



What is a Litigation Hold?

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A litigation hold requires a party to preserve all data – physical or digital – that may be related to a legal action. The purpose of a litigation hold is to stop routine or any other destruction of potentially relevant ESI, and to make sure that the ESI remains safe until the hold is released.

In the landmark e-discovery case, *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 216-18 (S.D.N.Y. 2003), Judge Scheindlein ruled that a party has an obligation to implement a litigation hold as soon as it is aware that a claim or lawsuit is likely. This means that even if a lawsuit has not been commenced, a party must preserve ESI if litigation is reasonably anticipated.

Failure to preserve ESI in accordance with a litigation hold may lead to a finding that spoliation of evidence has occurred. Companies, as well as their counsel, may be subject to sanctions for failure to preserve important, relevant evidence. As such, it is important for companies to recognize the events that may trigger their obligation to preserve ESI. For example, some events that may trigger a company's duty to preserve include:

- A formal complaint filed against your company;
- A preservation letter from an opposing counsel stating in effect, "You are going to be sued." This may include a collection letter or any other adversarial contention made by an outside party;
- An industry-wide threat of litigation or an investigation, such as the recent collapse of the sub-prime mortgage market;
- A company-wide problem that could turn into a lawsuit, such as discrimination complaints made by an employee.

If an event triggers a party's obligation to preserve ESI, it is important to document any and all actions your company takes in regard to that event. The documentation may help prevent your company from being sanctioned by the court for inaction or delayed action.

Once a litigation hold is in place, a party and their counsel must make certain that all sources of potentially relevant information are identified and placed on hold, which often includes "communicating with the 'key players' in the litigation." *Zubulake v. UBS Warburg L.L.C.* 229 F.R.D. 422, 432 (S.D.N.Y. 2004). "Key players" has been defined as "the people identified in a party's initial disclosure and any subsequent supplementation thereto. Because these 'key players' are '[those] likely to have relevant information,' it is particularly important that the preservation duty be communicated clearly to them." *Id.* at 433-34. Moreover, once a litigation hold is in place, companies and attorneys must continually check the progress of the hold and reach out to unresponsive custodians (the person responsible for granting access to a company's documents or electronic files).