



## What Goes In a Litigation Hold Letter?

One of the issues that continue to grow in importance is drafting a litigation hold (preservation) letter for your opponent. Of greater importance is enacting a litigation hold to avoid destroying any evidence.

What goes into a litigation hold letter? Magistrate Judge Kathleen M. Tafoya extensively outlined what should go in a litigation hold letter in *Stone v. Lockheed Martin Corp.*, 2009 U.S. Dist. LEXIS 12105 (D. Colo., Feb. 2, 2009).

Judge Tafoya's opinion identified the following for a litigation hold letter:

- Basic investigative work should uncover appropriate topics for the letter.
- Common sense should guide the actual points to include in a preservation letter.
- A litigation hold letter is not a discovery request.
- A party can disregard the request to preserve, but once the request has formally been made and evidence disappears, a preservation letter may place the discovering party in a superior position to seek sanctions or other relief.
- At a minimum, a letter should begin with a general statement that the discovering party expects the party to preserve digital evidence that in all probability will be relevant to the issues in a case, or may lead to the discovery of such evidence.
- The preservation letter should include a request that the other party suspend its regular document retention policy pending discovery.
- The preservation letter should identify all of the possible locations where such evidence might conceivably reside.
- The letter should inform the opposing party that a mere file backup of the hard drive is not adequate preservation.
- The party must be instructed to image hard drive in bit-stream copies, where all areas, used and unused, of the hard drive are copied.
- If a file is deleted before a backup is made, the deleted file will not be copied unless it is a bit-stream copy.
- The letter should also request that deleted files that are reasonably recoverable be immediately undeleted. *Stone v. Lockheed Martin Corp.*, 2009 U.S. Dist. LEXIS 12105 (D. Colo. Feb. 2, 2009)

Possibly the two most important principles from this check list 1) common sense should guide the preservation letter 2) a litigation hold letter is not a discovery request. It is easy to imagine lawyers being overly cautious and drafting what sounds like discovery requests instead of identifying what should be preserved.

There is one big problem with this case: This opinion will be heavily criticized because the judge denied a motion to preserve evidence because the Pro se plaintiff failed to assert or attach a "presentation letter." While not wading into those issues, this case provides a good overview of what should be included in a preservation letter.