

Litigation Holds

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Litigation Holds

- The Process by which an organization seeks to satisfy an obligation to preserve data and information
- For purposes of this presentation, Litigation Hold = Legal Hold
 - Governmental investigations
 - Tax audits
 - Pre-litigation



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“ ...to obtain a just, fair and equitable and impartial adjudication of the rights of litigants under established principles of law. ”

TEXAS R. CIV. P. 1

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“ ...this objective may be attained with as great expedition and dispatch and at the least expense both to the litigants and to the state as may be practicable... ”

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“ They should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding. ”

FED. R. CIV. P. 1

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The Duty to Preserve

A party's obligations regarding the preservation of electronic evidence is similar to a party's obligations with respect to traditional tangible evidence—they must preserve evidence that is relevant to potential or ongoing litigation.

Wal-Mart Stores v. Johnson, 106 S.W.3d 718, 722 (Tex. 2003)

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The Duty to Preserve

The duty to preserve evidence begins with counsel, "who [has] a duty to advise his client of the type of information potentially relevant to the lawsuit and of the necessity of preventing its destruction."

Turner v. Hudson Transit Lines, Inc., 142 F.R.D. 62, 73 (S.D.N.Y. 1991)

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The Duty to Preserve

- ▶ **To Potential Parties:** When presented with a credible threat of litigation, parties should send out evidence preservation letter to opposing counsel.
- ▶ **Internal Litigation Holds:** Legal hold notice sent by organization to employees after triggering event.

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The Duty to Preserve

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Turner v. Hudson Transit Lines, Inc., 142 F.R.D. 62, 73 (S.D.N.Y. 1991).

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The Duty to Preserve

“

A party's discovery obligations do not end with the implementation of a 'litigation hold'- to the contrary, that's only the beginning.

Counsel must oversee compliance with the litigation hold, monitoring the party's efforts to retain and produce the relevant documents.

”

Zubulake v. UBS Warburg LLC, 229 F.R.D. 422, 432 (S.D.N.Y. 2004)
[“Zubulake V”]

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Involve Litigation Support Early On



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Litigation Holds Are a Good Start, but...

- FRCP 37(e) authorizes sanctions
- Even though disruptive, preservation efforts should be prioritized

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Spoliation Concerns



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*E.I. du Pont de Nemours & Co. v.
Kolon Industries, Inc.,*
803 F. Supp. 2d 469 (E.D. Va. 2011)

➤ Theft of trade secrets case

Korean co. breached its duty to preserve when key employees, who were directly implicated in [the company]'s efforts to recruit consultants . . . and obtain information about Kevlar for use in developing Heracron, deleted files and email items from their personal computers in the days **after** DuPont filed the action and **after being apprised of their duty** to preserve relevant information.

➤ 2 Litigation hold letters were insufficient

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Effective Preservation Efforts

- Practical Steps to Follow:
 - Counsel/Client meetings
 - ID key people
 - Consult with IT
 - Litigation Hold Letter
 - Suspend document retention/destruction policies
 - Continuous monitoring and tracking

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Effective Litigation Holds

- Does it have to be in writing??
 - Depends on jurisdiction
 - Better Safe Than Sorry!
- Identify Information with Specificity
- Notify Appropriate Individuals
- Suspend Document Retention Policies

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Gathering Data: IT Interviews

- ▶ Company email/document retention policy:
 - ▶ Procedures for handling departing employees.
 - ▶ Are the computers preserved or wiped?
 - ▶ Disposition of hard copy files

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Gathering Data: IT Interviews

- ▶ File Servers
 - ▶ Office Locations
 - ▶ Third party service providers
 - ▶ Number of servers
 - ▶ Type of server (email, shared drives, user home drives), accounting and other systems.
 - ▶ Obtain data map if available.

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Gathering Data: IT Interviews

- ▶ Operating systems, version of software and migrations
- ▶ Email systems
- ▶ Network
- ▶ Webmail
- ▶ POP3 accounts

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Gathering Data: IT Interviews

- ▶ Social networks
- ▶ Instant messaging
- ▶ Logs
- ▶ Voicemail (converted to wav files)
- ▶ Requirements to save voicemail (i.e., energy traders, regulatory)

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Gathering Data: IT Interviews

- ▶ Disaster Recovery Plan
- ▶ Remote access to network and other systems
- ▶ Special systems that may be used at organization

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Gathering Data: IT Interviews

- ▶ Desktop/laptop computers
- ▶ Smart phones, Tablets, Blackberries, etc.
- ▶ Mobile Devices
 - ▶ Third party service providers
- ▶ Cloud based storage
- ▶ What software is used day-to-day? (e.g., Lotus Notes, Word, Excel, etc.)
 - ▶ Any specialty software used? (QuickBooks, AutoCad, Photoshop, etc.)

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Gathering Data: IT Interviews

Where does the custodian save data? Provide path/folder for following:

- Local
- Network share
- Home directory
- Thumb drives
- External drives
- Tablet/Smartphone, etc.
- Cloud storage

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Gathering Data: Custodian Interviews

Where does the custodian save data? Provide path/folder for following:

- Understand document management system (Documentum, Interwoven, FileNet, Desksite, etc.)
- Identify all databases used that may contain potentially responsive data
- Ascertain path/folder name for potentially relevant data.

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Gathering Data: Custodian Interviews

- Does custodian backup Local PC?
 - If so, what type of media is used and software used to backup?
- How long is data preserved?

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