

# Litigation Holds: Ten Steps to Preserve Evidence and Avoid Sanctions

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A recent federal district court opinion underscores the need for parties involved in litigation to take prompt and effective steps to ensure that discoverable electronically-stored information is preserved. This *Update* provides a brief overview of a recent sanctions case and ten steps for implementing effective litigation hold procedures.

## **Knickerbocker v. Corinthian Colleges – What Not to Do**

In *Knickerbocker v. Corinthian Colleges*, the court imposed sanctions on the defendant for failing to put a litigation hold in place to stop the deletion of potentially relevant e-mails.<sup>1</sup>

The *Knickerbocker* case involved a lawsuit brought by former employees of the defendant Corinthian Colleges ("Corinthian"). The former employees alleged that they were subjected to unlawful discrimination while employed by Corinthian.

Corinthian failed to put a litigation hold in place. Corinthian's IT department would slate a former employee's e-mails for deletion within 24 hours of receiving a termination notice. Unless a litigation hold was in place, Corinthian *automatically deleted* a terminated employee's e-mail account thirty (30) days after the employee's termination.

Employee termination notices went to the IT department on April 26, 2012 and April 30, 2012. This set the 30-day process in motion for deletion of the terminated employees' e-mail accounts at the end of May. The Equal Employment Opportunity Commission ("EEOC") sent notices on behalf of the plaintiffs on May 4, 2012, several weeks *before* the automated deletion was scheduled to occur. At this point, it was the duty of Corinthian to institute a litigation hold to prevent the deletion of the accounts. Corinthian did not suspend operation of this system, however, and the former employees' e-mails were deleted *after* receipt of the notices from the EEOC. The former employees brought a motion for spoliation of evidence and for sanctions based on Corinthian's failure to preserve information.

The court ultimately determined that sanctions were appropriate given Corinthian's failure to abide by its discovery obligations. Accordingly, the court awarded the plaintiffs' costs and attorney fees incurred due to Corinthian's spoliation of evidence. The court also imposed a fine of \$25,000 against Corinthian and levied a fine of \$10,000 on Corinthian's counsel.

In addition to these sanctions, Corinthian's failure to implement a litigation hold caused Corinthian to incur significant costs for outside vendors to retrieve e-mails from backup tapes, and required Corinthian to spend money defending depositions of IT personnel and others who would not have been deposed had the spoliation issue not arisen. The court also admonished Corinthian's in-house counsel for submitting a declaration that incorrectly described the company's document retention procedures.

### **Ten Steps for Effective Litigation Holds**

Taking the following steps can help parties comply with their discovery obligations and avoid the type of sanctions imposed in the *Knickerbocker* case:

#### **1. Be on the lookout for a "triggering event"**

After receiving notice of a potential claim by a demand letter, service of a complaint, or demand for preservation of evidence, parties must act promptly to prevent deletion of data, even if such deletion would normally occur in the ordinary course of business.

#### **2. Put a system for litigation holds in place and follow it**

Upon receipt of a demand, notice of claim, or complaint, a litigation hold must be put in place. While there is no obligation to preserve data that has nothing to do with the dispute, the litigation hold must cover all documents that could potentially be relevant to the dispute. The better practice is to cast a wide net and then narrow the scope of the litigation hold, if appropriate, as the case moves forward.

#### **3. Implement a written litigation hold procedure**

This procedure should outline when a hold needs to be put in place. The procedure should also include a chain of command with clearly defined roles for persons who will be responsible for putting the litigation hold in place. Immediate suspension of any automatic deletion is central to an effective policy.

#### **4. Make sure the litigation hold is sent to the right people**

The litigation hold should be distributed to anyone who might have any records that could be relevant to any ongoing or threatened litigation. In an employment discrimination case such as *Knickerbocker*, preservation of data for all "key players" is paramount. If there is any possibility that a person might have possession of relevant documents or data, that person should receive the litigation hold memo.

#### **5. Create and follow a document retention policy**

The policy should set forth the schedule for retention of documents based on applicable legal standards and include a provision for suspension when a litigation hold is put in place.

#### **6. Be careful about unintended deletion of data**

IT departments may have good reasons for seeking to free up data storage space by setting up programs that automatically delete information at certain set times. Failure to override such a procedure can result in the loss of relevant data and can lead to sanctions being imposed.

#### **7. Provide training on litigation hold procedures**

Take steps to make sure that employees understand their role in implementing and maintaining a litigation hold. The training should be documented for future reference.

#### **8. Document what has been done to identify and preserve evidence**

Make sure to record all search terms used to locate electronic data and that accurate records are maintained regarding the who, what, when and where of those efforts to gather and preserve records if a discovery dispute arises.

#### **9. Monitor and update the litigation hold**

Follow up with recipients of the litigation hold to monitor compliance and periodically redistribute the litigation hold to remind custodians of their obligation to preserve evidence.

## **10. If a mistake is made, face the music**

The *Knickerbocker* court emphasized that sanctions were imposed because the defendant repeatedly misrepresented that it had done everything it could to find documents, failed to meet deadlines for supplemental document production, and its witnesses provided conflicting testimony about what had been searched for and what was recoverable. Errors made in good faith that are addressed in a timely manner (especially if a party has reasonable litigation hold and document retention procedures in place) are less likely to result in sanctions.

### **Conclusion**

Litigation presents numerous challenges and unknowns. Failure to put an effective litigation hold in place can turn a winning case on the merits into a loser on procedural grounds. This failure can result in imposition of sanctions including monetary penalties, adverse-inference jury instructions, and even dismissal of claims and defenses. Other consequences are unnecessary litigation costs such as fees to outside data-recovery vendors and the need to defend additional depositions of IT personnel and in-house counsel involved in the document-gathering process. Taking timely and meaningful steps to make sure relevant data is preserved greatly reduces litigation risk and expense.

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<sup>1</sup> *Knickerbocker v. Corinthian Colleges*, \_\_\_ F.R.D. \_\_\_, 2014 WL 1356205 (W.D. Wash. Apr. 7, 2014).

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