



Legal Holds: Are You Prepared When the Summons Comes?

By [Cadence Group](#)

“It is clear beyond reasonable dispute that The Company has been guilty of gross spoliation of evidence. ... The court imposes limits upon The Company’s ability to present evidence in its defense and will instruct the jury as to their ability to draw an adverse inference from The Company’s failure to produce certain e-mails and evidence.”¹

There are few orders more damaging to a company’s legal defense than one containing this quote. Yet more and more companies are experiencing this trauma first hand. Such orders are based in spoliation, the failure to preserve evidence in a case after a company’s representative becomes reasonably aware of a potential matter requiring a suspension of routine destruction of related information.

“A party has a duty to preserve evidence when the party is placed on notice that the evidence is relevant to litigation or when the party should have known that the evidence may be relevant to future litigation. [cite omitted] The duty to preserve encompasses any documents or tangible items authored or made by individuals likely to have discoverable information that the disclosing party may use to support its claims or defenses. Any information relevant to the claims or defenses of any party, or which is relevant to the subject matter involved in the litigation, is covered by the duty to preserve.”
Broccoli v. Echostar Communications Corporation, 229 F.R.D.506 (2005 D.Md.)

Problems Preserving Evidence for Litigation

The rapid development of technology in electronic communications, including e-mail, instant messaging, and voice mail, has left a legal vacuum in a company’s ability to deal with litigation. Once viewed as a convenience and novelty, these technologies and their successors pose a significant threat to businesses. In the past few years, efforts to create order from this chaos have been underway. These efforts culminated in December 2006 with the implementation of sweeping changes to the Federal Rules of Civil Procedure around electronic discovery.

Developing hand in glove with the challenges of this new technology has been a heightened awareness by the trial bar of the hazards companies face when it comes to preserving evidence for litigation. In the paper world, spoliation claims rarely garnered attention in relatively unsubstantial actions. In the most egregious instances, the offending party, usually a corporate defendant, would merely pay the value of the claim when backed into the corner and that was the end of the story. With the advent of electronic records, especially e-mail, lost or difficult-to-locate evidence has taken a life of its own. The cost of locating, recovering, and producing this evidence can spiral into the

¹ Paraphrased from the Order in *Broccoli v. Echostar Communications Corporation*, 229 F.R.D.506 (2005 D.Md.)



millions of dollars. This cost factor has given parties the legal equivalent to a weapon of mass destruction in exacting punitive results from those parties who are unable to easily produce requested information.

When faced with this challenge, many companies are unaware or seemingly oblivious to even the first steps necessary to safeguard their position and avoid the claim of spoliation. To avoid that charge and be ready to present a viable argument for shifting and sharing the cost of production, companies must have policies in place and make sure they are followed. In order to ensure that employees adhere to these policies, they must be cognizant of their obligations to preserve evidence and which evidence to preserve. Companies have to monitor this adherence for accuracy and compliance.

Records Management Policy

Disposal suspension must be addressed and directed from the highest-level policy of the company. The company's overarching [records management](#) policy should clearly state that destruction of information subject to a legal hold or other disposal suspension is a violation of company policy punishable by termination and in certain instance criminal prosecution. This policy is the bedrock upon which the rest of the disposal suspension infrastructure is built.

Legal Hold Process

Anytime a manager learns of a pending claim, audit, investigation, or other cause of action, that person should report it directly to the legal department, whether in-house, through an insurance carrier, or outside attorney. The attorney will evaluate the matter and issue a Disposal Suspension Notice. This Notice orders the immediate halt to all destruction of information related to the matter. The attorney then notifies the necessary employees and departments of the Hold and instructs them as to the scope of the information under the Notice.

Compliance Training

Disposal suspension handling should be a separate topic within compliance training presented by the company. All employees need to complete one course on the subject, so as to be generally aware of the topic. Those employees who routinely handle disposal suspended information should receive additional specialized training as well as periodic reminder communications. Attorneys and employees related to [records management](#) also need specialized training and other subsequent communications to become subject matter experts within the company.

Employee Communications

Communication to employees, whether via intranet, e-mail, or traditional paper circulation, is critical to the success of a disposal suspension effort within an organization. These communications educate employees generally on the subject. They are a prime vehicle for keeping compliance at the front of everyone's mind. Effective



communications also are means of reminding the appropriate people of the existing Holds and are the first step in communicating the release of a Hold at the end of the matter.

Subject Matter: What to Hold

When a Disposal Suspension Hold is in place, destruction is halted for relevant records, as well as all other information related to the subject matter. This Hold applies to drafts, marked-on copies, even distribution lists of who may have received information subject to a Disposal Suspension Notice. There are many rules governing what is held, but a simple rule of thumb is to retain one rendering of each document related to the Hold and track each person who received that document.

Auditing Compliance with Disposal Suspension Notice

Periodic audits are necessary to evaluate compliance. Simply notifying employees of a matter under disposal suspension without appropriate follow-through does not protect you from a claim of spoliation. Only by periodic monitoring can a company truly ensure that its policy is being followed. Deficiencies help to identify areas where additional understanding is required and provide targets for continual improvement. Audits are a means of continually verifying a company's progress and provide solid evidence of a successful implementation.

The End of the Hold

Of equal importance to initiating a Disposal Suspension Hold is to end the Hold and resume routine destruction of information after a resolution has been reached in the matter that necessitated the Hold. This is regrettably one of the most overlooked aspects of disposal suspension and one that comes back to plague companies in a variety of ways. Failure to resume destruction increases storage costs and, more significantly, leaves potentially harmful records available that should be destroyed. Only by monitoring the subject matter of Holds and maintaining a current schedule of topics under disposal suspension can Holds be effectively ended and [records managed](#) in a consistent fashion.

Conclusion

An effective disposal suspension policy, enforced uniformly throughout a company, is the best defense to claims of spoliation. Adequate training of employees and others is the cornerstone to uniform application of the disposal suspension policy. Periodical review and update of Holds to ensure their currency avoids inappropriate destruction or Holds. Audits conducted to ensure a company's adherence to the policy completes the loop of compliance. When litigation occurs, you will have the information needed and avoid the hazard of "gross spoliation of evidence."

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About Cadence Group

Formed in 1988, Cadence Group is a certified woman-owned information and records management firm headquartered in Atlanta, Georgia, with satellite offices in Washington, D.C., and Houston, Texas. Services include Staffing, Consulting, Outsourcing for **records and information management**, **libraries**, and **research**. Cadence Group's clients range from medium- to large-size companies and government agencies. Among the firm's clients are telecommunications, healthcare, financial, retail, manufacturing and energy companies, airlines, law firms, and federal and state agencies.

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