for fear of spoliation claims and the potential for judicial sanctions – placing them squarely in conflict with data minimization requirements and privacy considerations.

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7. Given the novelty of data privacy laws and the rapid and ongoing transformation of eDiscovery and Data practice, there is currently little precedent, case law, guidance, or direction regarding modifying and lifting legal holds after implementation.
8. Preserving data longer than is necessary to comply with local, national, and international rules, regulations, and guidelines results in increased data volumes, which can cause increased storage costs, degraded system operating performance, increased costs to maintain legacy systems, increased cybersecurity risks, conflict with privacy laws, and potential exposure to costly litigation.
9. Preserving personal information of custodians beyond established retention periods to meet preservation requirements or using it for business purposes potentially conflicts with data minimization and purpose limitation requirements under the privacy laws in many U.S. jurisdictions such as California and Virginia as well as foreign data privacy laws like GDPR.<sup>1</sup>
10. Judges rendering decisions in this area as well as legislators making relevant law may benefit from guidance on policy rationales underlying discovery obligations generally and policy considerations unique to eDiscovery and lifting legal holds, including the factors that are causing data preservation to become increasingly burdensome and potentially in conflict with other legal obligations described within.
11. To provide Rules Committees/Legislators a framework for evaluating rules/guidelines for modifying and lifting legal holds.
12. Data Protection Authorities and other regulators may benefit from having greater insight into the legal obligations that underlie parties' decisions regarding document preservation throughout the life cycle of relevant litigation and government investigations.
13. Practitioners, judges, and legislators/Rules Committees may benefit from practical considerations for managing, modifying, and lifting legal holds.

### III. COMMENTARY OUTLINE

#### A. Why and how this issue is of interest to the intended audience

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<sup>1</sup> For example, preservation must comply with Articles 5 and 6 of the GDPR as preservation is considered “data processing,” and a violation of these principles makes the data processing unlawful and exposes the wrongdoer to potentially severe sanctions.

B. Governing principles for implementing, modifying, and lifting legal holds

1. U.S. Preservation Obligations

(a) “Reasonably anticipated litigation”<sup>2</sup>

- (i) The factors that go into determining the time frame for “reasonably anticipated litigation” and when the time for reasonable anticipation of litigation has passed, including potentially applicable statutes of limitations, resolution of a potential dispute through nonjudicial means, or other indicators that suggest that litigation will be unlikely.

(b) Duty to take Reasonable Steps to Preserve (*Zubulake* and other later precedents)

- (i) To meet preservation obligations, suspension of document retention and deletion protocols may be necessary.<sup>3</sup>
- (ii) But, to comply with legal-hold obligations, a party is not required to preserve “every shred of paper, every e-mail or electronic document, and every backup tape.” “A party is not required to preserve all its documents, but rather only documents that the party knew or should have known were, or could be, relevant to the parties’ dispute.”

(c) Federal Rules of Civil Procedure

- (i) Rule 1, which promotes the “just, speedy, and inexpensive

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<sup>2</sup> See Page 4 of The Sedona Conference *Commentary on Managing International Legal Holds*. “In 2003, U.S. District Court Judge Shira Scheindlin set the stage for a new era in United States litigation when she stated in *Zubulake v. UBS Warburg*:

“Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a “litigation hold” to ensure the preservation of relevant documents.” Judge Scheindlin’s admonition sprang from the longstanding common-law duty for litigants to prevent spoliation—the loss or destruction of relevant materials that may later be used by another at trial. It also flowed from the principle of broad pretrial disclosure in the U.S. first established in 1938 and continuing through the promulgation of the Federal Rules of Civil Procedure.”

<sup>3</sup> See Page 5 of The Sedona Conference *Commentary on Managing International Legal Holds*. “To comply with U.S. preservation obligations, an organization will need to consider taking a number of steps. These may include (1) sending a written legal hold notice to individuals likely to be the custodians of discoverable information; (2) suspending routine deletion or destruction policies for discoverable information; (3) adopting “preservation in place” strategies to suppress manual alteration or deletion within systems that hold discoverable information; and (4) copying sources to a centralized location to ensure the information will be available during the discovery process. The legal framework and guidelines for compliance with U.S. preservation obligations are detailed in *The Sedona Conference Commentary on Legal Holds, Second Edition*.”

determination of every action and proceeding.”

