

TEXAS LITIGATION SOLUTIONS

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DUTY TO PRESERVE?

The implementation of litigation holds has emerged as an increasingly important - indeed required - method of satisfying the duty to preserve relevant and discoverable information whenever litigation may be reasonably anticipated. Preservation requires locating, identifying, and maintaining relevant documents and other information, including that existing only in electronic form, and other tangible things. The scope of an organization's preservation duty with regard to electronic documents can be immense, and court-imposed penalties for failing to preserve, even as the result of an automated or regular destruction or deletion process, are often severe.

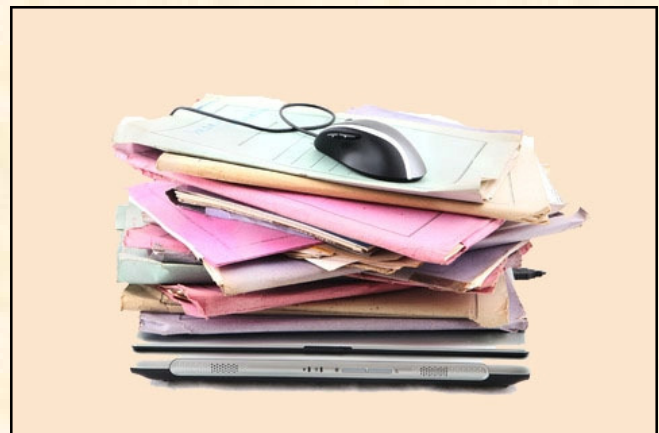
This article provides a broad overview of litigation holds, particularly as they relate to preservation of electronic data, as well as an introduction to the hold letter, a critical aspect of the litigation hold process. Future articles will explore the topic further, including the recognition and analysis of triggering events, enforcement and modification of holds, and implications for

the discovery process.

What is a Litigation Hold?

In any litigation, parties have a duty to avoid spoliation - destruction or loss of relevant documents or other records. A litigation hold is the process by which an organization collects relevant information

to the discovery of admissible evidence." An effective litigation hold should identify all classes or kinds of documents and other records to be preserved, all individuals who could possibly possess or control that material, all forms of media in which the material may appear, and all possi-



and, most importantly, seeks to prevent spoliation. At the very least, organizations must preserve all relevant material, but some courts have interpreted the duty as extending to the usual limits of discovery, therefore requiring preservation of all information "reasonably calculated to lead

to the discovery of admissible evidence." An effective litigation hold should identify all classes or kinds of documents and other records to be preserved, all individuals who could possibly possess or control that material, all forms of media in which the material may appear, and all possible storage locations. The bottom line regarding the importance of litigation holds is that organizations may suffer severe court-imposed consequences if they destroy or otherwise fail to preserve documents (continued pg 2) and records that are, or should have been, the sub-

RECENT CASE OF INTEREST

Romano v. Steelcase, Inc., Cause No. 2006-2233, in the Supreme Court of Suffolk County, New York (Sept. 21, 2010). In a personal injury case, the court ordered the plaintiff to provide authorization for the defendants to

access the private areas of the plaintiff's MySpace and Facebook accounts. The plaintiff alleged that injuries caused by the defendants caused her to suffer "loss of enjoyment of life." The court ruled that the photographs and other

information stored in the private areas of the plaintiff's social networking accounts were likely to contain information that was relevant to the defense against her claims.

DUTY TO PRESERVE? (CONT'D)

jects of a hold.

Litigation holds can be particularly onerous as applied to electronically stored information (ESI). Organizations issuing holds should include IT staff and applicable third-party vendors among those possessing or controlling relevant information, and must extend the reach of their holds beyond mere paper records to all electronic documents and storage devices, from a PDF attachment in a staff e-mail to e-mails on a personal BlackBerry, or to a rented copier storing relevant document information in its memory. Despite the broad scope of ESI preservation obligations, courts are increasingly unresponsive to claims of ignorance or failures to preserve due to organizations' small size or relatively lower level of technical sophistication.

The Hold Letter

A litigation hold letter – normally the first step in the litigation hold process – is a written notice to all appropriate persons in the organization that litigation is anticipated, and that certain specific categories of documents and other records must be preserved, regardless of the type of media and method of storage involved. The hold

letter is a key component of the litigation-hold process and the method by which the full range and applicability of the hold is communicated to all persons potentially possessing or controlling relevant material. Due diligence is the appropriate standard to adopt when writing a hold letter, and thoroughness in its preparation is critically important, given the court's ability – and propensity – to examine its contents if there are any claims of spoliation from the other side. In addition, taking a methodical approach to writing the hold letter results in the production of a valuable template upon which future hold letters may be based. The initial hold letter may be, and usually is, followed by revised hold letters as the scope of the claims in the case are explored and become better understood. The broadly framed initial hold letter can be modified to add or delete persons, or to enlarge or narrow the covered document scope.

Although hold letters will necessarily differ as specific litigation dictates, there are certain formatting rules applicable to all successful hold letters. First and foremost, the hold letter must be in writing, although oral explanation of the letter and its contents also should be communicated to key individuals within the organization. The

letter should include the name and contact information of the person implementing the hold, a name and tracking or reference number for the matter, a warning in bold type explaining the hold's importance, and a reminder that non-compliance could result in court sanctions. In addition, the letter should explain the specific reason for the hold, as well as the reason why the recipient has been provided notice, and offer a basic description of the scope of the hold and lawsuit. The types of documents and records to be preserved should be broadly defined, and guidelines for segregating and preserving retained information must be addressed. The letter should notify recipients of the dates of the material that must be preserved, make clear the hold applies to all forms of media (naming them specifically), and remind those involved that the hold applies to all past, present, and future records and documents of the types identified in the scope statement. Additionally, recipients should be warned against any alteration of records and notified that the hold supersedes any previous retention or destruction policies. Note that the duty to avoid spoliation applies to metadata as well.

Above all, the hold letter must make clear to all recipients that

they may no longer destroy or alter any relevant information, which in the case of ESI includes deleting or overwriting material contained on computers, cellular phones, smart phones, PDAs, flash drives, and other devices. Activities that result in the clearing out of old data to provide space for new data must also be

“Holds can be particularly onerous as applied to ESI.”

suspended, including, for example, reuse of archival storage tapes or overwriting of other storage. It is an organization's responsibility to discover and retain all sources of data relevant to the hold, so there can be no exceptions to the above policies. Ultimately, learning to successfully plan and implement the hold process is critical to any organization's ability to pursue and defend against litigation effectively.

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