

LEGAL HOLDS AND PRESERVATION LETTERS

Edwin P. Krieger

Wormington & Bollinger

212 E. Virginia Street

McKinney, Texas 75069

Tel: 972-569-3930

Fax: 972-547-6440

E-Mail: edwin@wormingtonlegal.com



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PREVALENCE OF DISCOVERABLE ELECTRONIC DATA

“Because of the prevalence of discoverable electronic data and the uncertainties associated with preserving that data, sanctions concerning the spoliation of electronic information have reached an all-time high.

Dan H. Willoughby, Jr., et al., Sanctions for E-Discovery Violations: By the Numbers, 60 Duke L.J. 789,709 (2010).”

Brookshire Brothers v. Aldridge, 438 S.W.3d 9, 17 (Tex. 2014).

DEFINITION OF LITIGATION HOLD NOTICE

A written communication placing the recipient/potential adverse party
(1) to preserve certain evidence in electronic, magnetic, or digital form, documents, and tangible items, and
(2) to take appropriate measures to prevent the alteration or destruction of that evidence.

BASIS FOR DUTY TO PRESERVE EVIDENCE

1. **Common Law**—duty to preserve evidence when a party knows, or reasonably should know, that (1) there is a substantial chance that a claim will be filed and that (2) evidence in its possession or control will be material and relevant to that claim.

Brookshire brothers v. Aldridge, 438 S.W.3d 9 (Tex.2014)

Walmart Stores v. Johnson, 106 S.W.3d 718 (Tex. 2003)



BASIS FOR DUTY TO PRESERVE EVIDENCE

2. TRCP 192.3(b) “Documents and tangible things”

Comment 2 to 1999 changes:

“2. The definition of documents and tangible things has been revised to clarify that things relevant to the subject matter of the action are within the scope of discovery *regardless of their form.*”



CONT'D TRCP 192.3(b) “DOCUMENTS AND...”

192.3 Scope of Discovery.

(a) Generally. In general, a party may obtain discovery regarding any matter that is not privileged and is relevant to the subject matter of the pending action, whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party. It is not a ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(b) Documents and tangible things. A party may obtain discovery of the existence, description, nature, custody, condition, location, and contents of documents and tangible things (including papers, books, accounts, drawings, graphs, charts, photographs, electronic or videotape recordings, data, and data compilations) that constitute or contain matters relevant to the subject matter of the action. A person is required to produce a document or tangible thing that is within the person's possession, custody, or control.

CONT'D TRCP 196.4 “ELECTRONIC OR MAGNETIC...”

196.4 Electronic or Magnetic Data.

To obtain discovery of data or information that exists in electronic or magnetic form, the requesting party must specifically request production of electronic or magnetic data and specify the form in which the requesting party wants it produced. The responding party must produce the electronic or magnetic data that is responsive to the request and is reasonably available to the responding party in its ordinary course of business.

If the responding party cannot-through reasonable efforts-retrieve the data or information requested or produce it in the form requested, the responding party must state an objection complying with these rules. If the court orders the responding party to comply with the request, the court must also order that the requesting party pay the reasonable expenses of any extraordinary steps required to retrieve and produce the information.

BASIS FOR DUTY TO PRESERVE EVIDENCE

3. FRCP 26(b)(2)(B) “Specific Limitations on Electronically Stored Information”

(B) Specific Limitations on Electronically Stored Information. A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

Ashton v. Knight Transportation, Inc., 772 F. Supp. 2d 772, 800 (N.D. Tex. 2011)
“The duty to preserve extends to the party’s or potential party’s employees “likely to have relevant information---the “key players”. (citation omitted). The duty to preserve evidence is a duty owed to the *court*, not to the party’s potential adversary, hence, spoliation is considered an abuse of the judicial process.” (citation omitted).