- (ii) Rule 26(b)(1):<sup>4</sup> Balancing data management, data minimization, privacy considerations, and the costs of preservation with preservation obligations, spoliation considerations, and the needs of the case.
- (iii) Rule 37(e): Lays out the considerations for leveraging sanctions for a failure to preserve data.
- (iv) Rule 45: Parties that issue subpoenas have an affirmative duty to prevent undue burden or expense to the persons subject to the subpoena.

## 2. Non-U.S. Preservation Obligations

### (a) UK

- (i) A party is required to preserve and disclose all documents on which it relies as well as those that adversely affect its case or support another party’s case.
- (ii) UK Civil Procedure Rule Practice Direction 31B.7: “As soon as litigation is contemplated, the parties’ legal representatives must notify their clients of the need to preserve disclosable documents. The documents to be preserved include Electronic Documents which would otherwise be deleted in accordance with a document retention policy or otherwise deleted in the ordinary course of business.”
- (iii) UK case law?

### (b) Other Civil law countries<sup>5</sup>

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<sup>4</sup> “[P]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.”

<sup>5</sup> See Pages 5 and 6 of The Sedona Conference *Commentary on Managing International Legal Holds*. “Civil law countries impose more limited preservation obligations. For example, German procedural rules, while not imposing a direct obligation to preserve, allow for the ease of evidentiary rules in cases where documents can no longer be produced. France and Spain, similarly, have limited preservation obligations. In such jurisdictions, the absence of a duty to preserve evidence may create legal and cultural conflicts if the individual or legal entity is required to preserve evidence by another jurisdiction such as the U.S.”



### 3. U.S. Privacy Laws

#### (a) Active

- (i) California (California Consumer Privacy Act & California Privacy Rights Act)
- (ii) Colorado (Colorado Privacy Act)
- (iii) Connecticut (Connecticut Personal Data Privacy and Online Monitoring Act)
- (iv) Montana (Montana Consumer Data Privacy Act)
- (v) Oregon (Oregon Consumer Privacy Act)
- (vi) Texas (Texas Data Privacy and Security Act)
- (vii) Utah (Utah Consumer Privacy Act)
- (viii) Virginia (Virginia Consumer Data Protection Act)

#### (b) Signed with Future Effective Dates

- (i) Delaware (Delaware Personal Data Privacy Act – Effective January 2025)
- (ii) Indiana (Indiana Consumer Data Protection Act – Effective January 2026)
- (iii) Iowa (Iowa Consumer Data Protection Act – Effective January 2025)
- (iv) Kentucky (Kentucky Consumer Data Protection Act – Effective January 2026)
- (v) Maryland (Maryland Online Data Privacy Act – Effective October 2025)
- (vi) Minnesota (Minnesota Consumer Data Privacy Act – Effective July 2025)
- (vii) Nebraska (Nebraska Data Privacy Act – Effective January 2025)
- (viii) New Hampshire (SB 255 – Effective January 2025)



- (ix) New Jersey (SB 332 – Effective January 2025)
- (x) Rhode Island (Rhode Island Data Transparency and Privacy Protection Act – Effective January 2026)
- (xi) Tennessee (Tennessee Information Protective Act – Effective July 2025)

#### 4. Non-U.S. Privacy Laws

- (a) GDPR:<sup>6</sup> Legal holds and data collection must comply with Articles 5 and 6 of the GDPR.

- (i) Article 5 GDPR principles

- (1) Lawfulness, Fairness and Transparency
    - (2) Purpose Limitation
    - (3) Data Minimization
    - (4) Accuracy
    - (5) Storage Limitation
    - (6) Integrity and Confidentiality; and
    - (7) Accountability

- (ii) Article 6 GDPR principles

- (1) Usually, Article 6 of GDPR is the one provision that is applicable in litigation. Processing is necessary for the purpose of the legitimate interests pursued by the controller [...], except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data [...].

- (b) UK GDPR<sup>7</sup>

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<sup>6</sup> See Pages 7-13 of The Sedona Conference *Commentary on Managing International Legal Holds*.

<sup>7</sup> See Page 15 of The Sedona Conference *Commentary on Managing International Legal Holds*.

