



Hold On ... to Evidence Potentially Relevant to a Lawsuit

by Mark B. Wilson, Partner, Klein & Wilson

If you have been involved in litigation, you may have received a "litigation hold letter," demanding that you preserve evidence relevant to the dispute and the consequences of failing to comply.

“ Failing to preserve evidence can have serious consequences. Depending on whether the failure to preserve was accidental, negligent, or intentional, a court may impose sanctions ranging from monetary or contempt sanctions, to adverse jury instructions and terminating sanctions (i.e., you lose the case because you destroyed key evidence). ”

Litigation hold letters probably trigger a duty to preserve evidence, and sometimes, a duty to preserve evidence may arise even before you receive such a letter. While a party to a lawsuit is not required to preserve every shred of paper, every email, or electronic document ever created, it must preserve documents it knows could be relevant to the dispute. The sources of potentially relevant information are not limited to electronic data on computers (e.g., emails, calendar entries, and word processing files) and hard files. Relevant information might be located on cellular telephones, thumb drives, and even social networking sites. The complexity of sources and sheer amount of potentially relevant information may seem daunting, but there are consultants and vendors who can help collect the evidence.

When a dispute arises, you should take steps to maintain and prevent

destruction of evidence. This includes identifying what is relevant, circulating the litigation hold notice to all people who might have related information, and instructing those people to not delete anything related to the dispute, whether it is electronic information or paper documents. You should suspend automatic document destruction and/or data deletion policies or practices. Ensure documents generated or received by former employees are properly stored and can be easily located. If you do not already have a litigation hold readiness plan in place, develop one so you can efficiently and effectively implement the litigation hold in the future.

Failing to preserve evidence can have serious consequences. Depending on whether the failure to preserve was accidental, negligent, or intentional, a court may impose sanctions ranging from monetary or contempt sanctions, to adverse jury instructions and terminating sanctions (i.e., you lose the case because you destroyed key evidence). When in doubt, err on the side of caution, hold on to the evidence, and call us at 949.631.3300.

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Mr. Wilson, a trial attorney, has won nearly every case he has tried or arbitrated. He lost only one jury trial but then obtained a complete reversal on appeal. This year, Mr. Wilson was listed in the Super Lawyers® Top 50 Orange County list, and he is a past Chair of Orange County Bar Association's Business Litigation section.



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