STARTING POINT: RETENTION NOTICE

A. Recipients

1. Potential parties
2. Officers of company/organization
3. Head of IT Department
4. Resident agent for process of service
5. Insurance adjuster for insured

B. Contents of Notice

1. State your role on behalf of the requesting party
2. State the nature of the dispute between the requesting party and the recipient/potential adverse party.
3. State the obligation of the recipient/potential adverse party to take reasonable steps to preserve and safeguard relevant documents, tangible items, and electronic, magnetic, and digital data.
4. State the obligation of the recipient/potent adverse party not to destroy relevant evidence.

CONT'D STARTING POINT: RETENTION NOTICE

B. Contents of Notice *Cont'd*

5. State the obligation of the recipient/potential adverse party to forward notice to others in the company/organization to take appropriate measures to preserve relevant evidence and to prevent the destruction of relevant evidence.
6. State with specificity the evidence that you want preserved and not destroyed.
7. State that if the recipient/potential adverse party. Does not understand the notice letter to contact you.
8. State your willingness to meet with the recipient/potential adverse party regarding your notice.

CONT'D STARTING POINT: RETENTION NOTICE

C. Reciprocal Obligation.

Types of Evidence to Request/Preserve:

1. Databases
2. Data files
3. Program files
4. Image files (eg. JPEG, TIFF)
5. E-mail messages and files
6. Voice-mail messages and files
7. Text messages
8. Temporary files
9. System-history files
10. Deleted files, programs, or e-mails
11. Backup files and archival tapes
12. Web site files
13. Web site information stored in textual, graphical, or audio Format.
14. Cache files, and
15. Cookies

SAMPLES OF COMMUNICATIONS

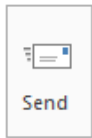
1. E-mail
2. Simple letter
3. Detailed letter

EMAIL

Sent: Saturday, November 14, 2015 10:36 AM

To: edwin.krieger@gmail.com

Subject: Sent from Snipping Tool

| | | |
|--|---------|-----------------------------------|
|  Send | To... | Opposing Counsel's e-mail address |
| | Cc... | Client's e-mail address |
| | Subject | L----- v. M----- Investments |

Joe,

This e-mail will act as a litigation hold notice. I intend to seek electronically stored information (ESI) during the course of [my client] of their obligations to preserve all such evidence regarding the pending lawsuit. Additionally, it is your firm's notification is issued and a litigation hold implemented throughout the course of this litigation. Please preserve all past data. It is also necessary that ESI continue to be preserved in a format that maintains the meta data, preserves and maintains access to financial information used in spreadsheets. Items of particular interest at this time include:

1. E-mails between [my client] and [adverse party] regarding water intrusion problems at ----- Avenue, including January 1, 2013 to the present time.
2. E-mails between [my client] and [adverse party] regarding water intrusion problems at ----- Avenue, including January 1, 2013 to the present time.
3. Text messages between ----- and ----- regarding water intrusion problems at ----- Avenue, including January 1, 2013 to the present time.
4. Text messages between ----- and ----- regarding water intrusion problems at ----- Avenue, including beginning January 1, 2013 to the present time.
5. E-mails and correspondence between any of the tenants of ----- Avenue and ----- regarding water intrusion problems including January 1, 2013 to the present time.
6. E-mails and correspondence between any of the tenants at ----- Avenue and ----- regarding water intrusion problems including January 1, 2013 to the present time.
7. Text messages between any of the tenants at ----- Avenue and ----- regarding water intrusion problems to the present time.
8. Text messages between any of the tenants at ----- Avenue and ----- regarding water intrusion problems to the present time.

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SIMPLE LETTER

THE LAW OFFICES OF

September 26, 2014

Vicki R [adjuster for insurance company]
[Insurance Company]
P.O. Box
Lexington, KY 40512

VIA E-MAIL:

Re: Claim Number:
Your Client: The ----- Company [the insured]
Date of Loss:
My Client/Claimant: Mr. AAA

LITIGATION HOLD NOTICE

Dear Ms. R-----,
I represent Mr. AAA in a claim for serious bodily injuries sustained on December 15, 2013. You have denied this claim in correspondence dated September 9, 2014. We intend to file suit.