- (c) Other countries' data privacy laws/laws that affect data retention (e.g. bank secrecy laws)
- 5. Case Law
  - (a) Spoliation
  - (b) Other?
- C. Guidelines, recommendations, and best practices for managing and lifting legal holds
  - 1. Guidance and recommendations for evaluating/modifying/lifting legal holds prior to the formal initiation of litigation proceedings (e.g., legal holds put in place as a result of a demand letter/reasonable anticipation of litigation) or put in place due to notice of a government investigation
    - (a) Inflection points for when/how the scope of legal holds should be evaluated (with examples)?
      - (i) Change in scope of the demand (e.g., subsequent demand letter)
      - (ii) Change in scope of noticed investigation (e.g., notice of change in targets or subject matter)
      - (iii) Information indicating a change in or addition of parties or custodians relevant to the anticipated litigation
      - (iv) Litigation is no longer anticipated
      - (v) Custodian interviews to assess if custodian has relevant data or knowledge
      - (vi) Considerations for complying with international data privacy laws (or other international laws protecting privacy rights and interests)
      - (vii) Potentially responsive data has been preserved through collection.
    - (b) Maintaining internal documentation of decisions
      - (i) Specific custodians, dates, and data sources placed on hold and when

- (ii) Decision-making process for placing information on hold.
  - (iii) Decision-making process for lifting a hold (as to certain or all data)
  - (iv) Decision-making process for destroying data previously on hold
2. Guidance and recommendations for evaluating / modifying / lifting legal holds during the course of litigation proceedings (e.g. revising a legal hold during the course of a litigation)
- (a) Inflection points for when/how the scope of an existing legal hold should be reevaluated (including but not limited to):
    - (i) Rule 26(f) Conference (e.g., discussion regarding scope of existing holds).
    - (ii) Agreement/Finalization of ESI Protocol (e.g., whether data outside the scope of the agreed upon protocol that was placed on hold needs to remain on hold).
    - (iii) Evaluation of custodian knowledge/information through custodial interviews.
    - (iv) Material change in the scope of discovery (if new custodians have been identified and/or requested during the course of discovery, or if previously identified custodians can be conclusively ruled out).
    - (v) Close of fact discovery (e.g., whether custodians who had no discovery information during discovery need to be maintained on hold).
    - (vi) Dismissal or modification of claims (e.g., whether custodians relevant only to dropped claims can be removed from the legal hold).
    - (vii) Considerations for complying with international and domestic data privacy laws (or other laws protecting privacy rights and interests) (e.g. whether maintaining data on hold potentially conflicts with data privacy laws and how to avoid risk of conflicts between the laws).
    - (viii) Potentially responsive data has been preserved through collection.

- (b) Maintaining internal documentation of decisions that may narrow the scope of a legal hold or remove custodians or data sources from hold during active litigation.
- 3. Guidance and recommendations for evaluating / modifying / lifting legal holds following the completion of litigation proceedings.
  - (a) Inflection points for when to modify or lift legal holds including but not limited to:
    - (i) Settlement
    - (ii) Dismissal
    - (iii) Appeals
    - (iv) Statute of Limitations
    - (v) Considerations for complying with international and domestic data privacy laws (or other laws protecting privacy rights and interests)
  - (b) Consider maintaining internal documentation of decisions.
- 4. Guidance and recommendations for evaluating document retention and production obligations in connection with active government investigations and third-party subpoenas.
  - (a) Whether litigation is reasonably anticipated after issuance of subpoena
  - (b) Duty to preserve vs. duty to produce
  - (c) Whether information is in the party's possession, custody, or control
  - (d) Does production satisfy preservation requirements (if any)
  - (e) Counterparties (government or private)
  - (f) Consideration of international and domestic privacy laws
- D. Considerations and recommendations for navigating potential conflicts between U.S. and International Data Preservation Requirements and U.S. and International

