

in the news

Commercial Litigation



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The Dog Ate My Evidence: Document Destruction Policies and the Duty to Preserve

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Most companies have adopted document retention and destruction policies to better manage the enormous amount of paper and data created through daily business operations. While these policies represent sound management, the failure to properly preserve potential evidence can have devastating effects if the company finds itself in litigation.

The destruction or material alteration of potentially relevant evidence—evidence that might affect pending or reasonably foreseeable litigation—is referred to in the courtroom as spoliation. Spoliation is a significant concern, no matter the type or location of the evidence or the type of case. Businesses that are anticipating

litigation, or that are currently in litigation, must take steps to ensure they preserve all potentially relevant evidence. Otherwise, they risk significant sanctions—including losing a case they might otherwise win and paying for all of the other side’s fees and costs in the process.

The Duty to Preserve

What triggers the duty to preserve?

Parties have an obligation to preserve potentially relevant evidence from the moment litigation is “reasonably anticipated.” However, it is often hard to determine the exact trigger for the duty to



preserve. Sometimes, the trigger can be obvious. It can be a letter threatening a lawsuit or the receipt of a complaint. Other times, the trigger is not as clear. It could include a report of harassment by an employee, an accident at work, or a government investigation. One leading court held the duty to preserve arises when a party “has notice that the evidence is relevant to litigation or when the party should have known that the evidence may be relevant to future litigation.” This inquiry requires a case-by-case analysis that businesses should undertake with the aid of counsel.

Who has a duty to preserve?

Parties have a duty to preserve all evidence within their “possession, custody, or control,” not just the evidence stored in their own systems. Thus, a party’s duty could extend to third parties, including independent contractors, former employees, and other current and former agents. If any potentially relevant information is in the hands of third parties, the company involved in the lawsuit should evaluate its ability to obtain the data from those third parties without having to serve a subpoena. And, if the company could obtain the data from the third parties, some courts have held that the company has a duty to ensure the third party preserves the evidence.

What is the scope of the duty to preserve?

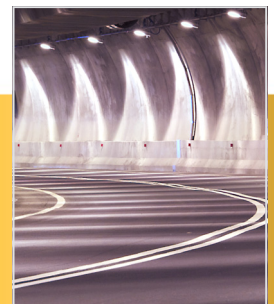
While a party does not need to preserve *everything*, the party must preserve evidence likely to be relevant to the litigation. Evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” It is often difficult to know what evidence will or will not be relevant based on the first notice of a dispute. Thus, it is vital to review your document retention policies with counsel and develop a plan for preservation of evidence, both internally and from third parties, early on. It is also important to review that plan periodically throughout the litigation process to ensure that employees comply with it.

Litigation Hold Notices

As soon as litigation is reasonably anticipated, businesses or their counsel should send letters notifying relevant persons that they must preserve documents and data regarding the dispute, and the business should also implement appropriate procedures to ensure the documents and data are actually preserved.

The best time to prepare for a litigation hold is before litigation happens. To that end, businesses and their attorneys should do the following:

- **Seek counsel.** Work with counsel to assess litigation hold obligations before litigation begins.
- **Prepare.** Establish a team that is ready to respond to discovery requests, with stakeholders from IT, HR, Records, and Legal.
- **Become familiar with the company’s electronic systems.** Relevant evidence could reside in email, cell phones, calendar entries, contacts and tasks list, hard drives, voice mail messages, networks and shared drives, back up dates, thumb drives, laptops, social media sites, home computers, and even the “cloud.” Businesses should identify and inventory the potential sources of information. This knowledge will allow businesses to implement litigation holds quickly and effectively.
- **Records retention policies.** Ensure that the company has a written document retention policy

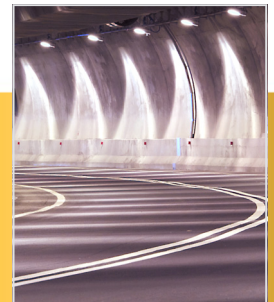




and that it is followed. Following the policy may provide your business a defensible way of disposing of documents.

Once the duty to preserve is triggered, you should do the following:

- **Don't procrastinate.** The litigation hold should be issued as quickly as possible. Taking no action for even a few days could result in the destruction or alteration of evidence and expose the company to sanctions.
 - **IT personnel.** Ensure that in-house IT professionals receive the litigation hold notices *first*. They are often in the best position to protect evidence from spoliation.
 - **Litigation hold parameters.** Work with counsel to identify the relevant scope of employees and topics. Identify key players and possible causes of action. The litigation hold should identify the relevant matter in sufficient detail and should be issued to all shareholders, directors, officers, and employees with potentially relevant information. The litigation hold should also make clear that preservation of paper *and* electronically stored documents is required. If the litigation is later found to be broader than that described in the litigation hold, the litigation hold should be re-issued with a new description of the matter. Also, if the litigant later finds that more individuals may have potentially relevant information, the litigation hold should be expanded to cover the additional employees.
 - **Third party spoliation.** Issue litigation-hold letters to third parties with potentially relevant information that would provide information to the business if the business requested it.
 - **Send periodic reminders.** Attorneys and their clients should send reminders to litigation-hold recipients
- about so information is not lost because an employee believed the case was over or that he or she no longer needed to preserve information.
- **Foreign language issues.** If the litigation hold is sent to foreign individuals, they should be especially educated about the importance of following the litigation hold, and the notice should be in a language that will be understood by recipients.
 - **Pay attention to the record.** Attorneys and their clients should remember that they may have to prove that their litigation hold procedures are adequate in court. "The record" should show that the key employees actually received the litigation-hold notice. This could be as simple as e-mailing the notice to employees with buttons for the employees to confirm they received and read it. Alternatively, you could send the litigation hold to employees and have them sign the document to confirm receipt.
 - **Consider additional preservation methods.** Where feasible, businesses may want to establish a systematic procedure to review deleted electronic records before permanently destroying them, particularly during litigation. Businesses could also make backups of documents and data before deleting them. Litigation counsel can assist in