This correspondence is a litigation hold notice. We hereby notify you to preserve and maintain all electronically-stored information (ESI), copies and backup as required under Texas law. The ----- Company and the contracted air-conditioning/heating company, retained by The ----- Company for warranty work to my client's house, have a duty to preserve evidence relevant to this action without the necessity of a court order. Because electronic data may be an irreplaceable source of discovery in this matter, it is your client's/insured's duty to preserve all potentially relevant electronic data. It is also your client's/insured's duty to advise it's air conditioning/heating contractor to do the same.

Furthermore, [insurance company] has the duty to ensure that a proper litigation notification is issued for preservation and maintenance of ESI and that a litigation hold is implemented. Consistent with that duty, we request that your client's/insured's ESI, and that of its air conditioning/heating contractor, be preserved and maintained in native format.

Items of particular interest at this time include:

1. Promotional materials of The ----- Company regarding its services and product before Mr. AAA signed a contract with The ----- Company,

2. All correspondence and e-mails between The ----- Company and Mr. AAA regarding the house being built for Mr. AAA, the closing, the warranty, and problems that occurred after the closing.
3. All correspondence and e-mails between The ----- Company and the air conditioning/heating contractor regarding the warranty obligations for Mr. AAA's house and problems with the heating system after the closing.
4. All invoices or statements for service from the air conditioning/heating contractor for services performed at Mr. AAA's house after the closing.

Please feel free to discuss any aspect of this letter.

Sincerely,

Edwin P. Krieger

DETAILED LETTER

Admitted in
Texas, Florida & Colorado



EDWIN P. KRIEGER, PC
Edwin P. Krieger, Esquire
4123 Prescott Avenue
Dallas, Texas 75219-2247
t: (214) 478-2012
f: (972) 629-9588
[e-mail: edwin.krieger@gmail.com](mailto:edwin.krieger@gmail.com)

Attorney & Counselor
at Law

Re: Litigation Hold Notice for Electronically Stored Information (ESI).

Dear _____,

As you know, _____ has a duty to preserve evidence relevant to this action, even without a court order. Because electronic data may be an irreplaceable source of discovery in this matter, it is your client's duty to preserve all potentially relevant electronic data. Furthermore, it is _____'s duty to insure that a proper litigation notification is issued and a litigation hold implemented. Consistent with that duty, we request that your client's data be preserved and maintained – in **native** format, and in accordance with the following safeguards:

1. ELECTRONIC DATA TO BE PRESERVED:

The following types of electronic data and/or the electronic data of your client's subsidiaries, divisions, agents, employees, and relevant third parties or vendors should be preserved in **native** format, in accordance with the steps set forth below:

- a. All electronic mail and information about electronic mail (including message contents, header, and logs of e-mail system usage) sent or received by any custodian relating to the subject matter of the litigation;
- b. All databases, including field and structural information as well as records, containing any information relating to the subject matter of the litigation;
- c. All logs of activity on any computer systems that have been used to process or store data containing information relating to the subject matter of the litigation;
- d. All other electronic data containing information about, or relating to, the subject matter of the litigation, including, but not limited to:



- i. All word processing files and file fragments;
- ii. Electronic data created by applications which process financial, accounting, and billing information;
- iii. All electronic calendar and scheduling program files and file fragments;
- iv. All electronic spreadsheet files and file fragments.

2. ON-LINE DATA STORAGE

With regard to online storage and/or direct access storage devices including, but not limited to, any file server or data array (e.g. RAID) physically or remotely attached to your client's computers through wired or wireless networking, we request that your client not modify or delete any existing electronic data files that meet the criteria set forth above, unless an exact mirror image has been made and will be preserved and kept accessible for purposes of this litigation.