## Privacy Laws

1. Limiting the collection of personal information to what is directly relevant and necessary to accomplish a specified purpose.
2. Retaining data only for as long as is necessary to fulfill the specified purpose.
3. U.S. Privacy Laws:
  - (a) Lifting legal hold if there is no legitimate purpose to keep legal hold and collected data, or if the basis for processing personal data is missing.
  - (b) Balancing the interests of the custodian and the interests of the data controller.
4. GDPR:
  - (a) Lifting legal hold if there is no legitimate purpose to keep legal hold and collected data, or if the basis for processing personal data is missing
  - (b) Balancing the interests of the custodian and the interests of the data controller,
5. Commentary on overpreserving data and international data privacy laws: Failing to address changes to the scope of a legal hold could violate GDPR processing principles: purpose limitation, data minimization, and storage limitation. For instance, the Sedona Conference *Commentary on Managing International Legal Holds* states as follows:
  - (a) “As a matter progresses, the scope of a legal hold may change, expanding in some cases and narrowing in others. When it does, organizations subject to a U.S. legal hold are expected to reevaluate the scope of the hold notice and amend it as necessary. This is particularly important for legal holds involving personal information subject to the data protection law. For example, failing to address changes to the scope of the legal hold could violate three key GDPR processing principles: ‘purpose limitation,’ ‘data minimization,’ and ‘storage limitation.’”
  - (b) “Under the GDPR, the purpose limitation requires that personal information be collected only ‘for specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes.’ Personal information that has been placed on

legal hold and preserved cannot be processed for any other purpose. If the scope of the matter changes, the controller must evaluate whether the original purpose still exists or if other matters or issues can support the original purpose. If the original purpose no longer exists, or the matter has terminated, then the GDPR requires that the legal hold be terminated, and the personal information released from the hold. Changes in scope may require the controller to revise the notice.”

(c) The principle of data minimization under the GDPR also limits the use of personal information to ‘what is necessary in relation to the purposes for which they are processed.’ This principle applies to information that was once subject to the duty to preserve but is determined later to be not discoverable and thus no longer ‘necessary’ for preservation purposes. Under these circumstances, organizations should release the applicable custodians and data sources from a legal hold and, if otherwise appropriate, dispose of personal information. This can include information that was culled based on search criteria that have not been challenged or have been agreed to by opposing counsel, and no future challenge is anticipated.”

(d) Under the principle of storage limitation, personal information must not be retained in a form that permits the identification of a data subject for any length of time that is ‘longer than necessary for the purposes for which the personal data are processed.’ Accordingly, personal information that is no longer required to be preserved under a U.S. legal hold and is not otherwise needed by the organization must be released and/or any collected information destroyed as soon as possible once the in-formation is no longer needed for the matter.<sup>8</sup>

E. Considerations and recommendations for negotiating / interacting with an opposing party when evaluating / modifying / lifting legal holds during the course of a litigation.

1. *The Sedona Conference Cooperation Proclamation: Resources for the Judiciary*; *The Sedona Principles, Third Edition*, Principles 3 and 6.

(a) *Sedona Conference Cooperation Proclamation: Resources for the Judiciary* provides that: “*The Judicial Resources* stresses cooperation and transparency in the search for, and collection of, ESI.”

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<sup>8</sup> See page 211-214, *The Sedona Conference Commentary on Managing International Legal Holds*, SEDONA CONF. J. 161 (2023).

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- (b) Sedona Principle 3 provides that “[a]s soon as practicable, parties should confer and seek to reach agreement regarding the preservation and production of electronically stored information.”
  - (c) Sedona Principle 6 provides that “Responding parties are best situated to evaluate the procedures, methodologies, and technologies appropriate for preserving and producing their own electronically stored information.”
  - (d) This sentiment is echoed, either explicitly or implicitly, in the various court rules and practices discussed below.
- 2. Individual court and local rules may encourage or require consultation with and/or transparency between parties.
  - (a) The Northern District of California sets out its expectations in various forms: (i) Guidelines for the Discovery of Electronically Stored Information;<sup>9</sup> (ii) Guidelines for Professional Conduct; and (iii) ESI Checklist for Use During Rule 26(f) Meet and Confer Process.
  - (b) N.Y. Supreme Court Commercial Division Guidelines for Discovery of ESI<sup>10</sup>
- 3. Choosing not to consult with the Requesting Party is not per se unreasonable, and a Responding Party may modify a legal hold in its own discretion during the course of a litigation as the scope of the parties’ preservation obligations change.
  - (a) A party that elects not to consult with the opposing party when modifying and/or lifting a legal hold may be required to demonstrate that its actions were reasonable under the circumstances / proportional to the needs of the case if their decisions are later challenged by the opposing party.

