



The Duty to Preserve Evidence for Litigation

Q: My company has a dispute with another company. We expect it to end up in court. Do we have a legal duty to preserve our documents relevant to this dispute, even though no lawsuit has been filed?

A: Yes. Your company is required to preserve evidence under these circumstances. The Oklahoma Supreme Court held in *Barnett v. Simmons*: “A litigant who is on notice that documents and information in its possession are relevant to litigation or potential litigation or are reasonably calculated to lead to the discovery of admissible evidence has a duty to preserve such evidence.”

Q: Does this mean we must preserve relevant emails and text messages?

A: Yes. Evidence includes “documents,” which is expansively defined to include emails, texts, and a host of other things.

Q: When, precisely, does this duty to preserve evidence arise?

A: It depends on the facts and law. In many states, a company must preserve evidence relating to a dispute when it “reasonably anticipates litigation”. The exact standard varies. A New York court ruled the duty arises when a party knows there is a credible threat it will become involved in litigation. A Texas court ruled the duty arises when it “knows or reasonably should know that there is a substantial chance that a claim will be filed.”

Q: Why does the duty to preserve evidence matter?

A: First, our justice system depends on litigants preserving relevant evidence and exchanging it during “discovery” to narrow disputes, focus trials, and promote settlements. Second, if your company is a party to a lawsuit and the court determines it failed to preserve evidence, it may be subject to sanctions or adverse consequences.

Q: Is it harder nowadays to preserve documents than before?

A: Yes. Previously, document preservation and production involved paper in file cabinets and boxes. Now, the advent of electronically stored information (ESI) has greatly increased the complexity and effort involved.

Q: What can we do to comply with this duty?

A: Consult an attorney about questions. Assess your IT and document management systems for their capacity to preserve documents. Develop policies and procedures to preserve evidence when the need arises. Educate your leadership. Proactively spot disputes that may lead to litigation.