3. OFF-LINE DATA STORAGE, BACKUPS, AND ARCHIVES

With regard to all electronic media used for offline storage, such as magnetic tapes and cartridges, CDs, DVDs, USB devices (e.g. "thumb drives"), and the like, used with any computer, file, or data array (e.g. RAID), whether physically or remotely attached to your client's computers through wired or wireless access that contain any electronic information relating to the subject matter of this litigation, we request that your client stop any activity that may result in the loss of such data. This request is intended to cover all removable electronic media used for data storage in any device, including those containing backup and/or archive data sets.

4. PRESERVATION OF REPLACE DATA STORAGE DEVICES

We request that your client preserve any electronic data storage devices and/or media that may contain data relating to the subject matter of the litigation and that it replaces for any reason.

5. FIXED DRIVES ON STAND-ALONE PERSONAL COMPUTERS AND NETWORK WORKSTATIONS

We request that your client not alter, delete, or over-write relevant electronic data that existed on fixed drives attached to stand-alone microcomputers, network workstations and/or data arrays (e.g. RAID) at the time of filing of this action, or perform other procedures such as data compression and disk defragmentation or optimization routines that may impact such data, unless an exact mirror image has been made of such active files and directory listings (including hidden and/or deleted files) for all directories containing such files and that it completely restore any altered, deleted, or over-written electronic files and file fragments and arrange to preserve all such data during the pendency of this litigation.



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DETAILED LETTER CONT'D

6. APPLICATIONS AND UTILITIES

We request that your client preserve copies of all applications and utilities that may be used to process electronic data discussed in this letter.

7. LOG OF SYSTEM MODIFICATIONS

We request that your client maintain an activity log of document modifications made to any electronic data processing system that may affect any system's capability to process any electronic data relating to the subject matter of the litigation.

8. PERSONAL COMPUTERS AND ALL OTHER DEVICES USED BY EMPLOYEES, INDEPENDENT CONTRACTORS, AND OTHERS UNDER THE CONTROL OF YOUR CLIENT

Please immediately take the following steps with regard to all fixed drives attached internally, externally, physically, and/or remotely by wired or wireless access to any personal computers used by any custodian under your client's control:

- a. An exact mirror image must be made of all electronic data relating to the subject matter of the litigation;
- b. Full directory listings (including hidden and deleted files) for all directories and subdirectories must be written;

Please immediately take the following steps with regard to all removable drives attached internally, externally, physically, and/or remotely by wired or wireless access to any personal computers used by any custodian under your client's control:

- c. All removable electronic media, such as floppy diskettes, magnetic tapes and cartridges, CDs, DVDs, USB devices (e.g. "thumb drives"), and the like, existed before the delivery of this letter and that contain relevant data should be collected, maintained intact, and kept available during the pendency of this litigation.

Please immediately take the following steps with regard to all other relevant devices used by any custodian under your client's control, whether it is internally, externally, physically, and/or remotely attached by wired or wireless access to any system used by your client:

- d. All cellular phones, personal data assistants (e.g. Blackberry), voicemail messages, text messages (SMS or otherwise), instant messages, and/or any other device that stores electronic information (e.g. RAM on printing devices or FAX machines), and the like, that existed before the delivery of this letter and that contain relevant data should be collected, maintained intact, and kept available during the pendency of this litigation.



9. EVIDENCE CREATED AFTER RECEIPT OF THIS LETTER

Any relevant electronic data created after receipt of this letter should be preserved in a manner consistent with the directions in this letter.

10. METADATA

As it is relevant to all items cited hereinabove, your client is instructed to preserve all metadata and not to alter, delete, and/or over-write any metadata.

Please feel free to contact me to discuss any aspect of this letter.

Very truly yours,

Edwin P. Krieger



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ELECTRONIC DISCOVERY

The reality of electronic discovery is it starts off as the responsibility of those who don't understand the technology and ends up as the responsibility of those who don't understand the law.

INSTRUCTIVE PRESERVATION LETTER

A clear and instructive preservation letter that serves to educate your opponent isn't just a professional courtesy.....it also compels recognition of a duty to intervene to prevent data loss and deprives an opponent of a sanctions "safe harbor".

QUESTIONS