

Preservation of Evidence: Use of a Litigation Hold
By: Richard C. Marder, Esq.

Your company just received a summons and complaint in a lawsuit seeking substantial money damages. The first thing you should do (after you call your lawyer) is:

- A.) Go through all of the paper and electronic files and destroy or delete anything that you think might be damaging; or
- B.) Act to preserve all of the records relating to the subject matter of the suit, regardless.

The correct answer, of course, is B. Large and small businesses faced with litigation or even the threat of litigation must take internal steps to identify and preserve relevant evidence. Small businesses, especially those which have never been involved in litigation, may be unaware of this obligation. The mechanism to do so is commonly referred to as a legal or litigation hold.

A litigation hold is a written instruction made within an organization directing designated employees to preserve and maintain records and information that may be relevant to a pending or anticipated lawsuit or government investigation. This is required regardless of whether the organization is the defendant or plaintiff. The purpose of the directive is to prevent paper files, electronically stored information ("ESI"), such as e-mails, and other data from being lost or destroyed. The legal hold directive supersedes a company's document retention policy. The company, usually through a records custodian or designated employee, preserves the assembled information for possible disclosure in litigation.

Under the law, a company has a duty to preserve evidence when it knows, or should have known, that litigation is imminent. The duty to preserve evidence is broad, encompassing any relevant evidence that the organization knew or reasonably could foresee may be relevant to litigation or an investigation. The earliest the duty generally attaches is when there is a credible threat of litigation.

Once an organization is on notice of the threat of litigation, an action has been commenced or a subpoena is received, a plan should be implemented to locate and preserve evidence. The legal hold process necessitates taking affirmative steps to prevent the destruction and/or alteration of potential evidence. Such steps should generally include the following:

1. Identification of all key employees from the business units impacted by the litigation;
2. Identification of all former employees from the applicable business units;
3. Notification to any applicable records custodian regarding the need to preserve records;

4. Notification to members of the Information Technology ("IT") department so that steps can be implemented to preserve ESI;
5. Discontinuing the deletion of records relevant to the matter, as an exception to the businesses' customary record retention/destruction policy;
6. Preserving backup tapes that are the sole source of relevant information;
7. Segregating and safeguarding the preserved records;
8. Where possible, preservation of records should be in a form that is searchable.

Generally, in-house counsel should be included in facilitating the development of a plan to oversee and preserve ESI and paper records. Small companies without in-house counsel should appoint a senior member of the management team in charge of implementing and monitoring the litigation hold.

The litigation hold directive should inform designated employees of their duty to identify, locate and preserve information that may be relevant to an ongoing or anticipated lawsuit or investigation. Information is deemed relevant to a lawsuit if it relates to the claims or defenses alleged in a suit or pertains to the subject matter of an investigation, the information is likely to lead to the discovery of admissible evidence and/or the company reasonably knows that the opposing party will request the information in litigation. If in doubt as to relevance, the information should be preserved and legal counsel consulted. In most cases relevant evidence may exist in paper or electronic form and may include the following: employee files, hard copy files, documents in storage, emails, voice mails, computer hard drives, external hard drives, backup tapes, data bases, remote storage facilities and handheld devices like tablet computers or "smart phones".

The litigation hold directive should not be conveyed verbally or made informally, but must be in writing and provide explicit instructions as to the preservation of relevant information. If a case is already in litigation, a description should be made as to the claims asserted and the general subject matter of the suit. The notice should contain explicit instructions not to destroy or modify records. The notice should also identify the date ranges and the types of documents and materials that should be preserved. Warnings should be made to the affected employees regarding the importance of preserving the records and the possible consequences for non-compliance. Contact information for the person in charge of the document retention and/or applicable counsel should be included in the notice so that anyone with questions or concerns about the content and scope of the hold can be answered.

The organization should utilize a certification or some other written confirmation from each recipient of the hold notice that acknowledges that the employee has read, understands and will comply with the hold. Either counsel or the designated company representative should track who received the notice and who has returned a confirmation receipt. The company should maintain the contact information of any departing employees identified as having access to or custody of relevant records. Because the litigation process is continuing, the organization should

monitor the process and issue periodic reminder notices to ensure compliance with the hold requirements. Once all of the records have been segregated and categorized, the organization's legal counsel should make arrangements to review them in preparation for defending or prosecuting the litigation.

The organization must supplement the litigation hold notice promptly after an event that changes the scope of the original hold. This typically occurs when issues arise in the course of a lawsuit, other locations with relevant information are found or when additional personnel are identified with potentially relevant information. If any of these events occur, it may be necessary to re-evaluate whether the existing preservation efforts are acceptable and whether any other procedures need to be put in place. Counsel or the designated representative should ensure that any revisions made to the hold directive are documented, including the reasons for the changes and the names of the people consulted about the changes.

The failure to timely institute and maintain a litigation hold can have serious consequences for an organization. The sanctions imposed by courts for failing to preserve information are not standardized. The penalties are discretionary with the assigned judge. A court in one jurisdiction may impose a different set of sanctions for the same conduct than those imposed in another jurisdiction. Sanctions can include the following: monetary penalties such as the payment of an adversary's legal fees and expenses, an adverse inference instruction to a jury relating to the information which was lost or destroyed or the preclusion of evidence necessary to support a claim or defense. In extreme circumstances, a court may even enter a default judgment or dismissal of the suit. An analysis of the types of penalties and standards applied to sanctions is beyond the scope of this article.

The implementation of a litigation hold is necessary to plan for or react to litigation. The process ensures compliance with the law, acts to preserve relevant evidence and will make the company appear credible to the court.

Richard is a partner with Deily, Mooney & Glastetter, LLP. He focuses his practice on Commercial Litigation, Creditors' Rights, Bankruptcy and Dispute Resolution.

DISCLAIMER

This article is for informational purposes only. This article should not be used as a substitute for legal advice from a lawyer you have retained and who has agreed to represent you. You should consult an attorney of your choosing to determine your legal obligation on this subject as they relate to your particular situation. By accessing this article you understand that there is no attorney-client relationship intended or formed between you and Deily, Mooney & Glastetter, LLP.