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<sup>9</sup> (“[a]t the outset of a case, or sooner if feasible, counsel for the parties should discuss preservation. Such discussions should continue to occur periodically as the case and issues evolve”) and “[t]he Court expects **cooperation** on issues relating to the preservation, collection, search, review, and production of ESI. The Court notes that an attorney’s zealous representation of a client is not compromised by conducting discovery in a cooperative manner. Cooperation in reasonably limiting ESI discovery requests on the one hand, and in reasonably responding to ESI discovery requests on the other hand, tends to reduce litigation costs and delay. The Court emphasizes the particular importance of cooperative exchanges of information at the earliest possible stage of discovery, including during the parties’ Fed. R. Civ. P. 26(f) conference.”

<sup>10</sup> A purpose of the guidelines is to “Encourage meaningful discussions and cooperation between parties,” and “[a]n attorney’s advocacy for a client is not compromised by conducting discovery in a cooperative manner, which tends to reduce litigation costs and delay, and facilitate the cost-effective, predictable and fair adjudication of cases.”



4. Federal Rules of Civil Procedure 1 and 26 encourage parties to work collaboratively to address issues related to preservation obligations, including but not limited to requests to modify / reduce legal holds and related expenses as the litigation progresses and the issues in the litigation narrow.
5. A party seeking to modify and / or lift legal holds may put the the Requesting Party on notice that it intends to modify / lift a legal holds on the basis that the scope of the litigation has narrowed and may properly ask the Requesting Party to identify custodians / data sources that that Requesting Party requests it maintain on hold.
  - (a) E.g., at the close of fact discovery, the Responding Party may inform the Requesting Party that it intends to modify its legal hold and may ask that Requesting Party to identify any custodians that that party believes should remain on hold beyond those from whom documents have already been produced (assuming custodian information was disclosed).
  - (b) If a Responding Party's decision to modify a legal hold at the end of discovery is later challenged, that party's decision to inform and solicit input from the Requesting Party may be used to show that the Responding Party acted reasonably.
- F. Considerations and recommendations for negotiating / interacting with the government when evaluating / modifying / lifting legal holds during the course of a government investigation.
  1. Government investigations often proceed outside the scope of the Federal Rules of Civil Procedure and may be subject to statutory mandates or criminal rules.
  2. A party to a government investigation may wish to raise the scope of its document preservation obligations with the government at the outset of the investigation, particularly if the scope of the investigation and / or mandate of the investigating agency is unclear or if the document preservation obligations potentially conflict with other legal obligations, e.g., international privacy obligations.
  3. As an investigation progresses, a party to the investigation may wish to revisit its document preservation obligations, particularly when the scope of an investigation narrows.
  4. At all stages of an investigation, when a party to a government investigation is negotiating the scope of preservation obligations for a demand or subpoena, a party may wish to consider other governmental

entities that are or might be conducting related investigations known or unknown to the subject.

5. While the government is not obligated to agree to modified and / or narrow document preservation obligations upon the request of an investigated party, government agencies and their attorneys are encouraged to and most often do work collaboratively with parties being investigated to clarify that parties' document preservation obligations as the investigation progresses and to otherwise address that parties' legitimate concerns regarding the scope of their preservation obligations and conflicts that may arise related to those obligations.

#### G. Final Recommendations

1. Framework for evaluating if/when to lift the hold or portions of it, including nonexclusive list of factors to consider when evaluating the modification/lifting of a legal hold either entirely or for specific custodians.

(a) **Cooperation/Transparency:** When strategic, feasible, or practicable, transparency between parties may be advisable before lifting or modifying the legal hold. See Section III.F.2, above.

- i. Cooperation/Transparency may, in certain circumstances, be addressed through provisions included in an ESI Protocol, if agreed upon by the parties or required by your jurisdiction. Such provisions may include various considerations about certain points in the litigation (e.g., close of fact discovery or subsequent to the deadline to amend the pleadings) where a legal hold might be modified or lifted.

**Inflection Points:** There are certain points in the litigation where the need to retain documents through a legal hold should be reassessed. These inflection points are discussed in detail at Section III.C.1-4.

- ii. This issue intersects with the proportionality considerations put forth in Federal Rule of Civil Procedure 26(1), given that, at certain points in litigation (e.g., close of fact discovery), the benefits to the Requesting Party of having a legal hold maintained might be outweighed by the cost burden to the Responding Party.
- iii. While the close of fact or expert discovery might be a standard inflection point in many litigations, whether a hold should be modified or lifted at that point might depend on

whether the conduct at issue was limited to a previous point in time or is ongoing. See Rule 26(b)(1) (discovery issues include “whether the burden or expense of the proposed discovery outweighs its likely benefit”).