designing a review system that may prove helpful in defeating later spoliation claims.

- [Wait for your attorney to release the litigation hold.](#) Reaching a jury verdict in the case may not mean the litigation hold can be released. The litigation hold must be maintained throughout the litigation, and this could include appeals.

Potential Sanctions

Courts have discretion in determining the appropriate sanction for spoliation, and they evaluate numerous factors in making this decision. These factors include:

- The “culpability,” or state of mind, of the spoliating party;
- The prejudice to the non-spoliating party;
- Whether lesser sanctions will deter future spoliation;
- Whether evidence was irrevocably lost; and
- Which sanction will adequately punish the party and/or its counsel.

While courts tend to select the least onerous sanctions corresponding with the intent of the spoliating party and the prejudice to the other party, a court may select from numerous sanctions or fashion its own. Appellate courts typically only reverse the award of sanctions upon finding that the trial court abused its discretion.

The following are possible sanctions or penalties for spoliation of evidence:

Adverse Inference

The court may instruct the jury that the lost evidence would have been unfavorable to the party who lost it. The majority of courts only award this sanction upon a finding of

bad faith, which generally requires the spoliator to have intended the destruction or alteration of evidence after it had a duty to preserve it. However, the case law is not uniform on whether evidence of bad faith is necessary for an adverse inference.

Evidence

The court may refuse to permit the party at fault to introduce evidence about the spoliated documents or data.

Monetary Sanctions

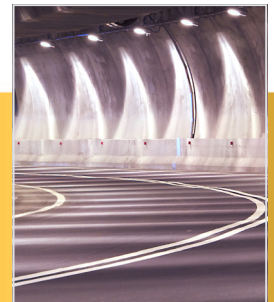
The court may also impose monetary sanctions, like attorneys’ fees, fines, and punitive damages. In some cases, these monetary sanctions have been so severe that they have essentially been dispositive of the case.

Criminal Sanctions

The destruction of evidence may sometimes qualify as “obstruction of justice” or a similar crime.

Dismissal and Default Judgment

These are the harshest spoliation sanctions because they are dispositive of the case. Courts typically use these sanctions only in cases of bad faith or prejudice so severe that no other remedy will suffice.





Spoliation Tort

While no independent spoliation cause of action exists in federal law and the majority of states, some states recognize an independent cause of action for intentional and/or negligent spoliation of evidence.

Counsel Can Help

The best time to prepare for litigation holds and preserving evidence is before litigation. Polsinelli's commercial

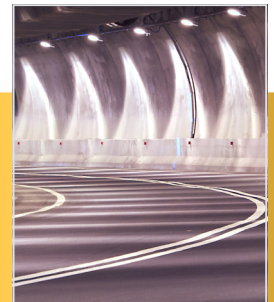
litigation attorneys can work with clients to develop a litigation and document preservation plan. Even if a business is not subject to pending or threatened litigation, working with counsel in advance is one of the most effective strategies to control the cost of litigation. If litigation is anticipated or ongoing, Polsinelli can also help clients quickly and effectively enact a litigation hold, suspend document destruction and deletion policies, sequester and collect relevant documents and data, and deal with spoliation disputes.

For More Information

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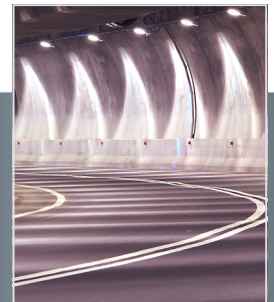
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Collectively, our teams offer significant experience in litigation involving:

- Aviation and transportation
- Business torts
- Class and mass actions, including consumer class actions
- Contract and UCC disputes
- Dealer/franchise/distribution litigation
- Government investigations and regulatory proceedings
- Insurance matters
- Professional liability
- Securities litigation
- Shareholder disputes, derivative actions and fiduciary claims
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- Real Estate issues
- Trials, arbitrations, mediations and appeals in all commercial and business fields.

Our experience allows for a proactive approach that is focused on relieving our clients and their businesses from the burden of litigation as quickly, efficiently and effectively as possible. Early in each case, we partner with clients to craft strategies that will help predict litigation costs and determine the best course of action. When a matter reaches the courtroom, our trial-savvy teams are prepared to implement aggressive and comprehensive strategies designed to achieve the best possible outcome for clients. Our success has earned the firm and our litigators acclaim in a range of industry directories and publications, but the most significant validation of our practice comes from clients who retain our litigators time and time again, trusting that Polsinelli will deliver real answers to real challenges.

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