(b) **Burden**

- (i) **Expense:** The decision to lift a legal hold may be informed by the expense of maintaining it. This issue intersects with the proportionality considerations put forth in Rule 26(b)(1). The following factors should be considered:

- (1) the magnitude of expenses incurred by maintaining the legal hold, see Rule 26(b)(1) (factors include “whether the burden or expense of the proposed discovery outweighs its likely benefit”);
- (2) whether the Requesting Party can obtain similar discovery somewhere else, see *id.*, (factors include “the parties’ relative access to relevant information”);
- (3) the amount in controversy, see *id.*;
- (4) the resources of the Responding Party, see *id.* (factors include “the parties’ resources”);
- (5) whether or to what extent the expenses can be ameliorated by a partial lifting or modification of the legal hold; and
- (6) factors related to the substance of the case enumerated in Rule 26(b)(1), including “the importance of the issues at stake in the action” and “the importance of discovery in resolving the issues.”

- (d) **Statutory or Regulatory Requirements:** Is the Responding Party subject to statutes or regulation concerning the information retained by the legal hold. For example, the California Consumer Privacy Act (CCPA), California Privacy Rights Act (CPRA), and the European Union's General Data Protection Regulation (GDPR) may have certain rules and/or regulations concerning the retention of certain information or data that may conflict with the requirements of a legal hold. This issue may intersect with the sensitivity of information considerations discussed below.

- (e) **Sensitivity of Information:** Does the information retained by the legal hold include Personally Identifiable Information (PII) or Personal Health Information (PHI) that may be subject to stricter standards? This issue intersects with various statutory and regulatory requirements discussed above.
  - (f) **Possibility of Sanctions:** The Responding Party should consider the law regarding sanctions (e.g., application of Federal Rule of Civil Procedure 37) in the applicable jurisdiction. For example, if the Responding Party is located in a district that has strict case law concerning discovery sanctions, such law may be relevant to this consideration and should be considered in order to avoid such sanctions.
- 2. Best Practices/Suggested Standard of practice for when/how legal holds can/should be modified/lifted.
  - (a) Once the framework described in Section III.G.1 is finalized, an analysis of best practices for each framework in the issue will be provided.
  - (b) Many of these best practices could be memorialized in draft language for an ESI Protocol.
  - (c) Certain best practices already discussed in this outline can be found at Sections III.F.4.a-b; III.F.7-8; III.G.1.a.i-iv; III.G.1.b.ii.
- 3. Sample memo to file documenting the decision to lift legal holds.
  - (a) Once the framework described in Section III.G.1 is finalized, a sample memo will be created providing a hypothetical analysis of each of the issues.
- 4. Checklist
  - (a). Litigation
    - i. Evaluating/modifying/lifting legal holds prior to the formal initiation of litigation proceedings. See Section III.C.1.
    - ii. Evaluating/modifying/lifting legal holds during the course of litigation proceedings. See Section III.C.2.

- iii. Evaluating/modifying/lifting legal holds following the completion of litigation proceedings. See Section III.C.3.

(b) Government investigation

- i. Evaluating document retention and production obligations pursuant to government inquiries and third-party subpoenas. See Section III. C.4.

(c) Cross-border or U.S. case law. See Section III.D.

- i. Evaluate data privacy concerns in both jurisdictions and see if there are any conflicts in the law between the jurisdictions.
- ii. If there are conflicts between the jurisdictions, can they be resolved through court intervention? For example, if there is a legal hold for a U.S. case, but the GDPR recommends document deletion, could the U.S. court issue an order requiring that the hold be put in place? Would this court order have any import for a country bound by the GDPR?
- iii. Are there any implications as to the Hague Evidence Convention?

H. Illustrative Hypotheticals and Examples (see detailed inflection points in V.C.2. above)

- 1. Considerations and recommendations for modifying or lifting a legal hold prior to the initiation of litigation.
- 2. Considerations and recommendations for releasing individual custodians/particular data sources.
- 3. Considerations and recommendations for otherwise modifying a legal hold during the course of pending litigation.
- 4. Considerations and recommendations for lifting a legal hold entirely
- 5. See also Final Recommendations at Section III.G.1 above.